



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KITALE**

**LAND CASE NO. 116 OF 2016**

**PAULINE AREPEL CHEPTALAM .....APPLICANT/PLAINTIFF**

**=VERSUS=**

**ZIPORAH CHEPOCHEPAW KANYONGO**

**SIMEON KALEKENO KANYONGO....RESPONDENTS/DEFENDANTS**

**RULING**

1. This is a Ruling in respect of a Notice of Motion dated **25<sup>th</sup> August 2016**, brought under the provisions of **Order 36 Rule 1(1) (b)** of the Civil Procedure Rules. The applicant seeks summary judgement in terms of prayers in the Plaint. The suit on which this application is based has a history which goes back to more than three decades ago.
2. The applicant **Pauline Arepel Cheptalam** had a dispute with her brother **Kanyongo Arepel Riamasia** (now deceased) over **LR No. West Pokot/Siyoi/125 (suitland)**. The applicant had filed proceedings before a panel of elders pursuant to the provisions of the Magistrates' jurisdiction (Amendment) Act of 1981 (now repealed). The panel of elders ruled that she was entitled to the suit land. The verdict of the panel of elders was adopted as judgement of the Court in Kitale Senior Resident Magistrate's Court Land case **No.22 of 1985**.
3. The deceased filed an appeal to the High Court which appeal was summarily rejected. He moved to the Court of Appeal and filed an appeal against the summary rejection of his appeal. The parties to the appeal failed to attend Court prompting **Justice Apaloo** as he then was to dismiss the appeal.
4. The case which had been filed in the High Court was at one time dismissed for want of prosecution but was reinstated. It was later on again dismissed and the deceased started fighting for its reinstatement which application was finally dismissed on **27<sup>th</sup> January 2015**. The deceased moved to the Court of Appeal where he sought extension of time to file Notice of appeal but his application was dismissed on **8<sup>th</sup> December 2015**. The deceased died on **7<sup>th</sup> May 2016**.
5. The applicant then moved and filed the present suit against the Respondents who are wife and son to the deceased respectively. In the Plaint, the applicant sought a declaration that she is the sole owner of the suit land and that the Defendants have no legal interest in it whatsoever. She also sought an order of eviction against the Respondents or anyone claiming through them.
6. The applicant contends that the Respondents are on the suit land because of their relationship with the deceased who had lost all cases filed in his bid to lay claim to the suit land. She therefore contends that the Respondents have no defence against her claim and as such, summary judgement should be entered in

her favour.

7. The applicant further contends that filing of a defence to her claim would only prolong the conclusion of this matter. The applicant has already obtained title to the suit land.

8. The Respondents have opposed the application based on a Replying Affidavit sworn on **5<sup>th</sup> September 2016**. The Respondents contend that the application for summary judgment is unmerited and that prior to the demise of the deceased, the deceased had filed another suit being Kitale **ELC No. 45 of 2016** against the applicant and that they will therefore be prejudiced if summary judgement is entered in this case.

9. I have carefully considered the applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions filed by counsel for the parties in this case. The only issue for determination is whether the applicant has demonstrated grounds for entry of summary judgement in her favour.

10. The provisions under which this application was brought provide that where a plaintiff seeks recovery of land, where the Defendant has appeared but not filed a defence, the Plaintiff may apply for summary judgement for recovery of the land. In the instant case, the Plaintiff filed this suit on **4<sup>th</sup> August 2016**. The Defendants entered appearance on **16<sup>th</sup> August 2016**. The instant application was filed on **26<sup>th</sup> August 2016** before a defence was filed.

11. The Defendants filed their defence on **29<sup>th</sup> August 2016**. This defence was filed unprocedurally. Where an application for summary judgement is made under **Order 36 Rule 1(1) ,(b)** following appearance by the Defendant but before a defence is filed, the Defendant is not allowed to file a defence unless he shows either by affidavit or oral evidence that he should have leave to defend the suit.

12. In the present case, the Defendants did not follow what they ought to do as provided under **Order 36 Rule (2)** of the **Civil Procedure Rules**. To this extent, the defence which they filed was irregularly filed. Be that as it may, this does not prevent me from considering this application for summary judgement and I am alive to the fact that summary procedure should be resorted to in the clearest of cases.

13. In the instant case, the deceased had exhausted all the avenues he had. He had been losing all applications all through from the 80's until **8<sup>th</sup> December 2015**, when *Justice Maraga J .A* as he then was dismissed his applications in which he sought extension of time to appeal against my decision which declined his application to reinstate a suit which had been dismissed for want of prosecution in the year 2000.

14. The deceased having lost all battles to lay a stake to the suit land decided to file a fresh suit in **March 2016**, shortly before he died. This is clearly an abuse of the process of the court. The history of the matter is well captured in the annexed Ruling from the Environment and Land Court **Kitale** delivered on **27<sup>th</sup> January 2015**, and the Ruling from the Court of Appeal delivered on **8<sup>th</sup> December 2015**.

15. This is one of the clearest cases where summary judgement should be entered. I therefore find that the application for summary judgement is well merited. I allow the same in it's entirety.

It is so ordered.

Signed at **Nairobi** .

**E.O .OBAGA**

**JUDGE**

Dated, and delivered at **Kitale** on this **7<sup>th</sup>** day of **March 2017**.

**F.M.NJORGE**

**JUDGE**

In the absence of parties who had been notified of today's date in good time.

Court Assistant: Isabella

**F.M.NJORGE**

**JUDGE**