



REPUBLIC OF KENYA



KENYA LAW
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**Chebet v Chesire & 3 others (Land Case E008 of 2022)
[2023] KEELC 20396 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20396 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
LAND CASE E008 OF 2022
L WAITHAKA, J
OCTOBER 4, 2023**

BETWEEN

FRANCIS K CHEBET PLAINTIFF

AND

WILLIAM KIPKOSGEI CHESIRE 1ST DEFENDANT

DAVID KIPYEGO CHESIRE 2ND DEFENDANT

DANIEL KIPKOGEI RONO 3RD DEFENDANT

ELGEYO MARAKWET COUNTY 4TH DEFENDANT

RULING

1. This ruling is in respect of the notice of preliminary objection (P.O) dated May 10, 2022. Through the P.O, the 1st and 2nd defendants seek to strike out this suit in limine on the following grounds;
 - a. that the suit is time barred;
 - b. that this court lacks jurisdiction to entertain the suit and;
 - c. that the parties lacked capacity to enter into the agreement on which the suit is premised.
2. Pursuant to directions given on May 23, 2023 that the P.O be disposed off by way of written submissions, parties to the suit filed submissions which I have read and considered.



Submissions

1st & 2nd Defendants Submissions

3. In their submissions filed on June 15, 2023, the 1st and 2nd defendants have reiterated their contention that the suit is time barred. In that regard, the 1st and the 2nd defendants have made reference to section 4(1) of the *Limitation of Actions Act*, cap 22 Laws of Kenya and submitted that to the extent that the suit seeks to enforce a sale agreement drawn on January 9, 2004, the same is time barred. According to the 1st and the 2nd defendants, the suit ought to have been brought within six (6) years from the date of execution of the agreement, which brings it to around January 2010. Pointing out that the instant suit was filed in 2022, about 18 years after the agreement sought to be enforced was entered into, the 1st and 2nd defendants maintain that the suit offends the provisions of section 4(1) of the *Limitations of Actions Act*.
4. It is also the case of the 1st and the 2nd defendants that the suit is barred by section 8(1) of the *Land Control Act* as no consent of the relevant Land Control Board was obtained within the time provided in section 8(1) of the *Land Control Act*, cap 302 Laws of Kenya rendering the contract on which the suit is premised void and unenforceable.
5. On whether this court has jurisdiction to hear and determine the suit, it is pointed that title to the suit property was obtaining through succession proceedings in respect of the estate of Kipsoy Chesire and submitted that any issue(s) concerning the suit property ought to have been raised in the succession proceedings.
6. As to whether the parties to the contract on which the suit is premised had capacity to enter into the contract, it is pointed out that at the time of entry to the purported sale agreement, the owner of the subject matter of the agreement was deceased and based on the provisions section 45(1) of the *Law of Succession Act*, cap 160 Laws of Kenya, submitted that the parties to that agreement lacked capacity to enter into the purported agreement. Further, reliance is placed on the cases of *Re Estate of Paul M'Maria (Deceased)* (2017) e KLR; *Re Estate John Gakunga Njoroge* (2015)e KLR and *Re Estate of Jamin Inyanda Kadambi (Deceased)* (2021) e KLR in which it was inter alia held that acquisition of property in contravention of the provisions of the *Law of Succession Act* is unlawful and that a valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and those who have the power to sell the property by virtue of section 82 of the *Law of Succession Act*.
7. Terming the sale agreement on which the suit property is premised as based on an illegality hence lacking any legal basis, the 1st and 2nd defendant have submitted that the plaintiff cannot be allowed to benefit from an illegality.

3rd Defendant's Submissions

8. The 3rd defendant, through his submissions filed on June 20, 2023 supports the position taken by the 1st and the 2nd defendants concerning the P.O.

Plaintiff's Submissions

9. The plaintiff, is however of a different view. Through his submissions filed on June 13, 2023, the plaintiff has submitted that the P.O herein does not raise pure points of law as by law required; that evidence is required to prove the issues of fact on which the P.O is premised and that the issue raised in the suit; alleged fraudulent transfer of the suit property to the third defendant, cannot be determined in a succession jurisdiction.



Analysis and determination

10. I have carefully considered the P.O raised by the 1st and the 2nd defendants and the circumstances leading to the filing of the suit which are ascertainable from the pleading filed in the suit. I have also considered the submissions by the parties and the authorities cited.
11. The sole issue for the court's determination is whether the P.O raises pure issues of law and subject to the outcome of that issue, whether the 1st and the 2nd defendants have made up a case for striking out of the suit based on those issues.
12. On whether the P.O raises a pure point of law, having read and considered the pleadings filed in this case, particularly the plaint dated September 5, 2022 and the statements of defence filed by the 1st and the 2nd defendant I do find as a fact that the plaintiff's claim is premised on an agreement purported to have been entered on January 9, 2004 between the plaintiff and the family of Kapchebingei for sale of the parcel of land known as Elgeyo Marakwet/Koimur/93.
13. It is pleaded that the family of Kapchebingei was represented in the sale agreement by David Kiyengo Chesire, William Kosgei Chesire and Francis Kosgei.
14. Vide paragraph 12 and 13 of the plaint, the plaintiff implicitly raises one of the issues taken up by the 1st and the 2nd defendants in their P.O namely whether the 1st and the 2nd defendants had capacity to enter into the sale agreement they entered into with the plaintiff on 9th January 2004 on which the plaintiff's suit hinges. The plaintiff also raises the issue of the capacity of the 1st and the 2nd defendants to enter into that agreement albeit implicitly.
15. By pleading that he commenced citation proceedings to issue against the defendants (read the 1st and the 2nd defendants), the plaintiff admits or acknowledges that as at January 9, 2004 the 1st and the 2nd defendants lacked capacity to deal with the suit property as it constituted estate of a deceased person.
16. Whilst the pleadings by the plaintiff point to a possible case of fraud committed by the 1st and the 2nd defendants concerning the suit property, from the pleadings filed in this suit, I find the issue of whether or not the 1st and the 2nd defendants had capacity to deal with the suit property to be a pure point of law capable of determining the suit preliminarily to the extent that it is premised on the agreement dated January 9, 2004 between the plaintiff and the 1st and 2nd defendants.
17. By operation of law, in particular section 45 as read with section 82 of the [Law of Succession Act](#), the transaction was unlawful and incapable of forming the basis of the plaintiff's suit. In that regard, see the case of [Re Estate of Paul M' Maria \(Deceased\)](#) (2017) eKLR where it was held:-

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the [Law of Succession Act](#) is tainted with killer poison; and is unlawful acquisition; thus, land so acquired does not enjoy the protection of property rights under article 40(6) of the [Constitution](#). See the claw-back provision of the [Constitution](#) that: Rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”



18. Also see the case *Re Estate of John Gakunga Njoroge supra* where it was held:-

“A person can only deal with the estate of a deceased person pursuant to a grant of representation made to him under the *Law of Succession Act*. In this regard, the jurisdiction of the court to protect the estate of a deceased person set out in section 45 of the *Law of Succession Act*...For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the grant of letters of administration to them and before the confirmed grant, the contracts of sale are in valid for offending the provisions of section 45 and 82 of the *Law of Succession Act*. Even if the sale transaction were by the administrators, the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under section 82(b) proviso (ii) which provides that:-

‘no immovable property shall be sold before confirmation of the grant’

19. Similar sentiments were expressed in the case of *Re Estate of Jamin Inyanda Kadambi (Deceased) supra* where it was held:-

“A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have power to sell the property by virtue of section 82. Even then, immovable assets, like land such as Kakamega/Kegoye/30 cannot be disposed off by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(1)(b)(ii) of the *Law of Succession Act*. Clearly, the sale transaction that was carried out by the administrators was contrary to section 54 and 82(b)(ii) of the *Law of Succession Act*, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.”

20. While I appreciate that striking of a suit preliminary is a draconian act that ought to be avoided especially where a suit can be remedied by way of amendment, in the circumstances of this case where the plaintiff's case is premised on an illegal contract, hence incapable of being revived by way of an amendment, I do agree with the 1st and the 2nd defendant that the suit is bad in law and I proceed to strike it out.

21. The upshot of the foregoing is that the preliminary objection is found to be having merit and is allowed.

22. Although this court has not had the opportunity to verify and/or authenticate the issues of fact raised in the suit, there being no reason to doubt the account offered by the plaintiff concerning the circumstances of the suit property, to wit fraud committed by the defendants concerning the estate of Kipsoy Chesire, deceased, I decline to award the defendants costs of the suit and the P.O and instead order that parties bear their own costs of the suit. Any order to the contrary, may make the defendants, particularly the 1st and the 2nd defendants, benefit from their own illegality and/or mischief.

23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 4TH DAY OF OCTOBER, 2023.

L. N. WAITHAKA

JUDGE

