



REPUBLIC OF KENYA



KENYA LAW

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Mwanthi (Suing on Behalf of themselves and on Behalf of themselves and on Behalf of the 850 Members of the Mtongwe Beach Management Unit Members) v Kenya Ports Authority & 3 others (Environment & Land Petition E011 of 2024) [2024] KEELC 7040 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7040 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION E011 OF 2024

LL NAIKUNI, J

OCTOBER 24, 2024

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ENFORCEMENT OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 22,23,27,28,35,36,40(3) (B) OF THE INDIVIDUAL AS ENSHRINED UNDER THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF: ARTICLES 10(1) (B), 19(2), 20, 21 OF THE CONSTITUTION THE REPUBLIC OF KENYA 2010 & RULES 2, 4,8,11 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: ARTICLES 1, 7, 8 AND 25 (1) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)

AND

IN THE MATTER OF: ARTICLES 6, 7(A) (II) & 11 OF THE INTERNATIONAL CONVENTION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1978)

AND

IN THE MATTER OF: INFRINGEMENT OF THE PETITIONERS' RIGHT OF FREEDOM FROM DISCRIMINATION AS ENSHRINED UNDER ARTICLE 27 OF THE CONSTITUTION

AND

IN THE MATTER OF: INTERNATIONAL LABOUR ORGANIZATION WORK IN FISHING CONVENTION (2007)

AND

IN THE MATTER OF: ARTICLES 1, 10, 14, 15, 35 AND 36 OF THE BANGKOK STATEMENT ON SMALL SCALE FISHERIES (2008)



AND

IN THE MATTER OF: SECTIONS 3,12 (2) (A). (B), 12 (3) AND 62 OF THE
KENYA PORTS AUTHORITY ACT CAP 391 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: SECTION 4 OF THE
FISHERIES ACT CAP 378 OF THE LAW OF KENYA

BETWEEN

FREDRICK KIOKO MWANTHI PETITIONER
SUING ON BEHALF OF THEMSELVES AND ON BEHALF OF THEMSELVES
AND ON BEHALF OF THE 850 MEMBERS OF THE MTONGWE BEACH
MANAGEMENT UNIT MEMBERS

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT
MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES 2ND
RESPONDENT
DEPARTMENT OF FISHERIES, COUNTY GVERNMENT OF
MOMBASA 3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

RULING

I. Introduction

1. This Honourable Court is called to determine the Notice of Preliminary Objection dated 3rd June, 2024 by Department of Fisheries, County Government of Mombasa, the 3rd Respondent herein.
2. Upon service of the objection to the Petitioner there was no response filed to counter the Notice of preliminary objection.

III. The 3rd Respondent's case

3. The 1 paragraphed objection was on the ground that:-
 - a. The entire suit offends Section 6 of the *Civil Procedure Act*, 2010 as it is sub judice to HCCC NO. E013 OF 2024 Mwacheti Suleiman Sumuni & 3 Others (suing on behalf of themselves and on behalf of the 850 members of the Mtongwe Beach Management Unit Members).

III. Submissions

4. On 3rd June, 2024 while all the parties were present in Court, they were directed to have the Notice of Preliminary objection dated 3rd June, 2024 be disposed of by way of written submissions. Pursuant to that a ruling date was reserved on 25th July, 2024 by Court accordingly.



III. Analysis & Determination.

5. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the written submission, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
6. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Preliminary Objection dated 3rd June, 2024 by the 3rd Respondent meets the fundamental threshold of a Preliminary Objection?
 - b. Whether this Honourable Court can determine this suit is barred by the doctrine of sub judice and what orders can be issued to cure the same.
 - c. Who will bear the Costs of Notice of Preliminary objection dated 3rd June, 2024.

Issue No. a). Whether the Preliminary Objection dated 3rd June, 2024 by the 3rd Respondent meets the fundamental threshold of a Preliminary Objection

7. Under this sub - title, the Honourable Court shall examine the merits of the Preliminary objection. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Limited (Supra) where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-“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 demurer it raises a pure 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 has to be ascertained or if what is sought in 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”
8. In furtherance of this point, I wish to cite the case of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR”:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
 - i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
9. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. In determining this instant Notice of Preliminary Objection, the Court will first



consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.

10. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the court observed that: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”.

11. The same position was held in the case of “Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;

“ A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”

12. Similarly in the case of “United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;

“ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”

13. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCC Misc. App No. 247 of 2003” where the Court held that;

“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”

14. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 3rd Respondent herein which are that the entire suit offends Section 6 of the *Civil Procedure Act*, 2010 as it is sub judice to “HCCC NO. E013 OF 2024 Mwacheti Suleiman Sumuni & 3 Others (suing on behalf of themselves and on behalf of the 850 members of the Mtongwe Beach Management Unit Members)”. I therefore, affirm that the filed Preliminary objection by the 3rd Respondent herein is founded on all fours of an objection as stated hereof.

Issue b). Whether this Honourable Court can determine this suit is barred by the doctrine of sub judice and what orders can be issued to cure the same.

15. The concept of sub - judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed



with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be res judicata. It is governed under the provision of Section 6 of the Civil Procedure Act, Cap. 21 which bars any court from engaging in matters sub judice before them. It 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 any other court having jurisdiction in Kenya to grant the relief claimed.”

16. In a recent decision, my brother Justice Mativo discussed the concept sub judice being “Republic – Versus - Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR” where he stated as follows:-

“.....there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a Court or Judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”

17. I have held before in this Court in the case of “Sheria na Haki Human Rights Institute – Versus - Noor & 10 others; Ethics and Anti-Corruption Commission & another (Interested Parties) (Constitutional Petition E003 of 2023) [2024] KEELC 4519 (KLR) (20 May 2024) (Ruling)” that

20. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the “Supreme Court of Kenya in Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)”, stated therein as follows: -

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

21. In the instant case, on 5th December, 2021, the Petitioners/Applicants instructed Messrs. Pimatech Land Surveyors and Consultants to carry out a comprehensive survey and do a report



in respect to the suit properties. Indeed a report was prepared on 6th December, 2022. He produced it in the affidavit on pages 16 and 17 of his exhibit a copy of the instructing letter of 5th December, 2022 and on pages 18 to 30 of his exhibit the Survey Report. He also produced two (2) other self-explanatory reports on pages 31 to 64 of his exhibits the Reports were by the Regional Surveyor and Deputy Registrar on the ground report of the suit property. He was aware that on 30th August, 2023 this Honourable Court gave orders in this matter and in particular order No. 6 of 30th August, 2023, which has adversely affected them and other third parties who were innocent purchasers in occupation, usage and or in the process of developing their sub-plots. He produced on page 65 and 66 of his exhibit the copy of the said Order of 30th August, 2023.

22. In light of their exhibit on pages 1 to 11 and 18 to 64 the Petitioners/Applicants averred to this Honourable Court that they misled this Court by misrepresentation that they were indeed in fully occupation, usage and developing suit properties, which allegations were not factual and indeed wrong as a result the Court issued order No. 6 of 30th August, 2023 which is now adversely affecting him and other third parties who are innocent purchasers. There is now urgent need to slay the said order No. 6 and subsequently set aside since none of the Applicants were in occupation or any of the suit sub-plots as initially alleged. The names appearing as to have instructed Sheria na Haki Human Rights Institute which he produced hereto on page 67 of his exhibit were the same names appearing as Plaintiffs in ELC (Mombasa) (OS) No. 011 of 2022 pending before this Court. He produced a similar list on page 68 of his exhibit. Hence this matter is actually sub-judice since the same parties are in Court over the same matter he produced hereto on produced hereto on pages 69 to 78 of his exhibits documents to verify the same.
23. These cases have one thing in common: litigating over or against the same subject matter either on one side or opposites ones, and the expected outcome in the two courts both of which have competence in jurisdiction automatically impact on the same subject matter.”
18. The doctrine of res sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. I have noted that there is a civil case of:- HCCC NO. E013 OF 2024 Mwacheti Suleiman Sumuni & 3 Others (suing on behalf of themselves and on behalf of the 850 members of the Mtongwe Beach Management Unit Members) deals with the same suit properties and the same members of the self help group and the matter is before a competent court pending hearing and determination.
19. To avoid a situation such as the one described above, Parliament in its wisdom enacted the provisions to cater for cases where overzealous parties might run to and from in the corridors of justice so as to mine for the best result in their estimation. In that regard, the provision of Section 5 of the *Civil Procedure Act*, Cap. 21 lays the basis for the operation of the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 by stating that any court can try any suit of a civil nature as long as it has jurisdiction, except the suits in which that act or process is either expressly or impliedly barred. For these reasons, therefore, this court having found that it is barred by the operation of law and in particular, the provision of Section 6 of the *Civil Procedure Act*, Cap. it lacks the requisite authority to hear and determine this Petition.

Issue No. c). Who will bear the Costs of Notice of Preliminary objection dated 3rd June, 2024.

20. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means



the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

21. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, based on the analysis made herein, I hold that the 3rd Respondent is entitled to and hence is awarded the costs of the Notice of Preliminary objection dated 3rd June, 2024.

III. Conclusion & Disposition

22. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
- a. That the Notice of Preliminary objection dated 3rd June, 2024 be and is hereby found to be meritorious thus allowed in its entirety.
 - b. That this matter is found to be sub judice hence an order be and is hereby issued staying the Petition pending the hearing and determination of “the Civil Suit HCCC NO. E013 OF 2024 Mwacheti Suleiman Sumuni & 3 Others (suing on behalf of themselves and on behalf of the 850 members of the Mtongwe Beach Management Unit Members) Mombasa” whereby the parties can move the Court appropriately thereafter.
 - c. That this Honourable Court do hereby issues an order vacating Order No. 5 issued on 29th April, 2024.
 - d. That the matter to be mentioned on 30th November, 2024 for attaining progress report and further directions by the Honourable Court.
 - e. That the 3rd Respondent shall have the costs of the Notice of Preliminary objection dated 3rd June, 2024 to be borne by the Petitioners.

It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF OCTOBER 2024.

**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

M/s. Firdaus Mbula, the Court Assistant.

No appearance for the Petitioners, the 2nd & 3rd Respondents.

Mr. Randiek Advocate for the 3rd Respondent

