



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**MISC. SUCCESSION CAUSE NO. 4 OF 2019**

**IN THE MATTER OF THE ESTATE OF SIMON NJOGU GICHENI (DECEASED)**

**LUCY NJERI NJOGU.....1<sup>ST</sup> APPLICANT**

**GEORGE GATONYE NJOGU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JOHN NJENGA NJOGU..... RESPONDENT**

**AND**

**IMANI MAAI MAHIU SELF HELP GROUP.....1<sup>ST</sup> INTERESTED PARTY**

**LAND REGISTRAR NAIVASHA SUB COUNTY.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The application filed by Lucy Njogu and George Njogu the (1<sup>st</sup> and 2<sup>nd</sup> Applicants) dated 30<sup>th</sup> February, 2019 seeks:

a) Cancellation of the registration of Imani Maai Mahiu Self Help Group (1<sup>st</sup> Interested Party) as the registered proprietor of Longonot /Kijabe Block 4/5 (“the Land Parcel”);

b) That the Registrar Naivasha, (2<sup>nd</sup> Interested Party) be ordered to effect cancellation and ownership of the Land Parcel and that it revert to the name of the deceased Simon Njogu Gicheni.

2. From the documentation availed by the parties, the background to the application is as follows. The Respondent, as sole administrator of the estate of his deceased father Simon Njogu Gicheni, obtained a grant letters of administration to the estate on 6<sup>th</sup> September, 2013. The grant was confirmed on 2<sup>nd</sup> May, 2014 by the Engineer SRM Court and a confirmation certificate was issued. The Respondent was indicated as the sole beneficiary of the Parcel of Land, which was the only listed asset of the deceased for distribution.

3. Forthwith upon receipt of the confirmed grant, John Njogu, the Respondent, effected a transfer by transmission of the Land Parcel to himself.

4. Simultaneously or nearly simultaneously with the transmission, John Njenga Njogu purportedly entered into a Sale agreement (“the Sale Agreement”) with Imani Maai Mahiu Self Help Group for the sale of the Parcel of Land to it. The Sale Agreement was dated 10<sup>th</sup> May, 2014, eight days after the issuance of the confirmed grant.

5. According to an official search exhibited by Imani Maai Mahiu Self Help Group and upon by Respondent, the Parcel of Land was transferred on 29<sup>th</sup> May, 2014, and a title deed issued the same day to Imani Maai Mahiu Self Help Group.

6. Lucy Njeri Njogu filed objection proceedings in the High Court in HC Succession Cause No. 55 of 2014. By a ruling of Meoli J dated 21<sup>st</sup> April, 2016, the grant issued to John Njogu was revoked, and a new grant issued in the names of Lucy Njeri Njogu, George Gatonye Njogu and John Njenga Njogu.

7. Interlocutory proceedings before the said ruling resulted in the registration of a caution on the Parcel of Land by Lucy Njeri Njogu claiming beneficiary's interest and court orders prohibiting any dealings with the Parcel of Land on 20<sup>th</sup> November, 2014 and 13<sup>th</sup> February 2015. The caution and orders subsist on the Parcel of Land as indicated by the search. There is no indication that the Ruling by Meoli J. has been appealed or reviewed.

8. John Njogu and Imani Maai Mahiu Self Help Group oppose the application herein. Their reasons for their opposition dovetail into two prongs.

9. First, they assert that under **Section 93 (1)** of the **Law of Succession Act** the transfer of the Parcel of Land to the Imani Maai Mahiu Self Help Group is a valid transfer whose validity cannot be affected or defeated by the revocation of the confirmed grant. This argument is grounded on the fact that at the time of the transfer, the transferor, John Njogu, was the administrator of the estate; that his name had been inserted into the title for the Parcel of Land as registered proprietor; the Certificate of confirmation had not been revoked; and the Imani Self Help Group as purchaser had taken vacant possession of the Parcel of Land.

10. Secondly, they assert that under **Section 26** of the **Land Registration Act 2012**, the Imani Maai Mahiu Self Help Group was registered as the absolute and indefeasible owner of the Parcel of Land which had been acquired legally, procedurally and without any fraud on their part.

11. The applicants' submissions are that: the transfer of the Parcel was effected very speedily; the confirmed grant being issued on 2<sup>nd</sup> May 2014, the Sale Agreement being executed on 13<sup>th</sup> May, 2014 and the transfer in favour of the Imani Maai Mahiu Self Help Group being effected on 29<sup>th</sup> May, 2014. This implied fraudulent collusion between the parties. They also argue that where there is intermediary with the estate, the court has power to make such orders as may be expedient depending on the circumstances of the case.

12. Further, they submitted that once the grant was revoked, all acts done under it are null and void and incapable of vesting any legal rights over the Parcel of Land. They rely on the following authorities:

a) **Santuzza Bilioti alias Mei Santuzza (Deceased) v Giancarlo Falasconi [2014] eKLR** where the court held:

*“.....the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by no-beneficiaries such as where the property is being sold before a grant is confirmed.”*

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

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

13. In their submissions the respondent and 1<sup>st</sup> Interested Party rely on authorities of the Court of Appeal dealing with **Section 93** of the **Law of Succession Act** and discredit the applicants' reliance on the authorities of the Courts by co-ordinate jurisdiction as merely pursuance. The authorities of the Court of Appeal that are binding, they argue are:

a) **Jecinta Wanja Kamau v Rosemary Wanjiru Wanyoike & Another [2013] eKLR.**

b) **Jane Gachoki Gathecha v Priscilla Nyawira Gitungu & another [2008] eKLR.**

These authorities are cited as setting out the following conditions precedent for application of **Section 93** of the **Law of Succession Act**:

i) The Interested Party must prove that he/she is a Purchaser.

ii) There must be a transfer of the immovable interest.

14. According to the Respondent and 1<sup>st</sup> Interested Party, **Section 93** of the **Law of Succession Act** is clear that once there is proof of a purchase and a transfer of the subject immovable property is effected, such transaction is valid and indefeasible. The same scenario applies under **Section 26** of the **Land Registration Act 2012** unless the parcel of land was acquired fraudulently, illegally or unprocedurally.

#### **Analysis and Determination**

15. The only issue before me is whether the transfer of the Parcel of Land was valid and indefeasible under both **Section 93** of the **Law of Succession Act** and **Section 26** of the **Land Registration Act 2012**.

16. **Section 93 (1)** of the **Law of Succession Act** provides as follows:

*“(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.”*

17. **Section 26 (1)** of the **Land Registration Act** provides as follows:

*“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”* (Emphasis added)

18. In **Jacinta Wanja Kamau’s** case, the Court of Appeal stated:

*“Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case, and as provided by Section 82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the grant.”*

Thus for **Section 93 (1)** of the **Law of Succession Act** to apply, one of the conditions that must be fulfilled is that the interest immovable property accrued to the person seeking to rely on the provision by virtue of he or she having proof of purchase of the interest in the immovable property. I accept this position.

19. In addition, however, there is the requirement for transfer. In the High Court case of **Re Estate of Salim Islam Saadan (Deceased) [2016] eKLR** refers to the Court of Appeals interpretation of **Section 93** of the **Law of Succession Act** as follows:

*“[19] Section 93 of the Law of Succession Act has been the subject of judicial interpretation in a number of cases. In Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and another [2008] eKLR where a purchaser claimed that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore protected under S.93 (1) of the Law of Succession Act (Cap 60) Court of Appeal sitting in Nyeri stated thus:*

*“We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immovable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”*

*[20] The Respondent was not the sole beneficiary of the property and therefore had no property to transfer to the Interested Party. It is evident to me that the Interested Party purchased the property with his eyes open. He was not a bona fide purchaser for value without notice as he would want this Court to believe. He was fully aware of the circumstances surrounding the property. The sale and transfer of Lamu/Block I/582 by the Respondent to the Interested Party is therefore void ab initio and the property is traceable.”* (Emphasis added)

20. I have carefully perused the documents availed by the parties. I note the following from the Certificate of Search which is relied on by the Respondent and Interested Party. It shows that what was transferred to the Imani Maai Mahiu Self Help Group is the absolute title in **Title No. Longonot/Kijabe Block 4/5** having an approximate area of 5.72 hectares (about 14.13 Acres), and a title deed was issued to the Imani Maai Mahiu Self Help Group.

21. However, the Sale Agreement exhibited shows as follows: the vendor is correctly indicated as holding: **“Longonot/Kijabe Block 4/5 measuring approximately 14 Acres”**; the Agreement continues:

*“And whereas the Vendor is desirous to sell 12 Acres out of the above parcel to the purchaser and the purchaser is ready to buy the same under the terms and conditions hereunder:*

*1. The Vendors sell to the purchaser the above plot at a consideration of Kenya Shillings Three Million Four Hundred and Eighty thousand (Kshs 3,480,000/=) only;*

*.....;*

*7. The purchaser shall take possession of the sold parcel after clearing the balance.....”* (Emphasis added)

22. Clearly what was in effect transferred - the whole 14.13 Acres comprising **Longonot/Kijabe Block 4/5** - and what was purchased under the Sale Agreement, namely, 12 Acres out of the above parcel, are not the same thing. In other words there was a failure of the parties to reach the classical consensus *ad idem*. In that regard, two (2) acres in excess of what was paid for, was transferred to the purchaser. It had no consideration. The agreement is imperfect in relation to the transfer. There is no indication that a supplemental agreement or rectification agreement or other such instrument was effected as between the parties. Thus the transfer is not a true reflection of the Sale Agreement and is itself imperfect to that extent.

23. In order to perfect the transaction to reflect the sale and purchase of twelve acres, the transferee would have to relinquish two acres from the title registered to them. The problem in that would arise in that the grant was revoked and the transferor no longer has any sole authority to transact over the parcel.

24. In my view the interest in the immovable property that was allegedly purchased did not crystallise and was not perfected by the transfer that was subsequently registered. With the failure of consensus, the transfer was and is void and the transaction unravels and collapses. If one were to strictly construe the transfer to have involved only twelve acres then two acres is returnable. As such, **Section 93** of the **Law of Succession Act** becomes inapplicable and unavailable to the transferor and transferee because no transfer of what was purchased and sold had taken place.

25. In addition, the Sale Agreement by its wording seems to have anticipated an exercise of survey and sub-division, for what was being sold was “12 acres *out of the above parcel*.” In absence of the sub-division the transfer of the whole title was uncontractual, irregular and unprocedural. In transferring more than what was contracted for, the transferee’s title is “traceable”, in the language of the Court of Appeal in the Case of **Jane Gachoki Gathecha** (supra).

26. There is a final curious point on which it would have been necessary to have some illumination but which is not central to the decision herein. The Respondent exhibited the transmission of land forms by which the Parcel was transferred to him. However, he did not exhibit the Land Control Board consent forms used for the consent of the transaction between him and the Imani Maai Mahiu Self Help Group. Had he gone through the control board exercise, the error made in transferring the whole of the Land Parcel rather than (12) acres would have come to light. Consequently sub-division would have been made a requirement including obtaining the consent to subdivide.

27. The processing of a sale transaction through the Land Control Board - for controlled properties in which Longonot Kijabe area would be - assists in building credibility to the transaction as it lends procedural propriety to it. **Section 6** of the **Land Control Act** makes a sale and purchase of agricultural land and the division of such land void where no Land Control Board Consent is obtained.

28. To conclude the decision on **Section 93** of the **Law of Succession Act**, I would say that where a substantive gap or question in respect of a transfer or a purchase transaction involving immovable property arises in respect of a claim under **Section 93** of the **Law of Succession Act**, the door to invalidation of the interest purported to be transferred is opened. Once opened the section becomes inapplicable.

29. The Respondent and 1<sup>st</sup> Interested Party’s reliance on **Section 26 (1)** of the **Land Registration Act** is, in my view, even more tenuous under the circumstances discussed herein. Simply put, **Section 26** of the **Land Registration Act** entails the holder of a Certificate of Title to claim indefeasibility generally. However, the section makes two exceptions where the certificate can be actively “challenged”. The second exception is on fraud or misrepresentation:

“(a) .....

(b) where the certificate has been acquired illegally, unprocedurally, or through a corrupt scheme.”

30. I think that where, as in the present case, the claim that the title was unprocedurally made can be raised; and the mis-procedure is substantive - and not a mere technicality that can be rectified on its face - including one such as a potential rectification of the agreement, fresh survey and reissue of title; then the title cannot be said to be indefeasible and **Section 26 (1)** of the **Land Registration Act** cannot avail the party seeking to rely on it. Such a title must be deemed unprocedurally obtained.

### **Disposition**

31. Ultimately, and in light of all the foregoing, the applicants’ application succeeds and orders are issued as follows:

a) The registration of Imani Maai Mahiu Self Help Group as the registered proprietor of **Land Parcel Longonot/Kijabe Block 4/5** is hereby cancelled.

b) The Land Registrar Naivasha Sub-County is hereby ordered to effect cancellation and ownership of the said Land Parcel and it shall revert to the name of the deceased Simon Njogu Gicheni to facilitate distribution of the estate amongst the beneficiaries duly recognized by law.

### **Administrative directions**

32. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

33. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

34. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 28TH DAY OF APRIL, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. G. M. Njuguna for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants
2. No representation for Mwaura Shairi for the Respondent & 1<sup>st</sup> Interested Party
3. Not represented - 2<sup>nd</sup> Interested Party
4. Court Clerk - Quinter Ogutu