



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 58 OF 2019

DOMIZIANO RATANYA.....PLAINTIFF/APPLICANT

VERSUS

NCHIRU CATHOLIC CHURCH AND PARISH

(THRO' THE CATHOLIC DIOCESE OF MERU TRUSTEES.....DEFENDANT/RESPONDENT

RULING

Background

1. The plaintiff was the ex-parte applicant in Judicial Review case No. 33 of 2008 dated 20.6.2008, where he had sought for orders of certiorari to quash the decision in objection case no. 832 in respect of parcel 1873 issued on 28.11.2007, as well as a stay of the implementation of the aforementioned decision.
2. In that suit, an order was allegedly given by Judge Emukule on 6.6.2008 for a stay of the implementation of the decision of 28.11.2007. Judgment in the Judicial Review matter was delivered on 14.6.2018 where the court directed that the dispute be remitted back to the land adjudication officer for hearing.
3. The plaintiff filed this suit on 30.10.2019 averring that the defendants herein caused the registration of the suit to themselves contrary to the orders of stay given on 6.6.2008 in the Judicial Review matter. The plaintiff has therefore sought for orders inter-alia, cancellation of the title in the name of defendant.

Application dated 30.10.2019

4. This suit was filed contemporaneously with an application dated 30.10.2019 where plaintiff seeks the following orders

(a) *“The application be certified urgent and the same be heard expeditiously, on priority basis and ex-parte in the first instance.*

(b) *The honourable court, pending hearing and determination of the application inter parties, be pleased to grant an order of temporary injunction restraining the defendant, its agents, servants, officials, trustees, employees, representatives and all other persons under its control from building on, fencing, farming on, working on, occupying, using and or in any other way whatsoever, interfering with the suit land No. LR NYAMBENE/URINGU/1/1873 (originally Uringu Adjudication Section P/No.1873).*

(c) *Pending hearing and determination of the main suit, the honourable court be pleased to grant an order(s) restraining the defendant, its agents, servants, officials, trustees, employees, representatives and all other persons under its control from building on, fencing, farming on, working on, occupying, using and or in any other way whatsoever, interfering with the suit land No. L.R Nyambene/Uringu/1/1873.*

(d) *The honourable court be pleased to grant an order of inhibition to be registered against the register of this suit land L.R No. Nyambene/Uringu/1/1873 to stop any dealings/transactions on the suit land pending hearing and determination of the application and the main suit.*

(e) *Costs of the application be awarded to the plaintiff/applicant”.*

5. The grounds in support of the application are:

(i) *“The defendant/respondent is in the process of irregularly fencing and building on the suit land.*

(ii) The defendant/respondent's actions are irregular to the extent that they are in contravention of this honourable court's orders of stay in Meru High court Judicial Review No. 33 of 2008 which has since been concluded in favour of the applicant/plaintiff.

(iii) The plaintiff/applicant is the sole lawful owner/proprietor of the suit land.

(iv) The defendant/respondent has obtained fraudulent/irregular and illegal registration over the suit land.

(v) The plaintiff/applicant stands to suffer irreparable loss and damage unless the orders sought in the application are granted.

(vi) It is in the interest of justice that the orders sought be granted".

6. The applicant has also filed a supporting affidavit on 30.10.2010 and a supplementary affidavit on 7.2.2020. The respondent has opposed the application through the replying affidavit of Fr. Basilio Njagi filed on 14.1.2020.

The preliminary objection dated 24.2.2020

7. The defendant filed the preliminary objection raising the following grounds:

(i) "The suit is bad in law as the same orders of this court on settlement of the dispute on the subject matter were made on 14th June, 2018.

(ii) The plaintiff's suit is Res judicata in view of the fact that the same dispute was dealt with in Judicial Review Application no. 33 of 2008.

(iii) The plaintiff's claim is time barred by the law of limitation of actions Act cap 22 Laws of Kenya dated 24.2.2020".

8. The court gave directions that both the application of 30.10.2019 and the preliminary objection dated 24.2.2020 be canvassed simultaneously through written submissions. Each party has filed two sets of submissions. Given that a preliminary objection has the potential of bringing closure to a matter, I will first deal with the said preliminary objection.

Determination of the preliminary objection

9. The defendant has submitted that plaintiff's claim is time barred as the case against the defendant could only be brought within 3 years. It is contended that registration of the suit parcel was done on 28.11.2014 and the case was filed on 30.10.2019 which is a period of 5 years. In the second set of submissions, the defendant contends that the calculation of time for purposes of limitation should be computed from November 2007 to 30.10.2019 which is a duration of 14 years.

10. On res judicata, it is submitted that the decision of the court in JR 33 of 2008 was to remit the dispute back to the land adjudication officer. This court cannot therefore purport to hear a dispute all over again. On this point, the defendant has relied on the case; **Petition 212 of 2011 (Malindi) H.C.C.C No. 20 of 2015 and Jr 685 of 2017 (Nairobi)**.

11. The plaintiff on the other hand has submitted that his claim is to recover land of which he is within 12 years period calculating from time of registration in 2014 to when the suit was filed in 2019. It is also averred that vide the provisions of section 26 of limitation of actions act, time for bringing an action founded on fraud starts to run from the time of discovery of the fraud.

12. On the issue of res judicata, the plaintiff has submitted that this is a civil matter in which the plaintiff is pursuing his proprietary right of ownership over the suit land. It is also contended that the parties herein are not the same as in JR 33 of 2008.

13. In determining this preliminary objection the court has considered the record of JR 33 of 2008 vis a vis the present suit. On the issue of limitation, I find that the plaintiff has pleaded fraud in the registration of the suit property when there was a stay order in the Judicial review matter. The pleadings of the parties particularly paragraph 7 of the plaint does not indicate when the plaintiff discovered that the land had been registered. I therefore find that the calculation of the limitation period is a disputed fact which ought to be subjected to prove in the usual manner of a full trial. I therefore find that the preliminary objection is not merited in so far as the issue of limitation is concerned.

14. On the issue of res judicata, the first point of consideration is that a Judicial Review matter is distinguishable from a civil (read land) matter in that a Judicial Review case is concerned with the decision making process and not the merits of a decision. Thus the argument that the issues raised herein are similar to the ones in JR 33 of 2008 is not grounded in law.

15. Defendant has raised an important aspect of this dispute, that the decision in the JR No. 33 of 2008 was that the dispute was to be remitted back to the land Adjudication officer for determination but instead, the plaintiff opted to come before this court. The courts have continuously pronounced themselves on this issue, emphasizing that parties must follow the dispute resolution mechanisms set out in the adjudication statutes: **See Reuben Mwangela M'itelekwa (suing as the Legal Representative of the estate of M'itelekwa M'mucheke Naituri alias M'itelekwa Mucheke) v Paul Kigea Nabea & 2 others [2019] eKLR, Tobias Achola Osindi & 13 others v Cyprianus Otieno Ogalo & 6 others [2013] eKLR, John Masiantet Saeni v Daniel Aramat Lolungiro & 3 others [2017] eKLR.**

16. On the face of it, it would appear that the plaintiff erred in instituting this suit instead of complying with the judgment in JR 33 of 2008. However, a deeper analysis of the matter reveals that the legal landscape was changed by the registration of the suit land during the subsistence of the JR 33 of 2008. The issue of registration is at the centre of the dispute in the present suit. That issue of registration was

certainly not a subject of contest before the adjudication body as the land was not registered when the decision of 28.11.2007 was made, nor was the issue of registration dealt within the JR 33 of 2008. The dispute has therefore been convoluted by the registration and hence this court is the one with the mandate to get to the bottom of the matter as far as the issue of registration of the land is concerned.

17. In the circumstances, I find that the matter is not res judicata, hence the preliminary objection is not merited.

Determination of the Application dated 30.10.2019

18. The applicant's claim is that he owns the suit land which has roots in ancestry. He also contends that he was the successful party in the JR Case NO. 33 of 2008. He contends that defendant is in illegal occupation of the land and should be restrained from carrying out any developments thereof.

19. The respondent/defendant has averred that they filed an application for review and stay of the judgment in JR 33 of 2008. It was submitted by the defendant that plaintiff is not on the suit land and has not occupied the same since 2007. He therefore doesn't stand to suffer any irreparable damages, hence the balance of convenience tilts in favour of the defendant.

20. I find that there is a lawful judgment of the court in JR 33 of 2008 where the court gave orders for the dispute to be remitted back to the adjudication bodies for determination. I have seen a ruling by Judge Cheron, which I delivered on 10.2.2020 where the application for review of the judgment was dismissed.

21. This court cannot purport to step in the shoes of the adjudicating bodies, hence the court cannot be persuaded at this stage to deal with the claims of ownership and occupation of the suit land. On the other hand, the court takes cognizance of the fact that the issue of registration of the suit land may pose a challenge in the determination of the dispute in the adjudication arena. Balancing all the issues raised herein, I find that the concern of this court is on the issue of registration of the land during the subsistence of the JR matter. Whether defendant was notified of the stay orders is a matter of evidence to be adduced during the trial. I conclude that the application is not merited.

Final orders

(1) Both the application and the preliminary objection are dismissed with each party bearing their own costs.

(2) Considering the fact that the dispute is very old as manifested in the JR case no.33 of 2008, I direct that the matter be heard on priority basis.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE