



REPUBLIC OF KENYA



**Kitaka v Mutunga (Environment & Land Case 20 of 2020)  
[2023] KEELC 531 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 531 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 20 OF 2020  
TW MURIGI, J  
JANUARY 25, 2023**

**BETWEEN**

**PAUL MUTUKU KITAKA ..... PLAINTIFF**

**AND**

**JAMES PIUS MUTUNGA ..... DEFENDANT**

**RULING**

1. By a Notice of Motion dated March 21, 2022 brought pursuant to the provisions of Section 6 of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#) the Applicant seeks the following orders:-
  1. Spent.
  2. That the suit herein be struck out.
  3. Costs be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on the even date.

**The Applicant's Case**

3. The Applicant averred that there is a case pending before the Tawa Law Courts being ELC Case No 7 of 2020 where the parties and the subject matter are similar to the present suit. The Applicant contended that the present suit is an abuse of the Court process and urged the Court to strike it out as there is an imminent danger of conflicting decisions emanating from suits filed in different Courts.



### **The Respondent's Case**

4. In opposing the application, the Respondent vide his replying affidavit sworn on November 21, 2022 averred that the application is devoid of merit as it does not meet the threshold set out by the law for striking out of a suit. He argued that although there exists a similar suit before the Tawa Law Courts, the issues for determination in both suits are different. He went on to state that on March 29, 2021, the issue was brought to the attention of Hon Justice Mbogo who then allowed the consolidation of the two suits. Counsel maintains that both suits should be consolidated without any further delay to pave way for the hearing of this matter. The Respondent urged the Court to dismiss the application with costs.
5. The application was canvassed by way of written submissions.

### **The Applicant's Submissions**

6. The Applicant's submissions were filed in Court on May 20, 2022.
7. In the Applicant's submissions, Counsel reiterated the contents of the Applicant's supporting affidavit. To buttress his submissions reliance was placed on the case of [Anna Cherop Vs Municipal Council of Eldoret and 2 Others.](#)

### **The Respondent's Submissions**

8. The Respondent's submissions were filed in Court on September 20, 2022. Counsel for the Respondent submitted that the order by Hon Justice Mbogo made on March 29, 2021 allowing the consolidation of the two suits is valid since it has not been challenged.

### **Analysis And Determination**

9. Having considered the application, affidavits and the rival submissions, I find that the issue that arises for determination is whether the Plaintiff's suit offends the provisions of Section 6 of the [Civil Procedure Act.](#)
10. 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.'
11. 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.
12. The Defendant has pointed out to this Court that there exists Tawa ELC Case No 7 of 2020 and I have seen the pleadings annexed in the supporting affidavit. In Tawa ELC Case No 7 of 2020, the Plaintiff was filed on May 20, 2020 by James Pius Mutinga. The Plaintiff therein, is the Defendant in the present suit, while the Defendant is the Plaintiff herein. In that case the Plaintiff (the Defendant herein) has sought orders inter alia to have the Plaintiff herein permanently restrained from entering, grazing, cultivating and constructing or in any other manner interfering with LR NO MBOONI/ITETANI/141.



13. The Plaintiff instituted the present suit against the Defendant vide a Plaint filed in Court on August 14, 2020 and sought for the following orders:-
  1. A declaration of land parcel No Mbooni/Itetani/141 is the property of the Plaintiff and his siblings as the beneficiaries of the Estate of Daniel Kitaka Kitua our father now deceased.
  2. An order of permanent injunction directed against the Defendant from disposing off, trespassing and/or interfering with land parcel no Mbooni/Itetani/141.
  3. An order of eviction restraining the Defendant from occupying the disputed suit property.
  4. That the costs and the interest of the suit be awarded to the Plaintiff.
14. The Defendant in Tawa ELC No 7 of 2020 (the Plaintiff herein) filed his Defence and Counter Claim and sought for the following orders against the Plaintiff (the Defendant herein):-
  1. An order of eviction be issued against the Plaintiff, his servants, agents restraining them from occupying land parcels namely LR No Mbooni/ITETANI/141.
  2. A permanent injunction to restrain the Plaintiff from entering into/trespassing, fencing, building, selling/disposing off, transferring and or in any way interfering with the Defendants lawful use of land parcel LR No MBOONI/ITETANI/141.
  3. A declaration that land parcel LR No MBOONI/ITETANI/141 is the property of the Defendants herein and their siblings as the beneficiaries of the Estate of Daniel Kitaka Kitua(deceased).
  4. General damages for trespass.
  5. Costs of this suit and interest thereon at court rates.
  6. Any other or further relief as this Court may deem fit and just to grant.
15. It is crystal clear that the orders sought by the Defendant in his Counter Claim in Tawa ELC Case No 7 of 2020 are similar to the orders sought in the present suit. Having made an assessment of the two suits, I have no doubt in my mind that the issues in this suit and in Tawa ELC No 7 of 2020 are precisely the same. The orders sought by the Plaintiff in the present suit can easily be ventilated in the Counter Claim filed in Tawa ELC No 7 of 2020.
16. On the issue of consolidation of the two suits, it is clear from the record that on March 29, 2021, the matter was fixed for mention for pre-trial directions before the Honourable Deputy Registrar. Mr Muthama holding brief for Mr Kioko for the Plaintiff was present while there was no appearance on the part of the Defendant or his Counsel. Counsel informed the Court that the Plaintiff was requesting for 60 days to make an application for transfer and consolidation. The Honourable Deputy Registrar took out of the matter from the cause list since there was no evidence that the Defendant was served with the mention date. Looking at the record, it is clear that the parties did not appear before Hon Justice Mbogo. It is also clear that Hon Justice Mbogo did not direct or allow the consolidation of the two suits.
17. This suit being sub judice to Tawa ELC Case No 7 of 2020 is hereby struck out with no orders as to costs.

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**HON. T. MURIGI**



**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF  
JANUARY, 2023.**

**IN THE PRESENCE OF: -**

**Court Assistant – Mr. Kwemboi**

**Mr. Kioko for the Plaintiff/Respondent**

