



**REPUBLIC OF KENYA**

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

**E.L.C CASE NO. 186 OF 2016**

**DOUGLAS ORIBU MATOKE (Suing through his attorney**

**SAMWEL MABEYA).....PLAINTIFF**

**VERSUS**

**WILLIAM SAGINI ORIBU.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff filed suit against the Defendant seeking the following reliefs:

- a) A declaration that a portion measuring 70 feet by 120 feet in land parcel number WANJARE/BOGIAKUMU/2004 and 6245 was part of the estate of the deceased Daniel Matoke Oribu.
- b) An order compelling the Defendant to transfer a portion of land measuring 70 feet by 120 feet in land parcel number WANJARE/BOGIAKUMU/2004 and 6245 to Douglas Matoke Oribu and also account for and pay death gratuity benefits he received.
- c) Costs of this suit.
- d) Any other relief that this Honourable Court may deem fit to grant.

2. According to the Plaintiff's statement, he avers that he is the son of Daniel Matoke Oribu - deceased while the Defendant is the brother of the deceased. The Plaintiff and the Defendant jointly applied for a Grant of Letters of Administration in respect of the estate of the deceased vide Nairobi HC Succession Cause No. 151 of 2001. The Plaintiff further avers that he enlisted all the properties of the deceased which included half an acre of land in Kericho, a plot at Gesonso Market, Kisii Afya Sacco shares and 500 shares at Kenya Airways.

3. The Plaintiff and Defendant were subsequently jointly issued with a Grant of Letters of Administration but at the time of confirmation of the said Grant, the plot at Gesonso market was omitted as it had not yet been transferred to the deceased and could therefore not form part of the deceased's estate. It was therefore agreed between the Plaintiff and the Defendant that since the Plaintiff was residing in the United States of America, the Defendant would pursue the transfer of the plot at Gesonso Market to the beneficiaries of the estate of the deceased. The Defendant pursued the same and eventually had the said plot which is now known as parcel number WANJARE/BOGIAKUMU/2004 and 6245 registered in his name. However, contrary to the agreement between him and the Defendant, he has failed to transfer the suit property to the Plaintiff.

4. The Defendant filed a Defence dated 12<sup>th</sup> July 2016 denying the Plaintiff's claim and stated that the suit properties were acquired by him in his individual capacity and not in his capacity as the administrator of the estate of the deceased.

5. The suit was set down for hearing and both parties testified. The Plaintiff called two witnesses while the Defendant testified as the sole witness for the Defence.

**PLAINTIFF'S CASE**

6. The Plaintiff testified through his attorney one Samwel Mabeja who relied on his witness statement dated 24<sup>th</sup> June 2016 and produced the documents listed in the Plaintiff's List of Documents. He stated that his late brother Daniel Matoke Oribu bought a parcel of land measuring 70 feet by 100 feet from one Christopher Biomuchio. The deceased paid the purchase price of Kshs. 85,000 in full. He

subsequently took possession and started constructing a brick house but he died before completing the said house.

7. He told the court that following the demise of his brother, the Plaintiff who is a son to the deceased and Defendant who is one of his brothers jointly applied for a Grant of Letters of Administration in respect of the estate of the deceased. He explained that since the suit property did not have a number at the time, it was not specifically mentioned in the Grant issued in Nbi HC Succession Cause No. 152 of 2001. It was his testimony that the Defendant who had bought a parcel of land adjacent to that of the deceased had the land surveyed and included the deceased's parcel in his own parcel of land. The said parcels were registered as parcel number WANJARE/BOGIKUMU/2004 and 6245. He stated that since his brother Daniel died, his children were entitled to their late father's property.

8. In cross-examination PW1 stated that the suit property was part of the estate of his late brother. He admitted that he had not filed an application for accounts in the succession matter. He stated the plot number of the suit property was not indicated in the succession documents since the same had not yet been transferred to the deceased. He told the court that after Daniel's demise, the Defendant bought two plots No. 16B and No. 17 known near the deceased's parcel of land. He stated that he was aware that there was an agreement between Douglas and the defendant to process the transfer of the parcel that the deceased had purchased so that it could be transferred to the deceased's beneficiaries.

9. PW2 testified that in 2013, he had rented premises on plot no.16B at Gensonso Market which belonged to the defendant. He said the said plot initially belonged to one Charles Mititi. He testified that in his capacity as the Secretary of the Market Committee he assisted the Defendant to have the said plot transferred to him. He told the court that plots 16 B and D.26 emanated from the same title.

10. PW3 testified that he sold plot no. D.26 Gesonso Market measuring 70 feet by 120 feet to Daniel Matoke Oribu- deceased in 1993 after which he put him in possession. He stated that he had not transferred the said plot to the deceased at the time of his death though the deceased had paid him in full. It was his testimony that he was not aware that the family of the deceased had applied for a Grant of Letters of Administration. He stated that he also sold the defendant plot no. 18 Gesonso Market. He explained that plot no. D.26 was behind plot no.18

#### **DEFENDANT'S CASE**

11. The Defendant testified as DW1. He stated that he bought plot no. 16B from Kisto Ongeri pursuant to a sale agreement dated 2.6.2008 which was witnessed by PW1. The said parcel was later registered as parcel number WANJARE/BOGIKUMU/6245. He testified that he bought parcel number WANJARE/BOGIKUMU/2004 from three brothers namely Christopher Orucho Miyoro, Luka Mosomi and Francis Nchabo. The plot was initially known as plot no.D17 and later registered as parcel no. WANJARE/BOGIKUMU/458. He stated that when they applied for succession in respect of the estate of Daniel Matoke Oribu, they listed all his assets including a market plot at Gesonso market whose number was not given. He stated that he processed his title for parcel 6245 in 2008 and parcel 2004 in 1992. He denied that the plot mentioned in the succession cause was the same as the suit property. He stated that the deceased's plot was not pointed out to him. He maintained that the 2 plots he bought were separate and distinct from the one bought by the deceased. He admitted that there was a structure on parcel no. 2004 though he said he did not know who built the said structure. He testified that this suit was filed against him when he demolished the said structure. He stated that he had distributed all the assets of the deceased except the market plot which was not pointed out to him. He said the plaintiff had not filed any objection in the Succession case to complain that he had failed to distribute some of the deceased's assets.

#### **ISSUES FOR DETERMINATION**

- i. Whether the Plaintiff's father Daniel Matoke Oribu purchased a portion measuring 70feet by 120 feet from one Christopher Orucho Miyoro?
- ii. Whether the said parcel forms part of what is currently registered as parcels number WANAJARE /BOGIKUMU/2004 and WANJARE/ BOGIKUMU/6245.
- iii. Whether the Defendant should transfer a portion of land measuring 70feet by 120 feet comprised in land parcels number WANAJARE /BOGIKUMU/2004 and WANJARE/ BOGIKUMU/6245 to the Plaintiff.

#### **ANALYSIS AND DETERMINATION**

12. It is not in dispute that the Plaintiff's father Daniel Matoke Oribu purchased a portion of land measuring 70 feet by 120 feet from one Christopher Orucho Miyoro. The Plaintiff produced the sale agreement dated 4<sup>th</sup> January 1993 which describes the parcel as plot no. D.26 Gesonso Market. Christopher Orucho Miyoro who testified as PW3 stated that he sold plot no. D. 26 Gesonso Market to the deceased. He confirmed that the deceased paid the purchase price in full but he died before the plot was transferred to him. Even though he had stated in his witness statement that that plot no. D.26 was also registered as parcel no. WANJARE/ BOGIKUMU/458, he denied this under cross-examination. The mutation forms produced by the Plaintiff indicate that parcel no. 458 was sub-divided to give rise to parcels no. 2003, 2004 and 2005 in 1986.

13. What is missing is the link between plot no. D.26 and parcel no. 458. Unfortunately, PW3 who sold plot D.26 to the deceased and who ought to have been able to confirm whether it was part of parcels number WANAJARE /BOGIKUMU/2004 and WANJARE/ BOGIKUMU/6245 did not make this clarification. Even though PW2 who is a former Secretary of the market committee tried to explain that there were some registered parcels of land that were assigned market plot numbers for purposes of collecting rates by the defunct Gusii County Council, there was no documentary evidence to back up his allegations.

14. The only hint that the deceased may have purchased the portion that was later registered as parcel no. WANAJARE /BOGIKUMU/2004 and WANJARE/ BOGIKUMU/6245 is the structure standing on the said parcel. The Defendant admitted that it was his attempt to demolish the said structure that prompted the Plaintiff to file this suit. In the circumstances, I am unable to make a conclusive

finding that the deceased's portion measuring 70 feet by 120 feet is part of parcels number WANAJARE /BOGIAKUMU/2004 and WANJARE/ BOGIAKUMU/6245.

15. Be that as it may, even assuming that the Plaintiff had proved that the Defendant had annexed the portion purchased by the deceased as part of his land, would this be the appropriate forum to seek redress? As correctly submitted by Counsel for the Plaintiff, section 94 of the Law of Succession Act makes it an offence to misapply the assets of a deceased person.

The said section provides as follows:

***“When a personal representative neglects to get any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned”***

16. I am constrained to agree with counsel for the Defendant that this court is not the appropriate forum to deal with matters relating to disputes among co-administrators touching on the estate of a deceased person which they are charged with the responsibility of administering. The Plaintiff ought to have filed his case in Nbi Succession Cause No. 152 of 2001 as the complaint by the Plaintiff is leveled against the Defendant in his capacity as one of the administrators of the estate of Daniel Matoke Oribu.

17. All in all, I am not persuaded that the Plaintiff has proved his case on a balance of probabilities. Consequently, the Plaintiff's suit is dismissed. As regards costs, I note that the parties are members of the same family and that this case has created bad blood between them. I therefore direct that each party bears their own costs.

**Dated signed and delivered at Kisii this 29<sup>th</sup> day of July, 2021.**

**J.M ONYANGO**

**JUDGE**