



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**

**ELC. NO. 1517 OF 1998**

**JOB OKUNA OYUGI**

**DOUGLAS ODHIAMBO OYUGI**

**JOSHUA ONYANGO..... APPLICANTS**

(SUING AS THE ADMINISTRATORS OF THE ESTATE OF HEZEKIAH NELSON OYUGI –  
DECEASED)

**VERSUS**

**TIMDHAR SAID SHERMAN.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This suit was commenced by way of a Plaint dated 9<sup>th</sup> July 1998 and filed on the same date whereby the Plaintiffs as the administrators of the estate of the late Hezekiah Nelson Oyugi sued the Defendants seeking the following orders:

- a. That the transfer of the parcel of land known as Land Reference Number 209/4491 located in Lavington, Nairobi (hereinafter referred to as the “suit property”) in favour of the 1<sup>ST</sup> Defendant be declared null and void.
- b. That the 1<sup>ST</sup> Defendant be ordered to perform her part of the contract specifically.
- c. That a permanent injunction do issue restraining the 1<sup>ST</sup> Defendant by herself, her agents/servants and/or any of them whatsoever from selling, disposing or dealing with the suit property and/or receiving rent from the suit property.
- d. Costs of this suit.
- e. Interest on (b) above.
- f. The court to grant any other relief that it may deem fit and just to grant.

The Plaintiffs filed their Amended Plaint dated 23<sup>rd</sup> September 2014 and filed on 24<sup>th</sup> September 2014 in which they sought the following further prayers:

- aa) The Registrar of Lands or Lands Registrar be and is hereby ordered to amend the land register

and reverse entries numbers 15 and 16 on Grant Number I.R. 11591.

aaa) The Defendants be and are hereby ordered to provide accounts for the rent collected from the suit property and to pay such rent to the Plaintiffs.

The Plaintiffs further deleted the prayer that the 1<sup>st</sup> Defendant be ordered to perform her part of the contract specifically. They sought interest on (aaa) instead of (b).

### **The Pleadings**

In the Complaint, the Plaintiffs stated that by a contract in writing dated 13<sup>th</sup> January 1998 (herein the "Sale Agreement") they agreed to sell the suit property to the 1<sup>st</sup> Defendant for a price of Kshs. 10,000,000/- and that the sale was to be completed on 8<sup>th</sup> April 1998. They further stated that it was an express term of the Sale Agreement that the sum of Kshs. 4,800,000/- be paid to the Plaintiffs on signing the Sale Agreement while the balance of Kshs. 5,200,000/- be deposited by the 1<sup>st</sup> Defendant with Guilders Bank Limited with instructions that it be released to the Plaintiffs on or before the completion date. The Plaintiffs stated that the 1<sup>st</sup> Defendant failed to deposit the balance of Kshs. 5,200,000/- with Guilders Bank Limited but instead proceeded to fraudulently transfer the suit property to herself. The Plaintiffs listed the following particulars of fraud:

- a. The 1<sup>st</sup> Defendant and/or her agents/servants willfully and fraudulently forged the Plaintiffs' signatures and appended them on the transfer document.
- b. The 1<sup>st</sup> Defendant transferred the title to the suit property to herself without paying the balance of the purchase price.
- c. The aforesaid transfer was null and void and of no consequence as the sanction of the Honorable Court was not sought and granted.
- d. The agents/servants of the 2<sup>nd</sup> Defendant in collusion with the 1<sup>st</sup> Defendant willfully and fraudulently conspired to transfer the title to the suit property to the 1<sup>st</sup> Defendant.

The Plaintiffs stated that because the court's approval for the transfer was not obtained, the Plaintiffs did not execute the transfer documents and the balance of the purchase price was not paid, the transfer of the suit property to the 1<sup>st</sup> Defendant is null and void *ab initio*. They further stated that despite notice of intention to sue having been served upon the 1<sup>st</sup> Defendant, she has refused, failed or neglected to remedy the defects herein.

In their Amended Complaint dated 23<sup>rd</sup> September 2014 and filed on 24<sup>th</sup> September 2014, the Plaintiffs stated that the court order that was used by the 1<sup>st</sup> Defendant to transfer the suit property to herself was forged and was of no legal effect.

The 1<sup>st</sup> Defendant filed her Defence dated 27<sup>th</sup> October 2000 and filed on 3<sup>rd</sup> November 2000 in which she stated that she deposited the balance of the purchase price for the suit property in Guilders Bank Limited with full instructions to release the same to the Plaintiffs. She denied the particulars of fraud enumerated in the Complaint stating that the transfer document used by her to transfer the suit property to herself was duly signed by the Plaintiffs and their signatures were witnessed by their lawyer, Mr. Steve Owino. She further stated that after she paid to the Plaintiffs the deposit of Kshs. 4,800,000/-, the balance of Kshs. 5,200,000/- was payable after the registration of the title in her favour and not vice versa. She further stated that the sale was not conditional to obtaining court's approval. She further denied having colluded with the 2<sup>nd</sup> Defendant to effect the transfer of the suit property to herself. She further stated that she duly fulfilled her obligations under the Sale Agreement and the Plaintiffs have no cause of action against the Defendants. She called for the entire suit to be struck out with costs.

### **The Evidence**

The Plaintiffs had two witnesses testify. The first was Douglas Odhiambo Oyugi, the 2<sup>nd</sup> Plaintiff (PW1). He explained that the 1<sup>st</sup> Plaintiff, Job Okuna Oyugi, is his brother and they are both the sons of the late Hezekiah Oyugi. He stated that the 3<sup>rd</sup> Plaintiff, Joshua Ogango, is their Uncle and the brother of the late Hezekiah Oyugi. He confirmed that the three of them were named as the administrators of the estate of the late Hezekiah Oyugi in **Probate & Administration Cause No. 1842 of 1993 at the Kisumu Law Courts**. He testified further that the late Hezekiah Oyugi died on 7<sup>th</sup> August 1992 and was survived by several beneficiaries including 4 widows and 12 children. He further testified that the late Hezekiah Oyugi left a number of properties including the suit property. He referred to a copy of the title deed to the suit property which was produced. He added that one of the late Hezekiah Oyugi's widows, Betty Oyugi, was assigned to receive the rent proceeds from the suit property for purposes of her upkeep. He stated that the suit property was leased to one Muzahim Mohamed and his wife, the 1<sup>st</sup> Defendant, Timdar Said Sherman. He stated that the said couple lived in the suit property for a number of years and the rent was paid directly to Betty Oyugi. He added that they, as the administrators, were aware of this arrangement and had no problem with it. He then stated that the said tenants stopped paying rent after some time. He said that towards the end of 1997, the administrators received information that Betty Oyugi had entered into an informal agreement to sell the suit property to the said couple and that the said couple was making payments to Betty Oyugi towards the purchase price. He stated that they as the administrators of the estate of the late Hezekiah Oyugi got in touch with Muzahim Mohamed and informed him that the sale could not continue without the approval of the court as the estate has never been distributed to the beneficiaries through a Confirmation of Grant. He stated that they came to learn that Betty Oyugi had received a deposit of Kshs. 4,800,000/- from the 1<sup>st</sup> Defendant towards the purchase of the suit property. He further stated that the tenants were threatening Betty Oyugi with criminal cases for obtaining by false pretenses. He stated further that Betty Oyugi approached them to see whether they could sanction the sale. He stated that, in the circumstances, the administrators agreed to sanction the sale subject to obtaining the approval of the court as was required by law. He stated that he informed the 1<sup>st</sup> Defendant that they would file an appropriate application in court seeking the approval to sell the suit property to her and would also seek the consent of the beneficiaries. He stated that before they could do that, the said couple told them to sign a Sale Agreement and deposit the title deed to the suit property with them to avoid them from pursuing criminal charges against Betty Oyugi. He confirmed that they proceeded to sign the Sale Agreement with the 1<sup>st</sup> Defendant on 13<sup>th</sup> January 1998 and deposited the original title deed to the suit property with her. He produced a copy of the Sale Agreement as part of his evidence. He stated that the Sale Agreement had a completion dated of 8<sup>th</sup> April 1998 to allow them sufficient time to obtain court's approval for the sale. He also stated that the agreed purchase price for the suit property in the Sale Agreement was stated as Kshs. 10 million and that the deposit of Kshs. 4.8 million already paid to Betty Oyugi was acknowledged, leaving a balance of Kshs. 5.2 million which was agreed to be deposited by the 1<sup>st</sup> Defendant in Guilders Bank Ltd with instructions to release the same to the Plaintiffs on or before the completion date. He testified that regardless of this understanding with the 1<sup>st</sup> Defendant, they came to learn that the suit property had been transferred to the 1<sup>st</sup> Defendant on 20<sup>th</sup> February 1998 without their obtaining court approval or signing the transfer forms or receiving the balance of the purchase price of Kshs. 5.2 million. He stated that this was not expected as they thought that the original title deed would be held by the 1<sup>st</sup> Defendant as security pending the confirmation of the grant. He further stated that after conducting a search at the Ministry of Lands, they managed to obtain a copy of the transfer dated 20<sup>th</sup> January 1998 (hereinafter referred to as the "disputed transfer form") which was used to effect the transfer of the suit property to the 1<sup>st</sup> Defendant. He produced a copy of the same as part of his evidence and stated that the administrators did not sign it. He added that their lawyer, Mr. Stephen Owino, did not witness their signatures on the disputed transfer form. He produced an affidavit sworn and filed on 7<sup>th</sup> March 2001 by their lawyer Mr. Stephen Owino in which he denied having signed the disputed transfer form. In that affidavit, Mr. Owino stated that the signatures on the disputed transfer form were therefore forgeries. He testified further that through their said lawyer, they had lodged a chamber summons application dated 21<sup>st</sup> December 1993 in **High Court Miscellaneous Application No. 119 of 1993** seeking approval to dispose some properties belonging to the estate of the late Hezekiah Oyugi in order to raise finances for the upkeep of the some of the beneficiaries of the said estate. He added that the properties affected in that application were listed but the suit property was not included. He produced a copy of this application as part of his evidence. He testified that the court allowed that application and a

court order to that effect was issued on 21<sup>st</sup> December 1993, a copy of which he produced. He stated further that they obtained from the Ministry of Lands a copy of the court order purportedly also issued on 21<sup>st</sup> December 1993 used by the 1<sup>st</sup> Defendant to effect the transfer of the suit property to herself (hereinafter referred to as the “disputed court order”), a copy of which he produced. He stated that the disputed court order allowed the disposal of various properties belonging to the estate including the suit property. He stated that this could not be correct as the suit property was not included in the application. He concluded that the disputed court order was not a genuine court order but a mere forgery. He produced a copy of their lawyers letter dated 14<sup>th</sup> February 2001 addressed to the Deputy Registrar, Kisumu High Court forwarding the two court orders for verification as to their genuineness and further produced a letter dated 15<sup>th</sup> February 2001 from the Deputy Registrar of the High Court in Kisumu confirming that the court did not order the sale of the suit property. He added that the Deputy Registrar stated that the disputed court order was not a legal order of that court. He stated further that the suit property is a leasehold for 99 years from the government. He confirmed that they did not apply for or obtain consent to sell the same to the 1<sup>st</sup> Defendant from the Commissioner of Lands as would be the usual procedure. He added further that they also did not apply for or obtain the Rent Clearance Certificate and the Rates Clearance Certificate from the Nairobi City Council (as it then was). He stated that these documents are required before a transfer can be effected and noted that to date, the 1<sup>st</sup> Defendant has not shown them any of these documents used to transfer the suit property to herself. He stated that it was their responsibility to obtain all the necessary documents and approvals for the transfer not the 1<sup>st</sup> Defendant. He added that there was no letter from their lawyer forwarding the completion documents to the 1<sup>st</sup> Defendant’s lawyer. He also added that there was no letter from the 1<sup>st</sup> Defendant’s lawyer forwarding the transfer document to their lawyers for approval. He concluded that the 1<sup>st</sup> Defendant forged the disputed transfer form, the disputed court order, the rates clearance certificate and the rent clearance certificate and presented them to the Ministry of Lands together with the original title to transfer the suit property to herself. He highlighted entry no. 15 on the title deed for the suit property as being the disputed court order and entry no. 16 being the disputed transfer to the 1<sup>st</sup> Defendant for Kshs. 11 million. He confirmed that to date, the administrators have not received the balance of Kshs 5.2 million from the 1<sup>st</sup> Defendant. He further stated that the 1<sup>st</sup> Defendant has been in possession of the suit property since 1998 to date and has rented it out. He estimated that the rent accruing therefrom has gradually moved from Kshs. 100,000/- in 1998 to approximately Kshs. 250,000/- in 2015. He confirmed that the estate of his late father has not been distributed by way of confirmation of grant to date and the beneficiaries continue to suffer as a result of this long outstanding case.

PW2, the 1<sup>st</sup> Plaintiff, confirmed the position taken by PW1.

Despite being duly served, the Defendants did not attend court during the hearing of this suit on 21<sup>st</sup> July 2015.

### **Issues for Determination**

1. Whether or not the transfer of the suit property to the 1<sup>st</sup> Defendant was effected using a forged transfer, court order, rates and rent clearance certificates;
2. If so, whether or not to nullify the transfer of the suit property to the 1<sup>st</sup> Defendant and order the Registrar of Lands to reverse entry no. 15 and 16 on Grant No. IR 11591;
3. Whether or not the 1<sup>st</sup> Defendant paid the balance of Kshs. 5.2 million to the Plaintiffs for the suit property;
4. Whether or not the 1<sup>st</sup> Defendant should be ordered to account to the Plaintiffs for the rental proceeds received from the suit property from 1998 to date and if so, how much;
5. Whether to issue a permanent injunction restraining the 1<sup>st</sup> Defendant by herself, her agents/servants and/or any of them whatsoever from selling, disposing or dealing with the suit property and/or receiving rent from the suit property;
6. Who is to pay the costs of this suit.

## **Determination**

1. Whether or not the transfer of the suit property to the 1<sup>st</sup> Defendant was effected using a forged transfer, court order, rates and rent clearance certificates;

The Plaintiffs have established that they are the duly appointed administrators of the estate of the late Hezekiah Oyugi. They also demonstrated that the suit property is one of the properties forming part of the estate of the late Hezekiah Oyugi. They stated that to date, the estate of the late Hezekiah Oyugi has never been distributed through a Confirmation of Grant to the beneficiaries thereof and therefore the sale of any of the properties forming part of that estate could only be done with a court order authorizing the same. The Plaintiffs admitted that they entered into the Sale Agreement with the 1<sup>st</sup> Defendant to sell the suit property to her for a consideration of Kshs. 10 million. They admitted having received a deposit of Kshs. 4.8 million and having released the original title deed to the suit property to the 1<sup>st</sup> Defendant to hold as security awaiting the procurement of a court order authorizing the sale. It is the Plaintiff's case that the 1<sup>st</sup> Defendant did not wait for the Plaintiffs to obtain the court order to authorize the sale as per the Sale Agreement but instead proceeded to transfer of the suit property to herself using the disputed transfer form and the disputed court order, all of which they term to be forgeries. The Plaintiffs produced copies of the disputed transfer form as well as a copy of the disputed court order. The Plaintiffs also stated that they have to date not seen copies of the rent clearance certificate, the rates clearance certificate and the consent to transfer from the Commissioner of Lands used by the 1<sup>st</sup> Defendant to effect the transfer. The Plaintiffs said that there was no letter from their lawyer forwarding the completion documents to the 1<sup>st</sup> Defendant's lawyer and there was no letter from the 1<sup>st</sup> Defendant's lawyer forwarding the transfer document to their lawyers for approval. The Plaintiffs stated that it was their responsibility to obtain all the necessary documents and approvals for the transfer not the 1<sup>st</sup> Defendant. Despite filing a Defence which was a mere denial, the 1<sup>st</sup> Defendant did not counter this position taken by the Plaintiffs. My finding is that the Plaintiffs have convinced this court that the disputed transfer form and the disputed court order were both forgeries. The Defendants have not been able to rebut the overwhelming evidence to this effect produced by the Plaintiffs.

2. If so, whether or not to nullify the transfer of the suit property to the 1<sup>st</sup> Defendant and order the Registrar of Lands to reverse entry no. 15 and 16 on Grant No. IR 11591;

In line with my finding above that the Plaintiffs have been able to convince the court that the transfer of the suit property to the 1<sup>st</sup> Defendant was done on the basis of the disputed transfer form and disputed court order both of which were forgeries, I hereby nullify that transfer of the suit property to the 1<sup>st</sup> Defendant and direct the Registrar of Lands to reverse entry no. 15 and 16 on Grant No. I.R.11591. The 1<sup>st</sup> Defendant is ordered to release the original title deed to the suit property to the Plaintiffs forthwith.

3. Whether or not the 1<sup>st</sup> Defendant paid the balance of Kshs. 5.2 million to the Plaintiffs for the suit property;

The Plaintiffs have conceded to having received the sum of Kshs. 4.8 million from the 1<sup>st</sup> Defendant towards the purchase of the suit property. The allegation by the 1<sup>st</sup> Defendant of having paid to the Plaintiffs the balance of Kshs 5.2 million has not been proved to this court. The 1<sup>st</sup> Defendant did not produce any evidence of having remitted this balance to the Plaintiffs. I therefore find that the 1<sup>st</sup> Defendant did not pay the Plaintiffs the sum of Kshs. 5.2 million as balance of the purchase price for the suit property.

4. Whether or not the 1<sup>st</sup> Defendant should be ordered to account to the Plaintiffs for the rental proceeds received from the suit property from 1998 to date and if so, how much;

Having found that the suit property still belongs to the estate of the late Hezekiah Oyugi, I further find that the occupation and use of the suit property by the 1<sup>st</sup> Defendant from the year 1998 to date has been

unlawful possession and improper. The 1<sup>st</sup> Defendant unlawfully had the ownership of the suit property transferred into her name. She is hereby ordered to account to the Plaintiffs for the rental income received from the suit property from 1998 to the date of this judgment at the rate of Kshs. 100,000/- per month for the entire period together with interest thereon at court rates. The total rental proceeds payable by the 1<sup>st</sup> Defendant to the Plaintiffs shall be reduced by Kshs. 4.8 million which is conceded to have been paid by the 1<sup>st</sup> Defendant to the Plaintiffs.

5. Whether to issue a permanent injunction restraining the 1<sup>st</sup> Defendant by herself, her agents/servants and/or any of them whatsoever from selling, disposing or dealing with the suit property and/or receiving rent from the suit property;

The court hereby issues a permanent injunction restraining the 1<sup>st</sup> Defendant by herself, her agents/servants and/or any of them whatsoever from selling, disposing or dealing with the suit property and/or receiving rent from the suit property;

6. Who is to pay the costs of this suit.

The 1<sup>st</sup> Defendant shall bear the costs of this suit

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup>**

**DAY OF MAY 2016.**

**MARY M. GITUMBI**

**JUDGE**