



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO.49 OF 2018

ISAAC GATHUNGU WANJOHI.....APPLICANT

-VERSUS-

SIMON MOLOMA NKARU.....1ST RESPONDENT

JACKSON SIMEL NKARU PARTERU.....2ND RESPONDENT

JUDGEMENT

By way of Summons for Revocation of a Grant, dated 24th September, 2018, brought under the provisions of Section 48(1), 76(a) and (b) of the Law of Succession Act and Rules 44, 49 and 73 of the Probate and Administration Rules, the Applicant seeks the following prayers:-

(a) THAT, this Honourable Court be pleased to revoke the grant of Letters of Administration Intestate issued in Kajiado Principal Magistrate's Court Succession Cause No. 44 of 2005: In the Matter of the Estate of Nkaru Ntekee (deceased) to Simon Moloma Nkaru and Jackson Simel Nkaru Parteru on 4th September, 2015, and confirmed on 8th September, 2015.

(b) THAT, if prayer 1. is granted, this Honourable Court be pleased to set aside the orders made on 8th September, 2015 confirming the said grant, the Certificate of Grant issues thereon be cancelled and all or any transactions carried out on its strength nullified.

(c) THAT, the said Petition be struck out.

(d) THAT the costs of the application be provided for.

A brief background of the instant case is that the Applicant claims ownership of property known as KAJIADO/KIPUTIEI/3169 (the suit property) which he claims to have purchased from Nkaru Ntekee (deceased) the subject of Kajiado Principal Magistrates Court Succession Cause No. 44 of 2015; *In the Matter of the estate of Nkaru Ntekee (deceased)*. It is not in dispute that the Respondents are the sons of the deceased who died intestate and filed the abovementioned succession proceedings to enable them legally deal with the estate of their deceased father. The Respondents obtain a Grant of Letters of Administration through the Aforesaid succession proceedings and thereby dispose the suit property by way of sale.

I take note that there are also pending proceedings in Kajiado Environment and Land Court ELC Civil No. 502 of 2017: (Francis Ngángá Mundia v Isaac Gathungu Wanjohi and 3 others- Formerly Machakos ELC No. 178 of 2016). In the case, the Mr. Francis Ngángá Mundia also claim to be the registered owner of the suit property which he purchased from the Respondents who are the beneficiaries of the suit property by virtue of a certificate of Confirmation pursuant to a grant of representation in respect of the estate of Nkaru Ntekee who died on 22nd November, 1998. Due to the fact that the Application at the ELC was challenging the issuance of the Grant of Letters of Administration, the Court found itself with no requisite jurisdiction to deal with such issues and the same was struck out with costs for want of merit. The Applicant then commence the proceedings herein seeking the Revocation of the Grant of Letters of Administration in the aforesaid Estate of the deceased.

ANALYSIS AND DETERMINATION.

I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter. The issues for determination herein are:

The crux of the matter herein is that the Applicant is seeking to revocation of the Grant of Letters of Administration issued to the Respondents in Kajiado Principal Magistrate's Court Succession Cause No. 44 of 2015: In the Matter of the Estate of Nkaru Ntekee (deceased) on the 4th September, 2015, and confirmed on 8th September, 2015. If this prayer is granted by this court, it entails that all transactions that were carried out on the strength of the impugned grant are automatically nullified. The Applicant's matter is anchored on two limbs; to wit, that the Applicant holds a purchaser's interest in the suit property and that the Principal Magistrate lacked jurisdiction to issue the said grant.

The circumstance of the case are such that the Applicant and Mr. Francis Mundia Ngángá hold titles to the same parcel of land, the suit property. The Applicant claims to have purchased the suit property and was transferred to the Applicant on 13th January 1994 as depicted by the Agreement for sale produced by the Applicant in the Environment and Land Court proceedings. He produced a title deed dated 23rd of December 1993 for KJD/Kiputiei-North/1531 made between Nkaru Ole Ntekese and the Applicant with respect to 10.12 ha. of the aforementioned property. The mutation form shows that the property purchased by the Applicant is KJD/Kaputei-North 1531 as at 11th of January 1994.

I have also seen an application for consent of Land Control Board which depicts that the Respondents' father (deceased) as the holder of the Interest and proposed purchaser as Isaac Gathungu Wanjohi and the nature of transaction as transfer and lastly, the transfer produced as evidence by the Applicant makes reference to Kajiado/Kiputiei-North/1202 dated 13th of January 1994, purchased from Raretu Endetuka to Issac Gathungu Kiputiei.

However, despite all the above evidence that the Applicant adduced both in the ELC and in this Court, the title that he holds not captured in the certificate of Search and the Green Card that was obtained as per the request of this Court. On the other hand, Mr. Francis Mundia Ngángá sued the Applicant in the Environment and Land Court on the basis that he acquired title of the suit property in an unfair manner.

I now turn to the evidence on record with regard to the above contention. A further affidavit was sworn by Jackson Simel Nkaru Parteru (herein the 2nd Respondent) who produced a Certified Copy of the Green Card for the suit property as per the request of the court on the 28th November 2018. The same was registered on the 5th December 2018.

The said Green Card depicts that on the 13th of January 1994, the suit property was registered in the names of Nkaru Ole Ntekere as KAJIADO/KIPUTIEI NORTH/3169 and on the 13th of January 1994 the title deed was issued. On the 18th of September 2015, a new joint registration was effected in the names of the Respondents; Simon Moloma Nkaru and Jackson Simel Nkaru and the title deed was issued on the 18th of September 2015 through transmission vide Kajiado Principal Magistrates Court Succession Cause No. 44 of 2015: In the Matter of the Estate of Nkaru Nteke (deceased).

Further, on the 5th of November 2015 the suit property was registered in the names of Mr. Francis Mundia Ngángá, and the title deed was issued on the same date and the same was acquired from the Respondents by way of purchase. A Sale Agreement was made between the said purchaser and the Respondents on the 1st of October 2015. The Respondents sold 22.5 acres of land reference number KAJIADO/KIPUTIEI-NORTH/3169 (herein the suit property) which 10.2Ha. This was pursuant to the completion of the aforementioned Succession proceedings which made the Grant of Letters of Administration to the Respondents. Lastly, a restriction was registered, restricting any kind of dealings until issues pertaining to title are determined.

The instant Application was brought under the provision of Section 76 of the Law of Succession Act, which gives room for any party interested in the estate of the deceased may bring the application contemplated under that section and/or Rule 2 as read with Rule 17(1) of the Probate & Administration Rules. The same section provides for revocation and annulment of grant. It provides that:-

76. Revocation or annulment of grant

“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-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

In the foregoing, it is abundantly clear that the Applicant has not demonstrated a purchaser’s interest he claims to have over the suit property on a balance of probabilities. This is because the Applicant’s interest is not captured or recognized by the green card, neither is it recognized in the certificates of search I have alluded to above. Under section 26(1) of the Land Registration Act 2012 that the title is prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, and such title can only be challenged on the ground of fraud, misrepresentation or if proved that the title had been acquired illegally, procedurally or through corrupt scheme. Clearly, in this case, the title for the suit property is disputed and clarity should be brought upon it.

Further, I’m also inclined to comment on the issue of advocate who represented the Applicant during the process of acquiring the property he claims to have interest in and when the grant was issued in 2015, the suit property was still registered in the name of the Respondent’s late father. The evidence on record also suggest that the Law Society of Kenya confirmed the said advocate was not certified to practice law. In the premises, there is no doubt that there are still unsettled issues of title which defeats the Applicant’s interest. It is trite that this court has no jurisdiction to deal with issues pertaining the sanctity of title and the same is the inherent jurisdiction of the Environment and Land Court (ELC).

As regards the issue of jurisdiction, it is not in dispute that the Grant of Letters of Administration was issued by the Principal Magistrate’s court which lacks the pecuniary jurisdiction to do so as argued by the Applicant. The Applicant relied on Section 48(1) of the Law of succession which stipulates as follows:

Section 48(1) of the law of Succession provides as follows:

“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of Section 49 of the Law of Succession Act, Magistrates shall have jurisdiction to entertain any application other than an application under Section 76 and to determine any dispute under this Act and pronounce such decree and make such orders therein as may be expedient in respect of the Estate. The gross value as may be expedient in respect of any estate the gross value of which does not exceed Kshs. One hundred thousand shillings.

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate’s court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”

As regards the Civil Jurisdiction of a magistrate’s court, the Magistrate’s Court Act provides as follows:

“Civil jurisdiction of a magistrate’s court

A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

(a) twenty million shillings, where the court is presided over by a chief magistrate;

(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;

(c) ten million shillings, where the court is presided over by a principal magistrate;

(d) seven million shillings, where the court is presided over by a senior resident magistrate; or

(e) five million shillings, where the court is presided over by a resident magistrate.

On the other hand, the Respondents contended that the Magistrate Court in the succession proceedings had jurisdiction to entertain the same and that this honorable court has no jurisdiction to entertain the instant application for revocation for revocation of the grant. The Respondents resorted to the case of *Turfena Anyango Owuor & another Vs Mary Akinyi Dengo (2018) eKLR* which states that:

“The effect of the aforesaid amendment was to accord jurisdiction to the magistrates to deal with applications under Section 76 of the Act which are for revocation or annulment of the grants issued by the magistrates’ courts. I, therefore hold that a Magistrates’ Court has jurisdiction to deal with an application for revocation or annulment of a grant it issued subject to the pecuniary jurisdiction of that court. Since the value of the estate in Form P & A 5 was disclosed as Kshs. 200,000/= the application must be determined by the lower court.

Before I come to the end of this ruling I must also clarify that Rule 44 of the Probate and Administration Rules, 1980 which requires applications seeking the revocation or annulment of grants to be exclusively filed in the High Court was not amended. However, given that the Probate and Administration Rules, 1980 are subsidiary legislation they cannot override any of the provisions of the Act and as such the position remains that the Magistrates’ Court have jurisdiction to deal with applications for revocation or annulment of grants issued by those courts subject to their pecuniary jurisdiction.”

It was therefore the Respondents adamant submission that pecuniary jurisdiction is dependent or determined by the value that parties to any proceedings disclose in the said proceedings and the pleadings therein. Going by the above-cited provisions of law, it is clear that jurisdiction pertains to a court’s power to hear and determine the matter before it. The primary source of jurisdiction of any court is the Constitution of

Kenya 2010 which enshrines the same in terms of Article 162 (1), (2), (3) and (4). It is trite that any decision made without jurisdiction is unconstitutional. In the case of **Samwel Kamau Macharia & another v. Kenya Commercial Bank Ltd and 2 others 2012 EKL.R.** It was held:

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings”

It is not in dispute from the evidence on record that the suit property was sold at a value of Kshs. 67 million by the Respondents to Mr. Mundia barely a month after they had obtained the Grant of Letters of Administration from the Principal Magistrate Court at Kajiado. It is trite in accordance with the above-cited provisions of section 7 of Magistrates’ Courts Act, 2015 that pecuniary jurisdiction of that Court is limited to five million shillings.

Having said so, there is prima facie evidence that the suit property was way more than ten million and if indeed the property was valued at less of or equal to ten million before the issuance of the impugned grant, the same would not have gone six times higher within a month. The constitution and the law categorically, classified certain aspects of law or certain provisions with certain Courts. Therefore, for purposes of giving credence to the constitution and the law as regards pecuniary jurisdiction in succession matters, the grant in question ought not to stand for want of pecuniary jurisdiction.

However, taking into consideration the circumstances of this particular case, I’m inclined to state that it is very possible that the Respondents were not aware of the true value of the property before and during the process of obtaining the Grant in question.

In the foregoing, the maxim of law used to be *ignorantia juris non excusat* or *ignorantia legis neminem excusat* (Latin expression for “ignorance of the law excuses not” or “ignorance of law is no defence”). It’s basically a legal principle holding a person who is unaware of a law, may not escape liability for violating that law merely because one was unaware of its contents and implications. It is undoubtedly true that civil proceedings are complex by nature and a layman would not be able to be knowledgeable of the process. In the Kenyan context and putting into consideration our literacy level, it is arguably possible that a person may innocently and honestly lack knowledge or may be unaware of some areas of law such as court procedures which are quite technical. Certainly when it comes to access court’s jurisdiction is the least thought of threshold.

It is therefore reasonable enough to believe offenders of such procedures, in appropriate circumstances such as where there is prima facie evidence that the offender wouldn’t have known the implications of their actions or what they are involving themselves in. For instance, the instant case is a typical example, there is no requirement of obtaining and/or filing a valuation report pertaining to the deceased’s Estate upon filing an application regarding Grant of Letters of Administration. The court also notes that the Respondents had never been involved in conveyancing transactions which would have helped them know the value of land hence their probability of being knowledgeable is in the area of pecuniary jurisdiction was rendered very minimal if not none.

Furthermore, I take judicial notice of the fact that under normal circumstances, when a party is filing a case, the question of pecuniary jurisdiction does not normally feature at all, therefore it is incumbent upon the court to give guidance to applicants through its duty of liaison with regard to pecuniary jurisdiction in succession matters. In most scenarios, administrators apply for the Grant of Letters of Administration with a sole aim of distributing the property to the heirs of the deceased’s estate and issues of the true value of the property will not be in question. It is for the above reasons that this court finds that the question of concealment of material facts (value of the property) did not come directly, expressly or intentionally in this case but impliedly since the Respondents had not known the true value of the property until upon transfer of the suit property by way of sell.

Having made the above findings, it is important to consider the rights of a purchaser of the suit property, for value without notice of the defective grant. **Section 93** of the **Law of Succession Act** provides as follows:

“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 purchase 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.”

Having found and recognized that an illegality had been perpetrated – what is the remedy? **W. MUSYOKA** in his casebook on the Law of Succession at page 581 states that:

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property.”

I wholly associate myself with the Land mark case of **RE DIPLOCK –VS – WINTLE [1984] ch 485** which makes an exception to this general rule in a case where the holder of such property is a bona fide purchaser for value. In the court’s view a Bona Fide Purchaser is one who purchases something for value without notice of another’s claim to the property or without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title. In the Uganda Court of Appeal case of **KATENDE V. HARIDAR & COMPANY LTD cited with approval in Kenya HIGH COURT CASE OF LAWRENCE MUKIRI V. ATTORNEY GENERAL & 4 OTHERS [2013] EKL.R on who is a bona fide purchaser for value. For a purchaser to successfully rely on the bona fide doctrine, he must prove the**

following:

- “a. He holds a certificate of Title.***
- b. He purchased the Property in good faith;***
- c. He had no knowledge of the fraud;***
- d. The vendors had apparent valid title;***
- e. He purchased without notice of any fraud;***
- f. He was not party to any fraud.”***

In the instant case, the Applicant has not demonstrated his claim that he holds a purchaser's interest over the suit property to the required standard of proof. The green card and certificate of search depicts that the land was registered in the name of the Respondents' late father before it was registered in the names of the Respondents' pursuant to the grant that was issued in 2015. Mr. Francis Ngángá Mundia the interested party herein acquired the suit property in October 2015 by way of a sale. No evidence of fraudulent activities or any irregularities was produced by the applicant to fault the Interested Party's title over the property. Further, nowhere in the green card or certificate of search is the Applicant's purchaser's interest recognized hence I find the Interested party to be a bona fide purchaser for value without notice of the defective charge (on grounds of want of jurisdiction) hence there is no need to revoke the process pertaining to the sale of the suit property to the Interested Party.

Indeed, in this very proceedings the applicant urged the court to revoke the confirmed grant issued to the administrators on grounds of want of jurisdiction but the learned trial magistrate who presided over the probate court. The true position is that as a general rule the administrators when petitioning for grant the inquiry as to the jurisdiction of the court is never in their minds at all. What is of significance to the estate is ways and means of obtaining letter of grant of administration to administer the estate on behalf of the deceased. It is also true that when a purchaser intimates to approach a registered owner of land or intestate estate he will not be concerned to the question whether the grant holder to the estate applied and obtained the said grant from a court with jurisdiction. The facts which have to be proved and considered as a whole by the purchaser is whether the administrator possesses a clean title free of any encumbrances or inhibitions in the register. As much as the issue of jurisdiction of the court can be raised at any time by any party or in suo moto by the court I found it strange that the applicant abandoned the ELC proceedings to pursue revocation of the confirmed grant to the estate on grounds of jurisdiction. I hold a strong view that sanctity and indefeasibility of the certificate of title in his name could still be determined by the ELC court notwithstanding that the grant of letters of administration was issued by a court which lacked pecuniary jurisdiction. The sole objective by the applicant was to have title currently held by Francis Nganga to be cancelled altogether to give him an upper hand in the ELC proceedings.

One can sympathize with the position the applicant finds himself in challenging the confirmed grant of letters of administration solely because there is a transfer of land which he vehemently disputes and remains active before the relevant court. The answer to the applicant objection is clearly demonstrated in the principles states in the case of *Philip Wambua Karanja & 3 others v Josephine Muthoni [2011]* The court held:

“Having said so, ia ma alive to the provisions of Section 93 of the Law of Succession Act which provides as follows:. The provision to the above Section seems to cover the Applicant in that he purchased the land from Josephine Muthoni who has the land registered in her name pursuance to a grant of representation issued in Kiambu CM'S court Succession Cause No. 137 of 2008. That grant is being challenged and it seems from a plain reading of Section 93 aforesaid that even if the grant were to be revoked, the transfer to the applicant shall remain valid. Unfair as that conclusion may be to a successful applicant, the remedy open to him would be either a claim for the purchase price from the administrator/holder of the grant of representation of damages for any loss occasioned”.

The purchaser's rights remain protected until annulled or varied by the court on grounds of fraud or mistake. On the issue of jurisdiction, it is implicit in the courts opinion that the Resident Magistrate's court assumed jurisdiction which was not conferred under the statute having been limited to pecuniary amount of Kshs. 5,000,000. As such the courts attention having been drawn to this jurisdictional effect has the power to undo an act, decision, order or judgement issued due to lack of jurisdiction. The effect of lack of jurisdiction on matters to do with purchaser's interest is well insulated under Section 93 of the Law of Succession Act. The infirmity appearing on the face of the probate and administration proceedings before the Resident Magistrate would be hereby set aside without impeaching the title issued to Francis Mundia Nganga.

It is noteworthy that the grant herein has been revoked for want of Jurisdiction and the Applicant has no locus standi to challenge the grant in question on the basis of jurisdiction alone. That means the only way he could have succeeded was through establishing a purchaser's interest over the suit property. Further, there is no correlation between the applicant's claim and jurisdiction as he can challenge the Grant of Letters of Administration against the Respondents based on the alienation and transfer of land which he claims proprietary rights.

I'm alive to provisions of Section 73 of the Probate and Administration Rules which provides that:

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.” In the case before me the power to preserve the existing rights of the purchaser is to ensure that nothing is done to his peril during the intervening period pending the outcome of the ELC court. In addition there is a statutory imposed restriction und Section 93 of the Act placed upon the purchasers' interest to land where there is prima facie evidence of

legal conveyance of title.

It must be noted that the object of the court is uphold substantive justice. It is my considered view that substantive justice will be done by ensuring that the bona fide purchaser for value without notice of the defective grant is protected. It is for that reason, that I invoke the inherent powers of this court granted under Article 159 of the Constitution, Section 76 of the Law of Succession Act and Section 73 of the Probate and Administration Rules and make the following orders:

a) That the grant of Letters of Administration Intestate issued in Kajiado Principal Magistrate's Court Succession Cause No. 44 of 2005: In the Matter of the Estate of Nkaru Ntekee (deceased) to Simon Moloma Nkaru and Jackson Simel Nkaru Parteru on 4th September, 2015, and confirmed on 8th September, 2015 be revoked for the lack of Jurisdiction on the part of the Resident Magistrate Court.

b) That a new Grant of Letters of Administration be issued by this court to the Respondent and its Confirmation thereof.

c) That the applicants claim be determined by the ELC court without necessarily placing reliance on the initial lack of jurisdiction by the probate court which issued and confirmed the grant of administration subject matter of this objection proceedings.

d) That the Applicant's claim lacks merit and hereby dismissed with costs.

Dated, signed and delivered in open court at Kajiado this 26th day of February, 2019.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Njenga for the respondent

M/s Koech holding brief for Mr. Munyori for the applicant