



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 23 OF 2017 (O.S)**

**JOANES ONDEGO OYWECH.....PLAINTIFF**

**VERSUS**

**ALEX OMONDI OGOLLA.....DEFENDANT**

**RULING**

1. The Defendant filed the notice of Preliminary Objection dated 11<sup>th</sup> January 2019, raising four grounds to the Plaintiff's suit commenced through the originating summons dated 28<sup>th</sup> August 2017. The grounds are summarized as herein below;

**a) That the Plaintiff entry into, or remaining onto the land in furtherance of a voided transactions contravened Section 22 of the Land Control Board Act.**

**b) That transaction was voided and the land remained part of the estate of the Defendant's late father that was administered through Kisumu H. C. Succession Cause No. 926 of 2014.**

**c) That the Plaintiff's objection and revocation proceedings in Kisumu H. C. Succession Cause No. 926 of 2014 was dismissed.**

**d) That the Plaintiff is the Defendant in Kisumu C.M.C ELC 134 of 2018, formerly Kisumu ELC 268 of 2016, for eviction orders and two Criminal Cases at Maseno P.M. Court Criminal Case No. 1187 of 2016, and 28 of 2017 for trespass, causing disturbance and forcible detainer.**

2. The Preliminary Objection was heard on the 25<sup>th</sup> March 2019 when Mr. Ayayo for the Defendant made his submission. Mr. Odeny for the Plaintiff submissions was heard on the 18<sup>th</sup> June 2019 after which Mr. Ayayo made a reply.

3. The issues for determination by the court are as follows;

**a) Whether the four grounds or any of them raises pure points of law.**

**b) What order(s) to issue.**

**c) Who pays the costs.**

4. The Court has considered the grounds on the notice of preliminary objection, submission by both Counsel, the pleadings and come to the following determinations;

**a) That while the Plaintiff alleges that he had purchased the land parcel Kisumu/Kanyawegi/4646, the suit land, in 1988 from Joel Ogolla Olum, the copy of the green card he attached to the supporting affidavit to the originating summons indicates that the suit land was first registered on the 12<sup>th</sup> February 2005. That it is therefore doubtful as to whether the suit land had been registered in 1988 for it to be subject matter of a sale transactions.**

**b) That the said Joel Ogolla Olum, deceased, is indicated in the ruling of 29<sup>th</sup> June 2017 in Kisumu H.C. succession Cause No. 926 of 2014, to have passed on the 7<sup>th</sup> December 2006 and the grant of letters of administration in respect of his estate was granted to the Defendant and another on the 18<sup>th</sup> December 2014 and confirmed on the 19<sup>th</sup> October 2015.**

**c) That the pleadings herein are not in agreement on when the Plaintiff took possession of the suit land. Was it before or after the**

death of Joel Ogolla Olum? That it is also not clear from the pleadings whether the Plaintiff has been in quiet uninterrupted possession of the suit land. The affidavit evidence availed is not sufficient for the court to make a determination on the parties' rights to the land. That it is therefore fair and just that the suit go the hearing for the issues raised to be determined on merit.

d) That the fact that the Succession Court has dealt with the administration of the estate of the late Joel Ogolla Olum does not lock the doors to the Plaintiff to lodge a claim over the property distributed thereof based on adverse possession, overriding interest **under Section 28 (h) of the Land Registration Act No. 3 of 2012** or any other claim that could not be dealt with under the **Law of Succession Act Chapter 160 of Laws of Kenya**.

e) That as the issues raised in the Preliminary Objections cannot be decided upon without calling for evidence, the court finds no merit in the objection.

5. That in view of the foregoing, the preliminary objection by the Defendant is rejected and dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JULY 2019

**In the presence of:**

Plaintiff      Absent

Defendants      Absent

Counsel      Ms. Oroni for Odeny for Plaintiff

Mr. Ayayu for the defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**