



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

SUCCESSION CAUSE NO. 226 OF 2007

IN THE MATTER OF THE ESTATE OF MATI NJERU (DECEASED)

MARYGORRETI WANJIRU GITHINJI (Suing on behalf of the Estate
of **FESTO GITHINJI MBOGO** [Deceased]).....**APPLICANT**

VERSUS

FIDENSIO MUGO MATI.....**1ST RESPONDENT/PETITIONER**

RICHARD NJERU MATI.....**2ND RESPONDENT/PETITIONER**

AND

JOHN KINYUA WAMBUGU.....**INTERESTED PARTY**

R U L I N G

A. Introduction

1. This ruling is for the summons for revocation dated 24th June 2019 in respect of the grant issued on the 3rd October 2013 and amended on 6th October 2015. The applicant avers that the respondents obtained the grant of letters fraudulently by the making of false statements and by means of untrue allegations specifically that land parcel No. Evurore/Evurore/1661 formed part of the deceased's estate.
2. It is the applicant's averment that her late husband one Festo Githinji Mbogo who is now deceased, bought the suit land from the deceased herein on the 18th April 1996 for a sum of Kshs. 20,000/= and had the land transferred to him. The applicant further states that by the time of the death of the deceased, the said land was registered in the name of her late husband Festo Githinji Mbogo. Before the applicant filed Nairobi Succession Cause No. 24 of 2013, she conducted an official search and confirmed that the land was still in the name of her late husband.
3. The applicant further states that the petitioners herein, for unknown reasons, included the land as part of the deceased's estate and proceeded to distribute it wholly to the interested party who is a stranger to the deceased's estate and to the estate of Festo Githinji Mbogo.
4. It is the applicant's case that the actions of the respondents and the interested party amount to intermeddling with the estate of Festo Githinji Mbogo which is subject of Nairobi High Court Succession Cause No. 24 of 2013 whereas a grant in favour of the applicant was issued on the 9th July 2013. The grant was confirmed on 19/11/2014 distributing the suit land to the beneficiaries of the estate of Festo Githinji Mbogo.
5. In rejoinder, the interested party deposes that the respondents sold him the suit land for a consideration of Kshs. 110,000/= and that during the transfer, he could not trace any documents showing that the land had been transferred to the applicant's husband.
6. The interested party further states that the alleged sale agreement relied on by the applicant details the seller as one Fidesio Mugo Mati the 1st petitioner herein who from the documents relied on by the applicant, did not sign any documents in relation to the land as he had no capacity to deal with the land. The interested party further stated that his use and occupation of the suit land has never been questioned by the applicant.

7. The parties agreed to dispose the application by written submissions but only the applicant filed hers.

B. Protestor's Submissions

8. It is submitted that the administrators' reluctance, as the legal representatives of the deceased herein, to respond to the instant application is evidence that the applicant's summons are uncontroverted and unopposed. Further it is submitted that the administrators of the deceased herein did not at any time challenge the registration of the suit land in the name of the applicant's husband. Reliance on this proposition is placed on the case of **Barrack Ofulo Otieno v Instarect Limited [2015] eKLR.**

9. It is further submitted that the interested party herein has no locus standi to swear an affidavit for the administrators of the deceased's estate without substitution in contravention of section 79 of the Law of Succession Act that provides for the role of an executor or administrator.

10. It is submitted that the interested party was not an innocent purchaser for value without notice as prescribed in section 93 of the Act. Reliance was placed on the case of **In Re Estate of M'mbwiria M'mairanyi [2019] eKLR.**

11. It is submitted that the applicant has met the threshold for revocation of grant as the petitioners concealed crucial information whilst applying for grant specifically that the suit land herein did not form an asset of the deceased in this case. Further, the respondents did not disclose to the court that the deceased had sold and transferred the land LR. Evurore/ Evurore/1661 to the late Festo Githinji Mbogo.

12. It is the applicant's case that subsequently, the grant issued to the petitioners should be revoked and all subsequent transactions nullified.

C. Analysis & Determination

13. The issue for determination is whether the applicant meets the threshold for the revocation of a grant within the meaning of **Section 76 of the Law of Succession Act.** That Section states;

“Section 76: 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

iv. that the grant has become useless and inoperative through subsequent circumstances.”

14. The applicant herein has a duty to prove that any grounds set out in **Section 76 of the Law of Succession Act** before the grant issued is revoked. In the case of **Albert Imbuga Kisigwa v Recho Kavai Kisigwa, Succession Cause No.158 OF 2000, Mwita J. in a decision rendered on 15th November, 2016, noted thus:**

“[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”

15. The applicant's case is that the grant was fraudulently obtained through material concealment and non-disclosure to the detriment of herself and the beneficiaries of the estate of Festo Githinji Mbogo who was the registered owner of the suit land herein. The land was included as an asset of the deceased with the knowledge that it belonged to another deceased person.

16. In rejoinder, the interested party purports that he acquired the suit land from the petitioners legally after paying consideration of Kshs. 110,000/= and that when he transferred the suit land to himself, there was no indication that the same was registered in the name of someone

else.

17. The interested party purports to be an innocent purchaser for value. Section 93 of the Act has been a subject of interpretation in various cases. In Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu and Another [2014] eKLR, Makau J held: -

“Whereas the above section states that a transfer by 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, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to legal representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighbourhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.”

18. In Re Estate of Christopher Jude Adela (Deceased) [2009] eKLR, Rawal J held, of Sections 93 (1) and (2) of the Act, as follows: -

The correct reading of those provisions will indicate that the transfer to a purchaser, if shown to be fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in that manner will be commensurate with the provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immoveable property. It shall be a very weak and unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immoveable properties of estate by a personal representative, it shall be against all notions of fairness and justice. No court can encourage such an interpretation where a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of the right beneficiaries of the estate.

In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative”.

19. In Monica Adhiambo vs. Maurice Odera Koko [2016] eKLR Nagillah J stated: -

“.....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 (sic) 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 property.”

20. In the case of Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu & Another [2008] eKLR, the Court of Appeal held:

“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 immoveable 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. ...”

21. The foregoing pronouncements is to the effect that Section 93 of the Act is not a panacea for fraudulent dealings with estate property. That provision was meant to protect bonafide purchasers for value without notice. It was not meant to shield fraudulent administrators and their cohorts from innocent beneficiaries. It was not an exception to the intention and spirit of the Law of Succession Act,

f. he purchased without notice of any fraud;

g. he was not party to any fraud.”

24. I rely on the foregoing decision to the effect that a bona fide purchaser must show that he made reasonable inquiries not only of the register but also physical inspection of the property. When a property is in the possession of another that *per se* is constructive notice and should raise a red flag on the conscience of an intended purchaser.

25. It is noted that the applicant's husband entered into an agreement with the deceased herein for the sale of the land in 1996. The attached a copy of the green card shows that the husband of the applicant Festo Githinji was registered as the proprietor of the land on the 21/08/1996. It is not clear how the land later reverted back to the 1st petitioner on 6/11/2013 as shown by a copy of another green card. It is highly probable that the 1st respondent must have used fraudulent means to transfer the land to himself and later sell it to a 3rd party thus permanently depriving the applicant of her property.

26. On his part, the interested party attached a certificate of search dated 18th May 2012 to his replying affidavit over the suit land clearly indicating that the proprietor of the suit land is one Festo Githinji Mbogo, the protestor's late husband. He did not explain why he bought the land in the name of a person he did not know while the vendor was Fidensio Mugo Mati. I also take note that unlike the applicant, the interested party herein offers no evidence of the transaction transferring the suit land to himself from the estate of the deceased. I further note that the green card attached by the applicant has no entries of 6/11/2013 showing that the suit land was ever transferred to the 1st respondent. The failure to produce evidence of the transaction between him and the 1st respondent also attributes fraud on part of the interested party.

27. For the foregoing reasons, I am satisfied that the interested party was not an innocent purchaser for value without notice. The search attached to his replying affidavit, in my considered view amounts to constructive notice of the fact that the land did not form part of the deceased's estate and that it was not available for sale by the 1st respondent. The interested party does not qualify for protection by the law in quagmire of the fraudulent transaction.

28. Accordingly, it was required that the respondents make the disclosures in this succession proceedings which they failed to do. Indeed, the suit land was not listed in P&A 5 as part of the deceased's assets confirming that the respondents knew at the time of filing that the land did not belong to their deceased father. Neither did the land appear in the original grant confirmed on 3/10/2013. The land appeared for the first time in the schedule to Form No. 9 on the distribution of the deceased's estate. This in my considered view is fraud and forgery of the highest level that ought to be subjected to criminal proceedings against the parties involved.

29. In my considered view, on a balance of probabilities, the evidence adduced by the applicant has not been rebutted by the respondents or the interested party. The Succession Act is clear that concealment of material facts from the court is a ground for the revocation of a grant which had been issued to a party in a succession matter.

30. The fraudulent procurement of LR. Evurore/Evurore/1661 and roping it into the schedule of distribution of the assets of the deceased in itself renders the succession proceedings defective under Section 76 of the Act to the extent of Evurore/Evurore/1661. This is yet another ground for revocation of grant that has been established in this application.

31. The court in the case of Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows: -

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (emphasis added.)

32. The applicant in my considered view has established that the grant of deceased's estate was irregularly obtained on the basis of concealment of facts material to the case with fraudulent intent rendering it defective.

33. Consequently, I hereby allow the application to revoke the grant made in favour of the respondents by making the following orders: -

a. That the grant confirmed on 3/10/2013 and rectified on 6/10/2013 is hereby revoked and or annulled only in respect of LR. No. Evurore/Evurore/1661.

b. That all transactions under the said grant are hereby declared null and void for all intents and purposes.

c. That the registration of LR. No. Evurore/Evurore/1661 will revert to the name of the deceased in Nairobi Succession Cause No. 24 of 2013 of Festo Githinji Mbogo.

d. That the respondents will meet the costs of this application in regard to the applicant while the interested party meets his own costs.

e. That the Director of Criminal Investigations (DCI) Embu is hereby ordered to investigate the respondents/ administrators and the interested party within forty-five (45) days on any crime that may have been committed in the impugned transfer of LR. Evurore/Evurore/1661 in the year 2013 and the Deputy Registrar to follow up on the progress of investigations to

conclusion.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for A.P. Kariithi for Petitioners

Applicant present