



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E246 OF 2021**

**EPHRAIM MIANO THAMAINI.....PLAINTIFF**

**VERSUS**

**NANCY WANJIRU WANGAI.....1<sup>ST</sup> DEFENDANT**

**ELINA MWAYITSI NAKAYA.....2<sup>ND</sup> DEFENDANT**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. This Ruling is in respect to the Application dated **7<sup>th</sup> July 2021** seeking for temporary injunctive orders against the 1<sup>st</sup> Defendant pending the hearing and determination of the suit and the 1<sup>st</sup> Defendant's Notice of Preliminary Objection dated **27<sup>th</sup> July 2021**.
2. The Plaintiff herein commenced this suit vide a plaint dated 7<sup>th</sup> July 2021 seeking for various reliefs. Contemporaneously to the filing of the plaint he also filed a Notice of Motion application where he sought for temporary injunctive orders against the 1<sup>st</sup> Defendant pending the hearing and determination of the suit in respect to suit property **NAIROBI/BLOCK/97/2347**. The Court considered the application and initially granted status quo orders to remain until and or when further orders are granted.
3. The Application is supported by grounds stated on its face as well as the supporting Affidavit of the Plaintiff, sworn on **7<sup>th</sup> July 2021**.
4. Pursuant to the directions of the Court issued on 25<sup>th</sup> January 2021 the Court directed that the Plaintiff's application dated 7<sup>th</sup> July 2021 and 1<sup>st</sup> Defendants' preliminary objection dated 27<sup>th</sup> July 2021 be canvassed through written submissions

**The Plaintiff's submissions**

5. In support of his application dated 7<sup>th</sup> July 2021, the Plaintiff relied on his own supporting affidavit sworn on the same date. The Plaintiff also filed written submissions dated 14<sup>th</sup> February 2022.
6. It was submitted that this application was for granting since the principles of granting of an injunction had been demonstrated. Counsel for the Plaintiff referred to the cases of ***Giella v Cassman Brown (1973) EA 358***, ***Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR*** and ***Mrao Limited v First American Bank of Kenya Ltd (2003) eKLR***.
7. Counsel submitted that the Plaintiff had been in occupation and possession of the suit property for a continuous period of more than 15 years and that the 1<sup>st</sup> Defendant had sought to evict him without issuing any notice and the same was in blatant disregard to the due process and a violation of his rights.
8. It was also disclosed that there was another suit relating to the same property which was ***Milimani ELC No. E258 of 2020 Samson Masaba Munikah & Elina Mwayitsi Nakaya v Nancy Wanjiru Wangai*** which suit sought to have the 1<sup>st</sup> Defendant's title to the suit property declared null and void and cancelled for having been obtained irregularly, unlawfully and fraudulently.
9. The Plaintiff contended that he has a legal interest to the suit property regardless of the fact that the same is registered in the name of the

1<sup>st</sup> Defendant. It was further submitted that there was also another suit **Nairobi ELC No. 554 of 2008, Nancy Wanjiru Wangai v National Social Security Fund & 4 Others [2016] eKLR** which also related to the dispute in respect to the suit property and Plaintiff was neither served nor notified of the said proceedings. The Plaintiff also stated that he was not accorded an opportunity to present his evidence and neither was he served. He prayed that his application dated 7<sup>th</sup> July 2021 be allowed as prayed.

### **1<sup>st</sup> Defendant's submissions**

10. The 1<sup>st</sup> Defendant relied on the submissions dated 16<sup>th</sup> February 2022. In her written submissions, Counsel referred to the 1<sup>st</sup> Defendant's relying affidavit sworn on 9<sup>th</sup> November 2021 and the Notice of Preliminary Objection dated 27<sup>th</sup> July 2021.

11. Counsel submitted that the Plaintiff had also requested to be enjoined in **Nairobi ELC Case No. 554 Of 2008** and that he had not informed court what became of his application in the said matter and further that he had waited for five years to file the current suit.

12. It was also submitted that the instant suit was sub judice in view of **Nairobi ELC No. E258 Of 2020** and thus the same ought to be stayed in view of this development. The court was requested to dismiss the application with costs.

### **2<sup>nd</sup> Defendant's case**

13. The 2<sup>nd</sup> Defendant did not file any written submissions, however on record there was a statement of defence dated 18<sup>th</sup> November 2021. At paragraph 21 of the said defence he pleaded and put the Plaintiff on notice that she would be raising an objection to the suit for the reasons that there were other matters dealing with the suit property namely **Nairobi ELC No. 258 of 2020 Samson Masaba Munika & Elina Mwayitsi Nakaya v Nancy Wanjiru Wangai and Nairobi ELC No. 554 of 2008 Nancy Wanjiru Wangai v National Security Fund & 4 Others**.

### **The 3<sup>rd</sup> Defendant's submissions**

14. The 3<sup>rd</sup> Defendant filed their submissions dated 17<sup>th</sup> February 2022 and a Replying Affidavit sworn 21<sup>st</sup> January 2022 by **Austin Ouko its Acting General Manager, Corporate Affairs and Corporation Secretary**.

15. According to the 3<sup>rd</sup> Defendant, they were in support of the Plaintiff's application and submitted that it was necessary to grant the injunctive orders sought pending the hearing and determination of the suit.

16. It was submitted that according to them, the Plaintiff having purchased the suit property from the 3<sup>rd</sup> Defendant for a sum of Ksh 315,000/- through a tenant purchase scheme and having been in occupation since the year 2001 had established a prima facie case.

17. The 3<sup>rd</sup> Defendant also submitted that they had engaged a surveyor Geoner Systems Limited with a view to get to the root of the issue of the suit property and to investigate the history of the title. According to them, vide a report dated 17<sup>th</sup> September 2021, the surveyor had stated that Nairobi/Block 97/1389 though surrendered as an open space was legitimately within the beneficial user of the fund and it was further recommended that the title giving rise to Nairobi/Block 97/2344 to 2350 be investigated.

### **Analysis and determination**

18. I have considered the application together with the 1<sup>st</sup> Defendant's Notice of Preliminary Objection, the written submissions and the responses filed thereto. The issues which in my opinion arise for determination and which can dispose of the application and together with the notice of preliminary objection is summarized are as follows: -

*i. Whether the suit filed herein is sub judice?*

*ii. What are the appropriate orders/remedies that can be issued herein?*

#### **Issue No. 1**

#### ***Whether the suit filed herein is subjudice?***

19. It was submitted that this suit was instituted by the Plaintiff despite the existence of another suit **Nairobi ELC Case No. E258 Of 2020 Samson Masaba Munika & Elina Mwayitsi Nakaya V Nancy Wanjiru Wangai** and that all this issues ought to have been raised in that suit instead of filing a separate fresh suit.

20. The subjudice principle is captured in **Section 6 of the Civil Procedure Act**, which provides as follows: -

***“6. 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.”***

21. In this regard, **section 6 of the Civil Procedure Act** expressly provides that 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.

22. With a large number of pending cases, the judiciary is overburdened and faces a stark lack of resources. When two suits arising out of the same issues between the same parties are brought before the courts, there is bound to be wastage of resources and frivolous litigation.

23. The basic purpose and the underlying object of *subjudice* is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

24. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR*, had occasion to pronounce itself on the subject of *subjudice*. It aptly 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”***

25. In the case of *David Ndii & others versus Attorney General & Others 2021 eKLR*, a bench of five Judges inter alia stated;

***“The rationale behind this provision (Section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”***

26. It is common ground that the instant suit was filed despite the existence of a pending civil suit **Nairobi ELC No. E258 of 2020**. I have had the occasion to peruse the pleadings filed in **Nairobi ELC No. E258 of 2020** and I find that the same relates to the current suit and has similar parties herein. The dispute in the said suit is in respect to the parcel number **NAIROBI/BLOCK 97/2347** which is the suit property herein.

27. I also wish to add that the practice of filing new and separate cases despite the existence of a similar case relating to the same subject matter amounts to an abuse of the court process. Courts usually frown on this practice since it leads to unnecessary backlog of cases and a waste of the precious judicial time.

28. In the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) eKLR 229*, the court of appeal stated as follows:-

***“ The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive’.***

29. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.

30. The point to underscore is that a litigant has no right to pursue *paripasu* more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

31. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice

32. Abuse of court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.

33. In the instant case, I can see elements of abuse of process of court as stated in the case of *Muchanga Investments Limited vs Safaris*

**Unlimited (Africa) (supra).**

34. Accordingly, I find that the issues in this suit have a nexus with **Nairobi ELC No. E258 of 2020** to the extent that they relate to the same suit property **NAIROBI/BLOCK 97/2347** and equally similar parties.  
**Issue No. 2**

***What are the appropriate orders/remedies that can be issued herein?***

35. I have stated as much in the earlier part of this ruling and having found as such how the Plaintiff's action of filing this suit despite the existence of a similar suit amounted to an abuse of the court process.

36. Order 2 rule 15 (1) (d) of the Civil Procedure Rules 2010 provides:

15. Striking out pleadings [Order 2, rule 15.]

(1) *At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*

*(a) it discloses no reasonable cause of action or defence in law; or*

*(b) it is scandalous, frivolous or vexatious; or*

*(c) it may prejudice, embarrass or delay the fair trial of the action; or*

*(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be [emphasis added]*

38. Even though a court of law should try as much as possible to allow a suit to be determined on its merits, the court should not shy off taking action to rid the court process of proceedings that are clearly an abuse of the court process. In the premises the proper order that commends itself and which I will proceed to grant is to struck out the suit for being an abuse of the court process.

**Disposition**

39. In the end, the Plaintiff's application dated 7<sup>th</sup> July 2021 is unmerited and I have no hesitation in finding, as I hereby do, that this suit is an abuse of court process. In conclusion, the suit is struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendant and any orders previously issued are discharged.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2022.**

**E. K. WABWOTO**

**JUDGE**

**IN THE VIRTUAL PRESENCE OF:-**

**MR. AMIMO FOR THE PLAINTIFF**

**N/A FOR THE 1ST DEFENDANT**

**N/A FOR THE 2ND DEFENDANT**

**MR. OPOLE H/B FOR MR. MUNGE FOR THE 3RD DEFENDANT**

**COURT ASSISTANT: CAROLINE NAFUNA.**