



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO.1484 OF 2000**

WILBERFORECE ASIEPI ONGORU

& TWO OTHERS.....PLAINTIFF

VERSUS

MARGARET ONDESO OPIO & 3 OTHERS.....DEFENDANT

**JUDGMENT**

Plaintiff'S are the administrators of the Estate of George Leonard James Opio who died on 10.3.94 by virtue of a Grant of letters of Administration given on 19.9.96 in High Court Succession Cause No. 2821/95. The first defendant is a widow of the deceased Goerge Leonard James Opio.

Plaintiffs claim that the first defendant caused herself to be registered as proprietor of L.R No. 209/1498/7 Ziwani Shopping Center and LR No. 209/440/306 Makadara Shopping Center on 17.2.92 and 20.1.91 respectively by fraud.

Plaintiffs aver in the plaint, inter alia, that one Kapoor Singh Sandhu filed Nairobi HCCC No. 3505/84 against deceased to recover some money; that the court ordered that the two suit properties to be sold by public Auction; that one Alexander Siteney bought the two properties and was issued with a vesting order (dated 12.4.2000); that the 2nd defendant refused to register the vesting order on 19.4.2000 unless this court gives an order directing the registration.

The relief's sought are:

1. A declaration that the purported transfers of LR No 209/1498/7 and LR NO. 209/4401/306 were null and void.
2. An order directing that the purported transfers be cancelled by the Registrar of titles.
3. An order that the vesting order obtained by the purchaser he registered against LR No. 209/1498/7 and LR 209/4401/306
4. An injunction restraining first defendant from transferring alienating or in any other way dealing with the Ziwani and Makadara properties until the determination of the suit.

None of the defendants entered appearance nor filed a defence. The first plaintiff gave evidence. He adopted the facts contained in his affidavit sworn on 23.8.2000 in support the application for interlocutory injunction dated 7.9.2000. and the documents annexed to that affidavit.

First plaintiff has annexed to that affidavit several documents. There is an order of High Court

Bungoma in Succession Cause No. 1 of 1995 given on 9.12.97 revoking the Grant given to the first defendant.

There is a copy of Grant given to plaintiffs on 19.9.96 in High Court Nairobi Succession cause No. 2821/95. There is the transfer of L.R No. 209/1498/7 dated 17.2.92 by which the deceased transferred half share of that land to first defendant in consideration of the love and affection. The abstract of title shows that the transfer was registered on 12.3.93. The vesting order in Nairobi HCCC NO.3505/84 in favour of Alexander Sitiency given on 12.4.2000 is annexed. There is a letter dated 4.11.98 from director of criminal investigations to the Commissioner of Lands showing that some documents relating to transfer of the properties of the deceased had been found to be forgeries. That letter does not however specifically refer to the suit properties. The report of documents examiner is not annexed to that letter. There is also a letter which is not wholly legible. It is from the Director of criminal Investigations and addressed to the Chief Land Registrar Nairobi.

It informs the Chief Land Registrar that it was suspected that some fraudulent transfers relating to the properties of deceased (including suit properties) have been carried out or are in the process of being carried out. It requests the Chief Land Registrar to visit office of Criminal Investigation Department to assist in the inquiries.

The letter also requests the Chief Land Registrar to issue a Nationwide restriction order to all Land Registries to halt any further transactions on the estate of the deceased. I note at this stage that those two letters from the Director of Criminal Investigations are not themselves concrete evidence of forgery in respect of the two suit properties. The Investigation by the Documents examiner was not annexed or produced as exhibit.

The particulars of fraud are given in paragraph 10 of the plaint as follows:

- (a) The purported transfer was not executed as the signature of the transfer or on the transfer is not that of the deceased and is a forgery.
- (b) The amendments were made to the transfer in ink before execution thereof
- (c) The amendments to the transfer were initialed (counter signed) by the transfer of
- (d) The purported transfer was improperly registered as the amendment to it is countersigned by the 1st defendant, the beneficiary and not the deceased
- (e) The defendant was well aware that the deceased was not only old but also too ill to enter into or freely enter into such a transaction.
- (f) The stamp of the City Commission over which the Town clerk is alleged to have signed is a forgery.
- (g) The Town Clerks signature on the said transfer is also a forgery
- (h) The signature and stamp of the advocate attesting the document are forgeries.
- (i) The said forgeries were perpetrated by the first defendant

Plaintiffs counsel gave a lot of weight to the fact that defendants have not filed the defences and submitted that they are deemed to have admitted all the allegations of fact in the plaint.

He relied on the authority of cleavers – Hune ltd versus British Tutorial College (Africa) Ltd – (1975) EA at page 323, where Harris J held that by virtue of provisions of order VI Rule 9(1) Civil Procedure Rules failure to file a defence operates as an admission of all allegations in the plaint except as to damages. But I do not think that that statement of law applies in all cases where defendant has failed to file a defence. It

of course applies where plaintiff makes a liquidated demand because if defendant fails to file a defence final judgment is entered without a need for hearing (order IXA Rule 3(1) Civil Procedure Rules). It also applies where plaintiff has a claim for pecuniary damages only or for detention goods because interlocutory judgment is entered on liability without hearing save for assessment of damages or value of goods (Order IXA Rule 5 Civil Procedure Rules) But except in those two cases order IXA Rules 7 as read with rule 8 Civil Procedure Rules requires that the suit be set down for hearing where defendant has failed to file a defence. In the present case, plaintiff seeks a declaration that the purported transfers of the two suit lands were null and void. They seek an order for cancellation of the transfers. Fraud in obtaining the registration is alleged. This is a case which falls within the exception in order IXA Rule 8 Civil Procedure Rules. In the claims falling under that exception the statement of law in order VI rule 9(1) as restated in Cleaver Hume Ltd (supra) does not apply. In the cases falling within the exception the suit is set down for hearing and plaintiff required to prove his claim on a balance of probabilities notwithstanding that no defence was filed. The absence of Defence does not absolve a plaintiff from discharging his legal burden of proof. The absence of defence merely makes that burden lighter.

Although defendants in this case did not file a defence plaintiff is required to prove his claim before he can get the reliefs sought in the plaint. According to the plaint, LR No. 209/4401/306 was transferred to the first defendant on 20.1.91 while LR no. 209/498/7 was transferred to the first defendant on 17.2.92. The transfers were purportedly executed by George Leanard, James Opio during his life time. He died on 10.3.94 – 3 years after the first property was transferred and about 2 years after the second property was transferred.

There are ten allegations of fraud in the plaint. Fraud is a serious accusation. The first plaintiff Wiberforce Asiepi Onguru gave evidence but he did not in any attempt to prove any of the ten allegations of fraud. The documents from the police annexed to his affidavit sworn on 23.8.2000 do not prove any fraud. The Documents examiner would have assisted plaintiffs in their case. He was neither called as a witness nor his report produced. The first plaintiff is not an expert in examination of document.

In the absence of any evidence from Documents Examiner and in the absence of any report from the Documents Examiner the ten alleged acts of fraud have not been proved on a balance of probabilities. They remain mere allegations which have not been proved by any concrete evidence.

For the foregoing reasons, I dismiss the suit with no orders as to costs.

E. M. Githinji

Judge

5.12.2002

Mr. Njoroge holding brief for Mr. Mutua present

Mr. Shimenga absent