



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 873 OF 2015**

**FORMERLY H.C. CIVIL CASE NO. 72 "B" OF 2005**

**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**

1. Douglas Onyango Olak, Evans Ochieng Olak and George Omondi Olak, the Plaintiffs, commenced these proceedings as personal representatives and administrators of the estate of Nerea Atieno Olak, deceased, against David Ondeng, the 1<sup>st</sup> Defendant, through the plaint dated 8<sup>th</sup> September 2005 and amended on the 30<sup>th</sup> November 2006, enjoining Bradon Awiti Ondeng, sued as the 2<sup>nd</sup> Defendant through his father the 1<sup>st</sup> Defendant, who is his guardian ad litem. The Plaintiffs avers that plot No. 2/61 Migosi Site and Service Scheme, and also known as un-surveyed plot No. 63, was allocated by Kisumu Municipal Counsel to Nerea Atieno Olak, the deceased, on or about 20<sup>th</sup> June 1986. That the said deceased passed on the 14<sup>th</sup> November 1993 without parting with ownership of the plot. That the Defendants knowing that the said plot belonged to the deceased fraudulently, falsely and maliciously made presentations to the Registrar of Titles and had the plot registered as L. R. No. 26583 [I.R. 98959] under Survey Plan No. 257594 in their names on the 7<sup>th</sup> September 2005, causing loss and damages to the Plaintiffs of Kshs. 12,000/= per month from August 2004. The Plaintiffs pray for permanent injunction, mesne profits of Kshs. 12,000/= per month from August 2004 till date of Judgment, rectification of the register to have the Plaintiffs as the legal proprietors, interest and costs.

2. The Plaintiffs' claim is opposed through statement of defence dated 28<sup>th</sup> October 2005 and amended on the 4<sup>th</sup> September 2007. The Defendant denies that the plot had been allocated to the deceased. That un-surveyed plot No. 63 which is now L. R. 26583 was allocated to them by the Commissioner of Lands on the 11<sup>th</sup> July 2002, and is different from Plot No. 2/61 Migosi Site and Service Scheme. That in the alternative, they had purchased the suit premises from Duncan Onyango Olak, the elder son of the late Nerea A. Olak with the consent and authority of the Plaintiffs and their other siblings. That the Plaintiffs are not entitled to Kshs. 12,000/= per month from August 2004 as the estate had no rights or interest over the land. That the Plaintiffs' suit be dismissed with costs.

3. That the hearing of the Plaintiffs' case commenced on the 8<sup>th</sup> October 2008 when Douglas Onyango Olak, the 1<sup>st</sup> Plaintiff testified as PW1. PW1 continued his testimony on the 12<sup>th</sup> February 2009 and after completing, Patrick Otieno Nyamila, the Acting Director Housing, Municipal Council of Kisumu testified as PW2. PW1 told the court that he is a son to Nerea Atieno Olak who died in 1994 and who owned Plot No. 2/61 Site and Service Migosi estate. That after their mother's death, the Plaintiffs filed Kisumu H.C. Succession Cause No. 381 of 2004 and were issued with the Grant of Letters of Administration intestate on the 27<sup>th</sup> July 2004. That plot No. 2/61 had been developed with two (2) units with a rent of Kshs. 6000/= each making a total of Kshs. 12,000/=. That before they got the Grant, the tenants in the units told them that they had received notices from the Defendant claiming he had bought the plot from the deceased's elder son Duncan Onyango Olak for Kshs. 400,000/=. That after making a follow up, they discovered that the said Duncan had forged documents which he used to sell the plot to the Defendant. The said Duncan was arrested, charged, convicted and sentenced to two years probation in Winam Senior Resident

Magistrate Criminal Case No. 288 of 2004. That the Plaintiffs wrote to the Town Clerk on 2<sup>nd</sup> August 2004 through their Advocate forwarding a copy of the Grant, and another letter on 16<sup>th</sup> July 2004 seeking for copies of the letter of allotment and confirmation whether a letter of allotment had been issued to the Defendant. They also had another letter dated 31<sup>st</sup> August 2004 done to the two tenants asking them to pay rent through them as the administrators of the estate. That the Defendant through his advocates wrote on 29<sup>th</sup> September 2004 to the property consultant and copied to the Plaintiffs' lawyers among others stating that he had bought the plot from the deceased elder son on 9<sup>th</sup> July 2002, after which it was allotted to him by the Commissioner of lands. That the Plaintiffs then obtained the memo from the Kisumu Municipal Council dated 8<sup>th</sup> August 2005 confirming the existence of the letter of offer to the deceased for plot No. 2-61 dated 20<sup>th</sup> June 1986, receipts for Kshs. 100/=, 7570/=, 5000/= and 3000/= in the deceased's name, among others. PW1 further testified that the said Duncan had not obtained a grant to administer their late mother's estate, and that the family had not authorized him to sell the suit land to the Defendant. PW2 confirmed that the suit property was originally offered to the deceased, Nerea A. Olak on the 20<sup>th</sup> June 1986 and that she paid the requisite fees. That the suit property records maintained by the council still had the deceased as the owner. That the alleged sale transaction between Duncan and Defendant was not reported to the Council, and the Council never recommended the plot's allotment to the Defendant.

4. The Defendants did not tender any evidence despite being given the opportunity to do so, and their case was marked closed on the 18<sup>th</sup> December 2018 and directions on filing and exchanging written submissions given. The learned Counsel for the Plaintiffs filed their written submissions dated the 4<sup>th</sup> February 2019.

5. The following are the issues for the Court's determinations;

- a) **Whether the suit property was registered in the name of the deceased by the time of her death.**
- b) **Whether the sale transaction over the suit property to the Defendant was regularly, legally and procedurally done.**
- c) **Whether the Defendant obtained good title over the suit land.**
- d) **Whether the Plaintiffs have proved mesne profits, and if so how much?**
- e) **Who pays the costs.**

6. The Court has carefully considered the pleadings filed by both sides, the oral and documentary evidence by PW1 and PW2, the written submissions by the learned Counsel for the Plaintiffs and come to the following findings;

a) That from the pleadings at paragraphs 3 to 5A of the Amended Plaintiff, paragraph 8b of the Amended defence, the testimonies tendered by PW1 and PW2, and the documentary evidence, especially the internal memo dated 8<sup>th</sup> August 2005, letter of offer dated the 20<sup>th</sup> June 1986 and the four receipts produced as exhibits P10, P11, P12 (a) to (c), it is clear the late Nerea Atieno Olak was the person the plot No. 2-61 was offered to. That the receipts evidencing the payments made and in her name confirms and leads the court to infer that she accepted the offer as required and for all practical purposes she was the proprietor of the said plot by the time she died on the 14<sup>th</sup> September 1993 which is the date appearing in the certificate of death No. 382056 issued on the 2<sup>nd</sup> March 1994 and produced as exhibit P1. That the said plot was therefore protected under **Section 45 (1) of the Law of Succession Act, Chapter 160 of Laws of Kenya** which states that **"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."** That **Subsection (2)** creates the offence and sets the penalty for intermeddling and the Court of Appeal decision in Nairobi C.A No. 81 of 2002, **Elly Odhiambo Onyuka vs Ayub Odhiambo Migwalla** is relevant.

b) That having found as in (a) above, it follows that the sale agreement between the Defendants and the deceased's elder son, namely Duncan Onyango Olak, over the suit property on the 9<sup>th</sup> July 2002 without first obtaining the confirmed grant in accordance with the provisions of the **Law of Succession Act** was null and void as the said Duncan Onyango Olak was not the administrator of the estate of Nerea Atieno Olak. That the said Duncan Onyango Olak had no title to the suit land that he could regularly, legally and procedurally pass over to the Defendants.

c) That flowing from the foregoing and considering that the said Duncan Onyango Olak pleaded guilty to a charge of forging the Assistant Chief signature to process and sell his late mother's land in Winam S.R.M Cr. Case No. 288 of 2004, the court finds that the conviction is further proof that the said Duncan could not have legally, regularly and procedurally transacted over the suit land and the title the Defendants obtained under the transactions cannot amount to good title. That the Defendants' title is therefore not protected under **Article 40 (6) of the Constitution** and **Section 26 of the Land Registration Act No. 3 of 2012**.

d) That the Defendants did not offer any testimony to support their pleadings and they remain mere allegation without evidence to support them. The Ag. Director housing, PW2, was very categorical that there was no documentary evidence with the Municipal Council to confirm any transaction, allotment or recommendation for allotment for the suit land in favour of the Defendant. The Defendant had alleged in the letter dated 29<sup>th</sup> September 2004, and produced as exhibit P8 that after buying the plot from the elder son of the deceased on the 9<sup>th</sup> July 2002, that **"subsequently the deceased's name at the Municipal Council of Kisumu Offices was replaced with our client's and a letter of allotment issued to him by the Commissioner of Lands."** That position has already been disputed by PW2 and as no documentary evidence was availed in support thereof, the court holds and finds that to have been a mere allegation.

e) That what the Plaintiffs have availed documentary evidence as belonging to their late mother is the plot described as No. 2-61 Migosi Site and Service Scheme. That though the plot is also described as un-surveyed plot No. 63 Kisumu municipality and L. R.

26583, no documentary evidence was produced to confirm who was indeed registered as its proprietor. That however, there is no doubt that the Defendants got registered with the plot described as L. R. 26583 that was formerly Un-surveyed Plot No. 63 Kisumu Municipality after allegedly buying it from Duncan Onyango, then described as Plot No. 2-61 Migosi Site and Service. That as the said Duncan Onyango Olak, the vendor, had not obtained a grant to administer his late mother's estate, then the sale transaction between him and the Defendants was fraudulent. That the title obtained by the Defendants if any is not protected under **Section 26 (1) of the Land Registration Act No. 3 of 2012 and Article 40 of the Constitution 2010**. That in the case of **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR** Munyao J cited the case of **Elijah Makori Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609B of 2012** with approval which this court agrees where it stated as follows;

*“It needs to be appreciated that **Section 26 (1)** to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, un-procedurally or through corrupt scheme. The heavy import of **Section 26 (1) (b)** is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder needs not to have contributed to these vitiating factors. The purpose of **Section 26 (1) (b)** in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”* That indeed in this case the Plaintiffs have shown to the standard required that the title to the suit land should be restored to the name of the deceased. That thereafter, the Plaintiffs as administrators of the estate will move the Succession Court for its administration and distribution in accordance with the **Law of Succession Act**.

f) That the Plaintiffs had sought for mesne profits assessed at Sh. 12,000/= per month from August 2004. There was no proof tendered to confirm that there was a development that was giving rise to Kshs. 12,000/= per month. That in the case of **Chief Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR**, the Court of Appeal at **paragraph 127** held as follows;

*“127. A claim for mesne profits is a claim akin to special damages . It must be pleaded and proved. (See **Mohammed Anun and Ors vs Vakil Ahmed and Ors 1952 (1) SCR 1133**). The 1<sup>st</sup> to 4<sup>th</sup> Respondents did not plead the sum of Kshs. 500,000/= awarded by the trial Judge as mesne profits. They also did not satisfy the trial court that they ought to be awarded the sum of Kshs. 2,690, 603,339/= pleaded in the amended petition as mesne profits.”*

That accordingly, even if the Plaintiffs had pleaded the mesne profits of Shs. 12,000/= per month from August 2004, to the date of the Judgment and interests, they have failed to offer proof in support and none will be awarded.

g) That the Plaintiffs having substantially succeeded in their claim are entitled to costs of the suit in accordance with **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

7. That flowing from the foregoing, the court enters Judgment for the Plaintiffs against the Defendants in terms of prayers (a) and (bi) of the Amended plaint dated 30<sup>th</sup> November 2006 with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JULY 2019

**In the presence of:**

Plaintiffs                      1<sup>st</sup> & 3<sup>rd</sup> present

Defendant                      Absent

Counsel                        Mr. Anyul for Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE