



Mbithi & 16 others v Mutua & another (Suing as the Trustees of the Redeemed Gospel Church Inc and 5 others) (Environment & Land Case E007 of 2023) [2024] KEELC 7178 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7178 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E007 OF 2023**

**TW MURIGI, J
OCTOBER 30, 2024**

BETWEEN

WILLIAM MUTINDA MBITHI 1ST PLAINTIFF

**FRANCIS GEORGE KITEU & 15 OTHERS & 15 OTHERS & 15
OTHERS 2ND PLAINTIFF**

AND

BISHOP PAUL MBOKO MUTUA 1ST DEFENDANT

REV JOHN BANKOSKY KITON 2ND DEFENDANT

**SUING AS THE TRUSTEES OF THE REDEEMED GOSPEL CHURCH INC AND
5 OTHERS**

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 18th October 2023 raised by the Defendants/Respondents on the following grounds:-
 1. That the suit is improperly before this court for which reason this Honourable court is not seized of jurisdiction to hear and determine the cause of action herein.
 2. That there is a pending matter involving the same subject matter and/or substantially the same parties pending for hearing and determination at Makindu Law Courts which suit was filed earlier in time.
 3. That for the foregoing reasons, this suit is res judicata or otherwise res sub judice.
 4. That the suit filed by the Plaintiffs/Applicants herein amounts to a scheme of forum shopping and a waste of judicial time and resources.



5. That the suit herein amounts to an abuse of the court process and ought to be dismissed summarily and with costs.
6. That the suit herein is bad in law, frivolous and fraudulent for concealing, misrepresenting or otherwise distorting of material facts.
2. The preliminary objection was supported by the affidavit of Japheth Munyao Mbune sworn on even date.
3. The preliminary objection was canvassed by way of written submissions.

The Defendants Submissions

4. The Defendants submissions were filed on 23rd January 2024.
5. On their behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the matter is properly filed before this Honourable Court?
 - ii. Whether this suit is Res sub judice?
 - iii. Whether the instant suit amounts to forum shopping or otherwise an abuse of the court's process?
6. On the first issue, Counsel submitted that Section 26(2) of the *Environment and Land Court Act* empowers the court to be held at such place and at such time as the court may deem necessary for the expedient and proper discharge of its jurisdiction. Counsel further submitted that Section 9(a) of the Magistrate's Act 2015, donates jurisdiction to the Magistrate's court to hear and determine environment and land cases. Counsel submitted that a suit relating to any right or interest to immovable property shall be instituted in the court within the local limits of whose jurisdiction the property is situated. In the matter at hand, Counsel submitted that the parties herein reside at Emali while the suit property is situated within Emali Township. Counsel argued that the court that is seized with jurisdiction to hear and determine this suit is Makindu law Courts and that no proper explanation has been given why the Plaintiffs have filed this suit before this court.
7. On the second issue, Counsel relied on Section 6 of the Civil Procedure Code to submit on the doctrine of sub judice. Counsel submitted that the instant suit is sub judice to Makindu ELC Case No. E052 of 2022 as the parties, the subject matter and the reliefs sought therein are the same as to those in the present suit. Counsel further submitted that the Plaintiffs have obtained an order of injunction in the Makindu suit and have applied to enjoin the Land Registrar Makuani in the suit. According to Counsel, the Plaintiff ought to have applied to enjoin any additional parties to the suit pending at Makindu or seek leave to plead any issues that they may have omitted therein
8. On the third issue, Counsel submitted that the suit herein amounts to forum shopping and is therefore an abuse of the court process. Counsel explained that the Plaintiffs instituted a suit in Makindu where the parties, the cause of action and the reliefs sought are the same as those in the present suit.
9. Counsel submitted that the Plaintiffs wilfully concealed from the court the existence of Makindu SPMCC No. E052 of 2021 where the parties and cause of action are the same as to those in the present suit.
10. Concluding his submissions, Counsel urged the court to dismiss the suit with costs.
11. To buttress his submissions, Counsel relied on the authorities annexed to the Defendants' submissions.



The Plaintiffs Submissions

12. The Plaintiff filed his submissions on 17th May 2024.
13. On his behalf, Counsel submitted that the only issue for determination is whether the preliminary objection meets the threshold set out in the case of Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Ltd (1969) E A 696.
14. Counsel submitted that for a preliminary objection to succeed, it must be based on a pure point of law and not on disputed facts. According to Counsel grounds 1-6 of the preliminary objection are not pure points of law since they are based on facts which must be ascertained by way of evidence or affidavit. Counsel further submitted that ground 2-6 of the preliminary objection should be proved by production of the pleadings in Makindu ELC Case No. E052 of 2021.
15. Counsel further submitted that the Defendant's preliminary objection is not clear on the provisions of the law that the Plaintiff's application and suit has offended. Counsel argued that the Defendants have merely stated that the court lacks jurisdiction to hear and determine the suit.
16. Concluding his submissions, Counsel asserted that the court has jurisdiction to entertain this suit and urged the court to dismiss the preliminary objection with costs.

Analysis And Determination

17. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696, Law JA stated as follows:-

“So far as I'm aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

19. In Oraro Vs Mbaja (2005) eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual



aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

20. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.
21. The Defendants’ raised five grounds in the preliminary objection which can be condensed into two grounds namely:-
 - i. Whether this court has jurisdiction to hear and determine this suit on account that it is sub judice of Makindu E052 of 2021;and
 - ii. Whether this suit is properly before this court.
22. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is therefore satisfied that the Defendant’s Preliminary Objection is based on a pure point of law. This court is called upon to determine whether it has jurisdiction to hear and determine this suit.
23. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case. The locus classicus on jurisdiction is the celebrated case of Owners of Motor Vessel ‘Lillian S’ Vs Caltex Oil (Kenya) Limited (1989) eKLR where the Court held that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”
24. Similarly, the Supreme Court in the case of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR pronounced itself thus;

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”
25. A court derives its jurisdiction from *the Constitution* or legislation or from both. The jurisdiction of this court is derived from Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. Having considered the application, affidavits and the rival submissions, the main issue that arises for determination is whether the Plaintiff’s suit offends the provisions of Section 6 of the *Civil Procedure Act*.
26. The Defendants are challenging the jurisdiction of this court on the grounds that the suit herein is sub judice to Makindu ELC No. E052 of 2021. It was argued that the instant suit amounts to forum shopping as the Plaintiff failed to disclose the existence of Makindu ELC Case No. E052of 2021 where the parties, the cause of action and the reliefs sought are the same as those in the present suit. Section 6 of the *Civil Procedure Act* provides as follows:-

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under



the same title, where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.

27. It is obvious that the sub judice rule applies where another suit or proceeding is pending in another Court relating to the same parties or their privies over the same subject matter. The rationale behind sub judice rule is to prevent conflicting orders emanating from two or more different courts over the same matter.
28. It is the Defendants' case that the suit herein is sub judice Makindu ELC Case No. E052 of 2021. At paragraphs 4 and 5 of the affidavit in support of the preliminary objection, the deponent deposed that he had annexed a copy of the Plaintiff's (JMM1) and a copy of the Defence and counterclaim (JMM2) in ELC E035 of 2023. However, none of the documents were annexed to the affidavit in support of the preliminary objection to enable this court to determine whether the parties, the cause of action and the reliefs sought in this suit are the same as those in ELC No. E052 of 2021. Moreover, Section 6 of the *Civil Procedure Act* provides that where it is found that the suit is sub judice, the other suit should be stayed. In the circumstances I find that the Defendants have not adduced any evidence to show the existence of Makindu ELC Case NO. E052 of 2021 or that the parties, the subject matter and the reliefs sought herein are the same as to those in Makindu ELC No. E052 of 2021.
29. In the circumstances, this court finds that the Defendants have not adduced any evidence to show that the instant suit is improperly before this court or that there is multiplicity of suits rendering this suit an abuse of the court process. In the absence of the pleadings in ELC Case No. E052 of 2021, I find that the Defendants have not demonstrated that this suit amounts to forum shopping.
30. In the end, I find that the preliminary objection is devoid of merit and the same is hereby dismissed with costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF OCTOBER, 2024.

In The Presence Of:

Ms. Mumo holding brief for Kuria for the 4th and 5th Defendants.

Kiluva present for the Plaintiff.

Court assistant Steve

