



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
SUCCESSION CAUSE NO. 173 OF 1993

IN THE MATTER OF THE ESTATE OF JEREMIAH NJOROGE (DECEASED)

FMN.....**APPLICANT**

VERSUS

JMN.....**1ST RESPONDENT**

EWN.....**2ND RESPONDENT**

BELL POINT ARCADE.....INTERESTED PARTY

JUDGMENT

1. This is an old file commenced in 1993 and concluded after confirmation of the grant the same year. The acrimonious dispute herein over revocation and review of the certificate of confirmation of grant is between siblings who are two daughters and a son to the deceased. On the other hand, there is an interested party who purportedly bought a portion of the estate after confirmation of the grant. It is however worth noting that the original file could not be traced perhaps because of the age of the case or long period it took before the current revocation application could be filed.

2. Nevertheless, a skeleton file was opened and the available documents availed to the court for consideration. However, the original court record (proceedings) could not be found hence the court will make its decision minus some crucial court proceedings and other requisite documentation. Despite all those challenges, parties by consent proceeded to canvass the revocation application viva voce and later submitted on the same.

3. The deceased herein died intestate on 4th May 1993 while domiciled in Mombasa, Kenya. He was survived by a widow Lydia Wangui Njoroge and children namely: EWN (daughter) born on 19th February 1976; FMN (daughter) born on 20th April 1977 and JMN (son) born on 22nd May 1978.

4. According to the petition for a grant of representation lodged on 5th July 1993, the estate comprised of:

(a) LR Plot No. 864 Section 1 Mainland North Mombasa worth 6m

(b) LR Plot No. 916 Section 1 Mainland South Likoni Mombasa worth Kshs400,000/=

(c) Motor vehicle registration No. KZL 088 worth 300,000/=

(d) 90 shares in Jerry's Mermaid worth 9,000/=

5. The estate estimated to be valued at a total of kshs 6,709,000/= had a liability in favour of the Municipal Council of Mombasa to the tune of Kshs 252,200.40. According to a document referred to as "consent to the making of a grant of letters of administration" sworn by Lydia Wangui Njoroge, she indicated that she had given consent to filing petition on behalf of her children namely; EWN, FMN and JMN.

6. Consequently, on 17th September 1993, a grant of letters of administration was issued to the petitioner as the sole administratrix. On 1st September 1995, the grant was confirmed. There is however no evidence attached by way of a schedule to show how the estate was distributed.

7. In a surprise turn of events and after a long period of time, FMN moved this court under a summons dated 6th August 2020 seeking construction of a skeleton file in respect of this file considering that the original file could not be traced. She also sought a temporary injunction against JMN (1st respondent) and the Land Registrar Mombasa (3rd respondent) and Mohamed Geilani and said Mumin Mope as interested parties restraining and or prohibiting them from any dealings in respect of parcel No. 8124 (original No. 864/1) Section 1/MN and 8125 (original No. 864/2) Section 1/MN/ Mombasa: sale and transfer of subdivision No. 8125/1/MN to Mohamed Geilani Sufi and Said Mumin Mope and subsequent dealings be nullified/cancelled: in the alternative, the said subdivision No. 8125/1/MN 1 be deemed to be the share of JMN from the original No. 864/1/MN: the register for subdivision No. 8124/1/MN and 8125/1/MN of which are created from Plot No. 864/1/MN be rectified and reverted to the estate of the late Jeremiah Njoroge: EWN and JMN be ordered to account for the rental income received in respect of the estate of Jeremiah Njoroge's estate for the period June 1996 to date and have it deposited in court for distribution and, FMN be appointed administratrix of the estate of the late Jeremiah Njoroge to finalize the administration and distribution of the same.

8. The application was supported by an affidavit sworn on 6th August 2020 by the applicant claiming that she (applicant) was not consulted nor was her consent sought during the petition for a grant of representation. When the application was presented before the duty Judge, the court directed for service to be effected upon the respondents.

9. Subsequently, the interested parties filed a notice of preliminary objection dated 1st September 2020 and filed on 2nd September 2020 challenging the application. On her part, EW (2nd respondent) filed a replying affidavit sworn on 24th August 2020 confirming that their mother petitioned for a grant of representation which was issued on 17th September 1993 and then confirmed on 1st September 1995. That on 29th April 1996 their mother transferred Plot No. 8125/1/MN to the 1st respondent as his share of inheritance.

10. She averred that their mother died in 1996 after completing administration of the estate. She stated that the year 2001 her brother voluntarily transferred to her half of his share in Plot No. 8124/1/MN which was subdivision of 864/1/MN for purposes of securing the property from illegal settlers.

11. That the applicant has all along been aware of the succession proceedings and has never raised any question. She averred that the transfer of LR 864/1/MN to their brother was in accordance with their parents' wishes. She further stated that their mother did not require any consent from anybody leave alone the applicant who had not reached the age of majority to transfer then any part of the estate to the 1st respondent. She termed the application as malicious and only intended to evoke sad memories about the death of their father.

12. On his part, the 1st respondent filed an affidavit opposing the application. The response is literally a replica of the 2nd respondent's affidavit. He also stated that their mother did not require consent from any of the children before seeking a grant of representation and its confirmation.

13. On 9th September 2020, the applicant filed an amended summons dated 2nd September 2020 basically adding the prayer for submission of accounts for the period March 2002 to June 2020; Further, that the whole succession cause proceedings as well as administration in respect of the estate of late Jeremiah Njoroge be deemed set aside or nullified for being unlawful and unreasonable hence fit to start denovo or in the alternative, upon accounts being rendered, the estate be distributed equally amongst the applicant, 1st respondent and 2nd respondent; that the transfer of 864/1/MN in 1995 was illegal as the property was made in favour of JM a minor then and that allocation of MSA/Block 1/916 was deliberate as it was occupied by squatters;

14. The summons was further re-amended on 17th September 2020 removing the names of the interested parties Mohamed Sufi and Said Mope from the proceedings and sought orders as follows:

(1) Spent.

(2) Spent.

(3) Pending hearing and determination of the application, a temporary injunction be issued prohibiting any dealings in respect of parcel No. 8124(Original No. 864/1) MSA and MSA/Block 1/916.

(4) Pending hearing and determination of the application JM N and EWN be ordered to avail copies of the pleadings and orders in respect of succession cause on 173/1993.

(5) (i) The whole succession proceedings as well as administration and distribution in respect of the estate of the late Jeremiah Njoroge be deemed reviewed, set aside or nullified for being unlawful, unreasonable which ought to be and ordered to start denovo.

(ii) Alternatively upon accounts being rendered, the estate be distributed equally amongst the applicant, 1st and 2nd respondents.

(6) The sale and transfer of motor vehicle KZL 088 as well as the 90 shares in Mermaid Hotel Limited and all subsequent dealings be nullified/cancelled.

(7) The said subdivision No. 8125/1/MN be deemed to be a share of JMN from the original estate Plot No. 864/1/MN.

(8) The register for subdivision No. 8124/1/MN created from 864/1/MN be rectified and reverted to the estate of the late

Jeremiah Njoroge.

(9) EWN and JMN be ordered to account for the rental income received in respect of the late Jeremiah Njoroge's estate for the period March 2002 and June 2020 to date and have it deposited in court for distribution.

(10) FMN be appointed administratrix of the estate of the late Jeremiah Njoroge to finalize the administration and distribution of the same.

15. In response to the re-amended summons, JMN filed a replying affidavit sworn on 29th January 2021 and filed on 8th February 2021 in which he reiterated the averments contained in his response to the original summons and the 2nd respondent's replying affidavit. He stated that Plot No. 8124/1/MN was sold long time ago to Bell Point Arcade Limited hence not available for distribution. He attached a search certificate reflecting the said sale transfer.

16. Equally, EWN filed a replying affidavit sworn on 29th January 2021 reiterating the content in her earlier replying affidavit to the original summons. She averred that it was their mother who caused the transfer of 8124/1/MN to the 1st respondent who later sold the same to Bell point Arcade(1st interested party). That the rent collected from the LR 864/1/MN belongs to the registered owners and that the property does not belong to the applicant. As to the shares in Mermaid Hotel Limited, they denied knowledge of their existence. That property No. 8124 has since ceased to be part of the estate.

17. Subsequently, by summons dated 11th February, 2020 and filed on 12th February 2020, the applicant enjoined Bell Point Arcade Ltd and Mutubia Advocate as interested parties under the provisions of Section 47 of the Law of Succession Act, Nos. 49 and Rule 73 seeking orders that:

(1) A temporary injunction do issue restraining any dealings in respect of Plot No. 8124 (original No. 864(1) Section 1/MN pending hearing and determination of the application and the re-amended summons dated 17th September 2020.

(2) That the transfer of Plot No. 8124/1/MN to Bell Point Arcade Limited on 4th December 2020 by the 1st and 2nd respondents is illegal, null and void;

(3) That the 3rd respondent be directed to rectify the register of property No. 8124/1/MN to revert to the estate.

18. Upon considering the application, Hon. Justice Ong'injo granted the prayer for temporary injunction pending hearing and determination of the application. In reaction to the said summons, the 1st interested party filed a notice of preliminary objection dated 19th February 2021 claiming that the property known as Plot No. 8124/1 is not part of the estate; the court has no jurisdiction to rectify the grant; the applicant is not a party to the contract between the 1st and 2nd respondents and the interested party; issues raised in the application are matters of estoppel; the issues raised are resjudicata; the conditions for rectification of land register have not been satisfied.

19. Equally, the 1st and 2nd respondents filed their notice of preliminary objection dated 23rd February 2021 stating that; this court lacks jurisdiction to hear and determine the summons for revocation/nullifying and cancelling the 1st interested party's interest; this court lacks jurisdiction to grant prayers 4 and 5 in the aforesaid summons; jurisdiction to hear disputes relating to title lie with ELC court. Application for cancellation of title cannot apply through an interlocutory application; the 1st interested party is an innocent purchaser for value; application is incompetent, fatally and incurably defective; application is misconceived, bad in law and amounts to abuse of the court process.

20. In further response to the said application, EWN filed a replying affidavit sworn on 23rd February 2021 reiterating the grounds contained in the preliminary objection and earlier affidavits sworn in response to the re-amended submissions. She averred that she and the 1st respondent sold that property as it belonged to them.

21. On 25th February 2021, the court directed that the preliminary objections and pending application were to be heard together. Parties were directed to file witness statements and documentary evidence.

22. However, by consent the second interested party's name was expunged from the proceedings and a case against him dropped on 18th May 2021.

Hearing

23. The matter proceeded with PW1 the applicant adopting her witness statement and affidavits in support of her applications the subject of these proceedings. She stated that she left for USA the year 2002 and only came back the year 2020. That her consent was not sought nor did she get equal share like the other children. On cross examination by Mr. Wambui, she stated that she has no claim against Plot No. 8125 which was sold to Mohamed Sufi and Said Mope.

24. On her part, the 1st respondent EW (DW1) also adopted her various replying affidavits in response to the various applications. She stated that the properties in question were transferred to their respective beneficiaries by their mother. She further stated that she was satisfied with the share she was given by her mother. On further cross examination, she confirmed that Plot No. 916 is invaded by squatters hence not easy to access the property.

25. By consent, the interested party's sworn statement filed on 25th February 2021 was admitted as their evidence. Parties then agreed to file written submissions.

Applicant's Submissions

26. Through the firm of Mogaka, Omwenga and Mabeya and Company Advocates, the applicant filed her submissions and supplementary submissions on 31st May 2021 and 8th June 2021 respectively. Mr. Mogaka reiterated the averments contained in various affidavits in support of the application dated 17th September 2020 and 11th February 2021. Counsel started by addressing the issue whether this court has jurisdiction to entertain the proceedings herein. In his view, this court is properly seized of this matter thus deriving jurisdiction from Section 47 of the Law of Succession as well as rule 73 of the Probate and Administration Rules. He further invited the court to invoke Article 159 (2) of the Constitution. He contended that the said provisions does confer unlimited jurisdiction to the court.

27. Learned counsel submitted that pursuant to rule 63 of the Probate & Administration Rules, this court can entertain issues of review in succession cases or orders or proceedings under Order 45 of the Civil Procedure rules. To support this proposition, reliance was placed in the case of **Wangeji Kimita and Another vs Mutahi wa Kabiru C.A 80 of 1985 (UR)** where the court held that it had unfettered discretion to review its own decisions or orders for any sufficient reasons.

28. It was counsel's contention that there are good grounds to support review of the earlier succession proceedings and the appointment of the applicant as the administratrix of the estate in place of the deceased administratrix.

29. Mr. Mogaka contended that according to the petition for the grant of representation and subsequent confirmation of the grant, it was done without the consent of the applicant despite being an adult at the material time. That having lived in America since 2002, she only came to discover of the succession proceedings the year 2020 when she came back. Counsel submitted that both parties are in agreement that consent of the children was not sought by their mother the petitioner contrary to rule 40 (8) of the Probate and Administration rules.

30. To fortify the submission that lack of consent is a ground to revoke and annul a grant, counsel referred to the case of **Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike & Another (2013) eKLR** where the court of appeal held that in the absence of a consent the grant could not even be confirmed hence an application for review of the confirmation orders was meritorious and competent.

31. Further, Mr. Mogaka urged the court to hold that, once an irregular default judgment is brought to the attention of the court, the court will set it aside as a matter of right even on its own motion. In this regard reliance was placed in the case of **James Kanyita Nderitu & Another vs Marios Philotas Ghikas and another (2016)**.

32. Touching on prayers 6 and 8 of the re-amended summons of 17th September 2020 and prayers 4 and 5 of the summons of 11th February 2021 all of which relate to the sale of motor vehicle KZL 088 and reversion of Plot No. 8124/1/MN to the name of the deceased, Mr. Mogaka submitted that the applicant being a child to the deceased was entitled to equal share in the two properties. That no valuation of the estate was done before distribution of the estate nor was a schedule on distribution attached thus the sale of the two properties without her consent was illegal.

33. Learned counsel further invited the court to uphold Section 35 (1) of the Law of Succession which provides for equal distribution of the estate to children with the widow getting life interest in case of a monogamous marriage. The court was referred to the holding **In re estate of Nganga Kahembe (2017) eKLR** where the court recognized application of Section 35 of the Law of Succession.

34. Learned counsel further submitted that the sale of Plot No. 8124/1/MN to the interested party while these proceedings were pending was meant to defeat the outcome of this case. He contended that the entry into a sale agreement on 11th August 2020 and transfer on 4th December 2020 while the dispute over the same property was actively going on with the knowledge of the interested party is a clear indication that they were not innocent purchasers as acknowledged by the 2nd respondent that the buyer was aware of these proceedings and originating summons No. 42/99. He opined that the interested party's sale transaction is still pending as the purchase price is still with their lawyer hence they will not suffer prejudice by getting their money back.

35. According to Mr. Mogaka, the two properties comprising the estate ought to be shared out equally. That the original Plot No. 864 being 1½ acres, each will be entitled to ½ an acre of which the 1st respondent has already sold ½ an acre which is Plot No. 8125/1/MN being a resultant subdivision from the original. That the balance which is one acre comprising of Plot No. 8124/1/MN being a subdivision from 864/1/MN and now being claimed by the interested party be shared equally between the 2nd respondent and the applicant. That Plot No. 916/1/MN currently invaded by squatters be shared equally.

36. Concerning prayers 5 (ii) and 9 of the re-amended summons in respect to submission of accounts and equal distribution of the estate, counsel submitted that while the applicant was in America, the 1st and 2nd respondents continued to enjoy rental income generated from Plot 864/1/MN. That the applicant only received two thousand dollars out of the entire amount collected as rent hence the need for the 1st and 2nd respondents to account for the proceeds.

1st and 2nd Respondents' Submissions

37. The firm of Musyoki and Mogaka Advocates appearing for the 1st and 2nd respondents filed their submissions on 18th June 2021. It was the 1st and 2nd respondents' contention that the applicant has not met the threshold for the court to review the grant confirmed on 1st September 1995. It was submitted by learned counsel Mr. Wambui that the applicant has not met the threshold for review of the impugned confirmed grant as spelt under Order 45 (1) (2) of the CPRs inter alia; discovery of new matter or evidence that was not within the knowledge of the applicant after the exercise of due diligence; mistake or apparent error on the face of the record. In this regard the court was referred to

the holding in the case of **John Githinji vs Bernard Munge Gichira (2017) eKLR** and **Otieno Ragot & Co. Advocates vs National Bank of Kenya Ltd (2020) eKLR** where the court laid emphasis on proof of three ingredients stated under Order 45 rule 1.

38. Learned counsel contended that the application for review was belatedly filed given the long time it has taken to be filed since 1995 when the grant was confirmed. That the applicant was all along aware of the existence of the succession proceedings before and after visiting Kenya few times between 2002 when she left for USA and 2020 when she returned.

39. It was further submitted that the applicant is feigning ignorance that she did not know of the succession proceedings hence inordinate delay which cannot be entertained. To buttress this submission, counsel relied on the holding in the of **Jaber Mohsen Ali & Another vs Priscillah Boit & Another E & C No. 200/2012 (2014) eKLR** where the court stated that for delay to be declared unreasonable it will depend on circumstances of each case and that even one day's delay can be unreasonable. Further reference was made in respect to **Civil Appeal No. 433/2015** in the matter of the **Judiciary of Kenya vs Three Star Contractors Ltd. (2020) eKLR** where the court found three month's delay as unreasonable.

40. According to Mr. Wambui, the application has been brought late in the day after completion of the administration of the estate and part of the estate changed hands. Learned counsel further submitted that the applicant ought to have filed an appeal and not a review as the application is challenging alleged breach of certain provisions of the law.

41. On the issue whether the applicant has met the threshold for revocation of the confirmed grant, counsel submitted that lack of consent which cannot be verified for lack of the original record is not an act of fraud. Mr. Wambui submitted that the grant was properly obtained and the court should act with restraint before revoking the grant. In his view, the applicant has not established the conditions set out under Section 76 of the Law of Succession Act as observed in **Jesse Karaya Gatimu V Mary Wanjiku Githinji (2014) eKLR and Matheka and another vs Matheka (2005) KLR 455.**

42. Mr. Wambui contended that this court has not been sufficiently persuaded to apply its discretion in favour of the applicant. Counsel expressed concern as to why transfer of Plot No. 8124/1/MN would be nullified yet the applicant recognizes the sale of 8125/1/MN sold to other 3rd parties under similar circumstances.

43. Regarding jurisdiction of this court, counsel submitted that this court lacks jurisdiction to entertain land dispute in respect of Plot No. 8124/1/MN which has since been transferred to the interested party hence an ELC matter. The court was consequently referred to the holding of Nyarangi J in **Owners of Motor Vessel "LillianS" VS Caltex Oil (Kenya) Ltd (1989) eKLR** where the court stated that when a court has discovered that it has no jurisdiction over a matter, it should down its tools and make no further step.

Interested party's submissions

44. On their part, the interested party filed its submissions on 9th June 2021 through Balala and Co. Advocates. It was submitted that the interested party was a bonafide purchaser for value hence legally acquired title after carrying out due diligence in respect of Plot No. 8124/1/MN. That the interested party is protected under Section 93 of the Law of Succession. To support this proposition, counsel relied on the holding in the case of **Samuel Kamere vs Land Registrar (2015) e KLR** where the court stated that, in order to be considered a bonafide purchaser for value, one must prove that he had acquired a valid legal title after carrying out necessary due diligence and that he paid value consideration for the purchase. It was contended that the interested party did carry out necessary searches and found no incumbrance hence paid 90 million as consideration resulting to acquisition of valid title.

45. In their rejoinder, the applicant filed supplementary submissions on 18th June 2021. Mr. Mogaka disputed the allegation by the 2nd respondent that consent of the applicant was not necessary as she was a minor. Counsel stated that the applicant was born on 20th April 1977 hence was over 18 years when the grant was confirmed on 1st September 1995. Counsel submitted that there was no unreasonable delay as the applicant discovered of the illegal distribution of the estate the year 2020 when the 1st and 2nd respondents purported to sell Plot 8124/1/MN.

Analysis and determination

46. I have considered the application dated 17th September 2020, re-amended summons dated 12th February 2021 against the 1st and 2nd respondents and preliminary objections of the said respondents and interested party. I have also considered illuminating parties' submissions through their able counsel who well researched, reasoned and vigorously defended their respective clients.

47. From the said pleadings, I can discern the following issues for determination:

- (1) Whether this court has jurisdiction to entertain the two applications in question.**
- (2) Whether this court has power to revoke and review the confirmed grant.**
- (3) Whether the interested party acquired legal title in respect of LR Plot No. 8124/1/MN.**
- (4) Whether the 1st and 2nd respondents should account for rental income from 2002 to date.**

Whether the court has jurisdiction to entertain the applications in question

48. According to the applicant, she is seeking revocation and review of the grant on grounds that the entire proceedings were a nullity as her consent was not sought nor was she consulted. It is admitted that the widow to the deceased obtained a grant, had it confirmed and later distributed the estate before she died. The key question is whether this court has power to entertain prayers for revocation.

49. It is trite that jurisdiction is everything and without it a court must down its tools and make no further step. See the **Owners of the Motor Vessels "LillianS" vs Caltex Oil Limited (Kenya) (Supra)**. Indeed, the Supreme court of Kenya has held that jurisdiction is a product of the Constitution or written law. See **Samuel Kamau Macharia and Another vs Kenya Commercial Bank and 2 others Supreme Court Civil Appeal No. 2/11**.

50. Section 76 of the Law of Succession provides that a grant may be revoked or annulled at any time at the instance of a party or on court's own motion if conditions spelt therein are satisfied. Further, Section 47 of the Law of Succession Act and rule 73 of the Probate and Administration rules does bestow wide discretionary powers to the court to consider any application and make any orders it considers expedient or necessary in the interest of justice. Further, rule 73 also donates inherent powers to the court to make any decision that will ensure that the ends of justice are met. These residual general powers are meant to balance the scales of justice where specific provisions governing the subject at hand may be lacking.

51. Concerning lack of jurisdiction in respect of title which had already changed hands to 3rd parties, this court is empowered to interfere with any illegality committed through succession proceedings to illegally change title to a 3rd party. That is why Section 93 of the Law of Succession specifies circumstances under which a bonafide purchaser can be protected. To acquire such protection, the probate court must hear the matter and where it finds title was illegally acquired, it can cancel the transfer and have the ownership revert to the original owner(deceased).

52. It is trite that an illegal act cannot breed a legal act. Therefore, an act that is void is void abnatio or a nullity. See **Mcofoy vs United Africa Co. Ltd. (1961) 3 all ER 1169** where the court stated that:

“if an act is void, then it is in law a nullity. It is not only bad, but incurably defective. There is no need for an order of the court to set aside. It is automatically null and void without more a do, though it is sometimes convenient to have the court declare it to be so and every proceeding which is founded on it is also bad and incurably bad. You cannot put something in nothing and expect it to stay there. It will collapse.”

53. In view of the above statutory provisions as read together with Article 165 (3) of the Constitution on unlimited powers of the High Court, I am satisfied that this court has jurisdiction to entertain the issues at hand and determine the same on merit. Having held as such, the ground that the court has no jurisdiction and that the applicant ought to have appealed cannot stand.

54. With the above finding, the preliminary objection seeking to strike out the applications for lack of jurisdiction falls on the way side as it does not meet the basic ingredients as stated in the celebrated case of **Mukhisa Biscuit Company vs West End Distributors Ltd (1969) EA 696** where the court held that:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

55. Indeed, an application for revocation or review of a grant is a matter of discretion hence cannot be disposed of by way of a preliminary objection. To that extent the ground of lack of jurisdiction is not tenable.

Whether the court has power to revoke or review the confirmed grant

56. There is no dispute that the widow to the deceased petitioned for a grant of representation on 5th May 1993. In her replying affidavit sworn on 24th August 2020 and filed on 26th August 2020 EW the second respondent attached a petition application together with an affidavit showing the list of beneficiaries as herself born on 19th February 1976, the applicant born on 20th April 1977 and the 1st respondent born 22nd May 1978. She further attached an affidavit titled“consent to the making of a grant of letters of administration” in which she stated that she had given consent on behalf of her children JM, EW and FM.

57. In their pleadings already alluded to and testimony of both parties, the petitioner did not seek consent from any of her children. Infact, the 1st and 2nd respondents were categorical that their mother did not require anybody's consent to deal with their father's estate. From the stated dates of birth, by the time the grant was confirmed, EW was about 19 years 7 months. F (applicant) was about 18 years 4 months while JM was 17 years 7 months. However, they were all minors by the time the petition was filed.

58. It is therefore apparent that by the time the grant was applied for in 1993 and confirmed, JM was a minor thereby defining the proceedings as those falling on a continuing resulting trust under Section 58 of the Law of Succession which provides that:

“(1) where a continuing resulting trust arises –

(a) No grant of letters of administration in respect of an intestate shall be made to one person alone except where that person is the public trustee or a trust corporation”

59. In a situation where there is a continuing trust, a court is required to appoint an additional administrator under Section 66 of the Law of

Succession. Section 58 is couched in mandatory terms.

60. In the instant case, either by way of an oversight or otherwise, an invalid grant of letters of administration was issued. That notwithstanding, by the time the grant was confirmed, JM was still below 18 years. However, E and F were above 18 years. Under rule 40(8) of the Probate and Administration rules, before confirmation of a grant, a petitioner is under obligation to submit an affidavit with consent of all beneficiaries showing their individual sharing of the estate.

61. It is not in dispute that such consent was not sought, submitted nor was the attendance of beneficiaries found necessary. Although the original file is lacking, the petitioner's affidavit that she had consent of the children speaks by itself that children did not give written consent nor participate in the entire proceedings.

62. In the case of **Samuel Wafula Wasike vs Hudson Simiyu Wafula (1993) LLR (CAK)** the court held that without obtaining consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable for revocation. Similar position was held in the case of **Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another (2013 eKLR)** where the court stated that:

“Lastly, it is apparent from the face of the application for confirmation of the grant that the consent of Samuel Wanyoike Magondu a beneficiary of the estate was not obtained as stipulated by rule 40 (8) P & A. In the absence of such consent, the grant could not have been confirmed. The application could only have been set down for hearing as stipulated by rule 40 (8). From the foregoing, we are satisfied that the respondent had locus standi to make the application for revocation; that the application for review was competent and meritorious; that the subordinate court had jurisdiction to entertain the application and that the appeal has no merit”.

63. From the above case law, it is appreciated that consent from the requisite beneficiaries was not sought. Is this a ground for revocation of the grant? The answer is in the affirmative. However, the court still reserves the discretion to revoke or not to revoke a grant depending on the circumstances of each case.

64. Section 76 of the Law of Succession Act provides that, 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 – that the proceedings were defective in substance; grant was obtained fraudulently by making of a false statement by concealment from the court of something material to the case; 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; that the grant holder has failed to apply for confirmation of the grant; administrator's failure to account for the estate or distribution of the estate or the grant has become inoperative or useless.

65. It is incumbent upon the applicant to prove the requirements set out under Section 76 before the court can revoke or annul a grant. See **Matheka and Another vs Matheka (Supra)**.

66. For purposes of this case, the point of contention is lack of consent which I have stated was not sought contrary to rule 40 (8) of the Probate and Administration rules as well as breach of Section 58 of the Law of Succession Act in which proceedings to obtain the grant were defective in substance and therefore a ground for revocation or annulment of the grant.

67. However, Mr. Wambui for the respondents urged the court to find that the applicant was all along aware of the succession proceedings but decided to sleep over her rights. It was Mr. Wambui's submission that equity is not for the indolent but for the vigilant. Whereas I do agree with Mr. Wambui that a period of over 25 years is quite a long period, one would be excused if he or she proves lack of knowledge of the existence of succession proceedings.

68. According to the applicant, she was not made aware of the existence of these proceedings until 2020 when she saw potential buyers of Plot 8124 seeking to evict her. That she went to USA the year 2002 until March 2020 when she came back. Mr. Wambui argued that between 1995 – 2002 when the applicant left for USA she should have gotten concern about her dad's estate.

69. It is not unusual for parents to do certain things without involving their children like it happened in this case. There is no proof that the applicant knew of the existence of the succession proceedings earlier than she is claiming. What is material is not the numerical period it has taken since confirmation of the grant but the period it has taken since she discovered the existence of those proceedings. Mr. Wambui is stating that the applicant ought to have known that succession proceedings were necessary. If courts were to take a generalized approach like the one Wambui is taking, then great injustice will be committed against innocent beneficiaries who may not know that succession proceedings are necessary before inheriting the property of a deceased person.

70. It is trite that succession proceedings do not have time limitation. This is because the limitation of actions Act that does not apply. See **in the estate of Josephine Magdalene (deceased) (2016) eKLR** where the court stated:

“my reading of this is that an application founded in Section 76 of the Law of Succession Act can be made at any time. There is no limitation set to the provision for the making of the application. The provision is open ended. Of course there is need for bringing in the test of reasonableness to play. That, however consent does not introduce time limitation. It merely requires the court to bring in to bear reasonableness in its exercise of discretion as whether or not to revoke a grant.”

71. The claim that the application dated 17th September 2020 is time barred and cannot apply in the circumstances of this case is not applicable in this case. An illegality cannot be cured by numerical effluxion of time alone. Courts are there to balance the scales of justice. Where a wrong has been committed and there is good explanation given for the delay in challenging it, it is prudent for the court to undo the illegal act therein even if at the expense or hardship of some people. When an act is void then it is void ab initio. **See mcfoy vs African United (Supra)**.

72. Having held that the powers to obtain the grant and subsequent confirmation was defective and therefore flawed, the completion of the administration of the estate on the platform of an illegality cannot stand. For those reasons, I am satisfied that there are good grounds to revoke the grant issued on 17th September 1993.

73. Having revoked the grant, it then calls for the question whether the certificate of confirmation of the grant can be set aside and or be reviewed.

74. Mr. Wambui submitted that for the court to review the confirmed grant the conditions set out under Order 45 of the CPRS must be followed. It is trite that pursuant to rule 63 of the Probate and Administration Rules, Order 45 (1) of the CPR rules is applicable in succession proceedings. Among the grounds which must be proved are; whether there is discovery of new evidence or important matter; mistake or apparent error on the face of the record and that the application is filed within reasonable time or for any sufficient cause.

75. The applicant has stated that she discovered the existence of the succession proceedings and that the estate had been shared out without her knowledge around 2020. In this case, the ground of discovery of new evidence, error apparent or mistake cannot apply as she did not participate in the original proceedings. What is relevant here is for any other sufficient cause. As to reasonableness of time, time must start running from when she discovered the existence of the proceedings in August 2020 when she also moved to court. As stated above, time limitation is not strictly applicable in succession matters except where time is specified. To that extent, the court having revoked the grant is duty bound to determine the element of distribution and where necessary review the same.

76. According to the confirmed grant, there is no schedule indicating who was to get what. However, parties are in agreement that, all the properties went to the mother. Under Section 35 of the Law of Succession, where an intestacy has left one spouse and a child or children, the surviving spouse shall be entitled to personal and household effects of the deceased and a life interest on the residual net intestate until her remarriage. Sub Section 5 goes further to provide that upon the death of the spouse or remarriage, the estate shall devolve equally between the children.

77. In this case, the estate ought to have been shared out equally upon the demise of the petitioner who should have held life interest of the estate. I do agree with both parties that original Plot No. 864/1/MN and 916/1/MN ought to have been share equally between the three children.

78. However, the deceased administratrix transferred Plot No. 864/1/MN in full to the 1st respondent who excised ½ acre comprising of 8125/1/MN and sold the same to Mohamed Sufi and Said Mope sometime 2008. The applicant withdrew her claim over this property. Under Section 93 of the Law of Succession, a transfer of interest in immovable or movable property made to a purchaser either before or after commencement of this Act by a person to whom representation has been made shall be valid notwithstanding revocation or variation of the grant.

79. Section 93 protects purchasers for value of property which has been acquired without knowledge that the title was tainted with illegality. Mere possession of title whose acquisition is questionable is not enough. See **Munyu Maina vs Hiram Gathiha Maina (2013) eKLR**. For sure, the two purchasers of LR 8125 although not parties to these proceedings had no idea that the title of the property they were buying was being challenged. They are therefore protected under Section 93(1) of the Succession Act hence the withdraw of the claim against them as bonafide purchasers for value was proper.

Whether the Interested Party acquired legal title

80. The interested party entered into a sale agreement over Plot No. 8124/1/MN on 20th August 2020 and got the property transferred on 4th December 2020. All these transactions were being undertaken during the pendency of these proceedings as confirmed by Pw1 with the knowledge of the interested party. The interested party cannot feign ignorance that they were not aware of these proceedings where the legality of title in respect of Plot No. 8124/1/MN was in question. They actually perpetuated the illegality in question by aiding the 1st and 2nd respondents to cause more confusion on ownership of this property. They did not act diligently in the circumstances hence estopped from claiming that they had no knowledge of the complaint that the title in question was tainted.

81. On account of deliberate entry into the sale transaction, they cannot seek protection of Section 93 as the title from the word go was illegally acquired. Unlike Mohamed Sufi and Said Mope, they are not protected by Section 93 of the Law of Succession Act. I do agree with the holding in the case of **Munyu Maina vs Hiram Gathiha Maina (Supra)** where it was held that:

“We state that when acquisition of proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need to be noted on the register”.

82. The speed at which the transaction was conducted while aware of these proceedings is questionable, wanting and an act of bad faith. For those reasons I will direct that the Land Registrar Mombasa to cancel its transfer and have the same revert back to its original status. The same shall therefore be shared equally between the three beneficiaries with the 1st respondent getting less the amount equivalent to the value of the proceeds realized after the sale of Plot No. 8125/1/MN. The consequence of this order is that the interested party Bell point shall be entitled to a refund of the purchase price unless the beneficiaries agree to retain the sale and share the sale proceeds as stated.

83. As regards Plot No. 916/1/MN, the same shall be shared out equally between the three beneficiaries.

84. As to shares in Mermaid hotel and motor vehicle KZL 088 the same cannot be traced as the deceased petitioner had dealt with them hence this court cannot make orders in vain.

Whether the 1st and 2nd respondents should be ordered to account for the rental income since 2002 to date

85. The applicant did demand for an inventory and accurate account of the rental income arising from the estate to date. She claimed that from 2002 when she left for America until she returned, she never received her share. The question is, why didn't she claim her share yet all this time she was aware of its existence? It is a fact which is not denied that, she visited Kenya 4 times yet she never claimed her right. Further, why didn't she claim the same even before she left for America? To start asking for accounts since 2002 is asking too much.

86. Indeed, equity is not for the indolent but the vigilant. One cannot sleep over his or her rights for 20 years while fully aware of their existence and start demanding for the same. This is totally unreasonable. It may not be practical to recall and produce accounts for all that period. It will be cumbersome and also unattainable. For those reasons, I decline to make such order save for the income collected from the time of filing this application.

87. As regards appointment of new administrator, I will direct that a grant of letters of administration de bonis non do issue to the three children namely; EWN, FMN and JMN for purposes of administering the unadministered part of the estate among them Plot No. 8124/1/MN, motor vehicle KZL and also shares in Mermaid Hotel whose fate is not known.

88. Accordingly, the applications dated 17th September 2020 and 11th February 2021 are allowed to the effect that:

(1) The grant of letters of administration issued on 17th September 1993 and confirmed on 1st September 1995 is hereby revoked.

(2) A grant of letters of administration de bonis non to issue jointly to EWN, FMN and JMN.

(3) That the Land Registrar to cancel registration of Plot No. 8124/1/MN and the same to revert to the original No. 864/1/MN.

(4) In the alternative to (3) above, parties to agree to share the sale proceeds already deposited with Mutubia Advocates equally with the 1st respondent getting less the amount equivalent to the value of Plot No. 8125/1/MN already benefited after its sale.

(5) Plot No. 916/1/MN be shared equally amongst the three beneficiaries herein.

(6) This being a family matter each to bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER 2021.

J.N. ONYIEGO

(JUDGE)