



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 873 OF 2015**

**DOUGLAS ONYANGO OLAK .....1<sup>ST</sup> PLAINTIFF**

**EVANS OCHIENG OLAK.....2<sup>ND</sup> PLAINTIFF**

**GEORGE OMONDI OLAK.....3<sup>RD</sup> PLAINTIFF**

**(Suing as personal representatives and administrators of the  
estate of NEREA ATIENO OLAK – Deceased)**

**VERSUS**

**DAVID ONDENG.....1<sup>ST</sup> DEFENDANT**

**BRANDON AWITI ONDENG.....2<sup>ND</sup> DEFENDANT**

**(Sued through his father DAVID ONDENG as guardian)**

**JUDGEMENT**

Evans Ochieng Olak and George Omondi Olak (hereinafter referred to as plaintiffs) have come to court vide plaint amended on 30/11/2006 and filed on 4/12/2005 against David Ondeng and Brandon Awiti Ondeng sued Through His Father David Ondeng As Guardian Ad Litem Claiming That On Or about the 20<sup>th</sup> June, 1986, Kisumu municipal Council allocated plot NO.2/61 Migosi Site and Service Scheme and also known as un surveyed PLOT NO. 63 to Nerea Atieno Olak- Deceased. The said Nerea Atieno Olak subsequently died on the 14<sup>th</sup> November, 1993.

The Plaintiffs aver that the Defendant has entered and taken up possession of the said land which is also known as un surveyed Residential plot no. 2/61 Kisumu Municipality Migosi Site and Service Scheme and which is also known as un surveyed Residential PLOT NO. 63 allegedly claiming that the said plot belongs to him and the Plaintiffs aver that the deceased never sold and or gave possession of the suit parcel to the Defendant.

The Defendants having been notified that the original title No. 2/61 un-surveyed plot no. 63 belonged to the estate of one Nerea Atieno Olak, deliberately and fraudulently proceeded and made false and malicious presentations to the Registrar of titles that the suit parcel is theirs hence processing title to the suit parcel and same is now registered as title NO. L.R. NO. 26583 on grant N. LR 98959 and vide land survey plan NO. 257594 and which was registered on the 7<sup>th</sup> September 2005.

The Plaintiffs pray for Judgment against the defendants for:

**a) An order for permanent injunction restraining the Defendant his agents, servants or employees from having possession, selling, alienating, collecting rent or from interfering in any manner howsoever with the said plot NO. 2/61 and known as plot NO. 63 MIGOSI SITE & SERVICE SCHEME- KISUMU which is now registered as title NO. L.R. 26583 vide grant NO. LR 98959.**

**b) An order compelling the Defendant to pay menses profits at the rate of Kshs. 12,000/= per month with effect from August, 2004 till date of judgment.**

**c) An order directing the registrar of titles to cancel the names of the Defendants as the proprietors and thereafter to rectify the register by inserting the names of the plaintiffs as the legal proprietors of L.R. NO. 2658 issued vide grant NO. LR. 98959.**

**d) Interest on (b) and costs of the suit.**

The Defendants vide further amended statement of defence and counter claim admit that the plaintiffs are the administrators of and beneficiaries of the estate of Nerea Atieno Olak, deceased, and that they consequently have capacity to institute a suit in a Court of law on behalf of the estate of the deceased but traverses that Plot No. KSM/MIGOSI/L.R./26583 is not one of the assets of the deceased's estate save for the uncompleted building prematurely erected thereon.

In particular, the defendants deny that plot No. 2/61 Migosi Site and Service Scheme was allocated to the deceased Nerea Atieno Olak. The defendant also denies that the alleged Plot NO. 2/61 Migosi Site and Service Scheme is also known as unsurveyed plot no. 63.

The defendant states that on the 20<sup>th</sup> day of June 1986 by letter reference No. HDD/90/2 (218) the Municipal Council of Kisumu made an offer to the deceased for a "Market Sales Plot No. 2-61" but not Migosi Site & Service Scheme as alleged, and the deceased never accepted the said offer by paying the prescribed acceptance fees hence no letter of allotment was ever issued to her and the plaintiffs are put to the strict proof thereof.

The 1<sup>st</sup> defendant in regard to paragraph 5 of the plaint avers that he and Brandon Owiti Ondeng are the registered owners of the suit property having been allocated the same by the Commissioner of Lands on the 11<sup>th</sup> July 2002.

The defendants deny the averments contained in paragraph 5 of the plaint and in particular that they have entered or taken up possession of Plot No. 2/61 Kisumu Municipality Migosi Site & Service Scheme. The plaintiff is nevertheless put to strict proof.

The defendants contend that they are in the lawful occupation of Plot No. 63 what is now LR 26583 for the reasons that: -

- a) The acquired title pursuant to a valid allotment letter from the Commissioner of Lands and paid all the stipulated allotment fees.**
- b) They are the first registered owners and therefore their title is indefeasible.**
- c) They hold valid title documents over the said Plot No. 63 which is now L.R. 26583.**
- d) The said Plot No. 63 which is now LR. 26583 IS NOT THE SAME AS Plot No. 2/61 Migosi Site and Service Scheme.**

Further in the alternative and without prejudice to the foregoing the Defendants aver that prior to the said allotment on 9/7/2002 the defendants had purchased the uncompleted building on the suit premises from one Dancan Onyango Olak the elder son of the late Nerea A. Olak and her eldest son.

The defendants aver that the plaintiffs and the other children of the deceased consented and authorized the said sale and therefore the plaintiffs' allegations at paragraph 5 and 6 of the plaint are not made in good faith and are meant to mislead this Honourable Court.

The defendants deny the contents of paragraph 5 of the plaint and reiterate the contents paragraph 4B hereinabove. The plaintiff is nevertheless put to strict proof otherwise.

The defendants deny the contents of paragraph 5A of the plaint and the particulars of fraud, false, malicious, presentation and particulars of mesne profits. The plaintiff is nevertheless put to the strictest proof otherwise.

The defendants deny the contents of paragraph 6 of the plaint that the suit land belongs to the estate of the late NERAH ATIENO OLAK and the plaintiffs are put to strict proof.

The defendants deny the contents of paragraph 7 of the plaint. The defendant aver that upon the said purchase and allocation he they entered into the suit premises and completed the uncompleted erected therein a residential building which is rented out to tenants.

In the alternative and without prejudice to the generality of the foregoing, the defendants shall contend that they obtained title over Plot No. 63 now LR NO. KSM/MIGOSI/26583 through proper and lawful means.

Further in the alternative the defendants aver that if at all the deceased NEAREA ATIENO OLAK was allotted the suit premises (which is hereby denied) then the said offer was conditionally on the terms stated in the letter which terms were never honoured by the deceased hence the said offer lapsed before the property plot passed to the deceased.

The defendants aver that the plaintiffs are not entitled to collect and receive rents due from the tenants as alleged in paragraph 7 of the plaint as they or the estate of the deceased have no rights or interests over the suit premises.

The defendants deny that the plaintiffs have suffered loss and damages and aver that the claim for mesne profit of Kshs. 12,000/= per month from August 2004 till date of judgment is fictitious and spurious.

The defendant aver that the plaintiffs' suit does not disclose any and/or any reasonable cause of action, is bad in law, inept and an abuse of the due process of the Court and should be dismissed with costs.

The defendants aver that they are in legal possession of the suit land and therefore cannot yield to the plaintiffs' demand to stop interfering with the suit parcel.

The defendants pray for judgment for Kshs. 400,000/= and damages for expenses incurred on completing the building and making the same habitable and costs of the constructions.

When the matter came up for hearing PW1, Douglas Onyango Olak testified that his mother Nerea Atieno Olak was the registered owner of plot no. 2/61 and used to get rent from the plot amounting to Kshs 12,000 pm. When the mother died, they obtained letters of administration. He went to collect rent from the tenants but found that the tenants had been given notices to vacate from the houses by one David Ondeng who claimed that he bought the plot from Duncan Onyango Olak at a consideration of Kshs 400,000. Duncan Onyango Olak was charged with forgery and convicted and placed on 2 years' probation. Duncan did not have a grant of letters of administration.

PW2 Patrick Otieno Nyamita the Acting Director Housing at the Municipal Council Kisumu states that the plot was initially offered to Nerea A. Olak. The allottee paid Kshs 100, 500, 7500, 300. The records remain that the plot belonged to Nerea. There was no sale agreement between David Ondeng and Olak's family members.

DW1, David Ondeng testified that he bought the land from one of the sons of the late Nerea, Duncan Onyango Olak but did not verify that the latter was the owner of the land. He learnt later that the property belonged to Nerea Olak. He confirmed that plot No. 2/61 was the same as plot number 63. When he bought the property, it was partly developed by the plaintiffs' mother. He has fully developed the property. He prays that he be refunded the money.

I have considered the evidence on record and do find that the suit property belonged to the late Nerea A. Olak who was deceased at the time of the alleged sale by Duncan Olak. At the said time of sale, Duncan Olak did not have the letters of administration intestate of the Estate of the deceased Nerea A. Olak and therefore the sale was null and void.

Section 45 of the Law of Succession Act provides:-

**“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**  
**(2) Any person who contravenes the provisions of this section shall—**  
**(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**  
**(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”**

Duncan Olak had no capacity to sell the property. Duncan Olak sold the property and caused it to be registered in the defendant's names fraudulently.

I do find that the plaintiffs have proved their case on a balance of probabilities. I do find that the houses on the parcel of land were fetching rent of Kshs. 12,000/= per month and therefore the plaintiffs are entitled to mesne profits which were pleaded and proved. I do award the Plaintiffs Kshs. 2,088,000 as mesne profits. The counter claim is dismissed. Costs of the suit to the Plaintiffs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 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**