



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO 13 OF 2017

IN THE MATTER OF THE ESTATE OF KUNGU WAIGI

(DECEASED)

EPHRAIM WAIGI KUNGU.....APPLICANT

VERSUS

JOHN NJUGUNA KUNGU.....RESPONDENT

R U L I N G

1. Before the court are three applications for determination. The first to be filed and heard is the Amended Summons for Revocation of Grant brought under Sections 48 and 76 of the Law of Succession Act, and was filed on 7th November, 2013 seeking that:-

- a) the grant of letters of administration made to JOHN NJUGUNA KUNGU in the Kiambu Senior Principal Magistrate's Court in Succession Cause Number 425 of 1997 be revoked.
- b) the registration of JOHN NJUGUNA KUNGU as the proprietor of land parcel Number LIMURU/NGECHA/2020 be revoked and the title to the said parcel of land be re-instated to the estate of KUNGU WAIGI deceased and registered in the name of the deceased KUNGU WAIGI.

2. The summons is based on grounds *inter alia* that that John Njuguna Kungu prior to filing the succession cause in which the impugned grant was made did not seek consent of all the beneficiaries of the deceased; omitted some of the beneficiaries of the estate in his petition for grant while including strangers thereto. John Njuguna Kungu (the Respondent) is accused by the Applicant of fraudulently causing himself to be registered as the proprietor of land parcel LR.No. Limuru/Ngecha/2020 which was derived from the subdivision of land parcel LR.No. Limuru/Ngecha/654 the latter which the deceased died possessed of, and of selling other subdivisions to third parties. EPHRAIM WAIGI KUNGU (initial Applicant) swore the affidavit in support of the summons. He listed the children of the deceased. It was his contention that his brother John Njuguna Kungu obtained the grant fraudulently by failing to seek consent and concealment of the beneficiaries of the estate while listing as beneficiaries, strangers such as one Wandati Njoka. He accused his brother of registering himself as the proprietor of Limuru/Ngecha/2020 which he had also subdivided with the intention of selling it off.

3. On 11th August, 2014 JOHN NJUGUNA KUNGU (Respondent) filed a replying affidavit in opposition to the amended summons. He listed members of the family of the deceased, including the deceased's four wives and their respective children. It was his contention that the deceased distributed his estate comprising of the suit land during his lifetime by assigning the first and second wives received three acres each while the third and fourth wives who had no children received three acres between them. He deposed that the Applicant herein received his mother's whole share while he received the third and fourth wives' share having taken care of them as instructed by the deceased. He contended that the Applicant is not entitled to any more share as fair distribution of the estate has already been achieved.

4. The initial Applicant died during the pendency of the application, and his son who bears similar names as the initial Applicant, namely, **EPHRAIM WAIGI KUNGU**, was substituted in place of his father. Upon enjoinder, he filed a further affidavit where he deposed that his uncle John Njuguna Kungu recklessly administered the deceased's estate by transferring a share of 31/62 out of land parcel LR. No. Limuru/Ngecha/654 to one Ng'ang'a Gathii who as a joint owner thereto, was only entitled to a share of 1/62.

5. Subsequent to directions by the Court, a witness, John Njuguna Karanja, described as the Applicant's uncle filed his affidavit in support of the summons for revocation of grant where he deposed that the deceased had three wives and that only the first wife had three sons who ought to benefit from the deceased's estate. It was his contention that the Respondent subdivided and sold off part of the deceased's estate without involving the other beneficiaries. Lastly, the Respondent filed a supplementary affidavit reiterating his earlier depositions.

7. As directed by the Court, the summons was heard by way of viva voce evidence which involved the adoption by witnesses of their

respective affidavits as evidence-in-chief and cross-examination.

8. BISHOP EPHRAIM WAIGI KUNG'U (**PW1**) adopted his sworn affidavits as his evidence. During cross-examination, he explained that he is the Applicant's son and the deceased herein was his grandfather. He contended that he had received from his father a Plot No. 3132 Ngecha which is a subdivision of Limuru/Ngecha 1171. He denied knowledge of the assertion that the deceased had owned another parcel of land other than parcel no. 654 or that his own father, had during the lifetime of the deceased, received the largest share of settlements made by the deceased to members of his family in respect of other parcels of land.

9. JOHN NJUGUNA KARANJA (**PW2**) adopted his affidavit as well. In cross-examination, he stated that the deceased had three wives who cultivated on the deceased's land. It was his contention that compared to his brothers, the Applicant herein received the smallest portion of land gifted *inter vivos* by the deceased.

10. JOHN NJUGUNA KUNGU (**RW1**) adopted his filed affidavits as his evidence. During cross-examination, he asserted that he filed Kiambu SPM's Court Succession Cause No. 425 of 1997 in respect of the deceased's estate. He contended that the deceased had already distributed his estate in his lifetime. He disputed the court's order issued in February, 2011 to restrain him from dealing adversely with the subdivision known as LR. No. Limuru/Ngecha/2020. He claimed that the deceased Applicant had received from the deceased a parcel of land which he was to hold in trust for his mother's house while he (Respondent) was assigned the land belonging to the widows who bore no children, upon their demise. He indicated that the original parcel number 654 suit property had been jointly owned by the deceased and Ng'ang'a Gathii in the share ratio of 61/62 and 1/62 respectively and hence the subsequent subdivision of the original parcel into parcels 2020 and 2021. He admitted that Ng'ang'a Gathii received two acres being made up of the latter portion which is more than what he was entitled to.

11. The court thereafter directed the parties to file their written submissions. The Applicant through his counsel submitted that failure by the Respondent to include all beneficiaries of the deceased in his petition for grant rendered the proceedings defective in substance. Counsel relied on the case in **Re Estate of Stephen Mwangi (deceased) 2018 eKLR**. He further submitted that court orders are not issued in vain pointing out that the Respondent had despite orders restraining him, had proceeded to subdivide the land parcel number 2020. The court was urged to revoke the grant and to cancel the titles obtained in respect of parcel LR. NO. Limuru/Ngecha/2020.

12. Subsequently, the Respondent filed his written submissions. He submitted that the application is an abuse of the court process. He emphasized that the Applicant herein had benefitted from the three acres assigned to their mother, the first wife, while the three acres belonging to the second wife were taken by her house and that the Respondent received the three acres assigned to the third and fourth wives as they had no children. Thus, in his view the purpose of succession proceedings, namely, the distribution of the estate had been achieved. Counsel submitted that the Applicant was not entitled to any more land having already inherited his fair share and that equitable distribution of the deceased's estate has been achieved. To support this proposition counsel quoted the case in **Re Estate of Simon Mburu Gachuhi (2019) eKLR** where the court declined to revoke a grant and instead made other orders which fitted the circumstances of the case. In conclusion, the court was urged to not allow the summons. The Court set the ruling for 30th July 2020. However, before that date, two further applications were filed.

13. The two applications were filed on 29th June 2020 by David Njogu Gichanga and James Gathuri Gichanga and on 17th July 2020 by Rev. David Muoria and Pastor Jacob Karanja Munyambu as representatives of PEFA church, Gatimu. The former seeks that the Applicants be granted leave to be enjoined in this cause as interested parties and that "*pending the hearing and determination of the application the court does stay its Ruling slated for 30th July 2020 and to grant the Applicants an opportunity to be heard*".

14. The prayer is evidently erroneous as the opportunity to be heard depends on the outcome of the application. As drafted, the prayer seeks a temporary order. The difficulty is that as crafted, the prayer is composite in nature and ideally ought to have been presented as two separate prayers. The second application was filed on 17th July 2020 and seeks that the applicants be granted leave to be enjoined in this cause as interested parties and to be heard alongside the earlier application. This latter prayer is spent. The court will refer to the two applications as the joinder applications and the Applicants therein as the proposed interested parties. The grounds in the two applications are similar in nature. The proposed interested parties in the first joinder application assert that between May and July 2011 they had purchased three parcels of land, being subdivisions of land parcel LR No. Limuru/Ngecha/2020 from the Respondent. The parcels subject to the sale are identified as Limuru/Ngecha/2712, 2714 and 2715; and it is asserted that the Applicants are protected by Section 93 of the Law of Succession Act.

15.. The gist of the supporting affidavit in respect of the first joinder application is that the Applicants only recently learned of the pendency of the ruling or judgment in respect of the summons to revoke the grant as they had been unaware of the present cause, whereas they had purchased and taken possession of the three parcels of land upon completion of the succession cause; and that if the decision of the court is rendered without giving them a chance to be heard their right to property may be adversely affected. They assert that they are protected as purchasers by the provisions of Section 93 of the Law of Succession Act. Two typed copies of sale agreements dated 30th May 2011 and 29th July 2011 in respect of parcels No. 2715 and 2712 are attached as annexures **DNG 1**. Also attached is a handwritten copy of an agreement dated 12.10.13 in respect of the purchase of a portion to be excised from the land parcel Limuru/Ngecha/2714.

16. The substance of the affidavit supporting the second joinder application is more or less similar to the above. It is deposed therein that the proposed interested party had only "now" learned of the revocation proceedings and that upon the completion of earlier succession proceedings they had in 2006 transacted with the Respondent in respect of the purchase of land parcel No.2718 being a subdivision of parcel No.2020; that if not enjoined, orders adverse to their interest may be made; that they are protected under Section 93 of the Law of Succession Act and that the proposed interested party will suffer irreparable loss and damage if not enjoined as it has developed a church on the suit land, which is near completion.

17. The joinder applications were opposed by Ephraim Waigi Kungu through the Replying affidavit filed on 17th July 2020. He pointed out that the issue pending for determination by this court related to the propriety of the grant obtained by the Respondent and that the proposed

interested parties not being beneficiaries have no role therein and ought not to be allowed to further delay the case. Setting out the history of the subdivisions to which the proposed interested parties lay claim, the deponent asserts with respect to the proposed interested parties in the first joinder application they allegedly purchased the same during the subsistence of an order of the court restricting dealings in the said property and that the proposed interested party in the second joinder application had been served with the said order which was ignored.

18. That the said proposed interested parties failed to conduct due diligence before transacting with the Respondent and in any event have not exhibited title documents to the parcels claimed; that further, the Respondent could not pass a good title to such claimants as he obtained the grant through fraud; that the applications constitute a proxy attempt by the Respondent to delay the matter. It is pointed out that the firm of **Nyoro Njogu and Co. Advocates** who have represented the Respondent since June 2013 were also the advocates for the parties in the exhibited sale agreements and that it would be surprising that he did not notify the proposed interested parties of the existence of these proceedings.

19. The two joinder motions were heard together on 21/7/2020. The Applicants through their counsel submitted on the basis of the material in the applications and asserted that some of the contentious raised in opposition can only be addressed after the Applicants are enjoined. Counsel for Ephraim Waigi Kungu also reiterated the material in the Replying affidavit, maintaining that the proposed interested parties have no role in the determination of the key question for determination in the substantive revocation summons. Referring to annexures in the annexure **EWK I** counsel highlighted encumbrances on the suit property, which include the injunctive orders of this court; that the proposed interested parties in the second joinder motion had notice of this cause and were indolent having waited until now to approach the court. That this litigation has been ongoing for 20 years and ought to come to an end.

20. Counsel for the Applicants responded by stating that the service of order on the proposed interested parties in the second application was of no consequence as the order was not addressed to them; nor was the fact that the sale agreements were drawn by counsel representing the Respondent in this cause relevant.

21. The court has considered the evidence and submissions of the respective parties in the three applications, in addition to perusing the present file and the record in Kiambu Succession Cause No. 425 of 1997 which was forwarded to this Court. The admitted facts of this case are that the deceased herein, Kungu Waigi, died on 4th July 1977 while possessed of a land parcel described as Limuru/Ngecha/654 (hereafter the suit property) which measured 1.24 ha. He owned 61/62 shares of the parcel while his joint co-owner, one Ng'ang'a Gathii owned 1/62 share of the asset as per the certificate search dated 17.12.97 and filed together with the Petition for grant. The Petition for grant in Succession Cause No. 425 of 1997 was filed by John Njuguna Kungu the Respondent herein on 17th December 1997. Although the deceased had 4 wives in his life time, two of whom had children, including the Petitioner and the late Ephraim Waigi, the beneficiaries named in the Petition were the Petitioner (Respondent herein), Nyathira Njenga widow of a son of the deceased named Njenga Kungu, who was deceased at the time, and Njoki Kungu the deceased's 3rd wife.

22. The Respondent herein, Ephraim Waigi Kungu (the deceased Applicant) and Njenga Kungu were the children of the deceased's first wife Nyamuru Kungu. Ephraim Waigi Kungu, the eldest son of the deceased filed the instant application for revocation but is now deceased, and his son, of the same name was substituted in place of his father. Reverting now to the lower court Succession Cause, the court issued a grant in favour of the Respondent herein on 9th March 1998. The grant was confirmed on 12th October 1998 and rectified on 21.1.99 pursuant to an application filed on 23rd December 1998 by the Respondent. Thus, the deceased's sole asset, namely, land parcel No. Limuru/Ngecha/654 was shared as follows;

John Njuguna Kungu	-	0.50 acre
Nyathira Njenga	-	0.75 acre
Joseph Wandati	-	1 acre
Njoki Kungu	-	0.75 acre to hold in trust for John Njuguna Kungu

23. There are on record subsequent applications made in the lower court by Ng'ang'a Gathii and Joseph Peter Wandati seeking to assert their claims to the suit property claiming to have purchased portions thereof from the deceased. It appears that these applications were never heard, but in the year 2004, the suit property was subdivided by the Respondent who ceded 10/62 shares to Ngang'a Gathii while retaining 52/62 shares. That subdivision yielded parcels No. Limuru Ngecha/2020 measuring 1.04 ha and Limuru/Ngecha/2021 measuring 0.20 ha. The latter was registered in Nganga Gathii's name and the former in the Respondent's name on 12th February 2005. It appears that by that date, the late Ephraim Waigi Kungu, (the Applicant) had in March 2003 filed an application seeking the revocation of the grant and an application for injunction against the Respondent, and when the parties appeared before **Aluoch J** as she then was, on 17th March 2003 two key orders made were for the calling up of the Kiambu Succession Cause and the second one which is pertinent to the instant application was that;

“2. That the Respondent who is already present in court do file a Replying affidavit.”

24. There followed a long hiatus in proceedings during which, it is claimed the Respondent sold parcel No. 2718 to the proposed interested party in the second joinder application. The lower court succession file was not forwarded to the High Court until 8th January 2009. The injunction application filed on 27th August 2004 fell by the wayside but undeterred, the late Ephraim Waigi Kung'u (hereafter the late Ephraim) filed an application on 11/2/2011 to restrain the Respondent in respect of dealings in land parcel No. Limuru/Ngecha/2020 (hereafter) the suit property pending the hearing of the revocation application.

25. The application was duly served on the Respondent who did not appear for the hearing slated for 16/2/2011 and the court (**Kimaru J**)

granted the application. According to the copies of the Green Card and Search certificate dated 4.7.11, in the annexure marked **EWK 1B** to the affidavit of the late Ephraim's son, and filed in response to the applications filed by the proposed interested parties, the order by Kimaru J was registered against the suit property on 18/3/2011. However, despite the subsistence of the orders and two cautions filed by Nyathira Njenga and the late Ephraim in the late 2010, the Respondent apparently transacted with the proposed interested parties in the first joinder application and allegedly sold to them three subdivisions of parcel No. 2020. Despite the encumbrances above, the Respondent was able on 5.8.13 to register the subdivisions prepared in 2010 in respect of the suit property, as per the copy of survey map annexed to the affidavit of the Applicant, filed on 11/5/18 and marked annexure **"EWK4"**. As a result of the subdivision the suit property yielded the subdivisions Nos. 2712 to 2729.

26. The Applicants David Njogu Gichanga and James Gathuri Gichanga assert to have purchased from the Respondent the subdivisions Nos. 2712, 2714 and 2715 between May and July 2011. While the Applicants David Muoria and Jacob Karanja Munyambu on behalf of PEFA Church assert purchase of the subdivision No.2718 in 2006 from the Respondent.

27. The first matter for determination relates to the joinder applications filed on 29th June 2020 by David Njogu Gichanga and James Gathuri Gichanga and on 1st July 2020 by PEFA Church through David Muoria and Jacob Karanja Munyambu for leave to be enjoined in the cause.

28. The term interested party is not defined in the Law of Succession Act. At paragraph 1232 of Black's Law Dictionary, 9th Edition an "Interested Party" is defined as:

"A party who has a recognizable stake (and therefore standing) in a matter."

29. No doubt, a party may be said to have a recognizable interest in a matter if the outcome of such matter or proceeding is likely to adversely affect his interest. In the case of **Mercy Njoki Irungu v Lucy Wamuyu Maruru [2016] e KLR, Mativo J**, citing the decision in **Randal v Randal [2016] EWCA Civil 494** stated that courts will adopt a broad approach in assessing whether a person claiming interest has an interest in the deceased's estate, particularly where the person may not have other form of recourse. In that case, the court was dealing with an application brought by an interested party under Section 76 of the Law of Succession Act seeking revocation of grant. This was also the case in **Khalid Abdi Ibrahim v Asha Ibrahim Hassan and Another [2019]** cited by the Respondent. Section 76 of the Law of Succession Act clearly recognizes an interested party and allows that such person may file an application to revoke a grant upon demonstrating an interest capable of being recognized by the law, or an interest upon which they acquire a legal standing in a succession cause.

30. Examples of persons who would be outright interested parties in succession causes would be beneficiaries, spouses, children, creditors and any person who has a legal claim to an estate. By parity of reasoning if such interested parties may apply to revoke a grant, similar parties whose interests are adverse to the those of a party seeking to revoke a grant ought ordinarily to qualify as interested parties. This however does not mean that the admission of such a party as an interested party in a succession cause is a matter of right. The discourse of the Supreme Court in **Francis Karioko Muruatetu & Another v R & 5 Others [2016] e KLR** regarding considerations on the admission of interested parties is helpful. Although based on the definition of an interested party in Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and Sections 23 and 25 of the Supreme Court Act. (providing for joinder of an interested party) the decision illuminates the subject of interested parties generally.

31. The Court stated as follows:

"[33] These legal provisions have been considered by the Court in *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others*, Supreme Court Petition No. 12 of 2013, [2014] eKLR (an application by the Law Society of Kenya). In this case, the Law Society of Kenya (LSK) sought to be enjoined in the proceedings as an interested party, but leave was denied. The Court observed that :

"[13] While the Rules have a definition of who an amicus is, there is no definition attributed to 'Intervener' or 'Interested Party'. However, from Rule 25 above, one is allowed to apply to be enjoined any time in the course of the proceedings.

"[14] Black's Law Dictionary, 9th Edition, defines "intervener" (at page 897) thus:

"One who voluntarily enters a pending lawsuit because of a personal stake in it" and defines 'Interested Party' (at p.1232) thus:

"A party who has a recognizable stake (and therefore standing) in a matter".

[34] With that definition of "interested party," the Court proceeded to hold further [paragraphs 17-18]:

"[17] Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

"[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and

champions his or her cause...”

[35] This Supreme Court decision was cited by the High Court in *Judicial Service Commission v. Speaker of The National Assembly & 8 Others*, [2014]eKLR. The High Court also cited the definition of ‘interested party’ in: The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the “Mutunga Rules”) thus:

“Rule 2 of the Mutunga Rules defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation.”

[36] Once again in the said High Court matter, the LSK was denied admission as an interested party because, in the perception of the Court, it could not show an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if not enjoined as a party.

[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.” (emphasis added)

32. Applying all the foregoing principles, it is evident that PEFA Church (the proposed interested party in the second joinder application) has not demonstrated the exact interest or stake in the cause in the estate of the deceased beyond mere statements to have purchased the suit property from the Respondent in 2006. Not even a copy of the alleged sale agreement or copy of title in their name is attached. Worse, or in the alternative, there is evidence by the Applicant herein by way of annexure **EWK 1A** attached to the Replying affidavit filed on 17th July, 2020 that on 8.9.2011, David Muoria was served with a copy of the injunctive orders issued by **Kimaru J**, prohibiting dealings in the parcel No. 2020 “*pending the hearing and determination of the application for revocation of grant.*” The order refers to the estate herein and the Respondent as the person being restrained.

33. The said proposed interested party took no action to protect its alleged interest only appearing some 8 years later with the instant application for joinder. It is not open to them to claim as they have done that service of the order on them is irrelevant. The past conduct, including delay by a party seeking joinder at the tail-end of proceedings is certainly a relevant consideration. The service of the order was clear notice to the said parties to move with dispatch and to take steps to protect its alleged interest. That they ignored the order over eight years demonstrates indolence and inordinate delay on their part. Given the stage of the proceedings and nature of their claim, their joinder application appears an afterthought. They are not without recourse; they can file a suit against the alleged vendor of the property to recover whatever monies they may have paid to the Respondent or whatever other relief they may deem appropriate in the circumstances.

34. Turning now to the first joinder motion, it is evident that the sale agreements relied on were drawn and apparently executed after the court’s order of 2011 restraining the Respondent from dealing with the suit property. The agreements marked annexure **DNG 1** and attached to the supporting affidavit of the proposed interested parties indicate at clause 8 that ;

“The purchaser’s and the vendors’ Advocate shall be Nyoro Njogu & Co. Advocates.”

35. Indeed, the said firm drew the two agreements for sale. As per the contents of the copy of a notice of appointment filed into court in this matter on 27/6/13 the firm of Nyoro Njogu & Co. Advocates received instructions to also act for the Respondent in this cause on 4th June 2013. Given these facts, I share the surprise expressed by the present Applicant in the revocation application on two scores. First, that in a period of 9 years since the alleged agreements, nothing was done to perfect the alleged agreements in order to facilitate issuance of titles to the alleged purchasers, and secondly, that counsel for the parties did not advise his clients, at least having become seized of this matter in 2013 of the necessity to enjoin the purchasers to protect their alleged interest. At the very least one would have expected him to accordingly advise the Respondent upon taking up the matter.

36. The material regarding the circumstances of alleged sale raise several pertinent questions. Is it believable that in drafting the sale agreements, the advocates really had a basis for including clause 6 thereof to the effect that:

“The said plot(s) is sold free of all encumbrances and with vacant possession.”

Yet the facts before the court prove this to be a false statement. The proposed interested parties in the second joinder application and indeed the first were always aware of the initial succession proceedings in this cause. Is it believable that having transacted with the Respondent,

seemingly without conducting any search on the suit property, and paid large sums of money, the parties merely sat back to wait for matters to evolve on their own? Like their counterparts in the first joinder application, they are reticent on the exact date when they learned of the pending ruling in this case but the material before the Court shows that at every turn since the 2000s there were encumbrances registered against the suit properties. In the circumstances of this case, and given the timing of these applications, counsel for the present Applicant cannot be blamed for reading mischief in the two applications, and for asserting them to be proxy attempts to scuttle the finalization of this case.

37. This may not be the appropriate time or place for the determination of the *bona fides* of the claims laid by the proposed interested parties upon the suit property. But it is an inescapable fact that the said parties, even if their claims are genuine, have been indolent and are guilty of laches. And in any event, they too are not without recourse; they can file a claim against the Respondent. This cause has been in court since 1997 – a period of 23 years while the deceased has been dead for 43 years.

38. The *bonafide* beneficiaries of the estate have used every legal means available to secure their inheritance, a majority of them dying before tasting the fruits of their efforts. The prejudice likely to be suffered by such beneficiaries and their estates if the court were to allow the joinder applications far outweighs the alleged prejudice to the proposed interested parties, who, on the face of it neither bothered to conduct due diligence on the suit properties they allege to have bought, or made any attempt in good time to enforce their sale agreements which on all accounts appear legally stale. The proposed interested parties have not even attempted to demonstrate what new evidence beyond what is already before the court they intend to present or demonstrate that the doors of justice will be forever shut in their faces if the joinder applications are not allowed.

39. In the Court's considered view, it will be a travesty of justice for this court to facilitate the sanitization of the deliberate and fraudulent conduct of the Respondent and his flagrant contempt of the orders of this court by indirectly providing him with an backdoor escape route from his *Karma* by re-opening this matter as sought by the proposed interested parties. In so far as the mischief relating to this estate is concerned, the Respondent and the proposed interested parties are like Siamese twins. The court has said enough to demonstrate that it is not persuaded to exercise its discretion in favour of the indolent proposed interested parties. As such, the applications filed on 29th June 2020 and 17th July 2020 are herewith dismissed with costs.

40. Returning now to the revocation application, Section 76 of the Law of Succession Act stipulates the grounds for the revocation of a grant by stating 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—

(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—

.....”

41. The Respondent admits that his brother the late Ephraim and other siblings survived the deceased. When during cross-examination the Respondent was shown the list of beneficiaries in the two chief's letters dated 14.2.18 and marked annexures **EWK I** and attached to the Applicant's affidavit filed on 11/5/2018, showing that the deceased had four wives and several sons and daughters, he stated:

“This is not my letter but it lists the widows of the deceased and other members of the family. Most of these people were alive when I filed the Petition (in lower court). The widow Njoki was with me when I filed the cause. My father had already distributed his estate and I included some of the beneficiaries”.

42. By his affidavits and oral evidence, the Respondent appeared to justify the exclusion of the late Ephraim among others in the succession cause by stating that Ephraim had already benefitted from gifts from the deceased and did not deserve more. He proceeded to assert, without tendering any proof, that his father had granted him the inheritance of about 3 acres which ought to have gone to the two widows of the deceased who had no children; that the late Ephraim having taken over the share earlier given to his mother's house in the life time of the deceased, was not entitled to any further inheritance.

42. Listening to the Respondent's testimony, it appeared that he had determined in advance who was to share in the sole remaining asset of his father – the original land parcel No. 654, and filed his petition accordingly. The chief's letter dated 14.2.18 lists a total of 12 members of the family of the deceased being his wives and children. Although some of them may have been deceased, or even some of them had perhaps had benefitted from gifts *inter vivos* during the lifetime of the deceased, Section 51(2)g) of the Law of Succession Act and Rule 7(1) (e) of the P & A Rules did not allow the Respondent the discretion of determining which sibling or widow to include in the Petition for grant. Moreover, the Respondent and his siblings, especially the late Ephraim were entitled in the same degree or priority to apply for letters of administration in respect of their father's estate. Thus, under Rule 26(2) of the Probate and Administration Rules, the consent of these siblings ought to have been obtained by the Respondent prior to filing the succession cause in the lower court. It is manifest from the record that the Respondent listed only 3 persons as surviving the deceased and thereby concealed the existence of other beneficiaries.

43. The purpose of the concealment is evident from the resultant distribution of the asset upon the rectification of the grant. Thereby, the Respondent received 0.50 acres in his name and a further 0.75 acres indirectly by allotting the said latter share to be held in trust for him by

Njoki Kungu the deceased's childless widow who had survived the deceased. Over time, the Respondent transferred to Ng'ang'a Gathii subdivision parcel No. 2021 out of the suit land. This latter parcel represented 10/62 share of the suit land whereas Ng'ang'a Gathii had been entitled to only 1/62 share thereof. And having transferred his own subdivision No.2020 measuring 1.02 ha to himself the Respondent proceeded to subdivide parcel no. 2020 and to sell off the subdivisions. The subdivision and purported sale were carried out despite the existence of the two caveats including one by Nyathira Njenga, the widow of the Respondent's deceased brother, and an order by this court restraining such dealings, which order had been registered against parcel No.2020 as early as 18th March 2011. Contrary to assertions by the Respondent, there is no evidence that Nyathira Njenga who had received 0.75 acre under the confirmed grant ever received her portion.

45. As early as 2003 the Respondent having attended the court in person for the hearing of the revocation application, and subsequently though counsel was aware of the revocation application and subsequently the order by **Kimaru J** made on 16.2.2011. The Applicant deposed in his affidavit filed on 17th July 2020 in opposition to the joinder motions that the Respondent was served with the extract of the said order. During cross-examination, the Respondent claimed that he was unaware of the order and even denied its existence. Shown his signature endorsed in acknowledgment of receipt on the face of the order he asserted;

“No, the signature on the orders is not mine ...I never got order to stop distribution. This signature on order is not mine, not true I signed at Chief's office Kiserian.”

46. First of all, it is impossible to believe that the Respondent while subdividing parcel 2020 did not learn of the registration of the court's order against the title. Inexplicably, the lands registry allowed the registration of the subdivisions of the title in 2013 notwithstanding the pendency of the suit and existence of cautions by Nyathira Njenga and the late Ephraim. Second, the endorsements on the order indicate clearly that service was effected on the Respondent on 18/5/11 and he signed acknowledging receipt. This part of the document bears a stamp of the Assistant Chief Kiserian sublocation, Kiserian dated 18th May 2011.

47. The Respondent cut the figure of wily and stubborn man who as the history of this matter revealed, had determined to lock out the late Ephraim, and indeed other beneficiaries from participating in the succession cause or benefiting from the estate of the deceased herein, and nothing, including the orders of this court, were going to stop him. He acted brazenly, fraudulently and with scarce regard for the law. The court cannot allow the grant made to him obtained through sheer chicanery and skulduggery to stand, or allow the Respondent to benefit from his own wrong doing by keeping the benefits of his deception and impunity, the latter which is evident from his constant refrain in these proceedings that “the law deems as done that which ought to have been done.” In other words, the hapless persons beneficially entitled who lost out have no option but to accept the *fait accompli* resulting from the defective succession proceedings. Such a cynical attitude to court proceedings and orders, no court can countenance.

48. As succinctly stated by **Kuloba, J** (as he then was) in **Gabriel Mbui v Mukindia Maranya [1993] e KLR**:

“No one can improve his condition by his own wrong. The latin of it is *Nemo ex suo delicto meliorem suam conditionem facere potest...* it is an ancient dictum of our law, that a person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, *Allegans suam turpitudinem non est audiendus....* By which they meant that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong and in equity, the maxim holds good that he who comes into equity must come with clean hands... *Null prendra advantage de son tort demesne...* meaning no man shall profit by the wrong that he does, and *Nullus commodum capere potest de injuria sua propria...* which means, no one can gain an advantage by his own wrong.”

49. In the result, the grant issued to the Respondent is hereby revoked. In the circumstances of this case, the court feels justified to find that in light of the fraudulent and brazen conduct of the Respondent, true justice can only be done to the victims by allowing prayer (2) of the summons. Anything less would amount to a pyrrhic victory for the Applicant and other beneficiaries. The alleged purchasers are not without recourse. They can pursue the Respondent to obtain appropriate remedies. If their claims are true, they too appear to have walked into their own predicament with their eyes wide open, because the respective green cards copies tendered herein in respect of mother title No.654, the subdivision 2020 and subsequent subdivisions No.2712 – 2720 indicate that there was always a caution by the late Ephraim and Nyathira Njenga prior to and after February 2011 when the order by **Kimaru J** was issued and registered against the titles. With regard to the alleged purchasers David Njogu Gichanga and James Gathuri Gichanga their purported sale agreements were entered into subsequent to the registration of **Kimaru J's** order restraining dealings with the property, a fact known to the Respondent and his counsels in this case **Nyoro Njogu & Co. Advocates** who seemingly prepared the said agreements.

50. While the Applicants representing PEFA church have not attached a sale agreement, they assert to have bought the property, subdivision No.2718 in 2006. The subdivision of parcel 654 into parcels No. 2020 and 2020 were registered on 22.9.04 and the mother title 654 closed on that date but due to various restrictions in the name of the present Applicant Ephraim Waigi Kungu and the beneficiary Nyathira Njenga, by the provincial administration and some of the beneficiaries including the late Ephraim, no title issued to the Respondent in respect of parcel No. 2020 until November 2010.

51. No more needs be said on this matter of the alleged purchasers. In the upshot, the court grants in its entirety the amended summons filed on 7th November 2013 and orders that all the costs be borne by the Respondent. A fresh grant shall hereby issue in the name of the current Applicant Ephraim Waigi Kungu and the beneficiary Nyathira Njenga or if she is deceased, the eldest child surviving her. For this purpose, counsel for the Applicant will supply details of such child who survived Nyathira Njenga. There is liberty to apply for confirmation of the grant before the expiry of 6 months in light of the age of this dispute.

SIGNED AND DELIVERED ELECTRONICALLY THIS 25TH DAY OF SEPTEMBER 2020.

C. MEOLI

JUDGE