



**In re Estate of Gaudensia Okola Watula (Deceased) (Succession Cause
769 of 2014) [2023] KEHC 19598 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 769 OF 2014
JN KAMAU, J
JUNE 29, 2023**

**IN THE MATTER OF THE ESTATE OF GAUDENSIA OKOLA WATULA (DECEASED)
AND
IN THE MATTER OF AN APPLICATION FOR LETTERS OF
ADMINISTRATION INTESTATE BY FREDRICK ODHIAMBO WATULA**

BETWEEN

FREDRICK ODHIAMBO WATULA 1ST PETITIONER

DOMNIC ODHIAMBO ODONGO 2ND PETITIONER

AND

EVERLYNE ODHIAMBO ODUOL RESPONDENT

RULING

Introduction

1. In her Summons for Revocation of Grant dated 9th January 2020 and filed on 21st January 2020, the Objector herein sought for orders that the Grant of Letters of Administration Intestate that was issued to the Petitioner herein on 19th January 2015 be revoked and/or annulled and the Title deed issued be cancelled.
2. She swore an affidavit in support of the said application on 9th January 2020. She averred that the deceased died domiciled in Kenya on 9th September 2009 and that she was her biological daughter and was thus entitled to a share of her estate.
3. She stated that the said Grant of Letters of Administration was obtained fraudulently by giving false information, concealing vital information and material facts from the court which had a direct nexus to the outcome of the court in the making of the said Grant of Letters of Administration Intestate.



4. She pointed out that the Petitioner was her biological brother but that the 2nd Petitioner was a total stranger to the deceased's estate and that he was irregularly included in the Certificate of Confirmation of Grant. She added that the Petitioner had indicated that he and two (2) minors namely, Silvester Odongo Watula and Kelvis Ouma Owino were the only beneficiaries of the deceased and that there were no other survivors.
5. She also contended that the said Grant of Letters of Administration indicated that the Petitioners were to hold the parcel of land No Siaya/Nyalgunga/2800 (hereinafter referred to as "the subject property") in trust of the said minors but that they had since disposed it of by selling and transferring the same to Onyango John Fredrick and Sophia Awuor Ohayo (hereinafter referred to as "Interested Parties").
6. She was emphatic that she was the rightful beneficiary of the deceased's estate and granting otherwise was unjustifiable and illegal and the said Grant of Letters of Administration Intestate therefore had to be revoked and/or amended.
7. On 25th February 2020, the Petitioners swore a Replying Affidavit in opposition to the Objector's Summons for Revocation of Grant. They averred that the Objector had come to court with unclean hands and that her application was an abuse of the court process and totally without merit. They stated that the Objector had not given sufficient reasons warranting the court to grant the orders she had sought as the said subject land had already exchanged hands and ownership.
8. They contended that they had sold the same to one Onyango John Fredrick at a consideration price of Kshs 600,000/=to cater for the Petitioner's medical bills for the operation at Siaya Referral Hospital as he was ailing and was bedridden. They added that they had given an alternative land to the aforesaid minors who they argued that were in a position to testify on the same if called upon as they were now adults of sound mind and position.
9. They asserted that the 1st Petitioner legally petitioned for the Grant of Letters of Administration on 21st August 2014 after having obtained the Chief's Letter dated 14th August 2014 and that the Objector was aware of the succession process but she was not interested in the same and at the time, she had indicated her disinterest resulting to the Petitioner proceeding in her exclusion. They asserted that the 2nd Petitioner was a close relative who was included in the Certificate of Confirmation of Grant dated 18th December 2015 by the court on its own motion as at the time, the 1st Petitioner was very sick and that it was the 2nd Petitioner who would escort him to court.
10. They further contended that the Petitioner was still unwell and bedridden and that the Objector had scouted for buyers and was intending to sell the already sold subject land and had already placed strangers on the same who were using it at the expense of the Purchasers. It was their case that the Objector's claim was an afterthought and was majorly out of malice and ought not be allowed but dismissed with costs.
11. The matter herein proceeded by way of *viva voce* evidence. The Objector's Written Submissions were dated and filed on 21st February 2023 while those of the Respondents were dated 6th November 2022 and filed on 8th November 2022. The Interested Parties' Written Submissions were dated 8th November 2022 and filed on 9th November 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

12. The Objector placed reliance on the case of *Re Estate of Shem Kitanga (Deceased)* (eKLR citation not given) where it was held that a succession cause started with an introduction letter from the chief of



the area where the intended petitioner hailed from and that although it was not a legal requirement, it was presumed the chief was well familiar with the family of the deceased person and could inform the court of the beneficiaries the deceased left behind.

13. She furnished the court with a letter from the Chief confirming that she was the daughter to the deceased and was thus one of the surviving beneficiaries in the degree of consanguinity to the deceased. She invoked Section 29 of the [Law of Succession \(Amendment\) Act 2021](#), Section 66 of the [Law of Succession Act](#) and Rule 26 of the [Probate and Administration Rules](#) and argued that the person given priority over an intestate was the surviving spouse and children and therefore in this case, since the deceased's spouse was not alive, his children had the priority to petition the court for letters of administration.
14. She pointed out that she was not notified of the application for letters of administration of the deceased despite having been entitled in the same degree as the Petitioner.
15. She further invoked Section 76 of the [Law of Succession \(Amendment\) Act 2021](#) and cited the case of [Re Estate of Moses Wachira Kimotho \(Deceased\)](#) [2009]eKLR where it was held that had the applicants been made aware of the application for the confirmation of grant by being served, they would have brought to the fore their interest in the estate of the deceased and the resultant grant would have taken care of those interests.
16. She argued that the Petitioners failed to comply with Rule 26 of [Probate & Administration Rules](#) to get consent from all the beneficiaries of the deceased's estate before filing the Petition herein. She asserted that she had not renounced her right to the deceased's estate and should have been notified of the filing of the cause. She added that the fundamental irregularity made the succession proceedings to be defective in substance and therefore the Title Deeds that were obtained pursuant to an unlawfully acquired certificate of grant could not stand. She thus urged the court to grant the orders sought.
17. On their part, the Respondents submitted that the principles for revocation of grant were set out under Section 76 of the [Law of Succession Act](#) and contended that one who sought equity had to come with clean hands. They pointed out that on 25th April 2022, the Objector testified that the 1st Petitioner who was her brother had been involved in a fatal accident and that she had prior knowledge that he had sold the subject land and used some money to cater for his medical bill.
18. They placed reliance on the case of [Serah Njeri Mwobi v John Kimani Njoroge](#) [2013]eKLR where it was held that where one party by his words or conduct made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party had taken his word and acted upon it, the party who gave the promise or assurance could not afterwards be allowed to revert to the previous legal relationship as if no such promise had been made by him but he had to accept their legal relations subject to the qualification which he had himself introduced.
19. They asserted that they had produced relevant hospital documents and payments receipts in support of their case. They pointed out that the Objector's case had been adjourned for hearing on 26th September 2022 by consent of the parties but the Objector did not appear and the Trial Court closed her case. It was therefore their contention that the Interested Parties' case was unchallenged and that all that the Objector did was to blame them of concealment of facts during the succession proceedings.
20. They further argued that the standard of proof where fraud was alleged in a civil dispute was higher than a balance of probabilities as was the requirement in civil cases. In this respect, they relied on the case of [Christopher Ndaru Kagina v Esther Mbadi Kagina & Another](#) [2016] eKLR where it was held that he who alleges fraud must prove fraud and that allegations of fraud must be strictly proved.



21. They asserted that the subject land had already exchanged hands and was legally registered in the names of the Purchasers on 27th June 2017. It was their contention that the court therefore lacked the jurisdiction to cancel the title deed issued in the proceedings herein. They cited the *Halsbury's Laws of England Vol 9 4th Edition Paragraph 8* to the effect that the court had the power to punish as contempt any misuse of the court's process. They further invoked Section 27 of the *Civil Procedure Act* and urged the court to grant them costs of the application.
22. On their part, the Interested Parties placed reliance on the case of *Charles Karethe Kiarie & 2 Others v Administrators of Estate of John Wallance Muthare (deceased) & 5 Others* [2013] eKLR where it was held that the Torren System of registration was applicable in Kenya and acknowledged that under the system the title of a bona fide purchaser for value without notice of fraud could not be impeached.
23. They further cited the case of *Zebak Limited v Nadem Enterprises* [2016] eKLR where it was held that for a purchaser to successfully rely on the *bona fide* doctrine, he had to prove that he held a certificate of title, he purchased the property in good faith, he had no knowledge of fraud, he purchased for valuable consideration, the vendors had apparent good title, he purchased without notice of any fraud and that he was not party to any fraud.
24. It was their submission that they entered into a legally binding and written land sale agreement with the Petitioners on 14th January 2016 for the purchase of the subject land measuring approximately 1.48 Hectares at a consideration price of Kshs 600,000/= which they paid in full. They asserted that prior to the said purchase, they conducted due diligence on the property and found out that indeed the parcel of land was in the names of the Petitioners having been registered on as owners on 27th January 2016 as referenced in entry no 6 of the parcel file's green card.
25. They contended that in conducting their due diligence, they found out that the Petitioners conducted a legal succession in court for letters of administration intestate for the deceased's estate and were issued with a first Grant Form P&A 41 on 19th January 2015 and subsequently Form P&A 54 Certificate of Grant on 18th December 2015. It was their contention that the Petitioners were therefore the legal owners of the subject land way after the succession process and the same was purchased without notice of any fraud having followed the due process of law.
26. In that regard, they referred this court to the case of *Arthi Highway Developers Ltd v West End Butcheries Limited & 6 Others* [2015] eKLR where it was held that under the doctrine of the purchaser without notice, a legal right was enforceable against any person who took the property, whether he had notice of it or not except where the right was overreached or was void against him for want of registration.
27. They further cited the *Black's Law Dictionary 8th Edition* and the cases of *Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another (Supra)*(sic) and *Katende v Haridar & Company Limited* [2008]2 E.A 173 where the common thread was that a *bona fide* purchaser was a person who honestly intended to purchase the property offered for sale and did not intend to acquire it wrongly. They argued that a bona fide purchaser of a legal estate without notice had absolute unqualified and answerable defence against claim of any prior equitable owner.
28. They pointed out that the law was extremely protective of title to land but the protection could be removed and title impeached on two (2) instances being, where the title was obtained by fraud or misrepresentation to which the person had been proved to be a party and where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.



29. In this respect, they relied on Section 26 of the *Land Registration Act* and the case of *Elijah Makeri Nyangwira v Stephen Mungai Njuguna & Another* [2013] eKLR where it was held that the heavy import of Section 26(1)(b) of the *Land Registration Act* was to remove protection from an innocent purchaser or innocent title holder and that meant that the title of an innocent person was impeachable so long as that title was obtained illegally.
30. They were emphatic that the purchase was done in accordance with the set out guidelines on contracts and without notice nor knowledge of any fraud and thus the Title Deed in their names was legally obtained as the Petitioners relinquished their proprietary rights over the property. In this regard, they also placed reliance on the case of *Shah v Guilders International Bank Ltd* [2003] KLR (sic) where it was held that the parties executed the same willingly and they were therefore bound by it. They also invoked Section 27 of the *Civil Procedure Act* and urged the court to grant them costs.
31. The Objector reiterated her averments in her Supporting Affidavit. She testified that they had a meeting with the village elder who encouraged them to resolve their issues so that each party could be given a portion of the subject property. When she was cross-examined, she stated that the Petitioners used a fake Death Certificate to petition for letters of administration but this was not reported.
32. On his part, the 1st Petitioner admitted that the Objector was his sister but urged the court to dismiss her case. He admitted having sold the subject land to the Interested Parties and that the purchase price was used in settling his medical bill. He stated that he had given land to his deceased brother's children. The 2nd Petitioner corroborated his evidence.
33. Onyango John Fredrick, the 1st Interested Party herein (hereinafter referred to as "DW 3") reiterated the averments they set out in their Written Submissions. He asserted that together with the Interested Party, they purchased the subject land at a consideration of Kshs 600,000/= to enable the Petitioner seek treatment.
34. Section 76 of the *Law of Succession Act* Cap 160 (Laws of Kenya):-

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.

35. An order for revocation of the grant can thus only be given if the aforesaid grounds for revocation had been satisfied. A similar finding was arrived at *In the Matter of the Estate of L A K – (Deceased)* [2014] eKLR.
36. Notably, the Petitioner did not include the Objector herein in the P & A 5 that was attached to the Petition for a grant of Letters of Administration. The Petitioners did not challenge the Chief's letter that was produced by the Objector which indicated that she was the daughter of the deceased. The Petitioners only submitted that the Objector had indicated to them that she was not interested in the aforesaid succession proceedings and the subject property but did not adduce any affidavit evidence during the said proceedings to prove that indeed she had consented to her exclusion from the proceedings.
37. The Objector's evidence that she was the deceased's daughter thus remained unrebutted. The Chief's letter that the Petitioner relied upon in obtaining the Grant herein which resultantly disinherited her was immaterial as the 1st Petitioner may have failed to disclose that she was indeed a beneficiary of the deceased's estate.
38. This court was therefore persuaded that there were false statements concerning the petitioning for the grant of Letters of Administration intestate herein and hence found and held that the grant was obtained fraudulently by virtue of concealment of a material fact to the detriment of the Objector herein.
39. Further, the proceedings of obtaining the grant of letters of administration were defective as stipulated in Section 76(a) of the *Law of Succession* for want of the Objector's consent which was to be expressed in Form 38.
40. After carefully considering the Objector's affidavit evidence, which was uncontroverted and her Written Submissions, this court came to the firm conclusion that she proved that there was merit in revoking and/or annulling the Grant of Letters of Administration that was issued to the Petitioner and the 2nd Respondent herein as stipulated in Section 76 of the Law of Succession Act.
41. Turning to the issue of whether the Interested Parties as purchasers of the subject land were protected by Section 93 of the Law of Succession Act, the said Section provides:

“ 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.”
42. Having said so, two (2) decisions of the Court of Appeal deal with the interpretation and application of the aforesaid provision. In the case of *Jane Gachoki Gathecha v Priscilla Nyawira Gitungu & Another* [2008] eKLR, the court therein took the view that a purchaser was not protected when the procedure used to acquire the grant was fraudulent.
43. In the case of *Musa Nyaribari Gekone & 2 others v Peter Miyianda & Another* [2015] eKLR, the Court of Appeal upheld the decision of the High Court in which it had determined that Section 93 of the



Law of Succession Act did not afford the 3rd appellant therein protection as there was evidence of fraud in the application for the grant therein.

44. While this court may not be certain if the Interested Parties were aware of the fraudulent manner in which Petitioners acquired title to the subject land, the decisions of the Court of Appeal cited above were clear that the purchasers' title was not protected by Section 93 of the Law of Succession Act as the Petitioners did not acquire good title to the subject property to pass the same to the purchasers. The Certificate of Confirmation of Grant dated 18th December 2015 was clear that the Petitioners herein were to hold the subject property in trust for the aforesaid minors.
45. The Petitioners were guilty of intermeddling with the deceased's estate as stipulated in Section 45 of the Law of Succession Act and were liable to be punished in accordance with Section 45(2)(a) of the Law of Succession Act.
46. As the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process under Rule 73 of the Probate and Administration Rules, this court came to the firm conclusion that it was prudent that the Objector be made a joint administrator of the deceased's estate together with the 1st Petitioner and that the 2nd Petitioner removed as he was not a beneficiary of the deceased's estate.

Disposition

47. For the foregoing reasons, the upshot of this court's decision was that the Objector's Summons for Revocation and/or Annulment of Grant dated 9th January 2020 and filed on 21st January 2020 was merited and the same be and is hereby allowed in terms of Prayer Nos (2) and (3) therein. The costs of the Summons will be in the cause.
48. The Grant of Letters of Administration Intestate herein that was issued on 19th January 2015 be and is hereby revoked but amended to reflect the change to the effect that the 2nd Petitioner be and is hereby removed from being an administrator of the deceased's estate and that the Objector herein be and is hereby enjoined as a co-administrator of the deceased's estate together with the 1st Petitioner herein as they both ranked equally in priority of those who could apply for letters of administration to the deceased's estate.
49. It is hereby directed that Title to land parcel No Central Alego/Nyalyungu/2800 be and is hereby cancelled and is declared void and shall revert to the original title of Siaya/Nyalyungu/2800 in the name of Gaudensia Okola Watula, the deceased herein for redistribution to the deceased's beneficiaries.
50. The 1st and 2nd Petitioners be and are hereby fined Kshs 30,000/= each and in default each to serve three (3) months imprisonment for intermeddling with the deceased's estate.
51. It is also hereby directed that this matter be mentioned before the Deputy Registrar of High Court Siaya on 10th July 2023 with a view to placing it before the Presiding judge for purposes of giving further orders and/or directions regarding the filing of Summons for Confirmation of Grant herein.
52. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF JUNE 2023

J. KAMAU
JUDGE

