



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**CASE NO. 987 OF 2016**

**(FORMERLY HCC NO. 335'A' OF 2012)**

**MARCELLAH NYANGAU OKENYE.....PLAINTIFF**

**VERSUS**

**NAFTAL ONTWEKA.....1<sup>ST</sup> DEFENDANT**

**ZAKARIA OBARA MOCHAMA.....2<sup>ND</sup> DEFENDANT**

**EZEKIEL OMBASA OUMA.....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

1. The Plaintiff is the widow of Livingstone Okenye Orina (deceased) and instituted the present suit as the administratrix of her late husband's estate. The Plaintiff vide the plaint dated 20<sup>th</sup> August 2012 filed in court on 12<sup>th</sup> September 2012 averred that her late husband was as at the time of his death the registered proprietor of land parcel **South Mugirango/Nyataaro/185**. The Plaintiff further stated that in 2009 the 1<sup>st</sup> Defendant who is her son commenced succession proceedings in regard to her late husband's estate vide Kisii HC Succession Cause No. 405 of 2009 and obtained temporary letters of administration on 29<sup>th</sup> September 2009. The 1<sup>st</sup> Defendant, before the succession proceedings were finalized, registered form R.L 19 against the suit property and caused the suit land to be subdivided into parcels **2217, 2218 and 2219** and transferred land parcel **South Mugirango/ Nyataaro/2218** to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

2. The Plaintiff filed an application for the annulment and revocation of the grant issued to the 1<sup>st</sup> Defendant in the succession cause and upon the application for revocation of grant being served on the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant withdrew the succession cause. The Plaintiff thus averred the transfer of land parcel **South Mugirango/Nyataaro/185** to the 1<sup>st</sup> Defendant and the consequent subdivision thereof and transfer of land parcel number **South Mugirango/Nyataaro/2218** to the 2<sup>nd</sup> defendant was irregular and illegal and null and void and ought to be cancelled. The Plaintiff prays for judgment against the Defendants for:-

**(a) A declaration that the transfer of land parcel then registered as South Mugirango/Nyataaro/185 by the 1<sup>st</sup> Defendant to himself was irregular and/or improper and/or unlawful and similarly the subdivision of the said land into 3 portions namely South Mugirango/Nyataaro/2217, 2218 and 2219 and subsequent transfer of parcel No. South Mugirango/2218 was also improper and/or unlawful and that all the aforesaid transactions be cancelled and/or annulled.**

**(b) An order of eviction of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their agents and/or servants and/or any person holding on land parcels No. South Mugirango/Nyataaro/2218.**

**(c) Costs of the suit.**

**(d) Any other order this court may deem fit to grant.**

3. The 1<sup>st</sup> Defendant did not enter appearance or file any defence in the suit. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a joint defence dated 16<sup>th</sup> October 2012. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied the allegations set out in the plaint and in particular that land parcel **South Mugirango/Nyataaro/185** was part of the estate of Livingstone Okenye Orina (deceased). The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contended that they were the registered proprietors of land parcel **South Mugirango/Nyataaro/2218** and that their title was absolute and indefeasible.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants advocate Mr. Ben Gichana of Ben K. Gichana & Company Advocates was granted leave to cease to act for the

2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 19<sup>th</sup> October 2017 and henceforth the said Defendants were served with Court process directly. The suit was fixed for hearing on 25<sup>th</sup> March 2019. The Defendants were served with the hearing notice as per the affidavit of service filed by Isaiah Miruka a court process server on 25<sup>th</sup> March 2019. The Court allowed the Plaintiff to proceed with hearing ex parte.

5. The Plaintiff testified as the sole witness in support of her case. Her evidence was brief and she basically relied on the witness statement she had recorded on 20<sup>th</sup> August 2012. It was her evidence that her late husband was the registered owner of land parcel **South Mugirango/Nyataaro/185** before he died. That her son, the 1<sup>st</sup> Defendant herein in 2009 secretly and unilaterally applied for letters of administration to her late husband's estate. She stated none of the other beneficiaries were involved and/or consulted and that when the 1<sup>st</sup> Defendant was issued the temporary grant of letters of administration, he caused the land to be registered in his name which he subdivided and transferred a portion thereof to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants without obtaining confirmation of the grant of letters of administration.

6. The Plaintiff stated that she applied for the grant issued to the 1<sup>st</sup> Defendant to be annulled but the Defendant upon being served with the application for revocation of the grant, he withdrew the entire succession cause. The Plaintiff stated she had equally filed a bundle of documents which she wished to rely on in support of her case. The Plaintiff's bundle of documents included the following documents:-

**(i) Copy of Certificate of Search for land parcel South Mugirango/ Nyataaro/185 dated 23<sup>rd</sup> April 2009 which showed the land was registered in the name of L. Okenye Orina.**

**(ii) Copy of search of land parcel South Mugirango/Nyataaro/2218 dated 6<sup>th</sup> December 2010 which shows the land was a subdivision of land parcel 185 and was registered in the name of Zakaria Obara Mochama and Ezekiel Ombasa Ouma.**

**(iii) Searches for land parcels South Mugirango/Nyataaro/2217 and 2219 dated 6<sup>th</sup> December 2010 which show they were subdivisions from land parcel 185 and are registered in the name of Naftali Ontweka Okenye.**

**(iv) Copy of Notice by 1<sup>st</sup> Defendant withdrawing Kisii HC Succession Cause No. 405 of 2009 entirely dated 1<sup>st</sup> December 2009.**

**(v) Copy of Grant of Administration Ad Litem issued to the Plaintiff dated 11<sup>th</sup> July 2012 for the Estate of Livingstone Okenye Orina who died on the 9<sup>th</sup> February 2001.**

7. I have reviewed the evidence and I am satisfied that Livingstone Okenye Orina (deceased) was the registered owner of land parcel **South Mugirango/Nyataaro/185** as at the time he died. The copy of Certificate of Search on the property issued on 23<sup>rd</sup> April 2009 shows that he was registered as owner of the land on 17<sup>th</sup> January 1970 and issued title on 25<sup>th</sup> October 1971. There is no evidence that any formal succession proceedings were conducted in regard to the deceased estate. The succession proceedings commenced by the 1<sup>st</sup> Defendant in regard to the deceased estate vide Kisii HC Succession Cause No. 405 of 2009 were apparently not concluded as the Petitioner withdrew the succession cause in its entirety as per the notice of withdrawal dated 1<sup>st</sup> December, 2009.

8. There is no evidence that there was a valid grant and certificate of confirmation of grant that would have enabled the estate of the Plaintiff's husband to be distributed. The Plaintiff has stated that the 1<sup>st</sup> Defendant did not have a valid grant of letters of administration that would have enabled him to distribute the deceased estate. The 1<sup>st</sup> Defendant did not challenge the Plaintiff's evidence and hence the same remained uncontraverted. The Court accepts the Plaintiff's evidence and holds that there was no valid succession proceedings relating to the estate of Livingstone Okenye Orina (deceased) and therefore any purported distribution of his estate was null and void.

9. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants inspite of filing their defence did not attend court for hearing. The defence filed remained a mere statement of facts which were unproven and/or substantiated. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file any witness statement and/or any documents which could perhaps have substantiated the defence they had filed. In the face of the evidence adduced by the Plaintiff the defence tendered by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is not sustainable.

10. In the premises, the Court is satisfied that the Plaintiff has proved her case against the Defendants on a balance of probabilities. The Court enters judgment in favour of the Plaintiff as against the Defendants and makes the following final orders:-

**(a) A declaration be and is hereby issued that the transfer of land parcel South Mugirango/Nyataaro/185 to the 1<sup>st</sup> Defendant and subsequent subdivision thereof into land parcels South Mugirango/Nyataaro/ 2217, 2218 and 2219 was null and void and is hereby ordered cancelled.**

**(b) The transfer of land parcel South Mugirango/Nyataaro/2218 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was null and void and is hereby ordered to be cancelled.**

**(c) The land registrar, Kisii County is ordered to rectify the register and to restore the name of L. Okenye Orina (deceased) as the owner of land parcel South Mugirango/Nyataaro/185 until appropriate succession proceedings in respect of his estate are undertaken.**

**(d) All parties to bear their own costs of the suit.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 31<sup>ST</sup> DAY OF MAY 2019.**

**J. M. MUTUNGI**

**JUDGE**