



**Joseph v Mbatha & 3 others (Environment & Land Case
E037 of 2021) [2024] KEELC 3347 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E037 OF 2021**

MN GICHERU, J

APRIL 23, 2024

BETWEEN

DR. GABRIEL NJUE JOSEPH PLAINTIFF

AND

JOSEPHINE MUENI MBATHA 1ST DEFENDANT

THE LAND REGISTRAR, KAJIADO 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

KENYA COMMERCIAL BANK 4TH DEFENDANT

RULING

1. This ruling is on the notice of preliminary objection dated 10/3/2022 and filed by counsel for the 1st defendant. The preliminary objection seeks to have the entire suit struck out on the following grounds.
 1. The suit is an abuse of the court process and ought no to be entertained.
 2. The present suit raises substantially similar issues as raised in Milimani Commercial Civil Suit No. E11904/2021. Dr. Gabriel Njue Joseph –versus- Kenya Commercial Bank and Josephine Mueni Mbatha.
 3. The ownership of L.R. Kajiado/Kaputiei North 19876 was determined in Kajiado Civil Suit No. 16/2017 Dr. Gabriel Njue Joseph –versus- Josephine Mueni Mbathi and the issue of ownership of this property is res judicata as the issues raised in this suit have been substantially litigated upon in the above captioned suits.
 4. That the suit referred to in paragraph 3 above is still actively being litigated before Justice Mutuku.



5. That the above entire suit as filed by the plaintiff is fatally defective for being in violation and/or offending the provisions of Section 7 of the *Civil Procedure Act*.
2. Counsel for the parties filed written submissions dated 29/9/2023 and 22/11/2023 respectively. In reply to the preliminary objection, the plaintiff urges as follows.

Firstly, HCCC 16 of 2017 related to the ownership of matrimonial property and it is already decided while in this case, what is sought is an order of specific performance compelling the 1st and 2nd defendants to jointly or separately register the plaintiff's proprietary interest in land No. 19876. This is a new issue that has not been heard and determined before any court of competent jurisdiction.

3. I have carefully considered the preliminary objection, the reply by the plaintiff as contained in the submissions and the submissions by Learned Counsel for both parties. I have also perused the record herein. I will treat the five grounds raised in the preliminary objection as the issues for determination as I consider them against the plaintiff's response in the submissions.
4. On whether this court can give an order of specific performance as per prayer (d) of the plaint dated 7/5/2021, I find that it cannot do so because in the judgment dated 11/12/2019, the High Court held as follows.

- (b) The value of the land upon which the block of flats aforementioned is situated does not form part of matrimonial property since it was acquired before the pendency of the marriage. The same is to be valued and its entire value shall be allocated to the respondents”.

If this court were to order that the plaintiff in this case is awarded the land on which the block of flats is situated, it would be contradicting the judgment dated 11/12/2019. This court would then be sitting on appeal against a decision of a court of concurrent jurisdiction. The only recourse open to the plaintiff is to appeal to a higher court.

5. Secondly, it is my considered view that all the prayers in the plaint dated 7/5/2021 are asking this court to enforce the judgment dated 11/12/2019. Prayer (a) is seeking a declaration that the 1st defendant is dealing with the suit land in a manner that contravenes the judgment of 11/12/2019. Prayer (b) seeks to compel the 1st defendant to account for and surrender the plaintiff's share of the rental income. All these orders sought are within the jurisdiction of the Deputy Registrar of the High Court. The High Court has jurisdiction to enforce its own decree. This court has no jurisdiction to enforce the decrees of the High Court.
6. In the plaint dated 7/5/2021, the plaintiff has at paragraph 15 thereof averred as follows,

“That there is no other pending suit between the parties nor in relation to the subject matter herein nor seeking similar orders”.

Yet at paragraph 9 of the submissions dated 29/9/2023, the plaintiff's counsel submits in part

“In Milimani Commercial Civil Suit E1/904/2021... the plaintiff sought to prevent the 4th defendant ... from auctioning, selling, transferring or in any manner dealing with the plaintiff's half share in the suit property registered in the 1st defendant's name...”



7. Order 4 Rule 1 (I), (f) of the Civil Procedure Rules provides as follows.

“The plaint shall contain the following particulars (f) an averment that there is no other pending suit, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint”.

I find that failure by the plaintiff to disclose the existence of the Milimani Suit in these pleadings flies in the face of Order 4 rule 1 (1) (f) of the Civil Procedure Rules.

8. For the reasons already given, I find that this suit is bad in law and an abuse of the court process. I strike out with costs to the defendants.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 23rd Day of April 2024.

M.N. GICHERU

JUDGE

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