



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO.24 OF 1966

IN THE MATTER OF: THE ESTATE OF NASSOR ALI NAHDY (DECEASED)

OMAR SHERIFF AHMED.....APPLICANT

VERSUS

MUNIR MOHAMED SKETTY.....RESPONDENT

AND

MOMBASA HOUSE WARES LIMITED.....1ST INTERESTED PARTY

EQUITY BANK (K) LIMITED.....2ND INTERESTED PARTY

RULING

1. The deceased herein died intestate on 25th September, 1964 while domiciled in Mombasa. He was survived by his wife Salma Binti Hemed Seif, Mohamed Ali Nahdi(brother),Rehema Binti AliNahdi(sister) and Zuhura Binti AliNahdi(sister) all of whom are now deceased. His family through Mohamed Ali Nahdy (deceased's brother) petitioned this Honourable Court for letters of administration intestate on 31st March 1966. A grant of letters of administration intestate was issued on the 18th June, 1969. According to form ED then applicable in petitioning for a grant, the asset listed as comprising the estate was indicated as "various undivided shares in plot no.284 Section III Mombasa North".
2. Unfortunately, the administrator Mohamed Ali Nahdy died on 21st August, 1972 leaving the estate unadministered. His son Nassor Muhammad Nahdy filed an application to this court dated 5th September 1973 seeking grant of letters of administration *De-Bonis Non*. The grant was issued on 20th November, 1974.
3. The Respondent herein Munir Mohamed Sketty approached this Honourable Court through a petition dated 23rd February, 2017 petitioning for letters of administration *De Bonis* in place of Nassor Muhammad who died on 19th December, 2015. A grant of letters of administration limited to assets left unadministered by the administrator was issued on 31st March, 2017.
4. On 28th September, 2017, the Respondent filed summons for confirmation of grant issued on 31st March, 2017. Consequently, the grant was confirmed on 10th October 2017 and the estate comprising plot Nos.1002/III/MN, 1004/III/MN and plot No. 890 being products out of subdivision of the original plot No. 284 shared out to Ali Omar Mohamed 1/4; Abdallah Mohamed Ali ¼, Twalib Abdallah Ali ¼, Aisha Mohamed Nahdy 1/8 and Sofia Abdalla Ali 1/8
5. The Respondent filed summons dated 20th November,2017 seeking temporary injunction restraining Omar Shariff Ahmed the Applicant herein, his agents and or servants from selling, mortgaging , transferring, leasing, charging and or in any other manner dealing with the property known as Plot No.1004/111/MN CR NO.41931 in Kilifi County pending the interpartes hearing of this application; the transfer of the title to Omar Sheriff be revoked and that orders to issue summoning the applicant to court to explain how he acquired the property. The court granted exparte temporary order on 21st November 2017 pending interpartes hearing.
6. The Applicant filed grounds of opposition dated 7th February, 2018 in response to the said application deposing that it was fatally and incurably defective in the circumstances and that the subject property does not comprise part of the estate herein.
7. Subsequently, the Applicant herein also filed an application dated 17th January ,2018 supported by the supporting affidavit of AHMED OMAR SHARIFF sworn on the same day, seeking the following orders:

a) Spent

b) That this Honourable Court be pleased to revoke the grant of letters of administration –*De Bonis Non* to Munir Mohamed Sketty.

c) That for avoidance of doubt this Honourable Court be pleased to issue an order staying any such administration of the assets and estate of Nassor Ali Nahdy (deceased) by the Respondent, Munir Mohamed Sketty, his assigns, representatives, nominees, family members and /or any other person howsoever pending the hearing and determination of this suit.

d) That this Honourable Court be pleased to issue an order staying any such administration of the assets and estate of Nassor Ali Nahdy(deceased) by the Respondent, Munir Mohamed Sketty, his assigns, representatives, nominees, family members and /or any other person howsoever pending the hearing and determination of this suit.

e) That this Honourable Court be pleased to issue an order requiring the Respondent Munir Mohamed Sketty to render an account of all assets (administered and unadministered) of Nassor Ali Nahdy (deceased) and Nassor Muhammad Nahdy (deceased).

f) That this Honourable Court be pleased to direct the criminal investigations department Mombasa County to investigate and issue a report/finding over the will drawn by MESSRS KAMOTI AMOLLO& COMPANY ADVOCATES in respect of the last will made codicil of Nassor Muhammad Nahdy (deceased).

g) That the Honourable Court be pleased to issue such further orders in the interest of justice.

h) That the costs of this application be provided for.

8. Upon perusing the application exparte, the court directed for service upon the respondent and granted prayer 3(c) pending hearing and determination of the suit. The application is anchored on grounds set out on the face of it and the content contained in the affidavit in support sworn on 17th January, 2018 by Ahmed Omar Shariff stating that; **the Respondent-Munir Mohamed Sketty is immensely guilty of factual non-disclosure, misrepresentation of material facts and overtly taken the Honourable Court for a ride /farce. He further averred that the conduct of Munir Mohamed Sketty –points towards seeking to administer the estate of Nassor Muhammad Nahdy (deceased) the former administrator of the estate of Nassor Ali Nahdy deceased;**

9. He also deposed that Nassor Muhammad Nahdy (deceased administrator) died testate on 19th day of December 2015 after having already taken out a last will and codicil drawn by the firm of MESSRS KAMOTI AMOLLO & COMPANY ADVOCATE wherein Nassor Muhammad Nahdy (deceased) expressed his last wishes how his estate was to be administered. That the purported attempt to administer the estate of Nassor Muhammad Nahdy (deceased)whilst there is an unchallenged and valid last will and codicil of Nassor Muhammad Nahdy (deceased)is against the tenets of the laws of succession and a criminal offence wilfully committed by MUNIR MOHAMED SKETTY.

10. That it is imperative that the actions of Munir Mohamed Sketty be subject to scrutiny and investigations by the county criminal investigations department Mombasa.

11. That the inordinate delay in lodging the letters of administration –*De Bonis Non* of the estate of Nassor Ali Nahdy (deceased) is a calculated move accentuated by Munir Mohamed Sketty to misguide this honourable court to pre-determine another estate being that of Nassor Muhammad Nahdy (deceased).

12. That under Mohammedan Law, a nephew cannot determine the estate of a grandfather without first seeking to administer the estate of the parent of the nephew as is purported to be connoted by Munir Mohamed Sketty

13. The Respondent filed a Replying Affidavit sworn on 8th March, 2018 urging the court to dismiss the summons for revocation and investigate the conduct of the Applicant. He averred that he is the administrator of the estate of his late uncle Nassor Muhammad Nahdy the deceased administrator in this estate. He contended that he is the current and sole administrator of the estate herein and that the applicant is not at all related to the deceased's family. He went further to claim that Nassor Ali Nahdy was his grand uncle and that plot No.1004/III/MN should revert back to the deceased for distribution to the rightful owners as per the confirmed grant. On 20th March 2018, the court directed for the matter to proceed by way of viva voce evidence.

14. The Respondent further filed an application/summons dated 30th August, 2018 seeking an injunction order restraining any dealings or transfer of plot No. 1004/III/MN; inclusion of the 1st and 2nd interested parties on grounds that; the 1st interested party had obtained ownership of the subject property fraudulently; the 1st interested party had charged the subject property to the second interested party for a sum of kshs 10,000,000 and defaulted in repaying hence culminating to advertisement for sale of the property by the 2nd interested party; the sale of the property to the 1st interested party by Nassor Muhammad Nahdy before confirmation of the grant was irregular.

15. The 2nd Interested Party filed a Replying Affidavit sworn on 10th September, 2019 in support of the revocation application dated 17th January 2018 thereby challenging the grant of letters of administration issued to Munir Mohammed Sketty and subsequent confirmation thereof.

16. The Applicant also filed a Replying Affidavit sworn on 19th November, 2018 terming the application/Summons as a gross abuse of the court process.

17. The 2nd Interested Party filed a Replying Affidavit sworn on 17th January, 2019 by Kariuki Kingori legal Manager to the second interested party urging the court to find that the summons herein are Resjudicata, hopeless, unmerited and should dismiss the same with costs to the 2nd Interested Party to allow the bank's right for sale which is good in law, to proceed as scheduled to recover an outstanding loan of about kshs26, 604,289 against the 1st interested party.

18. That due process was followed in advancing the loan as well as the quest to exercise their statutory right of sale. He deposed that the respondent had moved to the Land and Environment court seeking recovery of the said property where the same is pending determination. That due diligence was exercised before accepting the title deed as collateral free from any encumbrance. It was further contended that the 2nd interested party has a recognizable interest in the property which was known and acknowledged by the respondent since 2015 when the property was charged for the first time a fact that the respondent did not disclose to the court when petitioning for a grant of letters of administration de bonis non.

19. The 2nd Interested Party further filed an affidavit sworn on 17th September, 2020 by James Gakundi the 2nd respondent's Credit Manager thus adopting the averments made by Mr.Kariuki King'ori in the Replying Affidavit sworn on 17th January 2019 in opposition to the summons dated 30th August 2018.

Hearing by way of viva voce evidence

20. During the hearing, Omar sheriff Ahmed(pw1) the applicant herein told the court that, Nassor Mohammad Nahdy was his guardian having brought him up since childhood. That he used to manage his guardian's property including rent collection from his estate. He claimed that Nassor Mohammad always regarded him as his child. That Nassor Mohammad who was a retired chief Kadhi showed him all his properties in Mtwapa and Bamburi. He confirmed that the said Nassor Mohammad had a wife who later died without having had any biological child together. He stated that the respondent herein was a son to the said Nassor Mohammad's sister whom Mohammad had given three plots at Mwembe Tayari to construct on his behalf but the respondent never surrendered any rent to him

21. He confirmed that Mohammad did not complete the administration of the deceased's estate. That the year 2012, he had financial challenges hence sought help from Mohammad who gave him some property. That in appreciation of the good care he had taken of him, Mohammed wrote a will giving all his properties including transfer of the subject property he charged to Equity Bank in the presence of Munir the respondent herein. That he has filed P&A 109/17 in respect of Nassor Mohammad's estate to which he is entitled. On xx-examination by Mr.Khatib, he admitted that he did not know whether Nassor Mohammad had capacity to transfer plot no.1004/III/MN to him.

22. On his part, Munir (DWI) the respondent herein adopted the content in his affidavit sworn on 8th March 2018. He stated that he was a nephew to the late administrator Nassor Mohammad. He basically insisted that the transfer of plot No. 1004 to the applicant was irregular.

23. The second interested party through its branch Manager Mr. Ngera adopted the averments contained in his affidavit which is a replica to his colleagues' two affidavits sworn by James Gakundi and Kariuki Kingori contending that they did due diligence before advancing the loan.

24. Upon close of the case, parties agreed to file written submissions.

Applicant's submissions dated 16th December, 2020

25. The Applicant filed written submissions dated 16th December, 2020 through the firm of Gachiri Kariuki and company Advocates. The only issue identified for determination is **whether the court should revoke the grant.**

26. The Applicant submitted that the grant was confirmed and issued on 3rd November, 2017 without the respondent disclosing that the subject property was already registered in the name of the applicant hence concealment of material information from the court and therefore good ground to revoke the grant. In support of this position, counsel relied on the authority of **Re Estate of Julius Ndubi Javan (deceased) [2018] e KLR and rule 41(3) of the probate and administration rules** where the court held that failure to disclose ownership of the subject property amounted to concealment of material information to the court.

27. He further submitted that the issue of ownership of the subject property is properly before a court of competent jurisdiction vide Mombasa ELC No.148 of 2017. Further, that this court would have been able to deal with that issue had it been made aware of the legal ownership of the contested property before confirmation. He contended that upon determination of ownership in ELC 148 of 2017, its judgment can be brought before this court to be given effect, as per the holding in **Re Estate of Julius Ndubi Javan (Supra)**.

Respondent's submissions dated 30th November, 2020.

28. The Respondent filed his submissions dated 30th November 2020 and filed on

8th December 2020 through the firm of Khatib and company Advocates. The only issue raised is whether the applicant has proved a case for revocation of the grant issued to the respondent in respect of the deceased's estate under section 76 of the law of succession.

29. It was submitted that the will dated 16th June, 2015 bequeathed all the property of the deceased to the Applicant. That the Applicant is not a heir or a beneficiary and in Islamic law a person cannot bequeath all his property to non-heirs through a will and such a will is null and void ab initio. To fortify this assertion, reliance was placed on the holding in the case of **Saifudeen Mohamed Ali Noorbhai versus Shehnaz Abdulhussein Adamji (2011) e KLR and In re Estate of CCBH (deceased) (2017) eKLR** where the court held that **Amuslim may dispose off his estate by will to non-heirs up to 1/3 of the estate.**

30. Regarding the question whether the applicant obtained legal title from Nassor Muhammed, the Respondent submitted that Nassor Muhammad had no power to transfer property to a 3rd party before confirmation of the grant pursuant to section 55 of the Law of Succession Act. He contended that as an administrator, Nassor Muhammad's duty was to safe guard the estate and distribute the same to the rightful heirs. To buttress this point, the court was referred to the case of **Zacharia Wambugu Gathimu & another vs John Ndungu Maina (2019)eKLR** where the court found transfer and registration of adeceased's property before conclusion of a succession case in respect of the said estate was null and void

31. It was further submitted that the Applicant is not an heir or beneficiary of the estate and the will he is relying on is a forgery and invalid in law which has no legal force. The title transferred to the Applicant is defective because it was transferred without capacity and subsequent charge was done without capacity and therefore null and void ab initio.

The 2nd Interested Party's submissions dated 16th December, 2020

32. The 2nd Interested Party filed written submissions dated 16th December,2020

through the firm of Miller and company Advocates raising the following issues for determination;

(a) Whether the grant of letters of administration *De-Bonis Non* to Munir Mohamed Sketty was properly confirmed; does he have capacity?

(b) Unchallenged last will and codicil of one Nassor Muhammad Nahdy (Deceased)

(c) Bank's secured interest in relation to property number 1004(original number 284/111) section 111 Mainland North.

33. The 2nd Interested Party reiterated the averments contained in their aforesaid affidavits in response to the application. They relied on Section 76 of the Law of Succession Act and submitted that the Applicant/Respondent did not have capacity to present the application for confirmation of grant in his capacity as a son to Nassor Muhammed's sister hence not allowed by law to administer the estate of the late Nassor Muhammad Nahdy (deceased). It was further submitted that the letters of administration *De-Bonis Non* granted to Mr.Munir Mohammed Sketty, the Applicant/Respondent herein should be revoked for material non-disclosure of the existence of a charge in respect of the subject property. To express this argument reliance was placed in the holding in the case of in **Re Estate of Tabitha Waitherera Kamau (Deceased)[2019]eKLR** and in **Re Estate of Stephen Mwangi (Deceased)[2018] e KLR.**

34. Regarding the second issue, the 2nd Interested Party submitted that Mr.Munir Mohamed Sketty did not have capacity to have the grant confirmed as the late Nassor Muhammad Nahdy (deceased) who was the administrator to Nassor Ali Nahdy's is estate had a valid will and Munir Sketty was never named as a beneficiary therein.

35. Touching on the 3rd issue, it was submitted that, the sanctity of the land's records delivered a Torrens system of registration where essentially the state guarantees the indefeasibility of registered title. That the repealed Section 23(1) of the Registration of Titles Act (RTA) and the new Section 26(1) of the Land Registration Act No.3 of 2012 embody the doctrine of indefeasibility of title as envisaged under the Torrens system of registration which in our submissions applies to Kenya as the legal provisions depict.

36. It was contended that Mr.Munir Mohammed Sketty has not demonstrated any fraud and or misrepresentation and or illegal or unprocedural process undertaken by the 2nd interested party in lending credit to the applicant through the charged property. That in the absence of any ruling of the court that Ahmed Omar Sheriff acted wrongly in having the title transferred to him by the late Nassor Muhammad Nahdy (deceased), the Applicant is deemed to have acquired and charged legal title upon which the 2nd interested party properly acted and therefore a claim for recognizable interest in the said property hence loan recovery by way of sale is lawful. It was argued that the bank is likely to suffer prejudice should the grant *debonis non* remain in force.

Respondent's further submissions

37. The Respondent filed further submissions dated 25th January, 2021 and submitted that parties are bound by their pleadings and thus relied on **Malawi Railways Ltd Vs Nyasulu [1998] MWSC 3 CAS cited in Independent Electoral and Boundaries Commission &Anor Vs Stephen Mutinda Mule &3 Others [2014] eKLR** and **Adetoun Ooladej (NIG) Ltd Vs Nigeria Breweries PLC S.C 91/2002** as cited in **Independent Electoral and Boundaries Commission &Anor Vs Stephen Mutinda Mule &3 Others [2014] eKLR** case above.

38. He submitted that the Applicant has submitted on unpleaded issues and facts. That in fact the Applicant has not addressed the real reasons as to why the grant of letters of administration issued to the Respondent should be revoked and how the property was transferred without a confirmed grant. Further, that the applicant did not answer the question of forgery committed in acquiring a second death certificate of the deceased.

39. That the transfer of the contested property was by fraudulent means taking into account that the Applicant never attempted to bring evidence to court to show how he acquired the power to transfer a property in an estate which is under administration without powers to do

so or before confirmation.

Analysis and determination

40. I have considered the applicant's application and the supporting affidavit, responses thereto and rival submissions of the Applicant, Respondent and Interested Parties. Issues that crystalize for determination are:

- (a) Whether the administrator Nassor Muhammad Nahdy had power to transfer the title or property to a third party/applicant.**
- (b) Whether the grant issued to the respondent should be revoked.**
- (c) Whether Nassor Muhammad's will is valid/relevant in this case.**
- (d) Whether the interests of the 2nd interested party will be prejudiced if grant is not revoked.**

41. On whether the administrator Nassor Muhammad Nahdy had power to transfer the title to a third party/applicant, I am guided by section 82(b) and 83 of the Law of Succession Act on the powers and duties of a personal representative which include:

82 (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and**
- (ii) no immovable property shall be sold before confirmation of the grant;**

83 Personal representatives shall have the following duties—

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;**
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;**
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);**
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;**
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;**
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income there from, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;**

42. In this case, the applicant in his application stated that the administrator Nassor Muhammad Nahdy died on the 19th day of December 2015 testate having already taken out a last will and codicil drawn by the firm of Messrs Kamoti Amollo & Company advocates wherein Nassor Muhammad Nahdy (deceased) left his last wishes on how his estate was to be administered.

43. During the hearing, it was the applicant's evidence that around 2012 after his mother died, he had financial challenges. That after sharing with Nassor Muhammad, he (Nassor Muhammad) gave him his property. Subsequently, they went to the deceased's office in Mwembe Tayari from where the deceased called the respondent, took a title deed and then together proceeded to a lawyer's office where the deceased transferred the property to him. The property measuring 8 ½ acres in Majengo, Mtwapa (title no. is CR 41931 & LR NO.1002/I/MN) was subsequently transferred into the name of the applicant who charged it to equity bank through the 1st interested party a company whose directorship includes the Applicant.

44. He contended that the deceased gave him all his property through a will executed without coercion in appreciation of the good care he had given him during his old age.

45. In cross examination, the applicant stated that, he was given property known as Plot No.1004 Section III Mainland North Cr 41931 by the deceased who was the administrator of the estate herein. Further, he admitted that he did not know whether Nassor Muhammad Nahdy (Deceased) had the power to transfer the property to him. The property was allegedly transferred to him out of love and affection and that he has no relationship with the deceased nor his family.

46. The applicant conceded that the confirmed grant issued on 3rd November, 2017 includes as an asset for distribution Plot No.1004/III/MN (herein “the contested property”), which property had been transferred to the applicant on 23rd December, 2012. It is not in dispute that at the time the respondent made the application for letters of administration of the estate’s unadministered assets, the contested property was registered in the name of the applicant, a fact which the respondent admitted in his oral evidence he was aware of after conducting an official search before making the application.

47. In the case of Esther Wanjiku Machatha v Timothy Njenga Gitura & 4 others [2015] eKLR the court stated that;

“this court finds that the totality of the pleadings, oral submissions and annexed documents, the administrators have exceeded their statutory mandate and engaged or facilitated activities that are to waste the estate of the deceased and have intermeddled with the estate...”

48. Further, in the case of Paul Rono Pymto & Another Vs Giles Tarpin Lyonnet (2014) eKLR

Succession Cause No. 57 Of 2010 F. Ochieng J. stated as follows with regard to administration of the estate;

“It is important for the chief and family members to appreciate that in matters of administration of the estates of persons who died intestate- they have a limited role. Meanwhile, administrators must also appreciate that their role is to gather together all the assets of the deceased. They then also identify the liabilities; they have no authority to dispose of assets without express orders from the court. They do not even have authority to distribute assets when they have paid of all the liabilities. The Administrator must come to Court to seek authority to distribute remaining assets to the beneficiaries”.

In the case of Titus Mbaabu M’ Racha M’ Racha vs. Justus Muthamia Succession Cause 155 of 2001. HCT Embu (Lessit J)

“The administrators continued to sell the plots before the conclusion of the Succession Cause. The Court held the administrators exceeded the statutory powers as administrators in handling the estate.

The upshot of this application (s) is that the court finds that the administrator(s) have exceeded their statutory mandate and intermeddled with the estate of the deceased by subdivision, leasing and construction of houses, before consultation of all beneficiaries and proposed mode of distribution and confirmation of grant”.

49. From the above summary, provisions of the law and case law it is evident that Nassor Muhammad Nahdy (Deceased) was an administrator of the estate of Nassor Ali Nahdy (Deceased) and therefore was bound by the provisions of Section 55, 82(b) and 83 of the Law of Succession Act. No evidence has been tabled before this court to show that the deceased administrator had authority or a confirmed grant from court authorising him to dispose off the property of the deceased in the manner he did before confirmation of the grant.

50. Therefore, it is my finding that Nassor Muhammad Nahdy (Deceased) exceeded his statutory mandate as an administrator and intermeddled with the estate of Nassor Ali Nahdy (Deceased) by transferring Plot No.1004/III/MN to a third party who is the applicant herein without obtaining authority from court and or consulting all the beneficiaries on the proposed mode of distribution and confirmation pursuant to section 55 of the law of succession Act which provides that no distribution nor division of estate property can be done before confirmation of a grant in accordance with Section 71 of the law of succession Act.

51. The act of Nassor Muhammad in transferring the deceased’s property to the applicant in his capacity as an administrator without court’s authority or before confirmation of the grant amounts to an illegality which cannot be corrected or sanctioned by any other form of redress other than to declare the transfer transaction as null and void abinitio. See Mcfoy v United Africa Company & Ltd(1961)ALL E.R 1169 where the court held that, if an act is void, then it is in law a nullity and there is no order of the court required to set it aside as it is automatically null and void

52. In arriving at the above conclusion, I am further guided by the holding in the case of In re Estate of Mukhobi Namonya (deceased) [2020]eKLR where the court stated that;

“Whereas the court can sanction sale of a property of a dead person before grant is confirmed, there would be no jurisdiction for a court to sanction such a sale where no representation has been obtained. Any leave of court to dispose of such property must be preceded by the making of a grant. Since no grant had been obtained by 1999, the issue of a court granting leave to sell estate property before confirmation of grant does not arise. In any event the applicant has not purported that any such leave had been obtained, which would have clothed the transaction with some degree of legality.

The matter of transactions entered into by the survivors of the deceased after his death, and which affect the assets of the estate, is a different story. In the first place, no survivor, whether as spouse or child of the deceased, has a right to transact over estate assets until representation has been granted to them. Under section 45 of the Law of Succession Act, it is an offence for such a person to handle estate property without first obtaining representation. As I have stated above, the fact of appointment as personal representative of the deceased vests the assets of the estate in the person so appointed, by virtue of section 79 of the Law of Succession Act. It is only then that the person so appointed, and upon whom the estate has vested under section 79, can exercise the powers that are set out in section 82 of the Law of Succession Act and incur the duties imposed by section 83 of the same Act.

What the above means is that any transaction that is entered into with regard to the assets before representation is obtained, be it selling or leasing or contracting in connection with the assets, would be unlawful, and the contracts entered into would be

unenforceable for that reason. A grant-holder can bind the estate since the assets vest in them by virtue of section 79, and any contracts entered into with regard to estate assets would be enforceable. However, there is a restriction with respect to immovable assets. The proviso in section 82(b) (ii) of the Law of Succession Act is to the effect that immovable property is not to be sold before the grant has been confirmed. That would mean that where it becomes necessary to dispose of estate assets for whatever reason, the administrators have to have regard to that provision. It bars them from selling such property before confirmation. If the estate requires funds so urgently that it cannot wait for confirmation, then the prudent thing would be to move the court for leave to dispose of such property before confirmation for reasons that they should place before the court. Otherwise, any contracts that they would get into contrary to that proviso would leave them with contracts that they cannot enforce on account of their unlawfulness.”

53. In re Estate of Leah Wangui Nding'uri (deceased) [2020] eKLR the court stated that;

“Section 45 of the Law of Succession Act prohibits intermeddling with a deceased person’s estate. The section 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 administrations.”

54. *J. Musyoka* in considering the above section stated as follows; In Estate of *Veronica Njoki Wakegito (2013) eKLR*:

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized 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 serious view of intermeddling and makes it a criminal offence.”

55 In this case the person who committed the offence of intermeddling is now deceased. Having found and recognized that an illegality had been perpetrated – what is the remedy? **W. MUSYOKA** in his casebook on the Law of Succession at page 581 states that:

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

56. Accordingly, the respondent and other beneficiaries of the estate of Nassor Ali Nahdy have a remedy which is to follow the assets of the estate of Nassor Ali Nahdy from the hands of the person holding such property who in this case is the applicant.

57. In regard to whether the grant issued to the respondent should be revoked **Section 76 of the law of succession provides;**

“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 has ordered or allowed; 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.”

58. The applicant submitted that the application for revocation can be made by any interested party. The applicant, being the registered owner of the contested property, has the requisite locus to bring the application; he need not be a beneficiary of the estate to bring the application that failure by the respondent to disclose the ownership of the contested property at the time of making the application for grant brings the matter within section 76(b) and (c) of the Act.

59. The respondent submitted that the applicant has not addressed the real reasons as to why the grant of letters of administration issued to the respondent should be revoked.

60. The fact that the respondent is a nephew of Nasser Muhammad and that he obtained consent from the other beneficiaries to petition for the grant of letters of administration *de bonis non* and considering that the applicant is not related to either of the deceased the question as to who is the right person to apply for a grant over the estate of the deceased.

61. In the case of **In re Estate of Mukhobi Namonya (deceased) Supra eKLR** the court stated that,

“The law on who qualifies to apply for representation in intestacy is Section 66 of the Law of Succession Act, which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

“66. Preference to be given to certain persons to administer where deceased died intestate-

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(f) surviving spouse or spouses, with or without association of other beneficiaries;

(g) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(h) the Public Trustee; and

(i) creditors ...”

62. From the parties’ pleadings, oral evidence and submissions, it is evident that the respondent has preference under section 66 over the applicant and thus was the rightful party to apply for the grant of letters of administration *de bonis non* over the estate of Nasser Ali Nahdy.

63. It is trite law that whoever alleges must prove and thus it’s incumbent upon the applicant to prove his allegations on why the grant should be revoked under section 76(b) and (c). The allegation that the respondent did not disclose to the court the existence of a charge is immaterial and inconsequential in that it was not a liability owed by the estate to any creditor prior to the deceased’s demise. The estate had no known liability. Any illegally acquired credit or interest over the deceased’s property without court’s authority is not binding on the respondent for disclosure. In any event, this omission although not fatal was remedied by the joinder application bringing on board the interested parties.

64. Regarding the question whether this court should await the outcome of the pending ELC case, my view is that, it is the ELC case which should await the outcome of this case and not the other way round. This court is not dealing with ownership dispute but rather the legality of the process leading to acquisition of the subject title by the applicant. It is after the legality in the process of passing clean title is cleared that the ELC will decide on whether credit was advanced based on a clean title. Stolen land cannot acquire clean title capable of disenfranchising the real owner merely because it has been used to obtain credit.

65. In view of the above, I am not convinced that there is good reason given to interfere with the grant of letters of administration *de bonis non* given to the respondent. To do so will be prejudicial to the administration of the entire un-administered estate taking into account that this is a 1966 estate.

66. On whether the will dated 16th June, 2015 is valid, it is my view that the will was made in regard to the estate of Nasser Muhammad Nahdy which is not the estate in question and therefore the same is irrelevant in this case.

67. On the issue of the 2nd interested party’s interests, the 2nd interested party through its advocate submitted that it undertook due diligence in assessing its interests in relation to property number 1004(original number 284/III) Section III Mainland North before advancing the loan to Ahmed Omar Sheriff and Mombasa Housewares Limited.

68. Further, that it has a recognizable interest in the suit property which interest arose by operation of law and cannot be wished away and should the confirmation of the letters of administration –*De Bonis Non* be allowed to stand then the same would greatly prejudice the bank’s claim to the security as the same would allow the respondent to interfere with the suit property thus making it hard and even improbable for

the bank to recover its monies under the security.

69. The 2nd interested party made submissions in support to the applicant's application to have the grant issued to the respondent revoked.

70. In its replying affidavit, it annexed a valuation report and a search all marked kk1 and pleadings of E.L.C NO.193 OF 2018 which has an annexure of the original title deed on page 79 which indicates Nassor Muhammad Nahdy as administrator of Nassor Ali Nahdi(Deceased) .

71. From the above analysis, it's my finding that the 2nd interested party has not substantiated its claim that it did due diligence before charging the subject property herein. The fact that the title deed indicated that the applicant was an administrator was not good enough. Their legal office ought to have verified from court as is normally the practice that there was a valid certificate of confirmation of the grant conferring ownership of the property to Nassor Muhammad and not a mere grant of letters of administration which is only meant to collect and preserve the estate.

72. Having found that the transfer was an illegality it follows that a party cannot benefit from an illegality to the detriment of a real and innocent owner.

73. The upshot of the above leads me to the conclusion and determination that:

(a)The transfer of the property known as Plot No.1004/III/MN was an, a nullity and void ab initio.

(b) The said property shall revert back to the estate of Nassor Ali Nahdy the original owner.

(c)The application for revocation is dismissed.

(d)The will dated 16 June 2015, is not applicable to the application herein

(e)The claim of the 2nd interested party over property known as plot no.1004/III/MN is dismissed.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 31ST DAY OF AUGUST, 2021

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J.N.ONYIEGO

JUDGE