



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J]

SUCCESSION CAUSE NO. 441 OF 2014

IN THE MATTER OF THE ESTATE OF WILSON MASUBO CHACHA (DECEASED)

-between-

1. ANDREW OWUOR MASUBO

2. BERNARD ODOYO MASUBO.....BENEFICIARIES/RESPONDENTS

-and-

1. SUSAN ORINA MASUBO..... CO-ADMINISTRATRIX/RESPONDENT

2. SAMWEL OKOTH MASUBO.....BENEFICIARY/RESPONDENT

3. JARED JOEL OKELLO KASSAM..... OBJECTOR/APPLICANT

RULING NO. 5

1. *Jared Joel Okello Kassam*, the Applicant in respect of the Summons dated 25/09/2019 joined these proceedings sometimes in November 2015. That was through *Messrs. Kerario Marwa & Co. Advocates*.

2. The Applicant then took part in a Chamber Summons dated 04/11/2015 which had been filed by *Andrew Owuor Masubo* and *Bernard Odoyo Masubo* who were part of the beneficiaries to the estate of the deceased herein, *Wilson Masubo Chacha*.

3. The Applicant herein was the third Respondent in the said application. He swore a Replying Affidavit in opposition of the said application. The application was eventually partly allowed *vide* the ruling (No. 4) rendered on 04/10/2018.

4. The Applicant herein went silent upto 25/09/2019. He then filed an even dated Summons. That was through *Messrs. Odhiambo Kanyangi & Company Advocates*. That Summons is the subject of this ruling No. 5. The Summons sought the following orders: -

1. This application be certified as urgent and the same be heard ex-parte in the first instance.

2. The Honourble Court be pleased to grant an interim stay of Ruling dated 8th December 2014 until the hearing of the application inter-partes.

3. The Honourable Court be pleased to grant an interim Order of an injunction against the 1st and 2nd Applicants/Respondents by themselves, agents, relatives, assigns, representative be restrained from interfering in anyway whatsoever, including demands for Rent from the 3rd Respondent/Objector's Purchased 12ft by 15ft portions of Plot No. 45C until the hearing of this application interpartes.

4. The Honourable Court be pleased to Review the Rulings dated 8th December 2014 by including the 3rd Objector's Jared Okello Kassam's Purchaser Interest in Plot No. 45C measuring 12ft and 15ft and the same be reflected in the Certificate of Confirmation of Grant.

5. There be an Order to effect the immediate transfer of the said 12ft by 15ft portion of Plot No. 45C in the 3rd Objector's favour forthwith.

6. The Costs of this application be provided.

5. The Summons was supported by the Affidavit of the Applicant also evenly sworn.
6. The Summons was opposed by *Andrew Owuor Masubo* and *Bernard Odoyo Masubo* (hereinafter referred to as '**the Respondents**'). The Respondents swore a joint Replying Affidavit on 30/10/2019 which was filed on 31/10/2019.
7. Directions were taken on the hearing of the Summons. Parties proposed and this Court approved the hearing by way of written submissions. Both parties filed their respective submissions and referred to various decisions.
8. The Applicant's case was that he was the lawful beneficiary of a portion of Plot No. 45C within Migori town. The portion measured 12 ft. by 15 ft. I will hereinafter refer to the portion of the Plot No. 45C as '**the portion**'.
9. The basis of the assertion was that the Applicant bought the portion from *Susan Orina Masubo*. According to the Applicant the sale was on 03/11/2012. The Applicant contended that by then *Susan Orina Masubo* was the surviving wife to the deceased herein. She was also the sole Administratrix of the estate of the deceased herein. I will hereinafter refer to the said *Susan Orina Masubo* as '**Susan**'.
10. The Applicant further deponed that he immediately upon execution of the sale agreement took possession of the portion. He also deponed that he had been peacefully carrying on business from a premises he put up on the portion since then until when the Respondents began demanding that he paid rent just as the other tenants on the Plot No. 45C. To the Applicant he was not a tenant but a *bona fide* purchaser of the portion for value.
11. The Applicant submitted that his interest in the portion was protected by **Section 93(1)** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the LSA**'). He urged this Court to, on the basis of **Section 73** of the **LSA**, to allow the Summons and to make the necessary orders to prevent abuse of the process of the Court and to also ensure ends of justice are met.
12. The Applicant relied on **Nairobi Court of Appeal Civil Appeal No. 133 of 2006 Nancy Kahoya Amadiva vs. Expert Credit Limited & Another** and the High Court in **Central Bank of Kenya Limited vs. Trust Bank Limited & 4 Others (1996) eKLR** in support of the argument that the Respondents cannot allege fraud on his part since such must be pleaded and proved.
13. The Respondents went through the history of the proceedings. They also referred to the rulings in this matter.
14. The Respondents deponed that the estate of the deceased involved several beneficiaries who were identified by the Court at the confirmation proceedings and their respective shares ascertained.
15. According to the Respondents Susan did not disclose the alleged sale of the portion during the confirmation proceedings. Despite that, the Respondents further deponed that Susan only had a life interest in the estate of the deceased and as such she could not lawfully dispose of the portion by sale or otherwise.
16. The Respondents urged this Court to see the collusion between the Applicant, Susan and a son to Susan one *Samwel Okoth Masubo* who is one of the beneficiaries of the estate of the deceased and who willfully decided not to take part in the current Summons.
17. Relying on High Court decisions in **Virginia Mwari Thurania vs. Purity Nkirote Thurania (2017) eKLR** and **Jane Kagige Geoffrey & Another vs. Wallace Ileri Njeru & 2 Others (2018) eKLR**, the Respondents urged this Court to dismiss the Summons.
18. I have carefully read and understood the Summons, the responses thereto, the parties' submissions and the decisions referred to.
19. I decipher from the record that the main issue of consideration is whether the sale between Susan and the Applicant was protected by **Section 93(1)** of the **LSA**. If the issue is answered in the affirmative, I will then decide as to whether the Summons be allowed.
20. The starting point must therefore be the law. **Section 93(1)** of the **LSA** provides as follows: -

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.

21. Courts have occasionally dealt with the above provision. The Court of Appeal in **Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and Another (2008) eKLR** stated as follows: -

We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a "transfer" of any interest in immovable or movable 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.

22. Later the Court of Appeal in **Civil Appeal No. 53 of 2015 Benson Manani Mahinye vs. Waiganagana A. Kendi (2016) eKLR** dealt with the said provision at length. I will reproduce what the Court stated in paragraphs 21 to 25 inclusive. The Court stated thus: -

21. *The Appellant however says that he should not be affected by the fraud perpetrated by Julius; that he is an innocent purchaser of the property for value without notice of any defect in the title Julius purportedly transferred to him. But is he? The learned Judge did not think so. The Judge said:*

“The [appellant] is a neighbour to the deceased’s family. He indeed knows the family well. If it is true the Respondent was shown the documents in the cause as alleged he was properly put in the know and could easily detect from the said documents that the Petitioner had indicated that he was ‘the only surviving heir of the deceased.’ He equally would have noticed that the other heirs did not favour their consents thereto. He therefore had an opportunity to interrogate the issues given that he started dealing with the Petitioner long before the grant was issued and eventually confirmed. May be out of ignorance or otherwise, the Respondent chose to ignore to interrogate the issues.”

22. *The finding that innocence in the appellant’s case was wanting is in our view, well supported by the evidence before the Court. By the time the appellant entered into an agreement to purchase a portion of the property with Julius on 10th April, 2005, Julius did not have the capacity to do so. Indeed, even when the second agreement for sale was entered into in February, 2009 between Julius and the appellant for the remainder of the property, Julius did not have a confirmed grant. Furthermore, it is patently clear from the contents of the replying affidavit sworn by the appellant on 6th October 2014 that he knew the family of the deceased well. It certainly does not come across from the evidence that the appellant was, as he would have the court believe, dealing with Julius at arm’s length.*

23. *Could the appellant, in those circumstances, seek protection of his title under section 93(1) of the law of Succession Act? We do not think so. Section 934 of the Law of Succession Act provides:*

“93. (1). Validity of transfer not affected by revocation of representation

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.

24. *Commenting on that provision in the case of Adrian Nyamu Kiugu vs. Elizabeth Karim Kiugu and Anor [2014] eKLR the High Court at Meru stated:*

“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 grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood 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.”

25. *This Court took a similar approach in Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and Another [2013] eKLR*

23. The Court of Appeal re-affirmed the foregone position in Kisumu Civil Appeal No. 2 of 2014 Musa Nyaribari Gekone & 2 Others vs. Peter Miyianda & Another.

24. Rawal, J, as she then was, in Re-Estate of Christopher Jude Adela (Deceased) (2009) eKLR had the following to say on the provision: -

This leaves me with provisions of section 93(1) of the Law of Succession which on the face thereof preserves the validity of transfer of interest in immovable or movable property made to a purchaser by a person to who representation has been granted notwithstanding subsequent relocation or variation of the grant either before or after the commencement of the Act.....

These provisions shall have to be closely looked at. As per my considered view section 93(1) of the Act talks of “interest” for immovable or moveable property and section 93(2) refers to transfer of movable property....

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

25. Returning to the matter at hand, the Applicant contended that he purchased the portion from Susan. The sale was reduced into writing. A sale agreement dated 03/11/2012 was annexed to the Summons in proof.

26. By the time Susan and the Applicant entered into the sale agreement Susan had been issued with a grant in respect to the estate of the deceased herein. The grant was issued in Migori SPM Succession Cause No. 4 of 1992. The grant was dated 04/03/1992. The grant was

eventually revoked by the order of the High Court made on 17/10/2014. That was Ruling No. 1.

27. The Grant was never confirmed prior to the revocation. For clarity, the grant was still unconfirmed when the sale was entered into between Susan and the Applicant. (See Court of Appeal in **Benson Manani Mahinye vs. Waiganagana A. Kendi** (supra).

28. There is as well the issue as to whether the Applicant was aware of any misunderstandings in the family of the deceased especially relating to the estate. The Applicant distanced himself from any such knowledge.

29. A person intent on purchasing land is expected to undertake some due diligence to at least confirm that the seller is legally entitled to the land. That is the only time when the seller may pass good title. Such a burden is expectedly high in cases where the land involved relates to a deceased owner.

30. The Applicant did not address the issue in the Summons. He only centered on the fact that Susan had a grant by the time the agreement was entered into.

31. There is hence no doubt that the Applicant was well aware that Susan was the Administratrix of the estate of the deceased herein. Infact the parties to the agreement were both represented by the firm of *Messrs. Odingo & Company Advocates* in the transaction. In such a scenario the legal representative was expected to verify the position of the administration of the estate and the documents involved. That was simply by making a visit to the Magistrates Court at Migori.

32. Had the verification been undertaken then a serious revelation would have been made; that the estate had two grants. One had been issued to Susan and another grant issued to *Lawrence Odhiambo Masubo* one of the sons to the deceased. Such would have raised the Applicant's antennae and he would have been more cautious on the sale.

33. I have intently looked at the sale agreement. The agreement did not indicate that Susan sold the portion in her capacity as the Administratrix of the estate of the deceased. The agreement was clear that Susan sold the portion in her capacity as the owner of the portion. The agreement did not mention the estate of the deceased or any dependents or beneficiaries thereof. Even the son to Susan who signed the agreement as a witness did not indicate anything to do with the estate of his father.

34. I will now look at the confirmation proceedings. This Court was moved by Susan to deal with the twin grants. A decision was rendered on 17/10/2014. That was Ruling No. 1. The Court revoked both grants. It then issued a joint grant to Susan, *Lawrence Odhiambo Masubo* and *Simeon Maucha Masubo*.

35. The joint grant was confirmed *vide* Ruling No. 2 on 08/12/2014. Susan participated in the proceedings. The Court received *viva voce* evidence on the confirmation. Lawrence Odhiambo Masubo, Simeon Maucha Masubo and Samuel Okoth Masubo testified.

36. Susan and her son Samuel Okoth Masubo did not however disclose to the Court that they had sold the portion to a third party. The reason thereto was clear to them; there was a dispute on Plot No. 45C.

37. The Court aptly captured the issue and resolved it in the ruling. The Court stated as follows: -

6. The only issue which appeared to raise contention was the status of the Migori Town Plot. From the testimony of Simeon Maucha and Samuel Okoth, the deceased had given the plot to his wives to be used for their upkeep and that of his younger children particularly in his later years. The problem seems to be that the only surviving wife is now utilizing the income from the plot to the exclusion of others and other family members want part of the income from the property.

7. Having listened to them I find that the intention of the deceased all along was that his wives should be able to get income from the property to support themselves and their children. In the circumstances, I hold that Susan Orina Masubo shall continue to deal with it as she had done before including allowing members of the family to continue to collect rent. Upon her death the same shall devolve to Andrew Owuor Masubo, Benard Odoyo and Samuel Okoth Masubo representing each house and in equal shares.

38. Another issue worth consideration is the timing of the Summons. As said above, the Applicant came into the proceedings in 2015. He fully participated in a Chamber Summons dated 04/11/2015 which had been filed by the Respondents. The application challenged the sale of the portion. The application was partly allowed on 04/10/2018. The transfer was nullified. The Applicant never appealed that decision (Ruling No. 4). The Applicant also went mute.

39. The Applicant did not see any reason to assert his rights, if any, from 2015 when he learnt that the sale was challenged. He did so 4 years later. That was through the Summons. He filed the summons on 25/09/2019. By then Susan had died on 05/07/2019. The Applicant knew that Susan could not be interrogated on her role in the sale. The Applicant then opted to rely on **Section 93(1)** of the **LSA**.

40. Based on the above legal guidance and looking at the totality of the foregone issues from the failure to undertake due diligence on the portion, to the disposal of estate property when the grant was still unconfirmed, further to the failure to disclose that Susan and her son were entering into the agreement as representatives of the other beneficiaries of the estate of the deceased, to the indolence and the timing of the Summons on the part of the Applicant and lastly to the further non-disclosure to the Court during the confirmation proceedings that Susan had sold the portion to a third party, I find and hold that the Applicant is undeserving of the protection under **Section 93(1)** of the **LSA**.

41. Having so found, the other finding which naturally follows therefrom is that the Summons is unmerited.

42. The Summons dated 25/09/2019 is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. sirkanyangi2000@yahoo.com for Messrs. Odhiambo Kanyangi & Company Advocates for the Applicant.
2. rochodhiamboadvocates@gmail.com/nyakwarokul@gmail.com for Messrs. Odhiambo & Company Advocates for the Respondents.
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE