



REPUBLIC OF KENYA



KENYA LAW
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**Gichuki v Gichuki & 3 others (Environment & Land Case E020 of 2022)
[2023] KEELC 15703 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15703 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E020 OF 2022
LN GACHERU, J
FEBRUARY 23, 2023**

BETWEEN

SIMON NJOHU GICHUKI PLAINTIFF

AND

ANTONY MICHUKI GICHUKI 1ST DEFENDANT

JOHN THUO MBOCHI 2ND DEFENDANT

DISTRICT LAND REGISTRAR, MURANG'A 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. By a plaint dated August 11, 2022, the plaintiff Simon Njohu Gichuki, sought for judgement against the defendants for the following orders;-
 - 1) That the district land registrar be ordered to cancel title deed No Loc 4/Ngararia/2022, 2018 and 2019 and all subsequent sub-divisions and revert to the original title No Loc 4/Ngararia/85, and transfer the said land as per the High Court order issued on December 6, 2016;
 - 2) That the OCS Kandara Police Station be ordered to enforce the same;
 - 3) The costs of the transaction be met by the parties; and
 - 4) Costs and interest of the suit.
2. The 3rd and 4th defendants filed a joint statement of defence dated September 12, 2022, denying all the averments made by the plaintiff, specifically that the sub-division and subsequent issuance of title deeds was fraught with fraud. They put the plaintiff to strict proof thereof.



3. The 1st and 2nd defendants similarly filed their statement of defence dated October 13, 2022. They subsequently filed a notice of preliminary objection, on even date set on the following grounds:
 - 1) That the suit herein is sub judice and active before the Milimani High Court Civil Appeal 29 of 2005 Simon Njohu Michuki v Anthony Michuki, the 1st defendant herein;
 - 2) The suit is bad in law and constitutes forum shopping by the plaintiff;
 - 3) The suit is an abuse of the court process; and
 - 4) This honourable court lacks jurisdiction thereof.
4. The court directed that the preliminary objection be canvassed by way of written submissions. The plaintiff filed his written submissions dated January 20, 2023, in opposition to the preliminary objection. He submitted that this court has the requisite jurisdiction to hear and determine the matter as the orders sought are to enforce an order issued on December 6, 2016 in High Court Civil Appeal No 29 of 2005. The plaintiff submits that this is a matter of enforcing an order and prays that the court strike out the preliminary objection and proceed to hear the matter.
5. On the other hand, the 1st and 2nd defendants/objectors filed their written submissions dated January 4, 2023, through the law firm of Triple N W Advocates LLP in support of the preliminary objection. They raised three issues for determination in relation to a *sub judice* suit.
6. On the first issue of whether the suit is similar to an already instituted suit, the 1st & 2nd defendants/objectors submitted that there is a similar suit with similar parties before the Milimani High Court, namely Milimani Civil Appeal 29 of 2005, which seeks the same reliefs. They relied on section 6 of the [Civil Procedure Act](#) which bars any court from proceedings with a matter that is directly or substantially in issue in a previous instituted suit between the same parties.
7. On the issue of whether the subject matter in the two suits is similar, the 1st & 2nd defendants/objectors submitted that save from the change in title following the sub-division, the suit property is the same in both suits.
8. Lastly, on the issue of whether the matter is pending before any other court of competent jurisdiction, the 1st & 2nd defendants/objectors submitted that the matter is pending before Justice Catherine Ng'ang'a at the Milimani High Court. The 1st and 2nd defendants/objectors relied on the case of [Re Kibet Arap Kimarun \(deceased\) Bomet Succession Cause No 206 of 2015](#), wherein the court held that the purpose of the *sub-judice* rules is to prevent the filing of multiple suits between the same parties or those claiming under the same subject matter so as to avoid an abuse of the court process. They further submitted that the present suit reeks of said abuse and ought to be dismissed, with costs.
9. The court has considered the pleadings in general, the rival written submissions and the relevant provisions of law and finds the main issue for determination is whether the notice of preliminary objection dated October 13, 2020 is merited.
10. This court is asked to determine a preliminary objection that seeks to strike out a suit on the grounds that it is *sub judice*.
11. It is evident that vide a plaint filed on August 12, 2022, the plaintiff sought orders that the title deed for Loc 4/Ngararia/2022, Loc 4/Ngararia/2018 and Loc 4/Ngararia/2019, be cancelled and the land revert to the original title namely Loc 4/Ngararia/85, and the said land consequently be distributed as per the High Court orders issued on December 6, 2016. The 1st and 2nd defendants/objectors opposed the suit through a notice of preliminary objection on the grounds that it was *sub judice*.



12. It is trite that a preliminary objection, raises a pure point of law, which is premised on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or where the court is called upon to exercise judicial discretion.
13. In determining a preliminary objection, the court will take into account that a preliminary objection must stem from the pleadings and that it raises pure point of law. See the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No 53 of 2004*, where the court held that:-

' A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.'
14. Sub-judice, the basis of the preliminary objection herein, is provided for under section 6 of the Civil Procedure Rules which states:

' 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. Basically, for the doctrine of *sub judice* to stand in the instant suit, the four principles examined above must be present. That is, there must exist two or more suits filed consecutively, the matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits must be the same and they must be litigating under the same title and the suits must be pending in the same or any other court having jurisdiction in Kenya.
16. In the present case and from the pleading filed by the 1st and 2nd defendants/objectors in their preliminary objection, not enough facts have been captured nor evidence provided by the said objectors for the court to make a determination on whether the suit is indeed *sub judice*. On that limb alone, the preliminary objection, could fail, as there is no evidence of existing proceedings in another court. It was not enough to state that High Court Civil Appeal No 29 of 2005 exists, without proof of the same. The objectors ought to have availed proceedings of other suits and that would have amounted to ascertainment of facts. Through that ascertainment, then the allegations of subjudice ought to have been brought through a notice of motion application and not through a preliminary objection.
17. The plaintiff herein being dissatisfied with the lower court judgement in the Succession Cause No 182 of 1990, at Thika touching on the suit property preferred an appeal, at the High Court. It is not in dispute that the said appeal was heard, and determined. An observation of the orders in MilimaniHCCA No 29 of 2005, shows that the subdivision of the suit property was cancelled by the court orders issued on August 26, 2008. This was subsequently overturned in the same suit on December 6, 2016, in which orders were issued stating that the suit property should be equally divided among the three beneficiaries being Antony Michuki Gichuki, Simon Njohu Gichuki and Peter Mbochi Gichuki.
18. The 1st and 2nd defendants/objectors preliminary objection seeks to have the suit struck out on the grounds that a similar suit is running concurrently. However, no evidence was provided by the objectors as proof that Milimani HighCourt Civil Appeal No 29 of 2005, between Simon Michuki and Anthony Michuki meets the test for an objection based on *sub judice*.
19. There is a court order issued on December 6, 2016, which provided that the suit land Loc 4/ Ngararia/85, should be divided into three portions of 2.35acres and the resultant subdivisions



registered in the name of Anthony Michuki, Simon Njohu Gichuki and Peter Mbochi Gichuki – Simon Njohu Gichuki is the plaintiff herein.

20. In his claims, the plaintiff avers that the said suit land was subdivided into three portions without his knowledge and new numbers being Loc 4/Ngararia/2018, 2019 and 2022, were acquired.
21. In the said claim, the plaintiff seeks for the cancellation of the new titles and for the land title to revert back to Loc 4/Ngararia/85.
22. The 1st & 2nd defendants in their defence claim that the plaintiff was not entitled to a share of Loc 4/Ngararia/85, since he had been bought another parcel of land being Loc 4/Rukira/159, by his father Thuo Muhwanga.
23. These are issues that need to go for trial, and thus this case cannot be found and held to be an abuse of the court process and/or be bad in law.
24. Consequently, the court finds that the notice of preliminary objection as filed by 1st & 2nd defendants/objectors lacks merit and the same is dismissed entirely with costs to the plaintiff.
25. Let the suit proceed for hearing and be determined on merit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF FEBRUARY, 2023.

L. GACHERU

JUDGE

In the presence of;

Plaintiff – Absent

M/s Brenda H/B Ndungu for the 1st & 2nd Defendants/Objectors

M/s Kerubo for the 3rd & 4th Defendants

Court Assistant - Joel Njonjo

L. GACHERU

JUDGE

23/2/2023

