



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 67 'B' of 2018**

**ESTHER AKOTH ONGANGA,**

**DAVID MEDA GER &**

**BRUCE GER OLUOCH (Suing as the**

**personal representative of the Estate**

**of ALFREDA GER OMUGA (DECEASED).....PLAINTIFFS**

**VERSUS**

**CLEOPHAS OCHIENG GER.....1<sup>ST</sup> DEFENDANT**

**EVELYNE ATIENO OCHIENG.....2<sup>ND</sup> DEFENDANT**

**ALFRED J. MALOBA.....3<sup>RD</sup> DEFENDANT**

**ANDREW GER.....4<sup>TH</sup> DEFENDANT**

**ANAH AKINYI ALUOCH.....5<sup>TH</sup> DEFENDANT**

**YONAH GER OCHIENG.....6<sup>TH</sup> DEFENDANT**

**TERESA ANYANGO OCHIENG.....7<sup>TH</sup> DEFENDANT**

**THE REGISTRAR OF LANDS KISUMU.....8<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

Esther Akoth Onganga, David Meda Ger, Bruce Ger Oluoch (Suing as the personal representative of the Estate of ALFREDA GER OMUGA (DECEASED) (**hereinafter referred to as Plaintiffs**) sued Cleophas Ochieng Ger, Evelyne Atieno Ochieng, Alfred J. Maloba, Andrew Ger, Anah Akinyi Aluoch, Yonah Ger Ochieng, Teresa Anyango Ochieng and the Registrar of Lands Kisumu (**hereinafter referred to as defendants**) praying for: -

**a) Permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Defendants jointly and severally by themselves, their servants, agents and or any other persons authorized by them from carrying out any transactions, developments on the land, subdivision, sale, lease, transfer or any other dealing whatsoever concerning KISUMU/MANYATTA 'A'/3626 (NOW SUBDIVIDED INTO KISUMU/MANYATTA "A"/3819 TO 3834) AND or any part of the suit parcel herein.**

**b) Permanent injunction against the 8<sup>th</sup> Defendant restraining them from approving or registering any subdivision schemes, leases, assignments or any other dealings by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants jointly or severally relating to parcel Land Reference No. KISUMU/MANYATTA "A"/3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828,3829, 3830, 3831, 3832, 3833 TO 3834 AND or any part of the suit parcel herein.**

**c) An order directing to the 8<sup>th</sup> Defendant to Revoke and or annul of all entries illegally made on the Land register and all illegally acquired titles to the suit property being Land Reference No. KISUMU/MANYATTA "A"/3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828,3829, 3830, 3831, 3832, 3833 TO 3834 be revoked and the properties be amalgamated to one title as per the original parcel being KISUMU/MANYATTA 'A'/3626.**

**d) Punitive Damages.**

**e) Costs of the suit.**

The Plaintiffs' claim was based on facts that the Deceased ALFREDA OMUGA GER was the lawfully registered legal proprietor of the suit parcel of land known as, KISUMU/MANYATTA 'A'/3626 (NOW SUBDIVIDED) and KISUMU/MANYATTA 'A'/2588 containing by measurement Nought Decimal One One (0.11) hectares or thereabouts registered as I.R 48079/1. Being all that parcel of land situated in the

city of Kisumu in the Kisumu County.

The Plaintiff avers that the deceased passed away on the 7<sup>th</sup> day of August 1993 intestate and to date, the dependants' have never taken out letters of administration of her estate save for the letter Ad litem obtained by the Plaintiffs' herein for purposes of filing this suit and ever since her demise, no one has ever applied for letters of administration to enable them administer the estate of the deceased and consequently the deceased estate has been the registered proprietor of the suit parcels of land and has never disposed off, sold and or transferred its proprietary interest in the suit parcel of any third party.

The Plaintiffs state that the deceased and her dependants have over the years resident on the suit parcel of land and have built their ancestral home with several dependants' having been buried and others have built their homestead within the suit property which they have grown up and sired children who have grown to know the property as their home.

The deceased never took up title deed for the properties prior to her demise but left the property to the care of her children some of whom are now deceased. The Plaintiffs aver that the original title deed was subsequently issued by the government but the 1<sup>st</sup> Defendant took possession of the same and has never availed it to his fellow siblings and or the Plaintiffs herein.

That the 1<sup>st</sup> Defendant in collusion with the other Defendants and more so officers of the 8<sup>th</sup> Defendant have caused to be subdivided property known as KISUMU/MANYATTA 'A'/3626 (NOW SUBDIVIDED) into 16 parcels with their respective titles which original titles the 1<sup>st</sup> Defendant has retained possession in collusion with the other Defendants and efforts to get the same from him has proved futile. The subdivisions are as follows:-

<b>TITLE NUMBER</b>	<b>REGISTERED PROPRIETOR</b>
1. Kisumu/Manyatta 'A'/3819	Cleophas Ochieng Ger
2. Kisumu/Manyatta 'A'/3820	Bruce Ger Oluoch
3. Kisumu/Manyatta 'A'/3821	Charles Odhiambo Luoch
4. Kisumu/Manyatta 'A'/3822	Cleophas Ochieng Ger
5. Kisumu/Manyatta 'A'/3823	Evelyn Atieno Ochieng
6. Kisumu/Manyatta 'A'/3824	Alfred J. Maloba
7. Kisumu/Manyatta 'A'/3825	Andrew Ger
8. Kisumu/Manyatta 'A'/3826	Anah Akinyi Aluoch
9. Kisumu/Manyatta 'A'/3827	Cleophas Ochieng Ger
10. Kisumu/Manyatta 'A'/3828	Yonah Ger Ochieng
11. Kisumu/Manyatta 'A'/3829	Yonah Ger Ochieng
12. Kisumu/Manyatta 'A'/3830	Christopher Osawo Ger
13. Kisumu/Manyatta 'A'/3831	Christopher Osawo Ger
14. Kisumu/Manyatta 'A'/3832	Danis Ochieng Ger
15. Kisumu/Manyatta 'A'/3833	Alfred Odhiambo
16. Kisumu/Manyatta 'A'/3834	Teresa Anyango Ochieng

The Plaintiffs have since learned that the 1<sup>st</sup> Defendant holds an illegal title to the suit issued which were subdivided in 1997 without the knowledge of the legal beneficiaries yet the 1<sup>st</sup> Defendant was not an Administrator of the deceased estate. The Defendants have illegally disinherited some of the legal heirs and the 1<sup>st</sup> Defendant has bequeathed his children and unknown persons of the suit property.

The Defendants are not beneficiaries to the estate of the late Alfred Omuga Ger and that the Plaintiffs never consented to the transfer of the property to defendants. The whole process of transfer was irregularity, illegality and fraud. The defendants neither entered appearance nor

filed defence save for the 8<sup>th</sup> Defendant who entered appearance only but failed to file defence.

When the matter came up for hearing, PW1, Esther Akoth Onganga a resident of Kakamega County adopted her statement dated 19/12/2018 as evidence in chief and the documents dated 19/12/2018 as exhibits, both filed on 21/12/2018. PW1 states that the deceased was their mother who died on 9<sup>th</sup> August 1993 at Kenyatta National Hospital in Nairobi without making any will and, was buried on their ancestral land located at Manyatta "A" sub-location, Kondele location adjacent to the K'Osawo welfare hall. As a source of income, her late mother constructed semi-permanent rental units on part of the family land to help raise her children after the demise of her father. Upon the death of her late mother, her eldest brother (Maurence Oluoch Ger) took over the management of the family assets until his demise in 1996. Following his death, his immediate follower (late Christopher Osawo) with support from the third born (Cleophas Ochieng- 1<sup>st</sup> Defendant) took over without the consent of the surviving family members.

In 2007 her younger brothers got wind that the family land had been fraudulently subdivided by her two brothers and dished out to a few family members and some unknown persons, on by her two brothers but on confronting them, they denied knowledge of that allegation. One of the unknown persons confronted the 1<sup>st</sup> defendant claiming compensation from him for the funds he had used to carry out the subdivisions on the land. In 2011, out of curiosity, the family members agreed to make an inquiry at the Registrar's office in Kisumu where it was confirmed that their quarters of the land had actually been dished out to the 1<sup>st</sup> Defendant, his children, four family members and unknown persons. Seven immediate family members were left out of this allocation. A lot of mediation has taken place between their area chief, his assistant and the extended family members to persuade the 1<sup>st</sup> Defendant to transfer the land back to the family but he has adamantly refused to yield and instead threatened his siblings with dire consequences if they continue pursuing the matter. To date he holds the original seventeen titles forcing the legal heirs to live in absolute poverty while he enjoys benefits from the land with his family. In June 2018 after the demise of her brother Christopher, they agreed as a family that the plaintiff should lead in seeking legal redress in a court of law to enable other

family members get their rightful shares of the ancestral land.

PW2 stated that he was the 10<sup>th</sup> born child among eleven siblings to the Late Yonah Ger Osawo and the Late Alfreda Omuga Ger. That his father passed away on 23<sup>rd</sup> August 1971 in Kisumu and his mother died on 9<sup>th</sup> August 1993 at Kenyatta National Hospital in Nairobi.

Before his mother's death in 1991, she apportioned each of her eight son's a parcel of land in her compound in equal measures and constructed for each a semi-permanent two roomed house.

In 1997 his elder brother, the 1<sup>st</sup> Defendant herein, colluded with unknown persons at the Kisumu Land Registrar's office without obtaining letters of administration for their parent's estate and secretly transferred part of the land to himself, his children, few family members and some unknown persons. The land is subdivided into 17 parcels, in the process he has disinherited some family members and bequeathed his children and rewarded his friends. This information came to their knowledge and since then they have not known peace. He avers that this is their ancestral land where both his parents and deceased sibling are buried and they have nowhere else to go. Their pleas as a family to their brother Cleophas, the 1<sup>st</sup> defendant herein, to release the titles he is holding and return the land back to them has fallen on deaf ears. A number of times between 2001 to date, he has been forced to repulse intruders who came to the land with building materials purporting to be the owners of the land in his parents' compound until his nephew placed a caveat on the 17 parcels.

Among the 17 titles he is holding is for L.R. NO. 3825 & L.R. NO. 3826 where his house is built but the titles bear names of persons unknown to him. The 1<sup>st</sup> Defendant keeps referring to them as squatters on his land.

This court finds that the plaintiffs have proved that the Deceased ALFREDA OMUGA GER was the lawfully registered legal proprietor of the suit parcel of land known as, KISUMU/MANYATTA 'A'/3626 (NOW SUBDIVIDED) and KISUMU/MANYATTA 'A'/2588 containing by measurement Nought Decimal One One (0.11) hectares or thereabouts registered as I.R 48079/1. Being all that parcel of land situated in the city of Kisumu in the Kisumu County.

That the deceased passed away on the 7<sup>th</sup> day of August 1993 intestate and to date, the dependants' have never taken out letters of administration of her estate save for the letter Ad litem obtained by the Plaintiffs' herein for purposes of filing this suit and ever since her demise, no one has ever applied for letters of administration to enable them administer the estate of the deceased and consequently the transactions made without letters of administration intestate being taken when the proprietor of the suitland was deceased were an illegality and intermeddling with the deceaseds free property.

Section 26 of the Land Registration Act provides that:

**“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”**

I do find that the plaintiff has demonstrated that the defendants caused the original property number **KISUMU/MANYATTA ‘A’/3626** to be subdivided un-procedurally as the proprietor was long deceased. Therefore, the defendants obtained title to the properties they hold illegally and fraudulently. Moreover, the defendants were involved in intermeddling with the property of the deceased Alfreda Ger Omuga and therefore cannot benefit from their act of illegalities. I do find that the plaintiffs have proved their case on balance of probabilities and therefore deserve the prayers sought.

I do grant prayers:

**a) Permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Defendants jointly and severally by themselves, their servants, agents and or any other persons authorized by them from carrying out any transactions, developments on the land, subdivision, sale, lease, transfer or any other dealing whatsoever concerning KISUMU/MANYATTA ‘A’/3626 (NOW SUBDIVIDED INTO KISUMU/MANYATTA “A”/3819 TO 3834) AND or any part of the suit parcel herein.**

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**d) Punitive Damages of ksh 200,000 severally and jointly against the defendants**

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JULY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.*

**ANTONY OMBWAYO**

**JUDGE**