



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

JUDICIAL REVIEW APPLICATION NO. 4 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTION 13 (7) OF THE ENVIRONMENT AND LAND COURT ACT NO. 9 OF 2011

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR KISII COUNTY.....1ST RESPONDENT

THE COUNTY SURVEYOR KISII COUNTY.....2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

RICHARD NYABANDO.....EX-PARTE APPLICANT

ELIJAH NYAGAMI GAL.....INTERESTED PARTY

RULING

INTRODUCTION AND BACKGROUND

1. The Ex-parte Applicant approached the court vide Chamber Summons dated 24th November 2020, seeking the following orders:

- 1. Spent

2. That the Applicant be granted leave to apply for Judicial Review orders of Certiorari:

i) Removing into this Honourable Court for purposes of being quashed the decision of the Respondents made on the 17th day of July, 2020 by virtue of a report under Ref. KSI/BD/RPTS/CONF/VOL.11/11 conclusion no. 1 revoking land parcel number KISII/CENTRAL KITUTU/MWAMANWA/557 and its resultant sub-divisions particularly parcel number KISII/CENTRAL KITUTU/MWAMANWA/2230, 3448 and 2235.

ii) Removing into this Honourable Court for purposes of being quashed the decision of the Respondents made on the 17th day of July, 2020 by virtue of a report under Ref. KSI/BD/RPTS/CONF/VOL.11/11 conclusion no. 4 seeking to create a new survey map sheet in place of survey map sheet No. 5 and 7.

3. That the Court be pleased to grant leave to the Ex-parte Applicant to apply for an order of Prohibition:

i) Prohibiting and restraining the Respondents either by themselves, their agents, servants or whatsoever (sic) from taking any steps, actions and measures to enforce their decision contained in the Report dated 17th July, 2020 under Ref. KSI/BD/RPTS/CONF/VOL.11/11 conclusion no. 1 revoking land parcel number KISII/CENTRAL KITUTU/MWAMANWA/557 and its resultant sub-divisions particularly parcel number KISII/CENTRAL KITUTU/MWAMANWA/2230, 3448 and 2235.

ii) Prohibiting and restraining the Respondents either by themselves, their agents, servants or whatsoever (sic) from taking any steps, actions and measures to enforce the decision contained in the Report dated 17th July 2020 under Ref. KSI/BD/RPTS/CONF/VOL.11/11 until Court of Appeal at Kisumu Civil Appeal No. 90 of 2020 has been heard and determined.

4. That the Ex- Parte Applicant do have leave to apply for an order of Mandamus:

i) Directing the District Land Registrar Kisii to reinstate the land parcels title Number KISII/CENTRAL KITUTU/MWAMANWA/2230, 3448 and 2235 to its original position.

ii) Directing the County Surveyor, Kisii County to reinstate Survey Map Sheet No. 5 and 7.

5. That the Honourable Court be pleased to order that the grant of leave herein to operate as a stay of any transactions, dealings, sale and transfers until the hearing and determination of the substantive application.

6. That the costs of this application be provided for.

2. The application is anchored on the grounds stated on the face of the Chamber Summons, the statutory statement and the verifying affidavit of Richard Nyabando sworn on the 24th November, 2020.

3. In his statutory statement the Applicant states that it was unreasonable for the 1st Respondent to cancel the Applicant's title deed to land title number KISII/CENTRAL KITUTU/MWAMANWA/557 and its resultant sub-divisions which include land parcels No. KISII/CENTRAL KITUTU/MWAMANWA/2230, 3448 and 2235 without hearing the Applicant and giving him ample time to prepare a response or a written memorandum on how he acquired the said title deed.

4. In his verifying affidavit, the Applicant deposes that he is the registered owner of land parcel number KISII/CENTRAL KITUTU/MWAMANWA/2230, 3448 and 2235 and that he is in possession thereof to date. He further deposes that on 11th September 2018, the Interested Party came to the suit property with a group of people who wrongfully and unlawfully trespassed thereon. That in total disregard of a court order, the Interested Party entered into a sale agreement with the County Government of Kisii over the parcel of land covered by L.R number KISII/CENTRAL KITUTU/MWAMANWA/2227, 2228, 2229, 2230, 2231,2232,2233,3404, 2235, 3419, 3448, 3449 and 3450 which are all resultant sub-divisions of land parcel number KISII/CENTRAL KITUTU/MWAMANWA/557 purporting that the same portion of land is land parcel number KISII/CENTRAL KITUTU/MWAMANWA/2037,2038, 2039, and 2040 all being sub-divisions of the original parcel number KISII/CENTRAL KITUTU/MWAMANWA/558.

5. Upon being served with the application, the Interested Party filed a Notice of Preliminary Objection raising the following grounds:

i. That the issues raised in the Judicial Review proceedings were heard and determined in Kisii E.L.C No. 120 of 2004 vide the judgment dated 17th June 2010, the ruling dated 14th November 2014 and J.R No. 4 of 2019 respectively and is therefore *res judicata* contrary to the provisions of section 7 of the Civil Procedure Act.

ii. That the Ex-Parte Applicant herein has filed an appeal in the Court of Appeal being Civil Appeal No. 90 of 2020 at Kisumu which is yet to be heard and therefore the J.R proceedings are *sub-judice* contrary to section 6 of the Civil Procedure Act.

iii. That the Ex-parte Applicant failed to make full material disclosure of the issues in contention that L.R NO. KISII/CENTRAL KITUTU/MWAMANWA/ 557 and all the resultant sub-divisions do not exist and no orders of certiorari, prohibition or mandamus can issue in a vacuum.

iv. That this court lacks the jurisdiction to sit on appeal against her decision or the decision of a court of the same status which has pronounced herself on the issues raised.

v. That the Chamber Summons application, Statement of facts and affidavits are an abuse of due process and hence ought to be struck out with costs.

6. The court directed that the Preliminary Objection be canvassed by way of written submissions and the Interested Party filed his submissions dated 24th February 2021, while the Ex-Parte Applicant filed his submission dated 19th March 2021.

ISSUES FOR DETERMINATION

7. Having considered the Chamber Summons, Statement of Facts, Verifying Affidavit and the Preliminary Objection, the following issues emerge for determination:

- i. Whether the matter application herein is *res judicata*
- ii. Whether this matter is *sub-judice*
- iii. Whether this court lacks jurisdiction to hear and determine this suit.

ANALYSIS AND DETERMINATION

8. Learned counsel for the Interested Party has submitted that the matter herein is *res judicata* as the matters raised herein were heard and determined in KISII ELC Case No. 120 of 2004 and KISII J.R No. 4 of 2019. He argued that in ELC Case No 120 of 2004 Justice Makhandia (as he then was) delivered a judgment on 17th June 2010 whereby he held that parcel L.R No. CENTRAL KITUTU/MWAMANWA/557 did not exist since it was not adjudicated and therefore whatever claim was brought forth by the Defendants was barred by the Limitation of Actions Act. In the said case the Ex Parte Applicant who litigated as **Gechure Nyabando** is the same one in the instant suit claiming as **Richard Nyabando**.

9. After the said judgment was delivered, the Ex-parte Applicant applied for review of the judgment but the application was dismissed by Justice Okong'o vide his ruling delivered on 14th November 2014. The Ex-parte Applicant then filed an application for leave to apply for Judicial Review in respect of the same matter in Kisii J.R No. 4 of 2019 and this court upheld the Preliminary Objection raised by the Interested party that the matter was *res judicata*.

10. Learned counsel for the Ex-parte Applicant contends that the matter is not *res judicata* as the acts complained of in the instant application only arose on 17th July 2020. However, in the same breath he admits that there is a matter touching on the same subject matter in which this court held that the suit was *res judicata* and the same is pending before the Court of Appeal at Kisumu.

11. It is not in dispute that the Ex-parte Applicant has been litigating over land parcel no. CENTRAL KITUTU/MWAMANWA/557 since 2004. There is also no doubt the High Court and this court have rendered decisions in respect of this subject matter and that the Ex-parte Applicant and the Interested Party have been at the centre of this litigation. By the Ex-parte Applicant's own admission the matter is pending in the Court of Appeal vide Civil Appeal No. 90 of 2020. It is therefore not clear why the Ex-parte Applicant instituted another application for Judicial Review touching on the matter before the Court of Appeal. As I understand it, the Ex-parte Applicant is now complaining about the actions of the Land Registrar who was implementing the judgment that was delivered by Justice Makhandia on 17th June 2010. Is this a proper use of the court process? My analysis leads me to the conclusion that it is not.

12. Regarding the issue of *res judicata*, I am guided by the case of **Joshua Ngartu v Jane Mpinda & 3 Others (2019) eKLR** where Lucy Mbugua J relying on the case of **Attorney General & Another v ET (2012) eKLR** held as follows:

*“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way an in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of **Omondi v National Bank & Others (2001) EA 177** the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit” In that case the court quoted Kuloba J (as he then was) in the case of **Njanju v Wambugu & Another HCCC No. 2430 of 1991** (unreported) where he stated : “ If parties are allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion when he comes to court then I don't see the use of the doctrine of res judicata...”*

12. I therefore have no hesitation in holding that this matter is both *res judicata* and *sub-judice*. The Applicant would be well advised to pursue the case in the Court of Appeal to its conclusion rather than instituting multiple proceedings in this court as this amounts to an abuse of the court process.

13. Accordingly, I find merit in the Preliminary Objection and I uphold it. The application is hereby struck out with costs to the Interested Party.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2021.

J.M ONYANGO

JUDGE