

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
SUCCESSION CAUSE NO. 32 OF 2016

IN THE MATTER OF THE ESTATE OF JECONIA OPAR ALIAS OPAR ODIEMA
(DECEASED)

PENINA **AKINYI**
OPAR.....PETITIONER/RESPONDENT

-VERSUS-

HEZRON **OKECH**
OPAR.....OBJECTOR/APPLICANT

DENIS ARINGO ODEK.....INTERESTED
PARTY

JUDGMENT

This cause relates to the estate of **Jeconia Opara alias Opar Odiema (Deceased)** who died intestate on 12/12/2003. The estate is comprised of L.R. Suna East/Kakrao/13 measuring 4.4 Hectares (suit land). Hezron Okech Opar (the objector) commenced these objection proceedings vide an application dated 1/7/2020 seeking the following orders: -

- i. That the court do confirm letters of grant herein with a rider that the irregularly subdivided parcels by Penina Akinyi Opar to wit: - L.R. SUNA EAST/KAKRAO/5361, 5362 & 5363 be revoked and that same to revert to the original parcel L.R. SUNA EAST KAKRAO/13 measuring 4.4 Hectares.**
- ii. That the court upon granting prayer (a) above do order that Parcel L.R. SUNA EAST/KAKRAO/13 be divided as follows: -**
 - a) Penina Akinyi Opar - 0.908Ha**
 - b) Robert Otieno Opar**
 - c) Hezron Okech Opar - 1.773 Ha**
 - d) Hezron Okech Opar - 0.908 Ha**
 - a. Evalyne Akech Opar**
 - e) Julius Otieno Adiema - 0.908 Ha**

iii. Costs be in the cause.

The application is based on grounds found on its face and the supporting affidavit of the objector. The objector deponed that the petitioner is his step mother who subdivided the suit parcel into several parcels being Suna East/Kakrao/5361, 5362 & 5363 without their consent provoking the court's direction and order for fresh confirmation; that this court subsequently ordered that they become co-administrators precipitating in this application for confirmation; that the court should take judicial notice of the error apparent in regard to the irregular subdivision herein; that the irregular subdivision be revoked and the parcel revert to its original number L.R. SUNA EAST/KAKRAO/133 measuring 4.4 Ha; that this court distributes this parcel as per the mutation and sketch dated 2/6/2020 prepared by the surveyor. The objector further proposed the apportionment to be done on the parcel of land for the beneficiaries.

The application was opposed. The petitioner swore a replying affidavit dated 15/6/2021. The petitioner deposed that the proposed distribution fails to take into account the clear provisions of the law enshrined in Sections 38 and 40 of the Law of Succession Act which prescribe the principle of equality; that Section 40 of the Law of Succession Act enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous intestate; that the applicant seeks to have a lion share allocated to himself and has proposed a meagre 0.908Ha to the petitioner's household together with her son; that applying the above principle, the proposed mode of distribution does not accord equal distribution to all families; that the interested party is the lawful registered proprietor of all that parcel of land referred to as East Kakrao/5362 measuring approximately 0.10 Ha and he was issued with a title deed dated

17/2/2016; that it was during the subsistence of the confirmation of grant that the property was sold before its revocation on 3/7/2018.

The petitioner further supported her position by invoking the provisions of Section 93 (1) of the Law of Succession Act and Article 40 of the Constitution and deposed that it is in the best interest of justice that in confirming the grant, the court should leave out the property, East Kakrao/5362 for reason that it was sold to a bona fide purchaser for value without notice of the defect of the grant.

The interested party filed a replying affidavit dated 16/12/2020. He deposed that he is the lawful owner of East/Kakrao/5362 and he was issued with a title to the property on 17/2/2016; that he purchased the property from Jeanne Juliet Achieng' Origa, a second third party purchaser from the Estate of Jeconia Opar Adiemma; that due process was followed in the transfer of the suit property from the estate of the deceased, the certificate of confirmation of grant having been issued on 6/5/2014; that the grant was revoked more than 2 years after he acquired the property. The interested party deposed and relied on the provisions of Section 93 (1) of the Law of Succession Act and Article 40 of the Constitution and asked this court to leave out the property, East/Kakrao/5362 when confirming the grant.

By consent of both parties dated 25/9/2021, the application was canvassed by way of written submissions. The petitioner and interested party filed their submissions dated 17/11/2021. **On whether the interested party acquired an indefeasible title to the suit property**, it was reiterated that the interested party followed the due process in purchasing the suit property. The interested party and the petitioner relied on the findings of the Court of the Appeal Ugandan Case **Katende v Haridar & Company**

Limited (2008) EA 173 where the court outlined the principles for a purchaser to successfully rely on the bona fide doctrine. It was further submitted that the rights of such a person were prescribed by the Court of Appeal case in **Elizabeth Githinji & 20 Others vs Kenya Urban Roads Authority (2019) eKLR** and that the interested party falls within the definition of a bona fide purchaser.

The petitioner and the interested party further submitted that as per the provisions of Section 26 (1) of the Land Registration Act, 2012 the interested party has an indefeasible title and this position was upheld by the Court of Appeal in **Mellen Mbera vs James Theuri Wambugu (2020) eKLR**. It was further submitted that the Grant issued on 6/5/2014 was revoked on 2/7/2018; that this revocation was done more than 2 years after the interested party had acquired the property and his rights are protected under Section 93 of the Law of Succession Act and this position was upheld in the case of **Stephen Mwangi vs Joyce Wanjiru Wamthua & Another (2007) eKLR**.

On whether the grant should be confirmed as prayed by the objector, it was submitted that the mode would effectively remove the interested party from his portion and leave out the daughters effectively; that the proposed mode of distribution failed to take into account the principles enshrined in Section 40 of the Law of Succession Act as the deceased had two wives; that the objector seeks a lion share allocated to himself and has proposed a meagre 0.98 Ha to the petitioner's household and therefore the proposed mode of distribution is discriminatory. The petitioner and the interested party invited this court to be guided by the decision in **Re: Estate of Ndongu Kabugua (Deceased) (2019) eKLR**. It was also submitted that the mode of distribution seeks to exclude the deceased's daughters, which is also discriminatory.

It was further submitted that the interested party's portion should not be included in the proposed distribution scheme and the court should decline the proposed mode of distribution and distribute the estate equally.

On whether the objector/applicant should bear the costs of the suit, it was submitted that it is trite law that costs follow the event. Reliance was placed on the Supreme Court case of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (2014) eKLR**.

The objector filed his submissions dated 6/6/2022 on 7/6/2022. **On whether the title of the interested party or any other purchaser is valid**, it was submitted that when illegalities, fraud, irregularities and injustice informed the process of obtaining such Grant, then such transfer must be revoked and the interests restored back the Estate to be administered according to the law. On the reference and interpretation of Section 93 of the Law of Succession Act, the objector relied on the cases of **Jane Gachola Gathetha vs Priscilla Nyamira Githugu & Another (2006) eKLR**, **Christopher Aide Adela (Deceased) (2009) eKLR** and **Teresia Auma (Deceased) (2016) eKLR**.

Further, it was submitted that the interested party's title remains shrouded in a lot of suspicion when he failed to exhibit any consent of Land Board to himself or that of the other third-party purchaser whose agreement has also not been exhibited.

On whether the estate land should be distributed as proposed, it was submitted that the proposed mode of distribution is pursuant to how the deceased distributed the estate in his lifetime; that if the court is inclined to decline that proposed mode of distribution, then it should distribute the Estate Title Number Suna

East/Kakrao/13 measuring 4.4. hectares in accordance with the provisions of Sections 40 and 41 of the Law of Succession Act; that the total number of units is 7 against the 4.4 hectares thereby making each unit to be entitled to approximately 3 acres each. The objector urged this court to consider that the question as to the shares of each lawful beneficiary may require disposal by way of viva voce evidence.

Further, the petitioner through the firm of Ezra Odondi Awino & Co. Advocates filed submissions dated 29/6/2022 and is in agreement with the submissions of the objector and the interested party save for the following: -

- i. That the petitioner will provide for the interested party from her share.**
- ii. That the petitioner has the number of units as 3.**
- iii. That from the total measurement of 4.4. Ha, and reducing the same by 0.2 Ha to cater for the road and access, the remainder would be 4.2. Ha each unit would be entitled to 0.6 Ha $\times 7 = 4.2$ Ha.**
- iv. That the petitioner would hold 3 units of 0.6 $\times 3 = 1.8$ Ha on behalf of her daughters.**

I have carefully considered the objector's application dated 1/7/2020, the responses thereto by the petitioner and the interested party and the rival submissions. The main issues for determination are: -

- a) Whether the transfer of the parcel of land Suna East/Kakrao/5362 to the interested party was valid under Section 93 of the Law of Succession Act.**
- b) Whether the subdivisions being land parcels number Suna East/Kakrao/5361, 5362 and 5363 should revert back to the original parcel L.R. Suna East /Kakrao/13.**
- c) Whether the estate of the deceased should be divided as proposed by the Objector.**

From the pleadings and the affidavits of the parties; the deceased had two wives namely Wilkister Atieno Opar (deceased) and Peninah Akinyi Opar the petitioner herein. The Estate of the deceased comprised Suna East/Kakrao/13 measuring 4.4 Hectares. The initial Grant of confirmation of the Estate was issued to the petitioner on 6/7/2014 but was revoked on 3/7/2018 and another Grant issued jointly in the names of the petitioner and the objector.

Before revocation of grant on 6/7/2014, the suit land had been subdivided into three parcels and parcel 5362 had been sold to the interested party by one Jeanne Juliet Achieng.....a second third party purchaser from the deceased's estate. The interested party contends that he is a bona fide purchaser for value and he is protected under Section 93 of the Law of Succession Act which provides: -

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

Section 93 of the Law of Succession Act applies where the transfer of immovable property is done from a personal representative to a purchaser. In this case, the sale agreement dated 8/2/2016 for **Suna East/Kakrao/5362 (suit property)** was between one Jeanne Julliet Achieng Origa (Vendor) and the objector. The said vendor was neither a beneficiary, administrator nor a

personal representative in the estate of the deceased. The documents on record do not show whether the vendor had obtained a title to the suit property prior to the making and signing of the sale agreement with the vendor or the means which she acquired ownership of the suit property.

A further perusal of the court documents shows that the suit property's first title was in the name of one Catherine Wangari Wangui, another third party before it was sold by the vendor and finally to the interested party herein. The interested party has not explained nor demonstrated to this court whether he was required to obtain consents from the Land Control Board, whether he was required to pay the applicable land rates, whether he obtained the signed transfer forms from the vendor and the receipts used to pay for the transfer of the suit land in the land registry. The whole transfer process of the suit land raises some questionable actions marred with illegal and underhand dealings.

The application dated 9/6/2017 for the summons of the revocation of the grant issued to the petitioner, was premised on the fact that the petitioner failed to disclose material facts that there were other beneficiaries entitled to the deceased's estate and failure by the petitioner to distribute the estate to the rightful beneficiaries. The mere fact that the Grant issued on 6/5/2015 was revoked on the aforementioned grounds, it then follows that any action taken in respect to the estate of the deceased was null and void and the estate ought to revert to its original state.

As I have mentioned hereinabove, the sale of the suit land was not transacted between the objector and a personal representative of the estate of the deceased. Assuming that the interested party purchased the suit land from a personal representative of the estate

of the deceased, what then is the position in law, on sale which takes place in circumstances as the one before this court. The Court of Appeal in **Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and another (2008) eKLR** had this to say on parties seeking protection under Section 93 (1) of the Law of Succession Act:-

“We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immoveable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable. The Respondent was not the sole beneficiary of the property and therefore had no property to transfer to the Interested Party. It is evident to me that the Interested Party purchased the property with his eyes open. He was not a bona fide purchaser for value without notice as he would want this Court to believe. He was fully aware of the circumstances surrounding the property. The sale and transfer of Lamu/Block I/582 by the Respondent to the Interested Party is therefore void ab initio and the property is traceable.”

In Re Estate of Christopher Jude Adela (Deceased) (2009) eKLR, K.H. Rawal, J (as she then was) had this to say in reference to Section 93 of the Law of Succession Act;

“The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system

of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal action prejudicing the interests and rights or right beneficiaries of the estate. In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”

In **HCCC No. 13 of 2004 Nyamira - In the Matter of the Estate of Teresiah Auma (Deceased)** the court stated: -

“.....the fact that the petitioners title over the original suit land was revoked will automatically affect the interested party’s ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the Law of Succession Act. The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property.”

On appeal, the Court of Appeal agreed with the findings of the superior court **In The Matter of the Estate of Teresiah Auma (supra)** and it held: -

“Those decisions support the position taken by the learned judge of the High Court in this matter when he stated that while under Section 93 of the Law of Succession Act a revocation or variation of the grant does not invalidate a transfer by the

personal representative, other considerations, such as the disposal of the property in contravention of the confirmed grant may invalidate the transfer. Having found as he did that the transfer of the property by the personal representative to himself, the 2nd respondent and one Margaret Kerubo Orina was contrary to the provisions of the grant and having found evidence of fraud with regard to the representation in the application for grant and subsequent confirmation as to the persons beneficially entitled to the deceased's estate, the learned Judge was correct to take the view that section 93 of the Law of Succession Act did not afford the 3rd appellant protection. There is therefore no merit in the complaint that the learned Judge erred in revoking, nullifying and cancelling the transfer and registration of the suit property in favour of the 3rd appellant in contravention of section 93 of the Law of Succession Act."

I am inclined to take the same position. In my view, failure by the petitioner to include all the entitled persons in the estate of the deceased, whether the discovery is made a week, a month or many years later, automatically invalidates any transaction which followed thereafter in the dealings of the estate. There is no legal transaction which can crystallize from a Grant obtained from fraud, misrepresentation or concealment of material facts. The person who purports to have acquired any interest illegally does not in fact have any interest; and therefore their actions cannot be sanitized in any way.

Once the door challenging such transactions opens, Section 93 of the Law of Succession Act becomes inapplicable and unavailable to the purchaser because it cannot be said there was a legally accepted transaction which took place. Hence, the transfer of the parcel of land Suna East/Kakrao/5362 to the interested party was invalid and Section 93 of the Law of Succession Act cannot protect him.

The second issue for determination rests with the first issue. The subdivided titles to wit; Suna East/ Kakrao/5361, 5362 and 5363 be and are hereby cancelled and/or revoked and the same revert to the original parcel L.R. Suna East/Kakrao/13.

As regards the distribution of the estate, although the objector and the petitioners seem to agree that the court can distribute the estate in accordance with Section 35 and 40 of the Law of Succession Act, the deceased having been polygamous, yet it is not clear how many people survived the deceased. The objector listed the following survivors in his submissions: -

1st House

Hezron Okech Opar (Objector).

Survivors of Cleopas Opar.

Survivors of Samwel Opar.

Survivors of Timon Opar.

2nd House

Penina Akinyi Opar (Petitioner).

Hellen Awino.

Seline Adhiambo.

On the contrary, the petitioner listed the following survivors.

1st House

Wilkister Atieno Opar (deceased).

Hezron Oketch Opar (Son).

Cleophas Opar (son) (deceased).

Samwel Opar (son) (deceased).

Timon Akech Opar (son) (deceased).

2nd House

Penina Akinyi Opar - 2nd wife.

Robert Otieno Opar (son).

Hellen Auma Opar (daughter).

Seline Adhiambo Opar (daughter).

It was therefore the petitioner's submission that the objector gets one unit being the only surviving heir of the first house and the rest of the estate devolve to her and her daughters. It is clear that the parties have not agreed on who survived the deceased and this court cannot distribute the estate at this stage. The administrators should agree and file a consent on who the beneficiaries are within 45 days failing which the parties should file further affidavits on who the beneficiaries are and the court will take **viva voce** evidence to determine who the beneficiaries are.

In the meantime, the court finds that the objector's application has merit and grant the following orders: -

- a. The registration and subdivision of Suna East/Kakrao/5361, 5362 and 5363 are hereby cancelled;**
- b. The Estate shall revert to its original land parcel number being L.R. No. Suna East/Kakrao/13;**
- c. The administrators to file a schedule of distribution jointly or separately if need be;**
- d. The administrators to also file a Surveyor's report showing the current position of the suit parcel of land and if there are other demarcations;**
- e. Parties to share the costs of the surveyor's report;**
- f. Status quo be maintained;**
- g. Mention on 24/04/2023 to confirm compliance.**
- h. Notice to issue.**

**Dated, Signed and Delivered at MIGORI this 23rd day of
January, 2023**

**R. WENDOH
JUDGE**

Judgment delivered in the presence of;

Mr. Awino for the Petitioner.

No appearance the Objector.

Mr. Obuya for the Interested Party.

Nyauke Court Assistant.