



REPUBLIC OF KENYA



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Osodo & 7 others v Mukangai; Mukangai & 4 others (Respondent) (Civil Appeal 54 of 2021) [2023] KEHC 3634 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 54 OF 2021
JRA WANANDA, J
APRIL 28, 2023**

BETWEEN

BEN OSODO 1ST APPELLANT
BENSON BARASA 2ND APPELLANT
JOSEPH WAMALWA 3RD APPELLANT
RABECCA WANYONYI 4TH APPELLANT
JOHNSTON KHISA MAKHANU 5TH APPELLANT
TOM WANGANGA 6TH APPELLANT
JUMA WEKESA D.O 7TH APPELLANT
PETER KHAJINA 8TH APPELLANT

AND

ALICE NAMAEMBA MUKANGAI RESPONDENT

AND

PETER MUTONYI MUKANGAI RESPONDENT
ZAKAYO WAFULA MUKANGAI RESPONDENT
PATRICK NAIBEI MUKANGAI RESPONDENT
SAMWEL WANJALA MUKANGAI RESPONDENT
IDDI WAMBULWA RESPONDENT



JUDGMENT

1. This Appeal arises from a Ruling delivered on August 10, 2021 in Kimilili Principal Magistrate Court P & A Cause No E006 of 2020. The same relates to the estate of one Hudson Mukangai Makhanu (Deceased) who died on August 19, 2013.
2. By the Notice of Motion dated April 22, 2021 and filed in the said Cause on May 6, 2021 through Messrs Sikuta & Associates Advocates, the 1st Respondent (Petitioner in the said Cause) sought the following Orders:
 - i) That this Application be heard on priority basis.
 - ii) That this honourable court be pleased to issue a grant of letters of administration in respect of the late Hudson Mukangai Makhanu-Deceased to Alice Namaemba Mukangai the Petitioner herein.
 - iii) That the honourable court be pleased to issue an order cancelling the illegal sub-division of land parcel number Bungoma/Kabisi/229 creating land parcels numbers Bungoma/Kabisi/1378-1408 and registration made in the register in respect of the said land parcel number Bungoma/Kabisi/229 vide entry number 4 and 5.
 - iv) That this honourable court be pleased to issue an order directing the county land Registrar-Bungoma and County Land surveyor-Bungoma to visit the deceased's land parcel number Bungoma/Kabisi/229, conduct a survey exercise in distribution of shares in respect of the deceased's land parcel number Bungoma/Kabisi/229 to all the beneficiaries of the estate of the deceased herein.
 - v) This honourable court be pleased to issue an order directing the OCS Mbakalo police station to provide security during the survey exercise.
 - vi) This honourable court be pleased to issue an order of status quo to be maintained.
 - vii) That the petitioner to file an application for confirmation together with the mode of distribution immediately after the conclusion of the survey exercise.
3. The Application was premised on the grounds that the 1st Respondent had filed a Petition seeking to administer the estate but the same was yet to be issued despite the same being published in the Kenya Gazette on November 27, 2020, 30 days had lapsed long ago and nobody filed an objection to issuance of the same save a Notice of Appointment of Advocates filed by the purchasers, the purported purchasers had not filed anything since then, the land parcel Bungoma/Kabisi/229 which forms part of the estate was illegally divided long after the death of the deceased creating Bungoma/Kabisi/1378-1408, this illegal subdivision was done by the purchasers who consequently acquired title deeds without knowledge of the estate, the family of the deceased does not recognize the legitimacy of the purported purchasers, the 1st Respondent and the beneficiaries have decided to share the estate as they are the rightful bona fide beneficiaries, the purchasers are therefore strangers to the estate unless the legitimacy is proved, the purchasers have hijacked the estate and specifically land parcel number Bungoma/Kabisi/229, destroyed the boundary and unlawfully forcefully taken possession thereof without the consent of the family of the deceased, the visit of the County Surveyor to conduct survey and distribute the same to the rightful beneficiaries is vital as this will restore peace and quench panic caused by the purported purchasers.



4. The Application was supported by the Affidavit attached thereto, sworn by the 1st Respondent and in which she reiterated the grounds set out above.
5. On May 18, 2021, one Protus Kisuya Mukangai who described himself as an Objector, filed Grounds of Opposition together with an Affidavit opposing the Application.
6. In the Grounds of Opposition, he stated that the Petition was filed in bad faith by including strangers and not including the Objector, that the Objector and the 1st Respondent are of one father and mother who are deceased, that the 1st Respondent was not consented to file the Succession Cause, the deceased estate is Bungoma/Kabisi/1378, the land parcel number Bungoma/Kabisi/229 was closed on sub-division, the Objector is entitled to get a share out of the Bungoma/Kabisi/1378, the Court should not go ahead with the Succession Cause as the Objector has included strangers instead of the right beneficiaries and also the estate of the deceased is Bungoma/Kabisi/1378 and not Bungoma/Kabisi/229.
7. In the Affidavit, he reiterated the above matters and also deponed that the deceased had 2 houses, before his death he had allocated to them the parcel Bungoma/Kabisi/1378, each of them is to get a title deed, the 1st Respondent is his sister, that some of the persons listed as purchasers bought portions of the land from the deceased who consented to the transfer, others bought from the purchasers, the 1st Respondent and other girls were given their share and sold, the 1st Respondent was not consented to file the Cause because she has no share on the estate, the 1st Respondent is out to solicit cash for gain.
8. On June 8, 2021, the Appellants (alleged purchasers) filed their respective Replying Affidavits though wrongly titled Supporting Affidavits.
9. The 1st Appellant, Benson Odimar Osodo deponed that on March 9, 2008 he bought ¼ acre out of Bungoma/Kabisi/229 at a consideration of Kshs 35,000/- from the deceased, on August 15, 2008 he purchased a further 1/8 out of the same parcel from one Samuel Wanjala Mukangai, a son of the deceased, for Kshs 15,000/-, on November 22, 2008 he purchased a further 0.05 Hectares of the same parcel from the deceased at a consideration of Kshs 30,000/-, on December 20, 2009 he and one Johnstone Makhakha purchased a further 0.06 hectares at a consideration of Kshs 80,000/- from the deceased, on February 13, 2014 he bought a further plot measuring 1/20 acres from one Soita Barasa who had purchased the same from the deceased, the 1st Respondent is misled by persons who are envious of the 1st Appellant's developments, the 1st Respondent has knowledge that the 1st Appellant bought the plots from the deceased, the 1st Respondent's claims that he is a stranger is not true. He then exhibited copies of alleged documents in support of the transactions.
10. On his part, the 2nd Appellant Benson Barasa Wanjala deponed that on March 9, 1991 he bought land measuring 15ft x 100 ft out of the said parcel at a consideration of Kshs 10,000/- from one Benedict Okiru Ipora who had purchased the same from the deceased, the deceased executed documents of transfer and the 2nd Respondent obtained title, the 1st Respondent had filed the Application in bad faith, he is not a stranger as alleged by the 1st Respondent. He also exhibited copies of alleged documents in support of the said transactions.
11. On his part, the 3rd Appellant Joseph Wamalwa Namutale deponed that on August 19, 2001 he purchased land measuring 22 ft x 100 ft out of the same parcel of land at a consideration of Kshs 15,000/- from one Margaret Kafuna Musheni and Paul Lunani Lubonge who had purchased the same from the deceased, the deceased executed documents of transfer to enable the 3rd Respondent get a title now Bungoma/Kabisi/1384 before his demise, the 1st Respondent is not sincere, the parcel number Bungoma/Kabisi/229 was closed on sub-division and cannot be part of the estate of the deceased, the



- estate of the deceased is Bungoma/Kabisi/1378, the 1st Respondent has been misled by persons who are not beneficiaries to file the Application, the deceased executed instruments to transfer, obtained title and the 3rd Respondent cannot be a stranger on land he bought with his sweat, the 1st Respondent has filed the Application in bad faith. He too exhibited copies of alleged documents in support of the transactions.
12. The 4th Appellant Rebecca Wanyonyi deponed that on April 5, 2010 she purchased land measuring 27 ft x 100 ft from the deceased the proprietor of Bungoma/Kabisi/229, the deceased executed documents of transfer to enable him get title now parcel number Bungoma/Kabisi/1385 before his demise, it is just envy by the 1st Respondent to file the Application, the 1st Respondent has filed the Application in bad faith, the 4th Respondent bought the plot with his sweat and genuinely obtained title. She also exhibited a copy of an alleged Agreement for sale in support of the said transaction.
 13. The 5th Appellant Johnstone Khisa Makakha deponed that he and another person bought a plot measuring 60 ft x 100 ft out of parcel number Bungoma/Kabisi/229 from the deceased on December 20, 2009 at a consideration of Kshs 80,000/-, the deceased executed documents of transfer on October 28, 2010 and he and the other person obtained title No Bungoma/Kabisi/1389 before his demise, there was a 5 ft loan (sic) which he and the other person paid, the 1st Respondent is just out to solicit monetary gain, the 1st Respondent has full knowledge that parcel number Bungoma/Kabisi/229 is closed on sub-division, the estate of the deceased is now Bungoma/Kabisi/1378 and also the deceased made sub-division before his demise, the 1st Respondent has filed the Application with malice. He too exhibited copies of alleged documents in support of the said transaction.
 14. The 6th Appellant Tom Cheloti Kisiangani deponed that on May 4, 2011 he bought a plot measuring 25 ft x 100 ft out of parcel land Bungoma/Kabisi/229 from one Gladys Samita at a consideration of Kshs 165,000/-, on October 24, 2011 he bought a plot measuring 36 ft x 100 ft out of parcel land No Bungoma/Kabisi/229 at a consideration of Kshs 485,000/- from one Mary M Murumba, Florence M Nato and Rose I Omoiti on behalf of Mwema Women Group, the sellers purchased the same from the deceased, the deceased consented to the transfer and he has titles for the 2 plots, the 1st Respondent cannot claim that the 6th Appellant is a stranger, the 1st Respondent is not honest in filing the Application. He too exhibited copies of alleged documents in support of the said transaction.
 15. The 8th Appellant Peter Khajina deponed that on June 19, 1997 he purchased land measuring ½ acre out of parcel number Bungoma/Kabisi/229 at a consideration of Kshs 32,500/- from the deceased, he paid the amount in full on the material date, the deceased executed instruments of transfer and the 8th Appellant obtained title, the 1st Respondent's claim that the 6th Appellant is a stranger is not true, the 1st Respondent is not sincere in filing the Application. He also exhibited copies of alleged documents in support of the transactions.
 16. Upon considering the above, together with the written Submissions filed, the trial Court delivered its Ruling on August 10, 2021. It disallowed prayer 2 of the Application but allowed prayers 3. Prayer 4 was also allowed but on condition that the same shall only be effected after the application for confirmation of Grant is heard and determined. A summary of the Orders therefore reads as follows:
 - i) That this honourable court do hereby decline issuing grant of letters of administration in respect of the late Hudson Mukangai Makhanu-Deceased to Alice Namaemba Mukangai the Petitioner herein.
 - ii) That an order be and is hereby issued cancelling the illegal sub-division of land parcel number Bungoma/Kabisi/229 creating land parcels numbers Bungoma/Kabisi/1378-1408



and registration made in the register in respect of the said land parcel number Bungoma/Kabisi/229 vide entry number 4 and 5.

- iii) That an order be and is hereby issued directing the County Land Registrar and County Land Surveyor, Bungoma to visit the deceased's land parcel number Bungoma/Kabisi/229 to conduct a survey exercise with a view to establish the shares of all the beneficiaries but this shall only be done upon the hearing and determination of the Application for confirmation of Grant.
17. Being aggrieved by the said decision, the Appellants filed this Appeal vide the Memorandum of Appeal filed on September 20, 2021 through Messrs HP Wamalwa & Co Advocates. 6 grounds were cited as follows;
- i) That the learned trial magistrate erred in law and in fact to have allowed the applicant's application of orders No 2 and 3.
 - ii) That the learned trial magistrate erred in law and in fact to have made a decision for order No 2 and 3 when order No 1 was declined.
 - iii) That the learned trial magistrate erred in law and in fact to make an order of cancelling of the illegal sub-division of land parcel Bungoma/Kabisi/229 creating land parcel No Bungoma/Kabisi/1378-1408 and cancellation of the registration made in the register in respect of the said parcel land Bungoma/Kabisi/229 vide entry No 4 and 5 without considering that sub-division and registration was done by the proprietor in the year 1995 before his demise in the year 2013 and some Appellants have title deeds in that respect.
 - iv) That the learned trial magistrate erred in law and in fact in directing the county land registrar and county surveyor Bungoma to visit the deceased land parcel no. Bungoma/Kabisi/229 to conduct a survey with a view to establish the shares of all the beneficiaries without considering that the parcel land was sub-divided and numbers registered by a surveyor PO Aman on October 12, 1995.
 - v) That the learned trial magistrate erred in law and in fact to have made a decision for orders No 2 and 3 on an application without substantive hearing as the appellants were the purchasers.
 - vi) That the learned trial magistrate erred in law and in fact to have made decision for orders No 2 and 3 without hearing the parties and the input of the expert.
18. The Appeal was prosecuted by way of written submissions. The Appellants filed theirs on January 16, 2023 through Messrs HP Wamalwa & Co Advocates while the 1st Respondent filed hers on the same date through Messrs Sikuta & Associates.

Appellant's Submissions

19. Counsel for the Appellant submitted that the trial Magistrate having declined to grant order 2, it follows that Order 3 had no legs on which to stand, if the Court did not grant the order to cancel the subdivision, it could not, in the same breath order for survey to be done on a parcel of land which had already been subdivided and new titles issued for the various parcels created out of it, the original title ceased to exist on subdivision, the Appellants are bona fide purchasers for value of their respective parcels of land registered in their names, they filed their responses to the Application and detailed how they individually acquired their respective titles, the Appellants have annexed their respective statements and title deeds indicating that they purchased their respective parcels of land directly from the deceased, the Magistrate completely misdirected herself, the Appellants purchased their respective



- parcels from the deceased or from persons who themselves had purchased from the deceased while he was still alive.
20. He added that the question of intermeddling does not arise for Section 45 of the Law of Succession Act only applies to 'the estate of a deceased person.', evidence on record indicates that the Appellants purchased their properties from the deceased when he was still alive and by the time the succession process was started, they were not only in possession but had also set in motion the process of subdivision, subdivision was in fact being done as early as 1995, and even in 2010 consents were being sought (in the case land parcel No Bungoma/Kabisi/1389, there is in fact a letter of consent), at the time the Succession process commenced, the property available to the estate was land parcel No Bungoma/Kabisi/1378, no evidence has been provided that the Appellants have intermeddled in the estate.
 21. Counsel submitted further that the trial Magistrate went on a flight of fancy with regard as to whether there was consent from the Land Control Board, this was not a central issue in the application before the Court, no evidence was produced to show there was no requisite consent, the fact that the mother title No Bungoma/Kabisi/229 was closed on March 1, 2018 does not mean that sub-division was started just 6 months before such closure, no evidence of any illegality was presented to the Court, he who alleges must prove, it is fanciful for the Magistrate to postulate that the Appellant's failure to prove lack of consent (as if they were required to do so in the first place) 'is evidence enough that they obtained their titles illegally and unprocedurally', the 1st Respondent brought the Application in bad faith, all she was interested in was the recovery of land sold by the deceased legitimately as he was the absolute proprietor of land parcel No Bungoma/Kabisi/229, she has camouflaged her intentions in the Application instead of merely filing an action for recovery of land, and which clearly runs afoul of Section 7 of the Limitation of Actions Act, Cap 22. Counsel urged the Court to allow the appeal and find that the Appellants' titles are legitimate and indefeasible.

Respondent's Case

22. The 1st Respondent's Counsel submitted that the Appeal is misplaced, ambiguous, a sham and a waste of the Court's prime time, the deceased was the registered proprietor of land parcel number Bungoma/Kabisi/229 and died before sub-dividing, registering any sub-divisions or transferring to any person, the 1st Respondent/Petitioner after conducting due diligence realized that some of the Appellants without any colour of right and with use of fraudulent means had illegally sub-divided and or caused to be sub-divided the aforesaid deceased's land parcel number Bungoma/Kabisi/229 secretly without the 1st Respondent's knowledge and without the knowledge of other bona fide beneficiaries creating land parcels number Bungoma/Kabisi/1378-1408 among which they acquired title deeds, after such realization the 1st Respondent filed the said Application, being the daughter and heir of the deceased she filed the Application to administer the estate of her late father.
23. Counsel added that after gazettelement, the 1st Respondent was entitled to be issued with letters of administration, the Appellants who purport to be purchasers have no locus standi to question or challenge the Court on whether to grant or not to issue the grant, the Appellants with no regard of application of the laws of succession fraudulently forged transfer documents, presented before the lands registry and registered and or caused to be registered the said documents with knowledge that the registered proprietor who is deceased in this matter was no more, the question the Appellants are bound to answer is that, who signed the transfer documents? Who was present at the Lands Control Board purporting to be the proprietor when the deceased had died on August 19, 2013 long time ago before the said transfer was registered on March 1, 2018?
24. Counsel submitted that the express answer to all these questions is that the entire process was conducted through fraud, the appellants are strangers to the estate of the deceased and the



Respondents even wonder who executed transfer documents on behalf of the deceased who died on August 19, 2013, the process of sub-division of land parcel number Bungoma/Kabisi/229 and creation of land parcel numbers Bungoma/Kabisi/1378-1408 was null and void and same was executed through fraudulent means, the Appellants never took out Letters of Administration in respect of the deceased before sub-dividing and subsequently acquiring titles of new created numbers in respect of the subject land, Bungoma/Kabisi/229 is part of the estate of the deceased and for the same to change hands, proper procedure pursuant to the provisions of the law need to be employed, the mother suit is a Succession Petition and its dispensation calls for distribution of the estate among the rightful beneficiaries.

25. Counsel submitted that the Appellants are neither heirs nor beneficiaries of the estate, they have only raised mere allegations that they are purchasers, they are not liabilities to the estate as neither the Respondent nor the entire family of the deceased recognizes them as Purchasers, if indeed they are purchasers then that means they are intermeddlers. He cited the cases of *Succession Cause No 265 of 2004 – Beth Muthei Mulili – Deceased & Munyasya Mulili & 3 Others (Petitioners) versus Sammy Muteti Mulili (Protester) & Virginia Mbithe & Others – Applicants.*
26. According to Counsel, in the said case, the Court held that it had jurisdiction to revoke a title by finding that the titles acquired were unlawful. He urged the Court to dismiss the appeal with costs.

Analysis & Determination

27. As this is a first appeal, the Court has a duty as was set out in *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*, as follows:

' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

28. Upon considering the Pleadings filed in the trial Court, Memorandum of Appeal and the Submissions tendered by the parties, I find the following to be the issues that arise for determination:
 - i) Whether the trial Court erred in granting prayer 3 despite declining to grant prayer 2 of the Notice of Motion dated April 22, 2021
 - ii) Whether the trial Court erred in ordering cancellation of the sub-titles created out of Land parcel No Bungoma/Kabisi/229?
29. I now proceed to analyse and answer the said Issues.

i) Whether the trial Court erred in granting prayer 3 despite declining to grant prayer 2

30. Prayer 2 of the application, and which was declined, was framed as follows:

' That this honourable court be pleased to issue a grant of letters of administration in respect of the late Hudson Mukangai Makhanu-Deceased to Alice Namaemba Mukangai the Respondent herein.'

31. Prayer 3, which was allowed, was premised as follows:

' That the honourable court be pleased to issue an order cancelling the illegal sub-division of land parcel number Bungoma/Kabisi/229 creating land parcels numbers Bungoma/



KABISI/1378-1408 and registration made in the register in respect of the said land parcel number Bungoma/Kabisi/229 vide entry number 4 and 5.'

32. Counsel for the Appellant submitted that the trial Magistrate having declined to grant order 2, it follows that Order 3 had no legs on which to stand. He then stated that if the Court did not grant the order to cancel the subdivisions, it could not, in the same breath order for survey to be done. On this point, the Appellant's Counsel is wrong. The trial Court did grant prayer 2 thus nullifying and cancelling the sub-divisions. The order that was declined was the one seeking the 1st Respondent's appointment as Administrator of the estate.
33. My understanding is that the trial magistrate declined to grant the prayer appointing the Petitioner as the Administrator at this stage as it was not clear whether the other beneficiaries had consented to the appointment or whether they had been notified. Another ground for the rejection was that an Objection had been lodged. However, the Court went ahead and ordered the cancellation of the sub-division of land parcel number Bungoma/Kabisi/229 creating land parcels numbers Bungoma/Kabisi/1378-1408. The Court further directed the County Land Registrar and the County Land Surveyor to visit the parcel of land Bungoma/Kabisi/229 to establish the shares of all the beneficiaries.
34. Regarding the prayer 2 which was declined, the 1st Respondent's ground for seeking it was that she had filed a Petition on October 7, 2020 seeking to be appointed the Administrator, that although the same had been gazetted on November 27, 2020, the Letters of Administration was yet to be issued. The 1st Respondent felt that the process had delayed for too long and it is on this basis that she moved the Court by prayer 2 aforesaid to appoint her. It is this prayer 2 that the Court declined to grant at his stage.
35. The Court also granted prayer 4 in the following terms:

' That an order be and is hereby issued directing the County Land Registrar and County Land Surveyor, Bungoma to visit the deceased's land parcel number Bungoma/Kabisi/229 to conduct a survey exercise with a view to establish the shares of all the beneficiaries but this shall only be done upon the hearing and determination of the Application for confirmation of Grant.'
36. The Appellants appear to be arguing that in the absence of an Administrator duly appointed, the Court could not make any substantive orders as it did. While this may be a persuasive point, it cannot be the correct position that the Court in a Succession Cause cannot issue interim orders to preserve the estate simply because an Administrator is yet to be appointed. To my knowledge, once a Petition has been filed, there is nothing that bars a Court from interim issuing preservatory orders, in the interest of justice, pending formal appointment of an Administrator.
37. In any event, I note that at the end of the Ruling, the Court stated as follows:

' For avoidance of doubt, prayer 2 is disallowed, prayer 3 is allowed, prayer 4 is allowed with a condition that the same shall be effected after the Application for confirmation of grant has been heard and determined. The costs shall be in the cause'
38. The said condition is proof that the Court was alive to the fact that the orders it gave were only interim in nature pending hearing and final determination of the Cause. In the circumstances, I find that the submission that failure to grant order 2 rendered prayer 3 without any legs to stand on as unfounded. Indeed, the trial Court could legitimately grant prayer 3 despite declining prayer 2



ii) – Whether the trial Court erred in ordering cancellation of the sub-titles created out of Land parcel No. Bungoma/Kabisi/229

39. The Application which gave rise to this Appeal was based on alleged intermeddling with the estate of the deceased. The law regarding intermeddling with the estate of a deceased person is well codified in the [Law of Succession Act](#). Section 45 of the Act provides as follows:

- ' (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
 - (a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) Be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.'

40. Musyoka, J in [Veronica Njoki Wakagoto \(Deceased\) \[2013\] eKLR](#) further stated as follows:

' The effect of [section 45] is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.'

41. Further, Gikonyo J in [Re Estate of M'Ngarithi M'Miriti \[2017\] eKLR](#) held as follows:

' Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the [Law of Succession Act](#). I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the [Law of Succession Act](#). That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.'



42. Gikonyo J again, *in Re Estate of Paul M'Maria (Deceased) [2017] eKLR*, stated as follows:

' The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act* is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the *Constitution*. See the claw-back provision of the *Constitution* that:- 40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. Therefore, applying the law and the *Constitution*, the sale of Plot 18A Mitunguu Market on July 12, 2004 was in contravention of the *Law of Succession Act* and therefore vitiated by that illegality. It is thus invalid, null and void transaction. Such contract is ex facie illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute'

43. In light of the above, I cannot find any justification to fault the Learned trial magistrate for holding that there was intermeddling in the estate on the basis that the subdivision of the property Bungoma/Kabisi/229 to create the sub-plots Bungoma/Kabisi/1378-1408 was done in the year 2018 yet the deceased died 5 years earlier in the year 2013. I also cannot find justification for faulting the trial Magistrate for finding that as the same was admittedly a controlled transaction, the respective Consents from the local Land Control Board were prerequisites before the sub-division and also issuance of title deeds.

44. Similarly, the Magistrate cannot be faulted for correctly holding that under statute, for purchase of an agricultural land to retain its validity, consent from the Land Control Board must be obtained within a period of 6 months from the date of making the agreement of sale. Section 6(1) of the *Land Control Act* is premised as follows:

' An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto provided that the High Court may, notwithstanding the period of six months have expired, extend that period where it considers that there is sufficient reason to do so, if any, as it deems fit'.

45. On this point, the Appellants did not offer any evidence to demonstrate that such Land Control Board consents were indeed obtained within such period. Since they were being accused of intermeddling, it was in the Appellants' interest to demonstrate that this was not the case. By failing to answer that issue, the Appellants lost a golden opportunity to disabuse the accusation thus leaving the Magistrate with very little room to rule otherwise.

46. I have perused the Record and it is apparent that the title deeds exhibited by the Appellants were issued in the year 2018. I have also noted that out of all the 8 Appellants, only the 5th Appellant, Johnston Makokha Khisa produced an Application to the Tongaren Land Control Board seeking consent and also only he produced a Consent. However, even these are incomplete since, curiously, they are both not even dated.

47. The deceased passed away on August 19, 2013. All the title deeds were however issued 5 years later in 2018. It is true that in Kenya, in some cases, the process of registration of transfers, sub-division and issuance of titles can indeed take a very long time. However, in this case, in the absence of evidence to



demonstrate that such delay occurred, I am in agreement with the finding of the trial Court that the allegation of intermeddling was not disproved since the Appellants did not account for or demonstrate that the process of registration of the transfer and issuance of the titles was commenced during the lifetime of the deceased and that it was continuing up to the year 2018 when the titles were eventually issued.

48. Further, although the Appellants allege that the respective purchases were entered into before the death of the deceased, that before his death the deceased had signed transfer documents and that the process of sub-division had commenced way back, again only the 5th Appellant, Johnstone Khisa Makhakha produced a Transfer document. However, again, the same is not even dated and also does not bear the stamp of the Lands office.
49. Transfer documents are required to be prepared and filed in accordance with Section 37 of the [Land Registration Act](#), Act No 3 of 2012 and in the prescribed Form LRA 33 set out under Rule 49 thereof. Section 37 aforesaid provides as follows:

'A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.

(2) A transfer shall be completed by -

 - a. Filing the instrument: and
 - b. Registration of the transferee as proprietor of the land, lease or charge'
50. In this case, I would therefore have expected that both the deceased and the purchasers would have affixed their signatures on the Transfer Form and at the time of being lodged at the Lands office for registration, the Transfer would have been required to be accompanied by, inter alia, both parties' passport size-coloured photographs, Certificates of PIN, Identity Cards and the deceased's Spousal Affidavit or Affidavit of marital status.
51. The Form would then have also been required to have been signed and executed before an Advocate of the High Court of Kenya who would then have also signed a Certificate of Verification under Section 45 of the Act. As the property herein was agricultural land, consent of the Land Control Board would have also been required. Stamp duty and registration fees would then have also been required to have been paid before registration and the relevant Receipts issued.
52. Since the Appellants were being accused of intermeddling, the above are some of the items that they would have been expected to have produced before the Learned Magistrate to demonstrate that indeed the deceased had participated in the transfer process. Had these documents been produced by the Appellants, then the Court would have had the opportunity to scrutinize them and verify whether indeed the deceased had participated in the transfer process before his death. However, apart from failing to produce any of these documents, the Appellants also appeared very evasive and economical with the information sought thus lending credence to the 1st Respondent's allegations that the transfer process was not procedurally conducted and that it was done long after the death of the deceased.
53. Considering that the Appellants' title deeds were issued in the year 2018, 5 years after the death of the deceased in the year 2013, it was not enough for the Appellants to simply exhibit their title deeds without also demonstrating that the deceased was part and parcel of the transfer process before he died. In the circumstances, can the Appellants really fault the trial Magistrate for issuing the orders that she did? I think not.



54. While the Agreements for Sale may as well be genuine and authentic and could form valid contracts in law capable of being enforced by the Appellants against the estate, it was a requirement that once the deceased died, any transfer document not already executed by the deceased as at the time of his death had to henceforth be held in abeyance until the Court had appointed an Administrator to manage the estate of the deceased and distributed the estate accordingly. Only the duly Court appointed legal representative could then execute, on behalf of the deceased, any transfer document not already executed by the deceased as at the time of his death.
55. Nevertheless, since the issue of distribution of the estate is yet to be determined, it is debatable whether the trial Court should at this stage of the proceedings have nullified and/or cancelled the titles of the Respondents created out of the mother plot Bungoma/Kabisi/229. This is because it is debatable whether at this stage the trial Court could conclusively determine whether or not the sub-plots were indeed acquired illegally. One could even question whether the Court even possessed the prerequisite jurisdiction to make such a conclusive finding or order or whether in fact under Article 162(2)(b) of the Constitution such jurisdiction rested with the Environment & Lands Court (ELC).
56. Perhaps what the Court ought to have done in the circumstances was to issue an interim injunction restraining the Appellants from further alienating or disposing the sub-plots created out of the mother property pending confirmation the Grant or pending further orders of the Court including ascertainment of the Appellant's claims, if at all.
57. However, I note from the record that subsequent to the impugned Ruling the subject of this Appeal, the Appellants filed an Application seeking stay of execution of the Ruling but later withdrew the same on the basis that the orders had already been executed and the Application for stay had therefore been overtaken by events. It was also stated that pursuant to the orders, the land parcel Bungoma/Kabisi/229 had already reverted back to its original status.
58. I also note from the record of the lower Court that subsequently after the delivery of the impugned Ruling, the said Protus Kisuya Mukangai who had initially objected to the Application the subject of this Appeal, who described the 1st Respondent as his sister and who had initially taken the side of the Appellants, on December 8, 2021 sworn a fresh Affidavit changing sides and now supporting the 1st Respondent against the Appellants. He has in the fresh Affidavit now deponed that he has withdrawn his earlier Affidavit and now supports the 1st Respondent's Application to be appointed the Administrator and has now denied knowledge of the purported purchases by the Appellants.
59. In the circumstances, I find that the balance of convenience tilts towards not disturbing the Ruling and orders issued on August 10, 2021 since doing so will be too disruptive.

Final Orders

60. It is therefore the finding of this Court that this appeal is unmerited. In the circumstances, I order as follows:
 - i. This Appeal is hereby dismissed.
 - ii. Considering that the Succession Cause in the trial Court is yet to be finalized, each party shall bear its own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA



JUDGE

