



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO. 166 OF 2017

IN THE MATTER OF THE ESTATE OF CYRUS KINGORI NGOTHO ALIAS KINGORI NGOTHO (DECEASED)

NANCY MUKUNYA (Representative of Estate of

SAMUEL NDUNGU MUKUNYA).....BENEFICIARY/APPLICANT

VERSUS

JOSPHAT MURIITHI

KINGORI.....1ST ADMINISTRATOR/RESPONDENT

JULIA MUMBI

KARIUKI.....2NDADMINISTRATOR/RESPONDENT

VERONICAH NYAWIRA.....3RD RESPONDENT

LUCY WANJIKU.....4TH RESPONDENT

ROSEMARY NYAMBURA.....5TH RESPONDENT

R U L I N G

By the summons dated 19/12/2017, the applicant **Samuel Ndungu Mukunya** (now deceased) sought the following orders against the respondents:

1.spent;

2.spent;

3.spent;

4. This Honorable Court be pleased to issue a temporary injunction and/or conservatory order restraining the administrators and or respondents from allowing, seeking, transferring, disposing, receiving any dividends or otherwise dealing with 2 shares originally registered in the names of Cyrus Kingori Ngotho alias Kingori Ngotho (deceased) in Muhotetu Farmers Ltd Kedong Ranch or any portion thereof, until the hearing and determination of this cause;

5. This Honourable Court be pleased to issue temporary injunction and or conservatory order restraining Muhotetu Farmers Co. Ltd from paying any dividends or any other payments to the administrators and/or any respondent or allowing selling, transferring, disposing, paying out any dividends or otherwise dealing with 2 shares originally registered in the name of Cyrus Kingori Ngotho alias Kingori Ngotho (deceased) in Kedong Ranch or any part thereof until the hearing and determination of this cause;

6. That the order made on 24/10/2017 revoking the certificate of confirmation of grant dated 15/11/2013 be set aside or reviewed and the said grant be reinstated;

7. That the transfer of 2 shares of Muhotetu Farmers Company Ltd Kedong Ranch to the beneficiary/applicant be declared to be valid notwithstanding the revocation of the grant and/or certificate of confirmation of grant as per the order of 24/10/2017;

8. The applicant be declared to be the only beneficiary of the 2 shares in Muhotetu Farmers Co. Ltd in Kedong Ranch;

9. Costs of the application.

By an application dated 8/8/2019 Nancy Mukunya sought to be substituted as the legal representative of the applicant Samuel Ndungu Mukunya which application was allowed by consent on 23/9/2019.

The applicant swore two affidavits in support of the application dated 19/12/2017 and further affidavit dated 5/4/2018.

The application was opposed and, the 2nd respondent **Julia Mumbi Kariuki** swore a replying affidavit dated 19/2/2018 on behalf of herself, the 3rd, 4th and 5th respondents. The 1st respondent also opposed the application by his affidavit sworn on 27/2/2018.

All the parties filed written submissions which were highlighted by counsel.

The applicant's case is that the 1st respondent sold to the applicant two shares in Muhotetu Farmers Co. Ltd. vide an agreement dated 1/10/2011 and the applicant paid valuable consideration. The first respondent's wife signed the agreement; that the chief of Muhotetu wrote a letter dated 29/3/2002 in which he confirmed to the High Court in Nyeri that the 1st respondent was the only son of the deceased. As a result, the 1st administrator filed Nyeri Succession Cause No.423/2012 in respect of the estate of his late father one Cyrus Kingori and the grant was confirmed on 15/11/2013 in which the applicant was listed as the beneficiary of the 2 shares in Muhotetu Farmers and the 2 shares were transferred to his name in 2016. The applicant was paid dividends from Muhotetu (SMM.5); that the 2nd applicant filed NYA.CMCC.210/2017 seeking to be declared owner of the 2nd share in Muhotetu Farmers; that the applicant entered appearance in the said matter; that the applicant was not notified of the transfer of this case from Nyeri High Court to Nyahururu; that the respondents colluded, failed to disclose the fact of the sale of the shares to him and have obtained the orders of 24/4/2017 revoking the certificate of confirmation of grant in which the 2 shares have been transferred to him. That is why he sought to have the said orders set aside or reviewed for non-disclosure of material facts; that the shares having been transferred to him upon confirmation of grant, the shares no longer form part of the deceased's estate; that if these prayers are not granted, the applicants' estate stands to suffer irreparable harm.

In his very detailed further affidavit, the applicant contended that he entered into a sale agreement for the sale of the subject property (shares) on 1/10/2011 and paid some of the money but on realizing that the shares were still registered in the deceased's names, a second agreement was drawn on 27/2/2012; that only then was the Succession Cause 2/3/2012 filed in Nyeri on 7/5/2012 after the chief of the area wrote an introductory letter indicating that the 1st respondent was the sole heir of Cyrus Kingori; that the 1st respondent also swore an affidavit on 26/3/2017 to the effect that he was the only son of the deceased; that therefore the allegation in the 1st respondent's replying affidavit dated 27/2/2018 indicating that he had a brother is not true. The applicant also denied that the 2 – 5th respondents are heirs to the deceased's estate because the deceased's wife had land in Gituamba/Muhotetu Block 2/44 measuring 8.119 HA which she subdivided and gave some to the 1st respondent and other people and that the 2nd and 5th respondents were not named as beneficiaries of the deceased's estate and that is why the applicant believes that the 2nd – 5th respondents have colluded with the 1st respondent to enable them receive the dividends which were due from Muhotetu and that the Advocate Kelvin Kimani, 1st and 2nd respondents have opened an account with Kenya Commercial Bank (KCB) to have the cheque from Muhotetu deposited there.

As to whether it is the applicant who drew the sale agreement, he denied the same contending that he practiced with the law firm of Kagondu & Mukunya Advocates but was appointed Judge of the Independent Constitutional Dispute Resolution (ICDR) and sworn in on 15/1/2010. After that, in 2011, he taught at Dedan Kimathi University upto 1/10/2012 when he was appointed Judge of the High Court and he never drew the pleadings for the 1st respondent nor did he appear for him because by then, the firm had been taken over by Gori & Ombongi Advocates.

On his part, the 1st respondent in opposing the application stated that at the time he applied for letters of administration, he knew he was the only beneficiary of the deceased's estate and was not aware that his nieces, the 2nd – 5th respondents had a beneficial interest in the 2 shares in Muhotetu Farmers; that the nieces filed an application for revocation of grant dated 8/9/2017. He denied having colluded with the other respondents and could not tell whether the application for revocation was served on the applicant. He later learnt of the application dated 8/9/2017 being allowed; that the dividends on shares of Muhotetu were being received by Justice Mukunya (applicant) and that when the grant was revoked, the court ordered the 2 shares' dividends to revert to the estate for fresh distribution.

In her affidavit in reply, Julia Mumbi, (2nd respondent) deposed that the applicant is not a beneficiary of the deceased's estate; that the 1st respondent was served with the summons for revocation of grant, was present in court and was made to understand the application that was under consideration and agreed to the grant being revoked; that the grant was revoked because it had been a result of deception and failure to disclose material facts; that the applicant was an advocate of the High Court at the time of entering into the agreement with the 1st respondent on 1/10/2011, and he understood that the 2 shares at Muhotetu belonged to a deceased person and no Succession cause had been filed by then; that the applicant drew the sale agreement as an advocate; that even after the Succession Cause was filed, the court in Nyeri was not informed of the illegalities committed; that the applicant appeared for the 1st respondent in Nyeri Court, prepared all documents and a change of Advocates was only done a few days before the confirmation of grant and hence there was a conflict of interest because the applicant was a beneficiary in the matter; that the applicant cannot be allowed to benefit from an illegal transaction. It was also deposed that the grant having been nullified by the court, the orders sought cannot be granted unless on appeal, nor can the applicant seek protection from Section 93 of the Law of Succession Act as a purchaser.

Submissions:

Mr. Kariuki Mwangi, counsel for the applicant, argued that Section 47 Law of Succession Act and Rule 73 of the Probate and Administration Rules gives this court powers to make such orders as may be necessary to meet the ends of justice and can therefore grant an order of injunction as sought; that the Nyeri High Court had confirmed the grant based on the Chief's letter of Muhotetu Location, 1st respondent's affidavit and sale agreements filed in court giving the 2 shares in Muhotetu to the applicant; that the 1st respondent had indicated that he was the sole beneficiary of the deceased's estate and there were no objection proceedings filed.

It was further submitted that when the file was transferred to Nyahururu High Court, the applicant was not served with the notice of transfer nor was he aware of the application to revoke the grant; that the parties withheld material facts from the court that the estate had devolved to the applicant and the applicant was denied a right to be heard; that the 1st respondent is estopped from denying that he was aware of the applicant's interest; that this was an act of collusion between the respondents and counsel for the 1st respondent.

Mr. Maina, counsel for the 1st respondent submitted that this court cannot grant the orders sought because at the time the 1st respondent filed this cause, the 2 – 5th respondents were unknown to him; that the grant has been revoked and another has been issued hence the court cannot grant the orders sought; further, counsel urged that the sale of shares in Muhotetu was done before confirmation of grant; that the 1st respondent was represented by Kagondu Mukunya Advocates, a firm attached to the applicant and they misled the 1st respondent into believing that he could sell the land. Counsel also submitted that an order of injunction is not available to the applicant because Order 40 Civil Procedure Act does not apply to Succession matters; counsel relied on the decision of *Morara Gisemba v David Nyakoi Ongori [2015] eKLR* where it was held that Rule 63 of Probate and Administration Rules did not import Order 40 of Civil Procedure Rules into its procedures; that it was intended that Probate and Administration matters should not entertain injunctions.

As for an order of Review under Order 45 Civil Procedure Rules, counsel urged that the applicant failed to bring himself within its purview.

As regards Section 93 of the Law of Succession Act, counsel argued that the said Section will not avail protection for the applicant because it was meant to protect a purchaser in a regular sale made in strict compliance with the law. For the above proposition, counsel made reliance on the case of *Monica Odhiambo v Maurice Odero Koko [2016] eKLR* where the court held that Section 93 does not validate unlawful acts.

For the 2nd – 5th respondents, Mr. Kihoro submitted that the grant was revoked on 24/10/2017 for failure by the 1st respondent to disclose material facts to the court; that he had omitted to disclose that there were other beneficiaries to the deceased's estate; that it was not necessary to serve the applicant with the summons for revocation because it is the 1st respondent who had fraudulently obtained the grant and that the 1st respondent was duly served; that service of process is on the parties to the suit is governed by Order 5 of Civil Procedure Rules which was done. Counsel further noted that the counsel on record in the Nyeri, M/s Gori Ombongi & Co. Advocates was duly informed of the transfer of the matter to Nyahururu vide letter of Deputy Registrar Nyeri dated 20/9/2017 and copied to both counsel on record; that the Deputy Registrar Nyahururu likewise wrote back on 20/9/2017 and copied the letters to the two firms of Advocates, Wokabi Mathenge and Gori Ombongi Advocates and the respective firms had the duty to inform their respective clients of the transfer.

On the issue of collusion, counsel submitted that the same was not proved because the bank account was opened after the revocation of grant and its purpose was to hold monies accruing from the two shares in Muhotetu which were then due until the estate is redistributed. Like the 1st respondent, it was Mr. Kihoro's submission that Section 93 of Law of Succession Act does not protect the applicant and relied on the decision of *Re: Estate of Salim Saadan (deceased) 2016 eKLR* and the *Monica Adhiambo case (Supra)*.

Having considered the affidavits filed herein and the submissions of counsel, I think that the issues that I need to address are as follows:

- 1. Whether the applicant was notified of the hearing coming up on 24/10/2017;***
- 2. Whether this court has the jurisdiction to grant the orders sought;***
- 3. Whether the applicant is protected by Section 93 of the Law of Succession Act.***

The subject grant was confirmed to the 1st respondent on 15/11/2013 by Nyeri High Court. On 8/9/2017 the 2nd to 5th respondents filed an application for revocation of grant under Section 76 of the Law of Succession Act, alleging nondisclosure of material facts by the then petitioner, now 1st respondent and the fact that not all beneficiaries were notified and consented to the filing of the petition. It is that application that came up for hearing on 24/10/2017 before this court. By then, the 1st respondent was held in Civil Jail for another case but was produced in court and was present. The application was duly explained to the 1st respondent by counsel who was present, Ms. Wangeci and having understood, he had no objection to the revocation of grant. The court went ahead to revoke the grant and appointed the 1st respondent and 2nd respondent, Julia Mumbi as joint administrators of the deceased's estate.

The above order is what the applicant has challenged.

The applicant has complained that he was not aware of the transfer of this cause from Nyeri High Court to Nyahururu High Court. It is noteworthy that on 7/10/2013, Gori Ombongi & Co. Advocate came on record to act for the petitioner (1st respondent).

The record shows that on 20/9/2017, the Deputy Registrar Nyahururu High Court issued a notice that they were in receipt of Probate and Administration No.423/2012 [Nyeri] which had now been assigned the number Nyahururu 166/2017. The notices were copied to Wokabi Mathenge Advocate, Gori Ombongi Advocate and Josephat Muriithi Kingori, the 1st respondent. Although Mr. Kihoro alluded to another letter having been written by the Deputy Registrar Nyeri forwarding the Probate & Administration file to Nyahururu, I have not seen it. However, I find this cause was regularly transferred from Nyeri to this court and the parties concerned were duly informed of the transfer.

As to whether the applicant should have been notified of the hearing of 24/10/2017, I find that the parties to the cause were before the court, the 1st respondent as administrator and the objector who were represented by counsel. The applicant was not a beneficiary of the deceased's estate as such. It is the 1st respondent who was a beneficiary and had purportedly sold his interest to the applicant. Under Order 5 of Civil Procedure Rules, only parties to a suit are to be served unless the court for good cause wants any interested parties to be served. In Succession matters, the parties are the petitioners and objectors/protestors and there was no request that the applicant be served personally.

In the application dated 8/9/2017, the confirmed grant was challenged for reasons that there was nondisclosure of material facts by the 1st respondent. From the documents exhibited, it is true that in the letter from the chief of Muhotetu Location dated 29/3/2011 introducing the 1st respondent to the court, it was indicated that the 1st respondent was the only son of Cyrus Kingori Ngotho (the deceased) to whom the 2

shares at Muhotetu Farmers belonged. The 1st respondent further swore an affidavit dated 23/1/2013 in which he deponed that he was the only son of the deceased. Those are the documents that the applicant claims to have relied upon in entering into a sale agreement for the 2 shares at Muhotetu Farmers with the 1st respondent. However, as admitted by the applicant, the first sale agreement was entered into on 1/10/2011. The applicant said he checked with Muhotetu Farmers and found that the shares belonged to a deceased person. The agreement was held in abeyance till the 1st respondent filed Succession Cause No.423/2012 and they entered into a second agreement on 27/2/2012. So, even though the applicant knew that the 1st respondent did not have the authority to sell the shares because he was not yet an administrator of the deceased's estate, the applicant did not stop there. Through the firm of Kagondu & Mukunya Advocates, the Succession Cause was filed and before the grant was confirmed on 15/11/2013, the sale of the shares had been concluded. Section 55 of Law of Succession Act bars the distribution of a deceased's estate until the grant has been confirmed. By entering into a sale agreement before confirmation, the 1st respondent was intermeddling in the deceased's estate as he had no authority to deal with it as he did.

As submitted by counsel for the 1st respondent, the applicant being an advocate of the High Court of many years standing, was aware of what he was entering into, that the 1st respondent had no capacity to pass any rights in the shares at Muhotetu Farmers to the applicant. Under Section 45 of the Law of Succession Act, the 1st respondent was an intermeddler and incapable of passing any rights to the applicant. The sale of the shares was therefore null and void *ab initio*. Under Section 76 of the Law of Succession Act, the court has a discretion to revoke a grant on an application by an Interested Party or on its own motion if grounds for revoking a grant exists.

Even if the court had not been moved by the 2nd to 5th respondents to revoke the grant, there were good grounds to revoke the grant issued to the 1st respondent because first, the sale of the shares to the applicant was null and void, there having been no confirmed grant at the time of sale and then based on the application by the 2nd to 5th respondents, the court could revoke it. Although the applicant tried to demonstrate that the 2nd and 5th respondents were not genuine beneficiaries of the deceased's estate, the 1st respondent has recognized them as his brother's children and a chief's letter dated 8/9/2017 also confirms that they are children of the 1st respondent's deceased brother, Jackson Kariuki Kingori. There being two conflicting letters from two chiefs of the same Location, the issue can only be resolved at a viva voce hearing to determine which of them is telling the truth and that can be done at the time of confirmation of grant.

Whether Section 93 of the Law of Succession Act can protect the applicant;

Section 93 provides as follows:-

“(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act;

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

The court in applying section 93 stated as follows in *Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu & another [2014] eKLR*.

“Whereas the above Section states that a transfer by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that since transactions can only be relied upon when the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently.

The purchasers in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector here. I therefore find and hold the sale to be invalid.”

In *Musa Nyaribari Gekone & 2 others v Peter Miyianda & another [2015] eKLR*, the Court of Appeal agreed with the High Court when the Judge said that Section 93 of the Law of Succession Act:

“is to protect dealings with the legal representatives of the deceased who must have as personal representatives, have assumed deceased's authority to deal with the estate of the deceased.”

Again, the Court of Appeal agreed with the finding of J. Rawal in *Re: Estate of Christopher Jude Adela (2009) eKLR* when she said:

“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.”

In further application of Section 93, the court in *Monica Adhiambo's case* said:

“.....with that said, the fact that the petitioner's title over the original suit land was revoked will automatically affect the interested parties' ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a niche over the other beneficiaries who have also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the Law of Succession Act. The reality of the situation is that the provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawfully 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 the beneficiaries of deceased persons interest the property....”

Applying the above authorities to the instant case, the court would be doing an injustice to protect the illegal acts perpetrated by the 1st respondent in transferring land to the applicant with the full knowledge of the applicant. The applicant cannot find protection under Section 93 of the Law of Succession Act.

The application is brought pursuant to Section 93 of the Law of Succession Act, Rules 59 and 73 of the Probate and Administration Rules and Section 1A and 18 of Civil Procedure Act, Order 40 Rules 1, 2 & 3 of the Civil Procedure Rule. The applicant seeks a temporary injunction/conservation orders.

The applicant invoked order 40 of the Civil Procedure Rules which deals with injunctions. The Civil Procedure Rules only apply to Succession matters in exceptional matters as provided under Rule 63(1) of the Probate and Administration Rules. Order 40 of the Civil Procedure Rules is not one of them. It was clearly stated in ***Moraa Gesimba case (Supra)***:

“I find that the fact that Rule 63 of the Probate and Administration Rules has imported into several provisions of the Civil Procedure Rules and omitted Order 40 of the Civil Procedure Rules that deals with injunctions is a clear pointer that there was no intention to empower the Probate and Administration court to entertain injunctions.”

The Law of Succession Act is a self sufficient Act (sui generis) with its own unique and special procedures which regulates the procedure in Probate and Administration matters. Rule 63(1) of the Probate and Administration Rules provides for exceptional instances when the Civil procedure Rules will apply to Succession matters.

Under Section 47 of the Law of Succession Act, the High Court has power to entertain any application and to determine any dispute under the Act and pronounce such decrees and make such orders as may be expedient.

Rule 73 of Probate and Administration Rules also gives court wide powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. Whereas the court can grant conservatory orders to prevent abuse of power or prejudice to any party, the applicant has not demonstrated that he will suffer prejudice or that failure to grant the order would amount to an abuse of the court process.

The applicant also sought review of the court’s order and setting aside. Revision of court orders is provided for under Section 80 of Civil Procedure Act and Order 42 of the Civil Procedure Rules. The same is not applicable in Succession matters. As observed above, any application may be brought under Section 47 of Law of Succession Act unless it is an exception under Rules 63(1) Probate and Administration Rules. The applicant needed to meet the prerequisite conditions for an order of review issue. That is:

- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time of the decree that was passed or order that was made;***
- (b) There was a mistake or error apparent on the face of the record; or***
- (c) There were other sufficient reasons;***
- (d) That the application was made without undue delay.***

The grounds for review are specific and the applicant should have endeavored to bring himself under any of the above but did not attempt to do so.

The grant herein was revoked and two other administrators have been appointed. The said orders can only be challenged by an application for revocation of the grant or an appeal.

Having considered all the issues raised, I find no merit in the application. The same is dismissed with costs to the respondents.

Dated, Signed and Delivered at NYAHURURU this 28th day of May, 2020.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Counsel Notified but No appearance

Eric – Court Assistant