



**Munguu v Nyogesa (Environment & Land Case E015 of 2023)
[2024] KEELC 6821 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E015 OF 2023
EC CHERONO, J
OCTOBER 17, 2024**

BETWEEN

ZAKAYO WASWA MUNGUU PLAINTIFF

AND

MELITUS CHARLES NYOGESA DEFENDANT

RULING

1. Before me for determination is a Notice of Preliminary objection dated 4th June, 2024. The objection is raised by the Defendant/Respondent against the suit and Notice of Motion filed under certificate of urgency application dated 22nd May, 2024.
2. The Defendant/Respondent in her notice of objection seeks to have the said application as well as the suit herein struck out on the following two (2) grounds;
 - a. The Application is premised on a suit that is defective, bad in law as the same is sub-judice in view of Kisumu Civil Appeal No. 49 of 2018 and orders of stay of judgment pending constitution of 3 judge bench to hear the application for setting aside the judgment.
 - b. That the application is fatally defective bad in law and should be struck out in view of Bungoma High Court Case No. 43 of 2001 and Kisumu Civil Appeal no. 49 of 2018.

Parties Submissions

3. When the matter came up for directions, the parties agreed to canvass the said Notice of preliminary objection by way of written submissions. The Defendant/Respondent filed his submissions in support of the objection through the Firm of A. Kituyi & Company Advocates dated 27th June, 2024. In her submissions, the Defendant/Respondent contends that the Plaintiff/Applicant's application and plaint dated 22nd May, 2024 is res-judicata and sub-judice in lieu of Bungoma High Court Civil Case No. 43 of 2001 and Kisumu Civil Appeal No. 49 of 2018 which involves the same subject matter



having been litigated and decision made in the High Court and pending proceedings before the Court of Appeal.

4. The Defendant/Respondent also submitted that upon the Court of Appeal hearing an application for review of judgment between the parties herein concerning the subject matter, a hearing date was taken with an order directing status quo to be maintained pending the reconstitution of a 5 judge bench by the president of the Court of Appeal to hear the matter. The said orders were registered by the Land Registrar in respect to the subject land Land Parcel No. W.bukusu/N.Mateka/77 on 25th April,2024. It was therefore argued that the Plaintiff/Applicant cannot initiate a fresh suit over the same subject matter for orders of injunction and eviction yet there are stay orders in place having been issued by the Court of Appeal. The Defendant/Respondent argued that her objection is based on the provisions of Section 6 and 7 of the *Civil Procedure Act* and Order 4 Rule 1(f) of the Civil Procedure Rules.
5. The Plaintiff/Applicants on the other hand filed submissions in opposition to the objection through the Law Firm of Akhaabi & Co. Advocates dated 30th July, 2024. The Plaintiff/Applicant begun by giving a background history of litigation between the parties herein which was first commenced by the Plaintiff/Applicant herein who filed Bungoma High Court Case No. 43 of 2001 involving land parcel no. W.Bukusu/N.Mateka/77 and W.Bukusu/ N.Mateka/85. The said suit is said to have been struck out for having been filed out of time without leave of the court. The Plaintiff/Applicant is said to have preferred an appeal before the Court of Appeal claiming that time started running in the year 1997 when fraud was ascertained and not the year 1987 as perceived by the High Court. The Court of Appeal in determining the appeal is said to have set aside the learned Judge's orders in Bungoma High Court Case No. 43 of 2001 and declared that the Plaintiff/Applicant herein as the rightful owner of land parcel no. W.Bukusu/N.Mateka/77 and directed for his registration as the proprietor of the abovementioned parcel.
6. The Defendant/Respondent herein is said to have sought for stay of the Courts judgment, setting aside of the said judgment and a re-hearing of the appeal vide an application dated 7th September, 2023. Parties are thereafter said to have recorded a consent for status quo to be maintained pending hearing of the Defendant/Respondents application before the Court of Appeal. The Plaintiff/Applicant proceeded to submit on four issues.
7. On the first issue the Plaintiff/Applicant argued that the consent orders of status quo meant that the Plaintiff's rights over parcel no. W.Bukusu/N.Mateka/77 as the rightful owner subsisted since the courts judgment was not set aside or stayed. Reliance was placed in the case of Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others [2015] eKLR. Mburu v Kibara & 2 others (Environment & Land Case 237 of 2021) [2022] KEELC 3226 (KLR). On the second issue it was submitted that the Plaintiff/Applicant's claim in the Bungoma High Court Case No. 43 of 2001 was in relation to fraud while the claim in the current suit is on eviction, vacant possession and mesne profits. It was therefore argued that the parties and subject matter being similar, the issues in dispute in the two proceedings are different thus this suit was not res judicata.
8. On the third issue, it was submitted that the judgment by the Court of Appeal in Kisumu Civil Appeal No. 49 of 2018 is valid having not been reversed and/or set aside and the Plaintiff/Applicant therefore is entitled to the fruits of his judgment. Reliance was place in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2021] eKLR, ANN v RMK [2021] eKLR, Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR.
9. On the fourth and final issue, it was submitted that the Defendant's Preliminary Objection is incompetent because it obviously does not raise pure points of law as it raises disputed issues of fact



and that the facts are in dispute and need to be ascertained by the Court on consideration of all the material which is on the record. They cited the case of *Ess Pee Investment v Deegisat Services Limited* [2022] eKLR, *Kazungu Mramba & 45 others v St. Elizabeth Academy-Karen Limited & 2 others* [2022] eKLR, *Cyrus Mucebiu Irungu vs. Martha Wanjiru Irungu & another* [2022] eKLR.

Analysis and Determination.

10. I have considered the Notice of Preliminary Objection raised by the Defendant/Respondent herein to the Plaintiff/Applicant's application and Plaint dated 22nd May, 2024 on the grounds that the said pleadings are sub judice to the application dated 17th December 2023 before the Court of Appeal.
11. 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.....”
12. The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd -VS- West End Distributors Ltd.* [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law.
13. Further, in 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
14. Now turning to the issue of Sub judice, Section 6 of the *Civil Procedure Act* 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.”
15. The Defendant/Respondent has submitted that the pleadings herein offends the doctrine of sub judice. That there is a similar suit between the parties herein pending before the Court of Appeal, Kisumu which is a court of competent jurisdiction. The appellant has disputed this allegation and argued that the Plaintiff/Applicant holds a valid and binding Judgment in Kisumu Civil Appeal No. 49 of 2018 which has neither been reversed and/or set aside by any Court of competent jurisdiction and by this current suit, he desires to enjoy the fruits thereof.
16. It is trite that Sub judice only applies when another suit or proceedings is pending in another court involving the same parties over the same subject matter. Indeed, as revealed from the chronology of events in respect to the suit land, there is a pending application for review before the Court of Appeal in Kisumu, being Civil Appeal No. 49 of 2018. It is argued that the Court of Appeal issued orders in regard to preserving the status quo on the suit land pending the re-constitution of a 5 judge bench



to hear the application for review of the judgment. That notwithstanding, the Plaintiff/Applicant herein came to this court seeking to evict the Defendant/Respondent from parcel no. W.Bukusu/N.Mateka/77. In other words, he has asked this Court to evict the Defendant/Respondent from the subject matter of the Appeal.

17. Justice Mativo discussed the concept sub judice in Republic v 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.”

18. It is clear from the foregoing that the suit land herein is the subject in the Court of Appeal and what the plaintiff/Applicant is seeking cannot be granted on grounds that the matter is sub judice. If this Court were to issue orders contrary to those issued by the superior court, it would amount to issuing parallel orders and would result in interfering with the substratum in the Appellate Court. By law, I am barred from doing so.
19. 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, 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.
20. Ultimately, I find that this suit is sub judice and this court lacks jurisdiction to entertain the same. I am left with no option but to down my tools.
21. The upshot is that the preliminary objection is merited and the same is hereby allowed. The suit before this court is hereby struck out with costs for being sub-judice Kisumu Civil Appeal No. 49 of 2018. The costs of the Application shall be borne by the Plaintiff/Applicant.
22. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Akhaabi for plaintiff.
2. Mr. Kituyi for the Defendant.
3. Bett C/A.

