



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 268 OF 1996**

**IN THE MATTER OF THE ESTATE OF MITHINGA NGUNYURA (DECEASED)**

**FRANCIS KITHINJI.....PETITIONER**

**VERSUS**

**PETER KIAMBA M'MUTHAMIA.....OBJECTOR/APPLICANT**

**AND**

**EMILY GAKIL.....1<sup>ST</sup> INTERESTED PARTY**

**BENSON MUTAI MUTHIA.....2<sup>ND</sup> INTERESTED PARTY**

**PAUL MWENDA GIDEON.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. By a Summons dated 26/4/2018 brought, *inter alia*, under **Order 45 Rule 1 of the Civil Procedure Rules**, the applicant sought; an inhibition against **LR. Nos. Abogeta/Lower Kiungone/1236, 1391 and 1392** which resulted from the subdivision of the former **LR. No. Abogeta/Lower-Kiungone/1046**.
2. The applicant further prayed that the subdivisions be declared to have been contrary to inhibition Orders made on 3/4/06 and 1/7/08, respectively. He sought that the transfer of those subdivisions to the interested parties be cancelled and reinstated to the petitioner and be deemed part of the estate by virtue of the doctrine of tracing.
3. He therefore prayed that the decree (sic) be amended so that **LR. Nos. Abogeta Lower/Kiungone/1391 and 1392** measuring 0.12 ha and 0.793 ha, respectively be declared to be his and the production of the original title be dispensed with and all cautions and inhibitions thereon be lifted. An order of eviction on those in occupation was also sought to perfect the orders prayed for.
4. The application was supported by the affidavit of **Peter Kiambi** sworn on 26/4/2018. He averred that by a decree made on 5/1/2017, he was awarded 0.90 hectares to be excised out of **LR. No. Abogeta/Lower/Kiungone/1046**. That unknown to him, **Parcel No. 1046** was closed for subdivision on 21/12/2011 and later on subdivided to **Parcels Nos.1236 and 1237** by the petitioner.
5. **Parcel No.1236** was transferred to the 1<sup>st</sup> interested party while **Parcel No. 1237** was subdivided to **Parcel Nos. 1391 and 1392**, respectively. **Parcel No. 1391** was transferred to the 2<sup>nd</sup> interested party while the petitioner remained with **Parcel No. 1392**.
6. The applicant averred that while all these transactions were being undertaken by the petitioner, there was a pre-existing inhibition registered on 4/5/2006 and re-issued by consent on 1/7/2008. That the petitioner was also in the process of selling and transferring the remaining **Parcel No. 1392** to the 3<sup>rd</sup> interested party.
7. The application was opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties. The 1<sup>st</sup> interested party did not appear. The 2<sup>nd</sup> interested party averred that he purchased **Parcel No. 1391** from the petitioner vide a sale agreement made on 24<sup>th</sup> October, 2016. That he had since taken possession of the same and carried on developments thereon.
8. The 3<sup>rd</sup> interested party averred that he had purchased two portions in **Parcel No. 1392** vide two agreements made in 2015 and 2016,

respectively. That he had paid for the subdivision of his portions into **Parcels Nos. 1472 and 1473**, respectively. That a grant had already been issued to the petitioner and the petitioner had obtained title to the property before he sold it to him.

9. Both interested parties contended that they were not aware of any fraudulent scheme on the part of the petitioner. They urged the Court to protect them under the provisions of **section 93 of the Law of Succession Act**. They attached copies of the agreements between themselves and the petitioner.

10. The parties filed their respective submissions which the Court has carefully considered. The applicant submitted that the petitioner's dealings with the property was unlawful, fraudulent and in bad faith. That his title to the affected parcels was protected under **Article 40 of the Constitution**.

11. It was submitted for the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties that they were innocent purchasers for value without notice. They sought the protection under **section 93 of the Law of Succession Act**. They cited the case of **Katende v Haridar and Company Limited [2008] 2 EA 173** in support of their contention.

12. This matter has had a checkered history. The grant was issued to the petitioner on 20/3/1998. The petitioner later died in or about 2018 and his wife, **Irene Mucece Kithinji** was appointed in his place on 5/11/2019.

13. On 7/3/2006, the applicant applied for the revocation of the grant and inhibitory orders were placed on the subdivisions arising out of **Parcel No. 182** i.e. **Parcels No. 1041, 1042, 1045 and 1046**, respectively. This was vide the orders of 3/4/2006 and 1/7/2008, respectively. The latter order was by consent. The latter order was to the effect that the inhibition on **Parcel No. 1046** was to subsist until the Cause was heard and finalised.

14. The application for revocation proceeded to hearing and by a judgment made on 5/10/2017, the grant was revoked. The Court distributed the estate equally between the applicant and the petitioner.

15. Subsequently, the Court issued a decree to that effect on 9/11/2017 and a certificate of confirmation of grant was issued on 12/2/2018. However, there was an error as the Court wrongly included **Parcel No. Abogeta/Lower-Kiungoine/182** as part of the estate yet the same had been subdivided and was non-existent by that time. A rectification thereof is necessary.

16. The subdivision of **Parcel No. 1046** was contrary to the court orders of 3/4/2006 and 1/7/2008, respectively. Likewise, the resultant purported sale of the subdivisions arising therefrom, to wit, **LR. Nos. Abogeta/Lower Kiungone /1236, 1391 and 1392**, was in clear violation of the said orders. It should be remembered that, the petitioner had by then sold large parts of the estate and the parties had agreed that what he had sold be deemed to form part of his own share in the estate. That is why **Parcel No. 1046** was the only one inhibited. The estate measured over 4.5 acres.

17. The question therefore is whether the petitioner in his fraudulent dealings passed any good title to the interested parties. The 1<sup>st</sup> interested party never appeared though served. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties contended that they were innocent purchasers without notice and sought refuge under **section 93 of the Law of Succession Act**.

18. **Section 93 of the Law of Succession Act** provides: -

***“93(1) A transfer 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.”***

19. This provision has been a subject of various pronouncements. In **Re-Estate of Christopher Aide Adela (Deceased) (2009) Eklr**, the Court held: -

***“As per my considered view, Section 93(1) of the Act talks of interest for immovable or movable property and Section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and Section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The aspect 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 manner will be commensurate with provisions of Section 23 of the Registered Land Act (Cap 281) or any other provisions 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 actions prejudicing the interests and rights of right beneficiaries of the estate.”***

20. In **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 immovable or moveable property”. Kabitu 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. In **re Estate of M’Mbwiria M’Mairanyi [2019] Eklr**, it was held: -

*“What comes out from the foregoing pronouncements is 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. ...*

*Further, it must not have been the intention of the Legislature that section 93 of the Act be used as a vehicle for fraud.*

*In this regard, any transfer of estate property will be set aside if it is shown that; the transferor had not been lawfully issued with the grant under section 71 of the Act; or, the grant had been fraudulently obtained; or, the purchaser was not an innocent purchaser for value without notice”.*

22. In the case relied on by the interested parties of **Katende v. Haridar & Company Limited Case (supra)**, it was held that the doctrine of innocent purchaser for value applies where the claimant shows that; he holds a certificate of title, has purchased the property in good faith and for valuable consideration without notice of any fraud, has no knowledge of fraud and is not party to any fraud, and the transferor has apparent valid title.

23. In the present case, the sale agreements produced were not stamped. No copies of transfers were produced nor certificate of title. The interested parties were only contented with the search certificates produced that showed that they were owners of the subdivisions. That in this Court’s mind was not sufficient. The petitioner did not have any valid title.

24. The interested parties could no acquire more than that which the petitioner had. They were but mere conduits for the petitioner for his fraudulent acts which this Court cannot countenance. The petitioner could not sell that which he did not have.

25. For the foregoing reason, the interested parties could not seek protection under **section 93 of the Act**. The said Parcels cannot stand and they are hereby cancelled and the property revert back to **Parcel No. 1046**.

26. In order to perfect the Judgment of 5/10/2017, the acts that impede its effectuation must fall by the wayside. The Court has seen the green cards produced by the parties. The main property of the estate was **Parcel No. 182** measuring 1.82 hectares (approximately). It was subdivided into **Parcel Nos. 961** (0.2 ha), **parcel No. 962** (0.4 ha), **Parcel 963** (0.2 Ha) and **Parcel No. 964** (1.12 Ha.), respectively.

27. **Parcel No. 962** (0.4ha) was further subdivided to **Parcel No. 1041** (0.20 Ha) and **Parcel 1042** (0.20Ha.). **Parcel No. 964** was divided into **Parcel Nos. 1045** (0.101 Ha) and **1046** (1.014 Ha.), respectively. Vide a Ruling dated 4/2/2004, the court noted that the objector occupied parcel No. 962 while the petitioner had sold parcel No 961 to a 3<sup>rd</sup> party.

28. The defect and plausible oversight of this court was to the extent that Parcel No. 182 had been subdivided and **Parcel No. 1046** was but a resultant subdivision. This affects the mode of distribution decreed in the Judgment. I have taken into consideration the initial distribution of the estate.

29. This court held in the Judgment that the estate ought to be equally distributed between the petitioner and the objector. The original **Parcel No. 182** which formed part of **Parcel No. 1046** measured 1.82 ha. On subdivision both the petitioner and the applicant was to each get 0.9 ha.

30. **Parcels Nos. 1391 and 1392** equate to 0.913. Based on this arithmetic, it is prudent therefore that the applicant is entitled to hold **Parcel Nos. 1391 and 1392** as his share in the estate. The interested parties should pursue the estate of the petitioner for their outlay.

31. Accordingly, the Deputy Registrar of this Court is directed to sign the relevant transfer forms and execute all relevant documents to effect the Judgment of this Court and the presentation of the original title is hereby dispensed with.

32. The application is therefore allowed on the following terms: -

(i) **The subdivision of LR No. Abogeta Lower/Kiungone/1046 into parcel Nos.1391 and 1392 is hereby cancelled.**

(ii) **The certificate of confirmation is hereby rectified to the extent that the applicant gets 0.90 LR. No. Abogeta Lower/Kiungone/1046 and LR 182 is struck out.**

(iii) **The Deputy Registrar of this Court is directed to sign all the relevant and necessary transfer forms to effect the Judgment herein.**

(iv) **Presentation of the original title is to be dispensed with.**

(v) **An order of eviction be and is hereby issued against the petitioner, the interested parties and all and any other person(s) in occupation of part of Abogeta lower Kiungone/1046 Parcel Nos. 1391 and 1392) within 60 days from the date hereof.**

(vi) The Cost of the application shall be borne by the petitioner and the interested parties.

**DATED** and **DELIVERED** at Meru this 12<sup>th</sup> day of August, 2020.

**A. MABEYA**

**JUDGE**