



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CAUSE NO. 1474 OF 2014**

**CHRIS NYAKUNDI (Suing through his Attorney**

**JEREMIAH MATAGARO.....PLAINTIFF**

**-VERSUS-**

**MIMOSA PLANTATIONS LTD.....1<sup>ST</sup> DEFENDANT**

**EZEKIEL MISANGO MUTISYA.....2<sup>ND</sup> DEFENDANT**

**ZEPHR HOLDINGS LTD.....3<sup>RD</sup> DEFENDANT**

**NAIROBI DISTRICT LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. At the core of the preliminary objections raised by both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the Plaintiffs suit are two issues. Is the Plaintiff’s claim time barred? Secondly, is the Plaintiffs’ claim barred by reason of the issues now being raised having been determined on merit by a court of competent jurisdiction?
2. The Plaintiff filed this suit on 24<sup>th</sup> November, 2014. The Plaintiff through the duly constituted Attorney prayed for various declaratory orders. Substantively, the declarations were sought to affirm the plaintiff as the owner of all that property known as Nrb/Block 112/127. The Plaintiff also sought orders against the 4<sup>th</sup> and 5<sup>th</sup> Defendants for the cancellation of the Certificate of Lease issued in favour of the 2<sup>nd</sup> Defendant on 13<sup>th</sup> June, 2014 following a public auction of the suit property. The Plaintiff simply wants to be restored as the owner of the property.
3. The Plaintiff alleges that he acquired the suit property for valuable consideration in 1994 and secured for himself the title document. He thereafter took possession then somehow in February, 2001 the property was transferred to one Peter Obiero Bundi. It later turned out that the 2<sup>nd</sup> Defendant had purchased the suit property at sale by the court through a public auction in execution of a decree in favour of the 3<sup>rd</sup> Defendant obtained in Nbi HCC No. 248 of 2014 against

the said Peter Obiero Bundi. The Plaintiff states that he never transferred the property to Peter Obiero Bundi. The Plaintiff blames the 2<sup>nd</sup> and 4<sup>th</sup> Defendants for negligence. His attempts to cause the rectification of the title and restoration of the same to his name through an application filed in HCC No. 248 of 2012 was dismissed on 3<sup>rd</sup> November, 2014. Alongside the plaint, the Plaintiff also filed an application for injunction. The affidavit sworn in support of the application by the Plaintiff's duly constituted Attorney in factual form simply repeated the averments in the plaint.

4. The Defendant contested the suit. A notice of preliminary objection was filed on 19<sup>th</sup> December, 2014 by the 3<sup>rd</sup> Defendant. It raised three substantive points. Firstly, was the fact that the transfer of the suit property from the 1<sup>st</sup> Defendant to the Plaintiff was a nullity for an array of reasons. Secondly, that the suit was time barred and thirdly that the matter raised by the Plaintiff in the instant suit were *res judicata* having been raised and determined in JR 400 of 2013 and HCC No. 248 of 2012. The 2<sup>nd</sup> Defendant had also filed on the same date a notice of preliminary objection raising similar points but also adding that there was objection to the suit *in limine* as it was a wilful abuse of the process of court.
5. The two objections *in limine* were argued orally on 20<sup>th</sup> January, 2015. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants did not participate in the proceedings of 20<sup>th</sup> January, 2015. Mr. Kariuki for the 2<sup>nd</sup> Defendant submitted that the Plaintiff's suit is 15 years late as the alleged fraud is stated by the Plaintiff to have taken place in the year 2001 when the Plaintiff also then reported the fraud to the authorities. Accordingly, Mr. Kariuki added, the Plaintiff had been aware of the alleged fraud since the year 2001 but took no action until 2013 through the judicial review suit. Secondly, Mr. Kariuki also submitted that the issue as to who owned the property had been litigated and determined in HCC No. 248 of 2014. He relied on the case of **Lilian Njeri Muranya –v- Virginia Nyambura Ndida ELC 1271 of 2014 [2014] eKLR**.
6. On his part Mr. Mungala for the 3<sup>rd</sup> Defendant associated himself with and adopted Mr. Kariuki's submission. On behalf of the 3<sup>rd</sup> Defendant Mr. Mungala added that the power of Attorney purportedly utilized to convey the suit property to the Plaintiff was a fake and non-existent as at the time the property was allegedly transferred to the Plaintiff, the Plaintiff's Attorney was not properly constituted.
7. The Plaintiff, through Mr. Juma contested the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants arguments by stating that the issues raised by the Defendants are not issues to be investigated and determined by way of a preliminary objection. The Plaintiff insisted that he holds a Certificate of Lease which is yet to be impeached and such impeachment can only be through due process and not summarily. On the issue of the suit being time barred the Plaintiff submitted he only became aware of the fraudulent dealings in the year 2013 and it is then that the Plaintiff reported the matter to both the Criminal Investigation Department as well as the District Land Registrar. On the issue of *res judicata*, Mr. Juma was emphatic that the Plaintiff has never been a party to a suit where the ownership of the suit property was being determined. Judicial Review Casae No. 400 of 2013 as well as HCC No. 248 of 2012 had nothing to do with ownership and if either did, no determination was made by the respective courts. Finally, Mr. Juma urged the court to invoke the equitable maxim to the effect that equity looks on that as done which ought to have been done.
8. I have considered the rival submissions. I have also carefully read the affidavits filed herein.
9. I start off by stating that the law as to what constitutes a preliminary point of objection is relatively clear. The case of **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd [1969] EA 696** lay it out pretty well that it is a point of law of either limitation or jurisdiction argued on the basis or premise that the facts as pleaded are true. In **Mukisa (supra)**, Law J.A defined a preliminary objection to be:-

*“..... a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.*

On the same judgment Charles Newbold P Stated as follows:

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.*

10. In the case before me the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not asked for my discretion. They have asked for the case to be dismissed in its entirety on the basis that the issues are res judicata and further that the Plaintiffs claim is in any event barred by limitation. Such objection would meet the **Mukisa Biscuits** threshold and the only question to be asked would be whether all the facts are true as pleaded or arise from the pleading by clear implication.
11. The only undisputed fact of this case is that the property seems to have changed hands from the Plaintiff to one Peter Obiero Bundi on 6<sup>th</sup> February, 2001. The Plaintiff though says he never transferred the property. Likewise it is undisputed that the Plaintiff caused a restriction to be registered against the title in November, 2013. That the restriction was removed though an order of the court is also not in dispute and finally that the 2<sup>nd</sup> Defendant is currently the registered proprietor is also not in dispute. Finally, it also not in dispute that the 2<sup>nd</sup> Defendant bought the property through a court sanctioned sale.
12. There is however controversy as to when the cause of action begun to run. Likewise there is also controversy as to whether the other two cases namely HC Misc. No. 248 of 2012 and HC JR Case No. 400 of 2013 determined the issues now being raised before this court by the Plaintiff.
13. With regard to the question of res judicata, I have no doubt in my finding after a cursory glance at the pleadings proceedings and ruling/judgments rendered in the two High court cases that all the requirements of the doctrine of res judicata have not been met. A party alleging abuse of process by reason of res judicata needs to establish to the courts satisfaction that the matter in issue is identical on both suits which were/are between the same parties and that there is not only a concurrence of jurisdiction of the court but that the subject matter is the same and there has been a final determination as far as the previous decision is concerned: see **Christon –v- Haringey LBC [2013] 3 WLR 796**.
14. The parties in JR Case No. 400 of 2013 were the 2<sup>nd</sup> Defendant herein and the 4<sup>th</sup> Defendant. The Plaintiff sought to join the said proceedings. He joined and participated in the proceedings. The issue then involving the same subject matter was whether the restriction which had been registered against the title in November, 2013 could be removed by the court. The said Judicial Review Cause was heard by Justice G. V. Odunga who listened to various arguments by the 2<sup>nd</sup> Defendant herein (then the exparte applicant) as well as the Plaintiff herein (then an interested party) and also another interested party. The parties argued at length on the issue of title ownership but at paragraph 37 of the judgment, Odunga J rendered himself as follows:

*“[37] Therefore in this application this court is not concerned with the determination of the ownership of the suit property. To determine that issue would necessarily require the parties to call witnesses whose evidence would be subjected to cross examination before the court would be in a position to resolve the parties rivalling contentions some of which touch on fraud. It follows therefor that where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a*

*suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply...*”

15. The learned judge then continued at paragraph 38

*“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications do not determine ownership of a disputed property but only determines whether the decision maker had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters and did take into account irrelevant matters.....therefore in this case the court is only concerned with the determination of the issue whether the process of registration of the restriction on the unit parcel was illegal in the sense that the 2<sup>nd</sup> Respondent (the Chief Land Registrar) committed an error of the Law....”*

16. The learned judge then concluded his judgment by allowing the application to lift the restriction which order he also suspended for a period of 30 days to enable the Plaintiff herein to take whatever legal options the Plaintiff had with a view to protecting his interest.

17. Like the learned judge, I am clear in my mind that there was no determination of the substantive issue raised by the Plaintiff in the instant suit. The issue as to ownership as to the alleged fraud or illegality was never before the court in JR application No. 400 of 2013. If it was it was never determined on its merits. The Plaintiff could file another suit without the fear of the doctrine of res judicata or issue estoppel being raised.

18. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have also raised the question of issue estoppel with regard to the existence and determination of Civil Suit No. 248 of 2012.

19. I have also looked at the proceedings in that case as well as the final ruling of the court (Gikonyo J) rendered on 3<sup>rd</sup> November, 2014. Once again the court was also clear that the question of ownership of the property and how it had been acquired was not before the court. The court also made it clear that it was not the right forum to litigate issues of property ownership. One needs no reminder at this stage that for a plea of res judicata to succeed the determination must be by a competent tribunal seized with jurisdiction. Not only was the plaintiff not a party to the prior proceedings in HCC No. 248 of 2012 [see paragraph 7 of the ruling by GikonyoJ] but the court firmly determined that it had no jurisdiction to determine matters concerning and touching on ownership of property. The invocation of the doctrine of res judicata or issue estoppel is therefore misfounded in the circumstances of this case.

20. I now turn to the issue of limitation of action. The 2<sup>nd</sup> as well as the 3<sup>rd</sup> Defendant submitted that the Plaintiff's claim is statute barred. The Plaintiff stated that the claim was till ripe for determination by this court. According to the respondents the claim is an action for recovery of land and under Section 7 of the Limitation of Actions Act (Cap 22), the cause of action accrued in the year 2001. The Plaintiff had twelve years to file the suit and consequently the suit was barred as of the year 2013.

21. It is true that the Plaintiff seeks to recover the suit property. It is to be noted however that the basis of the recovery is an alleged fraudulent and irregular transfer of the suit property to one Peter Obiero Bundi. That is the core of the Plaintiff's claim. It is in respect of such claim that the 3<sup>rd</sup> Respondent particularly submitted that the Plaintiff was aware of the transfer way back in the year 2001 and reported to the police. The 2<sup>nd</sup> Respondent referred the court to paragraph 12 of the Plaintiff's claim. He also made reference to paragraph 11 of the Plaintiff's claim. The Plaintiff's Counsel in response stated that the report to the police was only made in 2013 immediately the Plaintiff became aware of the fraud. Having considered the rivaling submissions, I come to the following determination.

22. Section 26 of the Limitation of Actions Act (Cap 22) provides as follows:

*“26. Where, in the case of an action for which a period of limitation is prescribed, either (a) the action is based upon fraud of the Defendant or his agent, or of any person through whom he claims or his agent or*

*(b) the right of action is concealed by the fraud of any such person or aforesaid or*

*(c) the action is for relief from the consequences of a mistake,*

*The period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it”*

23. It is beyond controversy that the Plaintiff was allegedly divested of his interest in the suit property in the year 2001. The question to be posed then would be: was the Plaintiff aware of the fraud prior to 2013 and if not whether with reasonable diligence the Plaintiff should have discovered the fraud sooner. The burden is on the Plaintiff to answer these questions. The Plaintiff must show and establish that he could not have discovered the fraud without exceptional measures which he could not reasonably have been expected to take: see **Paragon Finance Plc –v- Thakerar & Co. [199] 1 All ER 400, 418.**

24. Such burden is however not to be discharged at the hearing of a preliminary objection. That is a burden that is best discharged through the evidence subjected to proper examination and interrogation. It would take the issue beyond the purview of a preliminary objection as encapsulated in the **Mukisa Biscuits** case.

25. I am aware that then the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants may themselves invoke the proviso to section 26 of the Limitation of Actions Act, but I would conclude, for now, that it would not be appropriate to uphold the preliminary objection as to the limitation of the Plaintiff’s suit based purely on the contention that the Plaintiff was aware of the alleged fraud in 2001 and which contention the Plaintiff denies.

26. I am also aware that the Plaintiff’s claim has not been pleaded with the same particularity expected of claims involving allegations of fraud: see **Okere –v- Kiinyukia & Others [2007] 1 EA 304.** I however bear in mind that the plaint is not exceedingly lacking in particulars as to warrant its being struck out at this preliminary stage. Life, in other words, can still be breathed into it. Rather than take the draconian and extreme action of summarily disposing of the claim at this preliminary stage, the same can be amended.

27. I would for the foregoing reasons not accede to the preliminary objection as far as the statute of limitations is concerned.

28. The last limb of the preliminary objection argued by the parties concerned the validity and effect of the power of Attorney donated by the substantive Plaintiff in 1994. This issue will require a more in-depth interrogatory role being played by the court. It certainly does not fit a preliminary objection. It must fail. I note though that the objection was pegged to the fact that an unregistered power of attorney was used for purposes of transferring the property to the plaintiff. While the efficacy of such action may very well be genuinely and validly questioned, one must remember that under the repealed Registered Land Act (Cap 300) a transferee did not necessarily need to execute a transfer I say no more.

29. I have reached the clear conclusion that each ground of the preliminary objection fails. I dismiss the preliminary objection raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with costs to the Plaintiff.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> day of March, 2015.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff/Applicant

.....for the 1<sup>st</sup> Defendant/Respondent

..... for the 2<sup>nd</sup> Defendant/Respondent

..... for the 3<sup>rd</sup> Defendant/Respondent