



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 762 OF 2014**

**IN THE MATTER OF THE ESTATE OF LOIS NGONYO NDAMBUKI- (DECEASED)**

**BENSON KIMOLO NDAMBUKI.....PETITIONER /RESPONDENT**

**VERSUS**

**SAMMY MUTISYA MWANGANGI alias SAMUEL MWANGANGI.....OBJECTOR /APPLICANT**

**RULING**

1. By a Summons for Revocation of Grant dated 4<sup>th</sup> May, 2017, the Objector/Applicant herein, 2<sup>nd</sup> November, 2018, the applicant herein, **Sammy Mutisya Mwangangi alias Samuel Mwangangi**, seeks an order that the Grant of Letters of Administration issued to **Benson Kimolo Ndambuki**, the Petitioner/Respondent herein and the Certificate of Confirmation of Grant issued on 26<sup>th</sup> January, 2016 be revoked and annulled.

2. According to the Objector, in the Certificate of Confirmation of Grant, a third of the whole of Land Parcel No Wamunyu/Kambiti/96 (the said property) was registered to **Bernard Kawinzi Muli** without a disclosure that there were other persons entitled to the same. It was deposed that the said property was originally owned by five proprietors namely **Mutungu Nthei, Musili Nthei Nthei, Munuku Kitonga, Kitaka Mulandi** and **Ngonyo Ndambuki** who on or about 17<sup>th</sup> September, 1969 agreed to sell the said parcel to **Samuel Mwangangi** and **Kawinzi Muli** for the sum of Kshs 4,000/- which sum was to be paid to all proprietors each one of them receiving Kshs 800/-. It was disclosed that the said purchasers paid 4 of the proprietors leaving **Ngonyo Ndambuki** hence the property was held by three persons, **Ngonyo Ndambuki, Samuel Mwangangi** and **Kawinzi Muli** as proprietors in common each person holding a third share therein.

3. It was averred that on or about 12<sup>th</sup> February, 2011, the three proprietors agreed that the portion of **Ngonyo Ndambuki** be sold to **Mwangangi Ndambuki** and **Muli Ndambuki** at the agreed price of Kshs 100,000/- with the families of **Mwangangi Ndambuki** and **Muli Ndambuki** each contributing Kshs 50,000/-. According to the Objector, they contributed their said portion and it was agreed that the said families of **Mwangangi Ndambuki** and **Muli Ndambuki** would hold the said property in equal shares and it was agreed that the boundaries of the property would be demarcated by sisal. It was also agreed that once there was an agreement on the respective portions held by each family, the two families would each contribute Kshs 10,000/- for the purposes of commencing succession proceedings for the state of the deceased herein. However, the Respondent proceeded to unilaterally and without informing the Objector, to file the said proceedings and subsequently confirmed the Grant indicating that the said **Bernard Kawinzi Muli** was to get a third share measuring 6.5 ha of the said property without disclosing to the Court the agreement by the two families. According to the Objector, the intention of the foregoing was meant to enable the Respondent acquire the remaining portion of the said property hence leave the Objector and his family has been left with nothing.

4. It is these facts that the Objector contends amount to obtaining the Grant fraudulently through concealment of material facts. The Objector believed that he has equal rights as the Respondent yet none of the members of the Objector's family consented to the Grant nor did they renounce their rights.

5. In opposing the Summons, the Respondent averred that at all material times, the said property remained a family land whereby his deceased mother owned 1/3<sup>rd</sup> share therein. After the death of his said mother, Lois **Ngonyo Ndambuki**, the deceased herein on 8<sup>th</sup> July, 2001, on 30<sup>th</sup> July, 2014 the Respondent and other family members of the deceased visited the office of the area Chief for an introductory letter showing the deceased's heirs. The Respondent contended that it was the deceased's 1/3<sup>rd</sup> share that was transferred to **Bernard Kawinzi Muli** upon the completion of the succession proceedings of the deceased herein. According to the Respondent the agreement relied upon by the Objector was null and void since under Kamba Customary Law, family land is never sold. The Respondent agreed that each of the three persons held the land in common for the other family members who could not be registered in the land transaction process of adjudication in 1970.

6. It was averred that the suit property was held in common for the family of **Ndambuki Nthei** who had two wives: **Ngini Ndambuki**

whereby 1/3<sup>rd</sup> went to **Bernard Kawinzi Muli** and the other 1/3<sup>rd</sup> to **Samuel Mwangangi**; and the other wife **Ngonyo Ndambuki**, 1/3<sup>rd</sup> was transferred to **Bernard Kawinzi Muli** by the Petitioner. The Respondent contended that the Objector has sold three portions out of the said property and that some of the purchasers have encroached on 1/3<sup>rd</sup> of the Estate of the deceased which was transferred to **Bernard Kawinzi Muli**. According to the Respondent it is the realisation by the Objector that he is now expected to share his 1/3<sup>rd</sup> share amongst his father's three wives who have not been captured in his 1/3<sup>rd</sup> that has triggered these Summons. The Respondent averred that the succession of the deceased herein needed not to include the Objector who is not one of the surviving heirs and more so as the deceased's portion was clearly defined in the official search and hence was not subject to subdivision as alleged by the Objector.

7. The Respondent therefore insisted that the grant was obtained rightly having followed all the procedures of succession cause and that it was not obtained by fraudulent means as alleged.

8. On 3<sup>rd</sup> August, 2017, this Court directed that the said Summons be canvassed by way of viva voce evidence.

9. In support of his case, the Objector relied on his statement in which he stated that his father is **Mwangangi Ndambuki**, the son of **Ndambuki Nthei**, one of the original owners of the said property, an ancestral property. It was his evidence that the said property was originally owned by five proprietors namely **Mutungu Nthei**, **Musili Nthei**, **Kitonga Nthei**, **Mulandi Nthei** and **Ndambuki Nthei**. However, **Ndambuki Nthei** and **Kitonga Nthei** died long before the survey was done.

10. The Objector reiterated what he deposed to in the supporting the affidavit regarding the alleged meeting of 1969 at which the family of **Ndambuki Nthei** was represented by **Mwangangi Ndambuki**, **Muli Ndambuki** and **Ngonyo Ndambuki** (the wife of **Ndambuki Nthei**) while the House of **Kitonga Nthei** was represented by **Munuka Kitonga**. By then the four brothers of **Ndambuki** had already acquired land in Yatta and settled there. At the said meeting which was held in 1969, it was agreed that the House of **Ndambuki Nthei** comprising of **Mwangangi Ndambuki** and **Muli Ndambuki** would remain in Wamunyu/Kambiti/96.

11. According to the Objector during the survey, **Ngonyo Ndambuki** insisted to have her name recorded because the Kshs 800/- due to the House of **Ndambuki** had not been paid, while the Objector was recorded to stand in place of his father **Mwangangi Ndambuki** while **Kawinzi Muli** stood in place of **Muli Ndambuki**. It was the Objector's case that on 12<sup>th</sup> February, 2011 they sat and agreed that the name of **Ngonyo Ndambuki**, who was registered in for **Ndambuki Nthei**, be removed on condition that she is paid the said unpaid Kshs 800/-. It was also agreed that due to the lapse of time they would pay Kshs 100,000/- which amount was to be shared equally by the two wives of **Ndambuki**, the House of **Ngonyo** and the House of **Ngui**. The said sum was to be contributed by **Kawinzi Muli** and **Sammy Mwangangi** and was paid on 6<sup>th</sup> October, 2012.

12. It was therefore the Objector's case that the 1969 agreement was thereby fulfilled and the said land was now to be shared between **Mwangangi Ndambuki** and **Muli Ndambuki** and consequently, sisal boundary was to be planted. At the time of the subdivision there were 25 people whose names were disclosed present after which a goat was slaughtered and eaten and the elders were paid for their work.

13. According to the Objector, they agreed that they would pursue the succession proceedings in respect of the Estate of **Ngonyo** in order to remove her name. Later in 2017, **Kawinzi Muli** informed the Objector that he wished to have the survey to confirm the subdivision as resolved by the elders. He did not however disclose that they had already proceeded with the said succession secretly and sought to have 2/3rds transferred to **Bernard Kawinzi**.

14. The Objector denied that he encroached onto the Petitioner's portion and insisted that he strictly followed the boundaries established by the elders.

15. In his oral evidence the Objector reiterated the foregoing and explained that the deceased herein was his father's step mother while the Petitioner herein was his uncle. He stated that he was staying on the said property together with his cousin which was divided between him and his said cousin and he had a search confirming that the land was so registered.

16. In cross-examination, the Objector insisted that though the said land is now subdivided into two, the documents show that he has 1/3<sup>rd</sup> while **Kawinzi** has 1/3<sup>rd</sup>. He insisted that the said property initially belonged to himself, **Kawinzi** and **Loise Ngonyo**, his grandmother' (the deceased), equally during the first registration in the 1960's but he was disputing **Loise's** share which went to **Kawinzi** by an order of this Court though his share was not affected. He however confirmed that the said deceased's children were **Kimolo Ndambuki**, **Mutinda Ndambuki**, **Munyoli Ndambuki** who is deceased and **Mutungwa Ndambuki**, a daughter. He admitted that he was not a child of the deceased and that the succession cause was filed by the deceased's children who agreed that the deceased's 1/3<sup>rd</sup> share be registered to **Kawinzi**.

17. The Objector however admitted that he was not present in 1969 but stated that in the said agreement, the person named as **Mwangangi Ndambuki** was his father and they agreed to sell to the land at Kshs 4,000/- after which the land was registered in the names of his father and **Muli Ndambuki**. By that time the land was already owned by the sellers and **Ngonyo Ndambuki** whose name was in the first registration document. He conceded that he did not complain about the inclusion of the deceased's name therein. According to the Objector, his father complained by later agreed that upon the deceased receiving the money they would remove her name from the property. It was his evidence that by the time the deceased died on 8<sup>th</sup> July, 2001 payment to her was still outstanding and that the subsequent agreement was dated 12<sup>th</sup> February, 2011 after her death and the money was paid to **Ndambuki's** next of kin. However, referred to the agreement he admitted that it was not signed and he had no evidence of receipt of the money. He admitted that he was buying land from the next of kin of the deceased though they had no letters of administration the transaction having been done after the deceased's death. He conceded that he was a member of the deceased's nuclear family.

18. The Objector called **Mutungu Mwau** as his witness. According to his statement, his father was called **Mwau Ndambuki** and his grandfather was called **Ndambuki Nthei**. On 6<sup>th</sup> October, 2012 he was called to a family meeting involving the brothers of **Ndambuki**

**Nthei** and their family members and he was the secretary that day. According to him, it was agreed that **Sammy Mwangangi** the objector and **Kawinzi Muli** were each to pay Kshs 50,000/- to compensate the house of **Ndambuki Nthei** and his wife, the deceased in order to enable then acquire the entire share of Wamunyu/Kambiti. 96. After the said sum was paid, they measured the parcel of land which was shared equally between the Objector and the said **Kawinzi Muli** and they planted sisal boundaries upon the two intimating their satisfaction with the exercise. It was then agreed that they would undertake the succession of the estate of the deceased and have her name removed in order for them to acquire the title.

19. Later the witness came to learn that **Bernard Kawinzi Muli** wanted to change the said agreement and get 2/3rds instead of what was agreed. It was his evidence that the minutes were given to **Nzueni Muli**.

20. In cross-examination, the witness stated that they were subdividing into two the deceased's portion of the land no. Wamunyu/Kambiti/96 which was registered in the names of **Sammy Mwangangi**, **Mukonyo Ngonyo Ndambuki** and **Kawinzi Muli**. By then **Ngonyo** was already deceased yet they were discussing how to dispose of her portion in her absence. According to him the deceased left a family and the Objector was not her son, brother or husband.

21. In cross-examination, the witness stated that the meeting was called by the Chairman, **Abednego Wambua Mwanja** and the deceased's family was represented by the Petitioner, **Benson Kimolo Ndambuki** and **Benjamin Mutinda Ndambuki** and others who agreed to give up the land and vacate. After the meeting the chairman went with the minutes and the land was subdivided into two between the Objector and **Kamwinzi**.

22. The third witness was **Joseph Nduva Mwangangi**, the son of **Mwangangi Ndambuki** and a step brother to the Objector and a cousin to **Kawinzi Muli**. According to his statement, he attended several family meetings to deliberate on Land Parcel Number Wamunyu/Kambiti/96 which culminated into the meeting held on 6<sup>th</sup> October, 2012 whereby it was agreed that the said land be shared equally between the Objector and **Kawinzi Muli** upon payment by the Objector Kshs 50,000.00 to compensate the home of **Ndambuki Nthei** in a follow up to an earlier agreement. According to him the said sum was to be shared between the homes of **Ndambuki Nthei** with **Ngonyo's** house getting Kshs 50,000/- while **Ngui's** House getting Kshs 50,000/- which sum was paid and shared accordingly and sisal boundaries were planted.

23. In cross-examination the witness stated that the Petitioner was his uncle and though the minutes of the meeting were to be printed by one **Muli** and disseminated, this was not done. According to him the land belonged to **Ndambuki** and was in the names of **Kawinzi Muli**, **Sammy Mwangangi** and **Ngonyo Ndambuki** sharing equally. He however stated that the Objector's share was still there as well as **Kawinzi's** but confirmed that the deceased, **Ngonyo**, passed away in 2001 and he was unaware if anyone had taken letters of administration. According to him, the Objector was the deceased's grandson but admitted that he was not a direct grandson of the deceased. Referred to the Chief's letter, he admitted that none of the deceased's family members was omitted from the said letter. He confirmed that the Objector was not a child of the deceased and he had no evidence that the deceased said that the Objector be given her land.

24. In re-examination, the witness stated that the Objector was related to the deceased and that the land had been registered in the name of 5 people who decided to sell the same to **Mwangangi Ndambuki**, the Objector's father and **Muli Ndambuki** while the deceased's name was inserted later. According to the meeting it was agreed that the deceased was to be given money in order to leave the land to be subdivided between the Objector and **Kawinzi** and the said sum was given to **Kimolo** and **Mutinda**.

25. On the side of the Petitioner, the Petitioner relied on his statement in which he stated that he was a son of the late **Ngonyo Ndambuki** who passed on, on the 8<sup>th</sup> July 2001 domiciled at Ikombe Yatta. According to hi, the deceased owned a 1/3<sup>rd</sup> of all that parcel of land known as Wamuyu/Kambiti/96. In this petition which he filed in order to administer the deceased's estate, the Petitioner contended that he included all his siblings upon receipt of a letter from the chief Ikombe indicating all the family members. He averred that during the confirmation the family mandated him to transfer the 1/3 of the aforesaid land to **Bernard Kawinzi Muli**.

26. He insisted that the objector is not a member of our family as he is not a son of the late **Ngonyo Ndambuki** and hence has no claim whatsoever in her estate. The Petitioner asserted that the issues raised about the sale of the land were unknown to him as he was not aware of any land sold to the Objector by the deceased and no other person has the authority to enter into any transaction of land pertaining to her estate.

27. In his evidence he stated that the land was in the names of three people, **Kawinzi Muli**, **Ngonyo** and **Sammy Ndambuki** and upon confirmation of the letters of administration the Objector remained with 1/3<sup>rd</sup> while **Kawinzi** was given 2/3rds.

28. In cross-examination, the Petitioner stated that initially the land was in the name of three people and not all of them were the deceased's children. He reiterated that the deceased's share was 1/3<sup>rd</sup> and he disclosed that there were other interests in the land. Referred to the Certificate of Confirmation of Grant, he admitted he could not see any other name apart from **Kawinzi** and that the said **Kawinzi** did not buy the land from the deceased and was not from the family though he was given the land due to the fact that they were not staying there and traditionally the land was not to be sold. It was his evidence that the family had a meeting at which it was resolved to give the portion of the land to **Kawinzi** though at that time the deceased was already dead.

29. The Petitioner recalled that there was a meeting at which it was resolved that he be given Kshs 50,000.00 being his expenses for attending the meeting. According to him there was no disagreement between them and **Mwangangi's** family. It was his position that **Muli's** family was not represented thereat and that the decision to give the deceased's land away was contrary to the earlier agreement.

30. The Petitioner however insisted that he was only interested in their mother's portion and that he did not take the Objector's portion and that they only gave **Kawinzi** 1/3<sup>rd</sup>.

31. On behalf of the Objector, no submissions were filed.

32. On behalf of the Petitioner, **Benson Kimolo Ndambuki**, it was submitted that he filed for the Letters of Administration of the estate of the late **Lois Ngonyo Ndambuki** who died on the 8<sup>th</sup> of July 2001 at Ikombe, Machakos and in the said petition listed the survivors of the late **Ngonyo Ndambuki** as follows:-

- (i) **Musyoki Ndambuki** - son
- (ii) **Benson Kimolo** - Son
- (iii) **Mutinda Ndambuki** - Son
- (iv) **Mutungwa Kamoli** - Daughter
- (v) **Ndulu Musyoki** - Daughter in law
- (vi) **Mumbi Musyoki** - Daughter in law

33. The petitioner however only listed Wamunyu/Kambati/96 as the only asset of the Estate and the matter was gazetted on the 30<sup>th</sup> January 2015 vide gazette notice number 682 and on the 5<sup>th</sup> March 2015 this court issued Letters of Administration intestate of all the estate of the deceased to the petitioner. On the 7<sup>th</sup> September 2015 the petitioner applied for confirmation of the grant and in the schedule of assets, the petitioner with the consent of the other beneficiaries of the estate indicated that the estate's 1/3 share of Wamunyu/Kambati/96 be given to **Bernard Kawinzi Muli** an application which was allowed thus making his share of the property 2/3 while the Objector, **Samuel Mwangangi**, still retained his 1/3 share.

34. It was submitted that from the evidence adduced, it is obvious that the petitioner did not conceal any material facts. From the evidence, the petitioner made a search of the particular asset in issue. He listed all his siblings and survivors of his late mother. He displayed a letter from the Chief. The court acted on this to issue and later confirmed the grant. The Objector was not part of this family.

35. Finally, on material facts, it is clear that the deceased died on the 8<sup>th</sup> July 2001 while the clan agreement which the objector relies on was on 12<sup>th</sup> of February 2011, long after the death of the deceased. Had the deceased sold the property during her lifetime then the Objector would have been included in her estate. Thus there is no material fact that was not disclosed.

36. It was submitted that if the said meeting did occur, it was incapable of conferring the objector with any rights or interests to the estate after the deceased had died since nobody at this time had capacity to sell to the Objector the land in issue.

37. It was therefore submitted that the evidence produced does not satisfy the provisions of section 76(b) of the **Law of Succession Act** and the Court was urged to dismiss the Summons with costs.

#### **Determination**

38. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

39. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

*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;*

40. According to the Objector, in the Certificate of Confirmation of Grant, a third of the whole of Land Parcel No Wamunyu/Kambati/96 (the said property) was registered to **Bernard Kawinzi Muli** without a disclosure that there were other persons entitled to the same.

41. From the evidence it is clear that the Objector did not rank in priority to the Petitioner in so far as the Petition for the Grant of Letters of Administration Intestate for the Estate of the deceased herein, **Lois Ngonyo Ndambuki**, was concerned. He was neither the child of the deceased nor the husband of the deceased. In fact, he was a step grandson of the deceased. Therefore, in so far as the beneficiaries were concerned, there was no material non-disclosure on the part of the Petitioner.

42. The Objector however contends that in petitioning for the said Grant and the subsequent Confirmation, the Petitioner did not disclose to the Court that the deceased's interest in Land Parcel No. Wamunyu/Kambati/96 had been transferred jointly to the Objector and to **Kawinzi Muli**. The genesis of this transfer was an agreement which was made on or about 17<sup>th</sup> September, 1969 by which the original five proprietors namely **Mutungu Nthei**, **Musili Nthei Nthei**, **Munuku Kitonga**, **Kitaka Mulandi** and **Ngonyo Ndambuki** who agreed to sell the said parcel to **Samuel Mwangangi**, the Objector's father and **Kawinzi Muli** for the sum of Kshs 4,000/- which sum was to be paid to all

proprietors each one of them receiving Kshs 800/-. It was disclosed that the said purchasers paid 4 of the proprietors leaving **Ngonyo Ndambuki** hence the property was held by three persons, **Ngonyo Ndambuki**, **Samuel Mwangangi** and **Kawinzi Muli** as proprietors in common each person holding a third share therein. As a follow up to the said agreement, on 12<sup>th</sup> February, 2011 they sat and agreed that the name of **Ngonyo Ndambuki**, who was registered in for **Ndambuki Nthei**, be removed on condition that she is paid the said unpaid Kshs 800/-. It was also agreed that due to the lapse of time they would pay Kshs 100,000/- which amount was to be shared equally by the two wives of **Ndambuki**, the House of **Ngonyo** and the House of **Ngui**. The said sum was to be contributed by **Kawinzi Muli** and **Sammy Mwangangi** and was paid on 6<sup>th</sup> October, 2012 by which time the deceased herein was dead having died on 8<sup>th</sup> July, 2001. It was therefore agreed that succession proceedings would be commenced in order to effectuate the said agreement.

43. The Petitioner admitted that there was a meeting at which it was resolved that he be given Kshs 50,000.00 being his expenses for attending the meeting. He however denied that the said sum was meant for the purchase of the deceased's interest in the said property.

44. It is clear from the evidence that by the time of the deceased's death she had an interest 1/3<sup>rd</sup> share in Land Parcel No. Wamunyu/Kambati/96 together with **Samuel Mwangangi** and **Kawinzi Muli**.

45. It is clear that as at 12<sup>th</sup> February, 2011, when the agreement for the transfer of the said portion allegedly took place the deceased had died having passed away on 8<sup>th</sup> July, 2001 and an administrator of her estate was yet to be appointed. Section 45 of the **Law of Succession Act** provide as follows:

*(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.*

46. Section 79 of the same Act, on the other hand provides that:

*The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.*

47. In **Muriuki Musa Hassan vs. Rose Kanyua Musa & 4 others [2014] eKLR**, Makau, J held that:

*“The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased beneficiaries and the sale of the land to them is challenged in this application. In such circumstances the interested parties interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan. That in any event Muriuki Musa Hassan is entitled to share of the deceased estate and he will definitely be interested in the interested parties interest so as to legitimize the sale of the land to the interested parties.”*

48. In **Re Estate of John Gakunga Njoroge (Deceased) [2015] eKLR** Muriithi, J was of the view that:

*“A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act...For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the Estate is restricted by the provisions on the powers duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:*

*(ii) no immovable property shall be sold before confirmation of the grant.*

*The persuasive authority of Wakiaga J. in **Stephen Waweru Ng'ang'a v. Kimani Ng'ang'a**, Nyeri HC P&A No. 1 of 2011 would be relevant in a claim against the beneficiaries who sold their interest so that they should not defraud the innocent purchasers of their money.”*

49. In the same vein, **Gikonyo, J** in **Paul Gituma Kiogora vs. Doris Mukiri Magiri & Another [2017] eKLR** held that:

*“I see the claim by the Protestors is that of a purchaser and is based on a sale of land agreement with the widow of the deceased. Doubtless, the agreement was done after the death of the deceased and before confirmation of the grant herein. Such purchaser is not a beneficiary of the estate and should not be tried in a succession cause...As the protestors are not beneficially interested in the estate, their claim cannot be litigated in this succession cause or even be set aside by this court*

under rule 41(3) of the Probate and Administration Rules. Given the circumstances of the case and the fact that the sale of the land violated the Law of Succession Act, the court cannot draw from its inherent jurisdiction to assist an unlawful transaction. I do not, however, wish to say much about the legality or otherwise of such transaction or the validity and enforcement of the agreement in question in order to avoid any prejudice to any future litigation on it. There are, however, ample judicial decisions on the matter and I do not wish to rehash them.”

50. In arriving at the said decision, the learned judge cited the decision of **Musyoka J** in **Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** that:

**“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”**

51. Just like my learned brothers above, I find that the Petitioner herein, though a son of the deceased, had no powers to dispose of the deceased’s properties before he was appointed as the administrator of her estate. That he received a sum of Kshs 50,000/- or Kshs 100,000.00 for whatever purpose is neither here nor there as far as the deceased’s estate was concerned.

52. In the premises, resolutions of the meeting of 12<sup>th</sup> February, 2011 were not binding on the estate of the deceased and the estate of the deceased was rightfully entitled to dispose of the deceased’s interest in the said property in any manner it deemed fit. It is therefore my finding and I hold that the Objector is not entitled to the orders sought in the subject Protest/Objection. Accordingly, the protest fails and is dismissed.

53. As was appreciated by **Gikonyo, J** in **Paul Gituma Kiogora vs. Doris Mukiri Magiri & Another** (supra) that:

**“The protestors are not left without remedy or recourse as they are at liberty to pursue their claim in the appropriate court. I note the protestors’ action may have been a legitimate quest for justice albeit filed in the wrong court. I also take into account the conduct of the Petitioner and the widow in entering into the kind of agreement I have seen without proper authority of the law. On that basis I will not condemn the protestors to costs. The order I make is that each party shall bear own costs of the protest.”**

54. I am however not entirely convinced that the petitioner was paid Kshs 50,000/- as his expenses for attending the said meeting. Accordingly, I am not satisfied that the Petitioner’s conduct is above board but that is a matter for a different forum.

55. There will be no order as to costs.

56. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 21<sup>st</sup> day of October, 2020.**

**G. V. ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Muema for Miss Mwau for the Objector/Applicant**

**CA Geoffrey**