



**In re Estate of Wahito Wachira (Deceased) (Succession Cause . E509 of 2020)  
[2023] KEHC 17414 (KLR) (Family) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE . E509 OF 2020  
MA ODERO, J  
APRIL 28, 2023  
IN THE MATTER OF THE ESTATE OF WAHITO WACHIRA (DECEASED)**

**BETWEEN**

**LOIS WANGUI WACHIRA ..... APPLICANT**

**AND**

**MARGARET WAMUYU WAHITO ..... 1<sup>ST</sup> RESPONDENT**

**JANE WANJA MURIGI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GODANA DIDA ..... PROPOSED INTERESTED PARTY**

**RULING**

1. Before this Court for determination is the Chamber summons dated 1<sup>st</sup> October 2021 by which the Godana Dida (the ‘proposed Interested Party’) seeks the following orders:-
  1. That the Honourable Court is pleased to enjoin Godana Dida as the Respondent in the present application.
  2. That costs be provided for.
2. The application which was premised upon Rule 49 and 73 of the *Probate and Administration Rules* was supported by the Affidavit of even date sworn by the proposed Interested Party.
3. The Application was opposed by the Objector Lois Wangui Wachira who filed a Replying Affidavit dated 6<sup>th</sup> June 2022.



4. The Petitioners Margaret Wamuyu Wahito and Jane Wanja Muririgi who were represented by Mr. Botany Advocate indicated that they had no objection to the application.
5. The matter was canvassed by way of written submissions. The proposed Interested Party filed the written submissions dated 29<sup>th</sup> June 2022 whilst the Objector relied upon her submissions dated 5<sup>th</sup> July 2022.

## **Background**

5. The Succession Cause relates to the estate of Wahito Wachira (herein after ‘the Deceased’) who died intestate on 24<sup>th</sup> April 1991. A copy of the Death Certificate serial Number 250437 is annexed to the Petition dated 24<sup>th</sup> July 2020.
6. A letter from the Chief of Huruma Location dated 16<sup>th</sup> October 2013 indicated that the Deceased was survived by the following persons:-
  - (a) Margaret Wamuyu Wahito
  - (b) Jane Wanja Murigi.
7. The estate of the Deceased was said to comprise of only one asset being Plot No J53 – Mathare Valley Joint Development Scheme LR No 209/7963/223 (hereinafter referred to as the ‘suit land’).
8. Following the demise of the Deceased his two (2) daughters (‘the Petitioners’) filed a Petition for Grant of letters of Administration Intestate in the High Court at Murang’a. A Grant was duly issued to the Petitioners on 11<sup>th</sup> March 2014 which Grant was duly confirmed on 5<sup>th</sup> December 2014 by the Murang’a High Court.
9. The proposed Interested Party then purchased the ‘suit property’ from the Petitioners in their capacity as Administrators of the Estate of the Deceased. The proposed Interested Party avers that he conducted due diligence before purchasing the ‘suit property’ and states that on the basis of the confirmed Grant issued by the Murang’a High Court he proceeded to pay to the Petitioners the full purchase price. The ‘suit property’ was then transferred to the Proposed Interested Party. Annexed to the supporting Affidavit dated 1<sup>st</sup> October 2021 is a copy of the transfer document (Annexure DG ‘1’).
10. Following the sale and transfer of the ‘suit property’ to the Proposed Interested Party the High Court in Murang’a found that the purported transfer of the ‘suit property’ to the Interested Party was irregular and a nullity.
11. The court in Murang’a vide a Judgement delivered on 22<sup>nd</sup> June 2020 proceeded to revoke the Grant which had been issued to the Petitioners and directed that the ‘suit property’ revert into the names of the Deceased. The Decree issued by the Murang’a High Court dated 21<sup>st</sup> July 2020 read as follows:-

“It Is Hereby Ordered and Decreed that:

1. That the grant issued to Margaret Wamuyu Wahito, (the 1<sup>st</sup> Respondent) on 11<sup>th</sup> March 2014 and confirmed on 5<sup>th</sup> December 2014 be and is hereby revoked. It is further ordered that the estate shall revert into the names of the deceased. It follows that the purported transfer of the ‘suit property’ to the interested party is irregular and a nullity.



2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondent (who rank in priority) shall apply for a fresh grant at the Family Division of the High Court of Kenya at Nairobi listing all dependants and assets of the deceased.
  3. That costs follow the event and are at the discretion of the court. That this being a contest between family members over inheritance, in the interest of justice each party to bear its own costs.”
12. Thereafter the Petitioners made a fresh application for issuance of Grant of Administration before the Family Division at the Milimani High Court. A fresh Grant was issued to the Petitioners on 18<sup>th</sup> February 2021. That Grant is yet to be confirmed.
  13. In the meantime Lois Wangui Wachira (the Objector herein) being the wife of the late John Wachira Ndungu the second born son of the Deceased and representing the wives and children of the sons of the Deceased) who had passed away, filed a Notice of Motion Application dated 24<sup>th</sup> August 2021 together with an Affidavit of Protest also dated 24<sup>th</sup> August 2021.
  14. The Objector avers that the Petitioners secretly sought and obtained the Grant in the Murang’a High Court falsely indicating that they were the sole beneficiaries to the estate of the Deceased. The Objector claims that the proposed Interested Party in defiance of the Decree issued by the High Court in Murang’a continues to collect rental income from the ‘suit property’ and continues to claim the ‘suit property’ as his which amounts to for intermeddling. The Objector prays in her application that all rental income derived from the ‘suit property’ be paid into an account held by herself/and seeks an order of inhibition to stop any further transactions in respect to the ‘suit land’.
  15. The Proposed Interested Party on his part contends that he has a proprietary interest in the ‘suit property’ pursuant to the transfer of the said property to himself. He urges that if the Grant is confirmed without his participation then he stands to lose his proprietary rights to the ‘suit property’. The Proposed Interested Party prays to be enjoined in this Succession Cause.
  16. As stated earlier the Petitioners through their Advocate indicated that they had no objection to the enjoinder of the Proposed Interested Party in this matter.

### **Analysis and Determination**

17. I have carefully considered the application before this court, the Replying Affidavit filed by the Objector as well as the written submissions filed by both parties. The only question for determination is whether the Proposed Interested Party ought to be enjoined in this cause.
18. The Proposed Interested Party submits that he is a bona fide purchaser for value of ‘suit land’. On the other hand the Objector submits that the application seeking joinder in baseless as the High Court in Murang’a has already nullified the purported sale by the Petitioners to the Proposed Interested Party and that the entire estate has reverted back to the name of the Deceased.
19. The Proposed Interested Party has relied on Section 93 of the *Law of Succession Act* Cap 160 laws of Kenya which provides as follows:-

“ 93

- (1) A transfer of any interest in immovable or movable property made to a purchaser either before 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 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.”

20. In this case the ‘suit property’ was transferred to the Interested Party by person who at the time of making said transfer held a valid Grant of Representation to the estate of the Deceased. That Grant was revoked after the property had been transferred into the name of the Interested Party and the court ordered that the ‘suit property’ revert back into the name of the Deceased.
21. The court in *Murang’a* revoked the Grant on grounds that the same had been obtained fraudulently. The court found that the transfer of the ‘suit land’ to the Interested Party was irregular and was therefore a nullity. Neither the Interested Party nor the Respondents have filed an appeal against this decision.
22. Can the Interested Party in the circumstances rely on Section 93 to stake a claim on the ‘suit land’? Section 93 of the *Law of Succession Act* has been the subject of Judicial interpretation in a number of cases. In *Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu & another* [2014] eKLR the High Court sitting Meru stated as follows:-

“Whereas the above section states that a transfer by 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, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the Grant fraudulently...”

23. Likewise in *Re-Estate of Christopher Jude Adela (Deceased)* (2009) eKLR Rawal J and (as she was then) held:-

“As per my considered view, Section 93(1) of the Act talks of interest for immovable or movable property and Section 93 (2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and Section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. 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 *Registered Land Act* (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 actions prejudicing the interests and rights of 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...”

24. Whereas the suit property was transferred to the Interested Party by the Applicants who at the time held a Grant of representation to the estate the issuance of that Grant to the two was later found to have been flawed. The High Court found that the transfer of the ‘suit land’ to the Interested Party was irregular and therefore a nullity.
25. An Act which is declared to be a nullity is an act which no longer exists and therefore cannot be relied upon. The Interested Party cannot base his claim to the ‘suit land’ on a transfer which the court has declared a nullity. As stated earlier no appeal was filed against that Ruling by the Court in Murang’a and thus said Ruling remains valid.
26. Moreover the judgement of 22<sup>nd</sup> June 2020 was delivered by the High Court sitting in Murang’a. This court being a court of concurrent jurisdiction cannot make a finding which effectively contradicts the findings made by the High Court in Murang’a. If as found by the Murang’a High Court the process leading to the issuance of the Grant to the Applicant was found by the court to be flawed then it would be detrimental to the estate to allow that flawed process to confer proprietary rights upon the Interested Party. Section 93 of the Law of Succession Act cannot be used to validate an unlawful act. Section 93 can only come to the rescue of a purchaser in a case where the issuance of the Grant was lawful.
27. Finally this is a Probate Court whose mandate is to facilitate and supervise the distribution of the estate of the Deceased to the genuine heirs. The Interested Party is not a beneficiary of the Estate. As such he has no locus standi to be enjoined in this Succession Cause.
28. If the Interested Party wishes to prosecute his claim to the ‘suit property’ then he can only do so in the Environment and Land Court (ELC) which is the only court mandated under the Constitution of Kenya 2010 to determine disputes relating to ownership use and occupation of land. The Interested Party cannot ventilate his claim to the ‘suit land’ in this Succession Cause.
29. Finally I find no merit in the Summons dated 1<sup>st</sup> October 2021 and I decline the prayer to enjoin the Interested Party in this Succession Cause.
30. In light of my above findings the Notice of Motion dated 28<sup>th</sup> August 2021 is spent. For avoidance of doubt the property known as Plot No J53 – Mathare Valley Joint Development Scheme LR No 209/7963/223 forms part of the estate of the Deceased and can only be dealt with by the legally appointed representatives of the estate. Any other person purporting to occupy, possess or otherwise deal with the said property will be deemed to be an intermeddler who will be subject to sanction by the court.

## Conclusion

31. Finally this court makes the following orders:-
  - (i) The Chamber Summons dated 1<sup>st</sup> October 2021 is dismissed in its entirety.
  - (ii) It is declared that the property known as Plot No J53 – Mathare Valley Joint Development Scheme LR No 209/7963/223 forms part of the estate of the Deceased.
  - (iii) The Interested Party Godana Dida be and is hereby restrained from in any way selling transferring, leasing or any other manner whatsoever dealing with the property known Plot No J53 – Mathare Valley Joint Development Scheme (LR No 209/7963/223).
  - (iv) Each party to meet their own costs.



DATED IN NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2023.

.....

MAUREEN A. ODERO

JUDGE

