



REPUBLIC OF KENYA



In re Estate of Geoffrey Robin Mkimbo (Deceased) (Succession Cause 242 of 2009) [2023] KEHC 1236 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 242 OF 2009
JN ONYIEGO, J
FEBRUARY 17, 2023**

IN THE MATTER OF THE ESTATE OF GEOFFREY ROBIN MKIMBO (DECEASED)

BETWEEN

BRANSON MWASHIMBA 1ST APPLICANT

BEVERLY MKAMBURI 2ND APPLICANT

AND

RODAH BIBI MKIMBO RESPONDENT

AND

JOHNES MWASHUSHE MWARUMA INTERESTED PARTY

RULING

1. The late Geoffrey Robin Mkimbo(deceased) died intestate on January 2, 1994. After his demise, the late Victor J.Mkimbo and Rodah Bibi Mkimbo son and daughter of the deceased respectively petitioned this honourable court for grant of letters of administration intestate *vide* a petition filed on August 4, 2009. In their affidavit in support to the petition, they listed themselves as the persons surviving the deceased and the following as the assets comprising the estate;
 - a. Plot No 12192/2 survey plan No 107201 Wundanyi Township
 - b. Plot No 209/8134 Old Racecourse Nairobi Area
 - c. Plot No Werugha/Werugha/543
2. The estate was gazetted in the Kenya Gazette No 3172 on October 30, 2009. A grant of letters of administration was made to the late Victor Mkimbo and Rodah Bibi Mkimbo on December 4, 2009 and issued on December 7, 2009.



3. Unfortunately, Victor died on May 1, 2011 before the finalization of the administration of the estate. Upon his demise, the respondent/administrator herein petitioned this honourable court for a grant of letters of administration *de bonis non* via a petition filed on December 5, 2012. The same was gazetted in the Kenya Gazette No 4251 on August 23, 2013. A grant of letters of administration *intestate* was made on October 31, 2013 and confirmed on June 20, 2016. A certificate of confirmation of grant was issued on the same day. Subsequently, the respondent herein applied for the rectification of the certificate of confirmation. The same was rectified and a rectified certificate issued on March 3, 2020.
4. After about one year and a half, the applicants herein approached this court through a summons for revocation/annulment of grant dated October 12, 2021 seeking the following orders;
 - a. Spent
 - b. That pending the inter parties hearing and determination of this application, this court be pleased to issue an order of injunction restraining Rhoda Bibi Mkimbo and/or any of her agents and assigns or person claiming any interest arising from any transaction executed by her from selling, transferring, charging, assigning and/or disposing any interest in land reference number plot No 209/8134 Old Racecourse Nairobi, plot No LR/1292/2 Wundanyi Township and plot No Werugha/Werugha/543.
 - c. That pending the inter parties hearing and determination of this application this court be pleased to issue an order of injunction restraining Rhoda Bibi Mkimbo and/or any transaction executed by her from evicting, dispossessing and/or otherwise interfering with the applicants / objector's quiet possession in land reference number plot No 209/8134 Old Racecourse Nairobi, plot No LR /1292/2 Wundanyi Township and plot No Werugha/Werugha/543.
 - d. That this honourable court be pleased to grant an order revoking or annulling grant of letters of administration *intestate* issued on October 31, 2013 confirmed to Rodah Bibi Mkimbo on June 20, 2016 and rectified on March 3, 2020.
 - e. That the honourable court be pleased to make any further or other orders it may deem necessary in the circumstances of this matter.
 - f. That costs be provided for.
5. The application is premised on the grounds therein and the supporting affidavit of the 1st applicant sworn on October 12, 2021.
6. The applicant in his affidavit stated that he is the son of Nicholas Mwashimba Mkimbo (deceased) who was a son of the deceased herein while the 2nd applicant is his sister. He stated that his father died on February 2, 2000 when he was barely 2 years old and his sister 8 years old. That prior to his father's death, they were living in Maringo Block B1-2264 together with their father and mother Lily Khayo. That after their father's demise, they moved to plot No 209/8134 Old Racecourse where they have been living to date. That they have been paying all the rent rates besides undertaking renovations and tremendous improvements on the property.
7. He stated that the grant herein was obtained without their knowledge or involvement as beneficiaries of the estate. That the respondent obtained the grant through fraud by failing to disclose that at the time of her applying for the said letters, the deceased had 2 surviving grandchildren as dependants whose father was a descendant and beneficiary of the estate of the deceased.
8. That the respondent falsely indicated to the court that she was the sole beneficiary of the estate of the deceased despite having the full knowledge that at the time of making the application, their uncle the



- late Victor Mkimbo was still live. That the respondent failed to disclose to the court the fact that the family had agreed that their father occupies plot No 209/8134 Old Racecourse Nairobi which they have known and called home throughout their lifetime.
9. He further stated that on September 15, 2021 they received a letter addressed to their mother Lily Khayo stating that the respondent had sold plot No 209/8134 old racecourse Nairobi to a third party who wanted them to move out. That he then filed a citation cause in Wudanyi law courts *vide* succession cause No 005 of 2021 on September 29, 2021. That it was after filing the citation that he learnt that the respondent had initiated the present succession cause in addition to filing High Court Mombasa succession cause No 241 of 2009 in the matter of Penina Geoffrey Mkimbo (wife to the deceased herein).
 10. He deposed that the grant herein was confirmed way after six months which is a ground for revocation. According to him, the fraudulent actions of the respondent have subjected them to untold mental anguish, pain and suffering. That unless restrained and the present grant revoked, the estate will be exposed to waste and further deny them their inheritance. He urged the court to revoke and annul the grant of letters of administration intestate.
 11. In response, the respondent filed a replying affidavit sworn on November 5, 2021 and filed on the same day. She admitted the fact that the applicants are children to her late brother whose mother Lily Khayo has remarried since the demise of her brother. That prior to the demise of her brother, her brother's family used to live in plot No LR 209/8134, Old Race Course Road, Nairobi.
 12. She stated that the survivors of the deceased as per form 5 of the petition for grant of letters administration were herself and her late brother Victor Mkimbo whom she replaced after his demise. She deposed that since the confirmation of grant, she has tried to reach out to the 2nd applicant who is now of majority age to have her and the 1st applicant furnish her with their credentials to enable her transfer to them plot No LR 12192/2 Wundanyi Township which is their share of the estate but in vain. That property LR 209/8134, Old Racecourse Road has already been transferred to a third party (the interested party herein) who is an innocent purchaser for value without notice having purchased the same based on the confirmed grant.
 13. She further stated that plot No 209/8134 was not a residential house as there was a tenant who was running a business there paying Kshs 22,000 per month to her late mother who settled in Taita following the demise of her father leaving their old home, a city council house at Maringo in possession of the applicant's mother where she resided with the applicants. That after the demise of her mother, the applicant's mother evicted the tenant and converted the premises into a residential house where she took up residence.
 14. She averred that the applicants' inheritance is plot No 12192/2 Wundanyi Township which she was willing to transfer to them after receipt of proper documents. In her view, she cannot rank *pari passu* with the applicants as their father passed away in 2000 while the late Victor Mkimbo passed away in 2011 leaving no wife or children and as the only sibling remaining she is entitled to his share.
 15. In their rejoinder, the applicants filed a further affidavit sworn by the 1st applicant on December 22, 2021. He stated that as per the respondent's admission of them being dependants under section 29 of the *Law of Succession Act*, they are entitled to inherit their father the late Nicholas Mwashimba Mkimbo's share of the estate. That their mother Lily Khayo has no interest in the estate.
 16. He further stated that he is the one in occupation of plot No 209/8134 old racecourse Nairobi. That it is the only place they have called home for the last 16 years.



17. He further stated that the facts in paragraph 8 and 9 of the respondent's affidavit were misleading and that the SMS message has no legal backing. That in the absence of a schedule of distribution having been done and a vesting assent being executed and registered, the respondent had no right to purport and assume ownership of any asset of the estate. That nothing bars the purchaser from seeking a refund from the respondent.
18. He urged the court to preserve the estate and order for redistribution of the estate to the lawful beneficiaries in a just and equitable manner taking into account the individual contribution in improving the estate.
19. The interested party also filed a replying affidavit sworn on May 16, 2022 stating that; he purchased plot No LR No 209/8134 on October 23, 2020 from the respondent which was transferred to him on March 27, 2021 after payment of the purchase price; he is a bonafide purchaser for value without notice of any defect in title or the obtaining of the grant herein; he purchased the property after confirmation of the grant which listed the respondent as the sole beneficiary of the entire estate of the deceased hence his interest in the property is protected.
20. The application was canvassed by way of written submissions.
21. The applicants through their advocate Onyari Nyameino & Company Advocates filed written submissions dated July 19, 2022. Counsel submitted on two issues namely;
 - a. Whether the applicants have met the legal threshold to sustain the revocation of grant of letters of administration issued to Rodah Bibi Mkimbo on October 31, 2013, confirmed on June 20, 2016 and rectified on 3rd March.
 - b. What is the fate of the property allegedly sold to the interested party the administrator.
22. On the rights of the applicants as beneficiaries, counsel submitted that it is uncontested that the applicants are children of Nicholas Mwashimba a son of the deceased herein and a brother to the administrator. That it is also not contested that Nicholas left behind a widow and the applicants. That the widow has since remarried and has no claim in the estate. Counsel relied on the holding in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] Eklr (not attached) thus submitting that the applicants have a right to inherit the estate to the same degree and equal to the respondent under the common law principle of representation.
23. On revocation of the grant, counsel placed reliance on the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] e KLR (not attached) and submitted that they had demonstrated the grounds for revocation in their application. That the respondent obtained the grant herein fraudulently by failing to disclose that the deceased had 2 surviving grand children who had an interest in the estate of the deceased. Counsel relied on section 51(2)(g) of the *Law of Succession Act* and the case of In *Re Estate of Seth Namiba Ashuma* (not attached) to express the position that the respondent did not meet the requirements in the said provision which provides;

Section 51

1. Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.
2. Every application shall include information as to—
 - a. the full names of the deceased;



- b. the date and place of his death;
 - c. his last known place of residence;
 - d. the relationship (if any) of the applicant to the deceased;
 - e. whether or not the deceased left a valid will;
 - f. the present addresses of any executors appointed by any such valid will;
 - g. in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
 - h. a full inventory of all the assets and liabilities of the deceased; and
 - i. such other matters as may be prescribed.
3. Where it is alleged in an application that the deceased left a valid will—
- a. if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either—
 - i. an authenticated copy thereof shall be so annexed; or
 - ii. the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;
 - a. if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.
4. No omission of any information from an application shall affect the power of the court to entertain the application.
24. On the status of the suit property, counsel submitted that the said property has at all times been in possession of the objectors for over 16 years where they have invested in payment of rent and rates and renovations. That the interested party is an innocent purchaser for value. That the interested party knew that the applicants' mother was in occupation of the suit property but went ahead to buy the same. Counsel relied on the case of *Monica Odhiambo v Maurice Odera Koko* [2016]eKLR(not attached) to express the point that the interested party does not stand to suffer any prejudice as he has a right to claim a refund of the purchase price, damages and costs from the respondent.
25. In conclusion, counsel urged the court to allow the prayer for revocation of the grant herein and invalidate the sale of plot No 209/8134 Old Racecourse Nairobi.
26. The respondent through her advocates Moses Mwakisha & Company Advocates filed her submissions dated on September 16, 2022 and filed on the same day. Learned counsel submitted that save for the omission of the applicants' names in form 5 of the original petition, no real or substantial prejudice has been visited upon them (applicants) as the respondent is willing to transfer plot No 12192/2 Wundanyi



- Township. That the interested party is an innocent purchaser for value who could not pin point any claims/dispute from the records. That the interested party is protected under section 93 of the [Law of Succession Act](#).
27. Counsel submitted that grants are to be confirmed within 6 months only where the court, in exceptional circumstances gives dispensation for such an earlier confirmation.
 28. The interested party through his advocates filed his written submissions dated August 30, 2022. Counsel submitted on two issues; the interested party as a *bonafide* purchaser and protection of purchaser's interest under section 93 of the [Law of Succession Act](#).
 29. On the issue of the interested party being a bonafide purchaser, counsel submitted that the interested party purchased plot No LR No 209/8134 on October 23, 2020 more than 4 years after the grant had been confirmed. That the same was registered in his name as the owner after full payment of the purchase price.
 30. Regarding protection of purchaser's interest under section 93 of the [Law of Succession Act](#), counsel submitted that the said provision provides protection to a purchaser where the grant is revoked or varied after the transfer of immovable or movable property to a purchaser. Thus the interested party is entitled to protection under the said provision 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.
 31. To support this position, counsel relied on the case of [Purity Ndirangu v Anthony Karanja & 2 others](#) [2019] eKLR where the court stated,

“Section 93 of the [Law of Succession Act](#) protects a bonafide purchaser of any property from a person who has obtained a grant of representation even if that grant is subsequently revoked or varied.”
 32. Counsel further submitted that the respondent had authority to sell the property having been registered as the owner. In conclusion, counsel urged the court to find that the interested party is protected under section 93 of the [Law Of Succession Act](#) and his ownership of plot No LR No 209/8134 should not be disturbed.

Determination

33. I have considered the application herein, responses thereof and rival submissions by counsel. Issues that emerge for determination are;
 - a. Whether the applicants are dependants and or beneficiaries of the deceased herein.
 - b. Whether the grant issued on October 31, 2013, confirmed on June 20, 2016 and rectified on March 3, 2020 should be revoked.
 - c. Whether the interested party is a bonafide purchaser for value.



34. On whether the applicants are dependants of the estate of the deceased, the applicants have stated that they are son and daughter of the late Nicholas Mwashimba Mkimbo who was a son to the late Geoffrey Robin Mkimbo the deceased herein. This fact has not been disputed by the respondent.
35. The late Nicholas Mwashimba died on February 2, 2000 while the deceased died on January 2, 1994. The respondent together with the late Victor Mkimbo petitioned for a grant of letters of administration on August 4, 2009 and the same was issued on December 7, 2009. Victor died before confirmation of the grant leaving the respondent as the only survivor of the estate of the deceased.
36. It's trite law that grandchildren cannot inherit their grandparent/s directly. The only time they can do so is when their parent has predeceased the grandparent. This position was upheld in the case of *In re Estate of Hellen Wangari Wathiai (deceased)* [2021] eKLR where the court stated that;

“looking at both parties’ submissions, my appreciation of the matter at hand is that the applicant herein brought this summons before court as a beneficiary of the estate of his late father who predeceased the deceased herein. A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent’s share in the estate of the grandparents as was enunciated in the case of *Re Estate of Wahome Njoki Wakagoto* (2013) eKLR where it was held: -

“Under part v, grandchildren have no right to inherit their grandparents who die intestate after July 1, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

37. However, in this case, the late Nicholas Mwashimba died 6 years later after the demise of the deceased. He also died before the filing of the petition for grant of letters of administration in these proceedings. Thus, the question that arises is whether he ought to have been included as a beneficiary and or survivor of the deceased herein in the list of survivors. The fact that the late Nicholas was a child of the deceased herein is not in dispute.
38. The issue at hand is whether his children were entitled to a share of the estate of their grandparent (the deceased herein) as their father did not predecease the deceased herein. The court in the case of *In re Estate of John Kibara Njau alias Kibara John (deceased)* [2021] eKLR faced with similar circumstances stated that;

“A child of a deceased who died intestate therefore need not prove dependency in order to inherit from the estate of their deceased parent. The question that follows then is what happens when despite surviving the deceased, such a child dies before the estate of the deceased is distributed. In such instances, the share of the deceased child, otherwise termed as a beneficiary, devolves under the rules of intestacy or testacy as applicable. In the instant case, the child or beneficiary in question is Naomi Karungari Kairu (deceased). Her share of the estate of her late father, the deceased herein, ought therefore to devolve to her beneficiaries.



This is to say that a grandchild can inherit from their grandparents directly through their deceased parents.”

39. Accordingly, it’s my finding that the applicants herein are entitled to the share of their parent in the estate of their grandparent. I must however wish to clarify that the claim by the applicants that the family had agreed on sharing the properties is not supported by any evidence.
40. The crux of the matter herein is the claim by the applicants that; the petitioner/respondent did not disclose that the applicants were beneficiaries of the estate and therefore ought to have been informed of these proceedings; their consent was not sought; they were not listed as beneficiaries and consequently not given a share of the estate.
41. From the averments contained in the affidavit in support of the application, it’s evident that the applicants are not merely seeking the share of the estate that was due to their father but instead they are seeking to be recognised as dependants of the deceased herein. They are also seeking a share of the estate as dependants of equal status with the respondent.
42. As stated herein above, it is trite law that grandchildren can only inherit directly from their grandparents in cases where their parent predeceased the deceased or died after the deceased before the grant could be obtained. Grandchildren only inherit the share that was rightfully due to their parent from the estate of the deceased. If they claim a share of the estate in their capacity as dependants, then they have to prove dependency as it was held in the case of *In re Estate of John Kihara Njau alias Kihara John (Deceased)* (supra) where the court stated that;

“Since the applicants are merely seeking the share of the estate of the deceased that was rightfully due to their late mother, and not directly claiming a share of the deceased’s estate in their own capacities, they need not prove dependency as argued by the respondents.”

43. In view of the above finding, it is my holding that the applicants herein are beneficiaries of their grandfather’s estate courtesy of their late father’s entitlement(estate).
44. On whether the grant herein should be revoked, section 76 of the [Law of Succession Act](#) provides grounds for revocation as follows;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- a. That the proceedings to obtain the grant were defective in substance;
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. To proceed diligently with the administration of the estate; or



- iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. That the grant has become useless and inoperative through subsequent circumstances.
45. It is trite that the power to revoke a grant is purely at the discretion of the court. See the case of *In Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] where the court stated that;
- “(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”
46. The applicants’ claim is that the grant herein was obtained fraudulently by concealment and or non-disclosure of material facts by the respondent. They argued that the respondent failed to disclose to the court the deceased herein was survived by two grandchildren.
47. As stated herein above, the applicants are not direct dependants of the deceased herein. However, by virtue of their late father being a child of the deceased entitled to a share of the estate of the deceased, the court ought to have been informed of their existence and the death of their father.
48. In the petition for grant obtained in 2009, the respondent together with the late victor only listed themselves as the survivors of the estate thus concealment of material facts. The concealment of a material fact amounts to a ground for revocation. In that regard, I am guided by the case of *In re Estate of John Kihara Njau alias Kihara John (Deceased)* (supra) where the court stated thus;
- “Having determined that the deceased’s daughter Naomi (deceased) was entitled to the deceased’s estate, it is only just and fair that her estate too is included in the distribution. Omitting her name from the list of the beneficiaries who survived the deceased whose estate is in issue amounts to concealment of a material fact, which is a ground upon which a grant of representation can be revoked. Based on the rules of intestacy, the estate of the deceased ought to have been shared equally amongst his beneficiaries, the three daughters who survived him.”
49. Further, the court in the case of *In re Estate of Julius Ndubi Javan (deceased)* [2018] eKLR observed as follows on non-disclosure of material facts from the court;
- “Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimaefidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”
50. Accordingly, it’s my finding that the applicants have established the ground for revocation of the grant under section 76(b) of the *Law of Succession Act*. What is the share of the applicants? section 38 of the



law of succession provides that where an intestate has left children without a spouse, the net intestate shall devolve in equal share amongst the children. In a nutshell, the estate should have been shared equally between the respondent and the estate of Nicholas Mwashimba Mkimbo the applicant's father through the heirs in this case the applicants.

51. On whether the interested party is a bonafide purchaser for value, the court in the case of *Ibrahim v Hassan & Charles Kimenyi Macharia, interested party* [2019] eKLR had to say;

“Having found and recognized that an illegality had been perpetrated – what is the remedy?
W Musyoka in his casebook on the Law of Succession at page 581 states that:

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property.”

However, the author goes onto cite *Re Diplock v Wintle* [1984] ch 485 which makes an exception to this general rule in a case where the holder of such property is a bona fide purchaser for value. In the court's view a Bona Fide Purchaser is one who purchases something for value without notice of another's claim to the property or without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title. In the Uganda Court of Appeal case of *Katende v Haridar & Company Ltd* cited with approval in Kenya High Court Case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR on who is a bona fide purchaser for value. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of title.
- b. He purchased the property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.”

52. The interested party's claim is that he is a bonafide purchaser for value without notice of any defect in title or in the obtaining of the grant which is the subject for revocation as he bought plot No 209/8134 on October 23, 2020 from the respondent pursuant to the grant issued on October 31, 2013, confirmed on June 20, 2016 and rectified on March 3, 2020. The same was transferred to him on March 27, 2021. That he was not aware of any dispute in respect of the estate. That he has great interest in the property in question. In his submission, he argued that he is protected under section 93 (1) of the *Law of Succession Act*. This fact has not been disputed.

53. However, although section 93 is meant to protect an innocent or *bonafide* purchaser for value, the same cannot be invoked in situations where an administrator intentionally disinherits other beneficiaries by failing to disclose their identity to the court hence proceeds to sell part of the estate. An illegal transaction cannot be sanitized by invoking section 93. Once an act is nullity the same is definitely void *ab initio*. See *Mcfoy v United African Company Ltd* 1961 3ALL ER 1169. In my view, the estate of Nicholas Mwashimba Mkimbo is entitled to half share out of the entire estate of the deceased Plot No.209 Race course included and thereafter the applicants to equally share their father's share or entitlement. I must however make it clear that the late Victor did not leave any heirs hence no estate to



claim his share. Accordingly, the estate is only available for distribution between the respondent and the estate of Nicholas.

54. To be fair to the interested party, I will direct that the respondent compensates the estate of Nicholas Mwashimba to the tune of the value of half share of the race course plot No 209 which half share the applicants shall share equally in default, the sale transaction be nullified and the property reverts back to the deceased's name for distribution between the rightful beneficiaries.
55. The respondent is therefore given 180 days within which to compensate Nicholas Mwashimba's estate as directed above failure to which the transfer of the said plot to the interested party shall be cancelled and the property reverts back to the deceased's name and subsequently be sold and the proceeds thereof be shared out between the respondent and the estate of Nicholas Mwashimba equally. Equally, plot No, plot No 12192/2 survey plan No 107201 Wundanyi Township and plot No Werugha/Werugha/543 shall be shared out equally between the respondent and the estate of Nichols Mwashimba Mkimbo and thereafter the heirs to Nicholas being the applicants herein equally to share their father's share. Accordingly, it is hereby declared and ordered that;
- a. The grant of letters of administration issued on October 31, 2013, confirmed on June 20, 2016 and rectified on March 3, 2020 is hereby revoked.
 - b. That the sale of plot No 209/3184 to the interested party was illegal, null and void.
 - c. That afresh grant to issue in the joint names of the applicants and the respondent immediately.
 - d. That the applicants herein Branson Khayo Mwashimba and Beverly Mkamburi are entitled to their father's share of the deceased's estate which they will equally share.
 - e. That the respondent to compensate the estate of Nicholas Mwashimba with half the value of the plot known as Race course 209/ 8134 within 180 days from the date of this ruling in default the sale transaction between her and the subsequent transfer of title of the subject plot to the interested party be cancelled and the plot reverts back to the deceased's name for distribution between the respondent and the estate of Nicholas Mwashimba Mkimbo equally.
 - f. That a proper accurate account of the estate of Geoffrey Robin Mkimbo be filed within six months by the respondent.
 - g. The current status of the title in respect of plot LR No 209/81134 be reserved for a period of 180 days pending compliance with the above directions.
 - h. After the expiry of 180 days, an amended certificate of confirmation of grant shall issue in the joint names of the applicants and the respondent reflecting distribution of the estate equally between the estate of Nicholas through his heirs the applicants herein and the respondent subject to fulfilment of order No (d) above.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 17TH DAY OF FEBRUARY 2023.

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J.N. ONYIEGO
JUDGE

