



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 20 OF 2017 (OS)**

**RICHARD K. KUOMEI.....PLAINTIFF**

**VERSUS**

**RICHARD KIGEN.....DEFENDANT**

***[Sued in his own capacity and as the Administrator of the Estate of the late Kigen Chemases]***

**RULING**

1. The defendant, Richard Kigen, raised the following two points of law in the Notice of Preliminary Objection filed through their counsel dated the 14<sup>th</sup> February, 2017 to the suit and or application by Richard K. Kuomei, the plaintiff;

(a) That the suit offends ***Section 45 of the Succession Act Chapter 160 of Laws of Kenya.***

(b) That the suit contravenes ***Section 36 of the Land Act, 2012.***

2. The preliminary objection came up for hearing on the 2<sup>nd</sup> October, 2019 when Mr. Chemwok and Tororei, the learned counsel for the defendant and plaintiff respectively made their oral submissions for and against the objection. Mr. Chemwok submitted that the pleadings filed shows the suit is based on a sale transaction over the land registered in the name of a deceased person. That the suit is therefore a non-starter as the defendant has no locus to be sued over the deceased property and likewise, the plaintiff is without capacity to sue over the said land. That the transaction over the suit land contravenes **Section 45 of the Law of Succession Act**, and that a claim based on adverse possession cannot arise as time stopped running when the deceased passed on, until an administrator is appointed through a grant. That the provisions of **Article 159 of the Constitution** cannot be available to protect an illegality. Mr. Tororei on the other hand submitted that the suit was commenced through the originating summons and is premised on adverse possession and not a sale transaction. That further, the suit is against the estate of the deceased registered proprietor of the suit land, and does not therefore offend the provisions of **Section 45 of the Law of Succession Act**. That **Section 36 of Land Act** relates to public land while the suit land herein is private land. That the plaintiff has not been charged and convicted on the offence under **Section 45(2) of the Law of Succession Act** and as **Article 159 of the Constitution** requires the court to emphasize on the substance and not technicalities, the preliminary objection should be rejected.

3. The following are the issues for the court's determinations;

(a) ***Whether the suit contravenes the provisions of Sections 45 of the Law of Succession Act and or Section 36 of the Land Act.***

(b) ***Who pays the costs?***

4. The court has after considering the two grounds on the preliminary objection, the learned counsel's submissions and the pleadings come to the following conclusions:

(a) That indeed the suit was commenced through the originating summons dated the 23<sup>rd</sup> January, 2017. That the suit names the defendant as Richard Kigen and goes on to show that he is "***sued in his own capacity and as the administrator of the estate of the late Kigen Chemases.***" That from the introductory paragraph of the originating summons and the five (5) questions or issues set out for determination thereon, it is clear the claim is based on adverse possession and not a sale transaction.

(b) That in dealing with preliminary objections on matters of law, evidence is not taken or considered. That the details of the sale transactions are not on the originating summons but the supporting affidavit, which is evidence that is more or less rebutted by the defendant through their replying affidavit. That the court therefore finds and hold that it is not possible to determine from the pleadings filed whether the suit commenced through the originating summons contravenes or offends **Section 45 of the Law of Succession**, without hearing or considering the evidence of the parties. That accordingly, ground (a) of the preliminary objection fails.

(c) That though the defendant had in ground (b) stated that the suit contravenes **Section 36 of the Land Act No. 6 of 2012**, Mr. Chemwok, the learned counsel for the defendant, did not pursue that ground in his submissions. That nevertheless, Mr. Tororei for the plaintiff pointed out in his submissions that the Section is only applicable in public land. That the court has perused that section and the margin notes reads as follows; **“Notice of lease, licence or agreement action on public land.”** That indeed the provision has no relevance to the suit land as it is not public land. That it follows that ground (b) of the preliminary objection also fails.

(d) That the defendant having failed on both grounds of their preliminary objection should pay the plaintiff costs in accordance with **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya.**

5. That in view of the foregoing, the court finds no merit in the defendant’s preliminary objection contained in their notice dated 14<sup>th</sup> February, 2017 and is rejected with costs to the plaintiff.

Order accordingly.

**Dated and delivered at Eldoret this 13<sup>th</sup> day of November, 2019.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

Plaintiff - present

Absent - Defendant.

Christine: Court Assistant