



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 596 OF 2013

THIBA MIN. HYDRO CO. LTD PLAINTIFF

VERSUS

JOSPHAT KARU NDWIGA DEFENDANT

RULING

This ruling is with respect to the Preliminary Objection raised by the defendant that this suit is sub-judice in view of the pendency of Kerugoya C.M.C.C No. 176 of 2013 which is pending hearing in the subordinate Court.

I have called for and perused the pleadings in Kerugoya C.M.C.C No. 176 of 2013. What comes out clearly from those pleadings is as follows:-

1. That defendant herein is the plaintiff in Kerugoya C.M.C.C No. 176 of 2013.
2. The plaintiff herein describes itself as a Limited Company but in Kerugoya C.M.C.C No. 176 of 2013, they are the 15 defendants who describe themselves as members of a group called THIBA POWER PROJECT OR THIBA MICRO HYDRO POWER and who have put up a power house on the plaintiff's parcel of land known as L.R KABARE/NJUKU/215.
3. In this suit, the plaintiffs claim is loss of Ksh. 700,000/= that they have incurred after the defendant denied them access to the said power house. The plaintiff also seek an undisclosed sum as loss of credibility and reputation from it's customers as well as general damages. They also seek an injunction.

4. In Kerugoya C.M.C.C. No. 176 of 2013 the plaintiff who is the defendant in this case, has sued some 15 defendants whom he has described in paragraph 4 of his plaint as follows:-

“The defendants who purport to be members of a group called THIBA POWER PROJECT or THIBA MICRO HYDRO POWER”

The plaintiff in the said Kerugoya C.M.C.C No. 176 of 2013 and who is the defendant herein goes on to seek the eviction of the defendants from his land KABARE/NJUKU/215 and an order for the demolition of the defendant's power house on the said parcel of land.

5. In their defence in Kerugoya C.M.C.C. No. 176 of 2013, the defendants

have filed a counter-claim seeking orders that they have the right to maintain their project on the plaintiff's land KABARE/NJUKU/215 and the plaintiff should therefore be restrained from interfering with the said project.

It is clear from the above that the issues being canvassed in this suit are substantially the same issues that are in dispute in Kerugoya C.M.C.C No. 176 of 2013 which was originally a High Court Case (ELC No. 436 of 2013) but was transferred to the subordinate Court with the consent of the parties as that Court has jurisdiction over the matter. Although the plaintiff herein describes itself as a Limited Liability Company, it is essentially the same 15 defendants who in Kerugoya C.M.C.C No. 176 of 2013 are described members of THIBA MICRO-HYDRO POWER PROJECT.

The Preliminary Objection founded on the sub-judice rule is therefore well founded. The sub-judice rule is described in **Section 6 of the Civil Procedure Act** as follows:-

“No Court shall proceed with the trial of any suit or proceedings 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”.

The issue of this matter being sub-judice has been pleaded in paragraphs 11 and 12 of the defence herein. Although the plaintiff herein is a Limited Liability Company while the defendants in KERUGOYA C.M.C.C No. 176 of 2013 is a group of 15 defendants who have also described themselves as a Self Gelp Group under the name THIBA MICRO – HYDRO POWER PROJECT, it is clear to me that the plaintiff herein and the defendants in KERUGOYA C.M.C.C No. 176 of 2013 are really the same litigants and the claim herein can perfectly be litigated in the suit now before the subordinate Court. It is not the form in which the suit is framed that determines whether it is sub-judice. Rather it is the substance of the suit and looking at the pleadings in both cases, I am satisfied that the claim herein can perfectly be litigated in KERUGOYA C.M.C.C No. 176 of 2013 and there can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the **Civil Procedure Act** which require under **Section 1B** that there be an **“efficient use of the available judicial and administrative resources”**.

Having considered all the above, I am satisfied that the plea of sub-judice has properly been invoked in this case. However, the remedy is not to strike out this suit as the defendant has asked me to do. Indeed the marginal notes in Section **6 of the Civil Procedure Act** read ***“stay of suit”***. Since KERUGOYA C.M.C No. 176 of 2013 has not commenced trial, the orders that commend themselves to me and which I hereby make are as follows:-

- 1. This suit is transferred to the Chief Magistrate's Court Kerugoya for the parties to consider consolidating it with KERUGOYA C.M.C.C No. 176 of 2013.***
- 2. If they are unable to do so, this suit shall remain stayed pending the determination of KERUGOYA C.M.C.C No. 176 of 2013 but shall nonetheless remain in that Court until further orders by the trial Court***
- 3. The plaintiff will meet the costs of this application.***

B.N. OLAO

JUDGE

8TH OCTOBER, 2013

8/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Ndegwa for Applicant – present

Mr. Ombongi for Respondent – present

COURT: Ruling delivered this 8th day of October 2013 in open Court

B.N. OLAO

JUDGE

8TH OCTOBER, 2013