



**Ndambiri v National Environmental Authority & 4 others (Appeal E056 of 2022) [2023] KEELC 907 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
APPEAL E056 OF 2022  
J OMANGE, J  
JANUARY 19, 2023**

**BETWEEN**

**DAVID NJERU NDAMBIRI ..... APPELLANT**

**AND**

**NATIONAL ENVIRONMENTAL AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**BILL ORENGE OKEMWA ..... 2<sup>ND</sup> RESPONDENT**

**SUSTAINABLE DEVELOPMENT ..... 3<sup>RD</sup> RESPONDENT**

**AMEEY HOMES LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**KOCH CONSTRUCTION LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Following this court's ruling delivered on November 24, 2022 the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed applications dated November 28, 2022 and December 2, 2022. The applications sought to review the court's ruling dismissing the preliminary objection. The applications were brought on the grounds that there is an error apparent on the face of the record as the court had indicated that the pleadings in E 026 of 2022 had not been placed before the court hence the court could not determine that the matters were indeed similar.
2. The appellant who is the respondent in this application has opposed the application on the grounds that the applications are an abuse of the process of the court. He avers that the court had found that the respondents had not filed any papers and hence nothing had changed. The appellant further argues that the principles of subjudice do not apply.
3. Counsels filed submissions which I have considered.
4. The issues that arise for the court's determination are:-



- a. Is there an error apparent on the face of the record warranting a review of this court's decision?
  - b. If yes, does the preliminary objection dated October 11, 2022 and December 2, 2022 have merit?
5. Order 45 rule 1 of the *Civil Procedure Rules*, 2010 provides as follows: -
- (1) Any person considering himself aggrieved—
    - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
6. The court at paragraph 12 and 13 of its ruling dated November 24, 2022 had found that there was no material placed before the court that would enable it to make a determination as to whether the criteria for the doctrine of subjudice that was elaborately laid out by the Supreme Court in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (interested parties) had been met.
7. The applicants contend that the finding that there was no material is an error on the face of the record as the appellants own pleadings had pleadings in E 026 which the court could rely on to make the determination whether the matter was sub judice or not. The appellant/ respondent insists that since the applicants had not filed any papers nothing had changed to warrant the court to review its decision.
8. I find that given the fact that the pleadings were on record, the courts finding that there was no material was an error which this court is allowed to correct by setting aside its order dismissing the preliminary objection.
9. Taking into account the proceedings in E 026 of 2022 and the current appeal the court must now determine whether the preliminary objections are warranted.
10. Section 6 of the *Civil Procedure Act* provides as hereunder:
- “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.”
11. The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) had occasion to pronounce itself on the subject of sub judice. The court stated: -
- 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.

12. I have looked at the pleadings in ELC Pet E026 f 2022 and the pleadings in this appeal. The parties are the same as the defendants herein appear as interested parties in the other case. The property in question is the same LR NO 209/7549-City park drive is the same. Indeed, the application seek orders that are strikingly similar. I find that it could embarrass the court to proceed with the application and risk having two conflicting decisions of the court in a matter involving the same property.
13. In the premises given that this appeal was filed after the earlier suit, I stay it as guided by the Supreme Court in the cited case above.
14. The notice of preliminary objection is upheld in the following terms;
  - a. The suit is stayed pending the hearing and determination of ELC Pet E026 of 2022.
  - b. The deputy registrar to mention the matter periodically.
  - c. Costs to be in the cause

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 19<sup>TH</sup> DAY OF JANUARY 2023.**

**JUDY OMANGE**

**JUDGE**

In the presence of: -

Mr Wageni for the Appellant

Mr Rene for 3<sup>rd</sup> Respondent

Mr. Bashir/ Ms Njeri for 4<sup>th</sup> Respondent

Steve Musyoki- Court Assistant

