



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT SUCCESSION CAUSE NO.6 OF 2017

IN THE MATTER OF ESTATE OF KIONGA S/O MURIITHI alias KIUNGA MURIITHI (DECEASED)

JAMES MURIITHI KARANJA

JOHN MURAGURI KARANJA

STEPHEN WARUTERE KARANJA

ROSE WAHU KARANJA

DOUGLAS WAHOME KARANJA

ALEXANDER MWANGI KARANJA

PENINA WANGECHI KARANJA

EPHRAIM GATHUA KARANJA.....APPLICANTS

VERSUS

BERNARD KOINGA GICHINI.....1ST RESPONDENT

CHRISTOPHER MUCHOKI KIBUL.....2ND RESPONDENT

JUDGMENT

On 17th February 2016, in Karatina PMSUCC Cause No.83 of 2014 Bernard Kionga Gichini was issued with written grant of representation to the Estate of Kionga s/o Muriithi alias Kiunga Muriithi. On 14th April 2016 the same was confirmed pursuant to the provision of s.71 (1) and (3) of the Laws of Succession Act. He became the sole heir of L.R Ruguru/Kiamariga/704.

He was issued with a title deed on 29th April 2016 according to the green card for the title. On 27th October 2016 he transferred the same to Christopher Muchoki Kibui and a title deed was issued to him.

On 6th March 2017 the applicants herein brought this summons for revocation of grant under s.76 of the Laws of Succession Act and rules 44 (1) and 73 of the P&A rules. In it they sought the orders herein:-

i) The grant of letters of administration of letters issued to Bernard Kionga Gichini (1st respondent) on 11th March 2015 and confirmed on 17th February 2016 at SPM Succession cause 83 of 2014 in the matter of the estate of Kionga s/o Muriithi alias Kiunga Muriithi be revoked and or annulled.

The summons for Revocation of Grant was supported by the affidavit of the 1st applicant James Muriithi Karanja and the grounds set out on the face of the summons.

a. That the deceased herein died on 5th May 1976, and was survived by the father of the applicants Samuel Karanja Muriithi (his younger brother) in respect of the suit land Ruguru/Kiamariga/704.

b. That the deceased herein had sold Ruguru/Kiamariga/704 to his younger brother Samuel Karanja Muriithi sometimes on 7th June 1970 at a sum of Kshs.400/- and the family of Samuel Karanja Muriithi specifically the 1st and 2nd applicant took possession of the land, occupied and developed it ever since.

c. That the applicant's father Samuel Karanja Muriithi also died in 1976, soon after the death of the deceased herein.

d. That even before the sale of Ruguru/Kiamariga/704, the deceased Kiunga Muriithi had been living at Kabaruru with his family until the time of his demise and never occupied the suit land.

e. That Samuel Karanja Muriithi did not register the suit land in his name, and it has all the years remained in the name of Kiunga Muriithi as the applicants did not also follow up the transfer.

f. That the petitioner is a grandson of the deceased as he is a son of Gichini Kiunga.

g. That sometimes on 28th April 2014, the Kiamariga Location chief, one Wilfred N.Karangi at the behest of the petitioner summoned the applicants to his office but upon hearing them, he told the petitioner to bring the entire family of Kiunga Muriithi so that the dispute can be heard.

h. That from that time, the applicants only recently saw a letter requiring them to vacate from the land as they were never involved at all when this petition was filed, neither did the petitioner involve the other beneficiaries/survivors of Kiunga Muriithi.

i. That the petitioner filed Senior Principal Magistrate's Court at Karatina Succession Cause Number 83 of 2014, in the matter of the Estate of Kiunga S/O Muriithi alias Kiunga Muriithi, discreetly with a view to defraud the applicants and the entire family of Samuel Karanja Muriithi, which he has done by selling the suit land to the 2nd respondent.

j. That subsequently, the 2nd respondent has filed High Court at Nyeri ELC Number 21 of 2017, Christopher Muchoki Kibui-V- Wanjohi Karanja & another seeking for orders to evict the applicants from the suit land.

k. The orders sought are merited and should be granted.

In the affidavit in support of the summons for revocation of the grant, the 1st applicant reiterated the grounds as set out on the face of the summons. He also annexed a document he referred to as the sale agreement between his father and the deceased. He deponed that the 1st respondent was a grandson of the deceased- that it is only when they saw a letter from the 2nd respondent's advocate dated 6th January 2017 to vacate the land or face eviction that they realized what had happened.

Further that the 2nd respondent had filed Nyeri **HCC ELC No.21/2017 Christopher Muchoki Kibui -Vs- Wanjohi Karanja & another** seeking eviction order against the 1st and 2nd applicants who are in occupation of the land.

That in their view the 2nd respondent was involved in the fraudulent dealings with the land and was not protected by the law. That they had lived on the land since 1976 and demonstrated through photographs the kind of developments on the land in trees and tea.

On 20th April 2017 it was agreed that the status quo be maintained pending the hearing of the Summons for Revocation of Grant.

The 1st respondent responded to the summons for revocation of grant vide affidavit sworn on 4th April 2017- with the authority of the 2nd respondent.

Ø That he never concealed anything hence the Summons for Revocation of Grant did not meet the threshold of s.76 of Laws of Succession Act.

Ø That the applicants were neither beneficiaries of the Estate nor were they dependants of the deceased.

Ø That the applicants' father was only allowed to farm on the land and not as a beneficiary.

Ø That the alleged sale agreement between their father and the deceased was 46 years old, statute barred, null and void under the Land Control Act, Sale of Contract Act.

Ø That he acquired the title to Ruguru/Kiamariga/704 through transmission after confirmation of the grant and he transferred the same to 2nd respondent.

Ø That the 2nd respondent was only enforcing his rights through ELC 21/17.

Ø That the 2nd respondent's title was protected under s.93 of the Laws of Succession Act.

Ø That the applicants not being the legal representatives of Samuel Karanja Muriithi could not purport to enforce the alleged sale

agreement of 7th June 1970.

The protest and Summons for confirmation of grant were heard by way of oral evidence.

The 1st applicant adopted his affidavit sworn on 6th March 2017 as evidence. He testified that the 1st respondent was his cousin. That the suit property first belonged to Kiunga Muriithi – the elder brother of his father Karanja Muriithi both of whom died in 1976.

That Kiunga Muriithi had 2 wives – Wangui Kiunga who had three children, and Wanjugu Kiunga who had 7 children- including Samuel Gichini the father of the 1st respondent. The land was just 1.2 acres. Kiunga Muriithi had a large family. He sold the same to his brother Karanja Muriithi and moved with his whole family to a place called Kabarú at Kieni East. He produced the sale agreement witnessed by some elders including himself. He conceded that the original agreement did not bear the parcel No.704 but that it was he – 1st applicant inserted it later. That upon purchase of the land from his brother, their father Karanja Muriithi bequeathed the land to him and his brother 2nd applicant where they have lived since – that he had planted 3000 tea bushes.

That in 2014 the 1st respondent called them to the chief's office where he was claiming the parcel of land and wanted to 'refund' Kshs.400/- to the 1st applicant.

On cross-examination he was taken through the 'sale agreement' which literally meant that Kiunga Muriithi had given Karanja Muriithi the land in Kahiga and he had agreed to give Kshs.400/-. The kikuyu word for buy/sell was not in the agreement. He conceded that between 1970 and 1976, neither party had moved to transfer the land formally. He said the 1st respondent was told by the chief to bring his uncles/brothers to the office too. He confirmed from the form P&A 5 filed in the Karatina Cause that 1st respondent had named his brothers only as the other beneficiaries to the deceased's estate.

On re-examination he confirmed that the land they occupied was in Kahiga and Kiunga Muriithi had no other land in Kahiga, that their father never utilised the land but gave it to 1st and 2nd applicants- that Kiunga never used the said land. That the form P&A 5 contained only three names yet Kiunga Muriithi was survived by many people.

PW2 **Francis Muthée Kiunga** testified that had recorded witness statement on 7th June 2017 which he adopted as his evidence. That deceased herein was his father. He said 1st respondent was son of his brother Gichini Kiunga. . He testified that his father, the whole of his father's family lived in Kabarú before the emergency- that his father had land in Kiamariga which had belonged to their grandfather which he gave to Kiunga and Karanja.

That his father sold his share of the the land to his uncle- Karanja the 1st applicant's father and bought land in Leshau in Nyahururu. That none of his father's children had ever claimed the land in Kahiga, including the father to the 1st respondent. That 1st respondent had no claim over the said land because it was sold by their father. That 1st respondent never informed the rest of Kiunga's family that he was filing a succession cause over the said land.

On cross-examination he said in 1970 he was 30 years old. He said his father told them he was selling the land so as to buy a larger parcel of land for the family. He said he had come to testify so as to tell the court the truth about the said land.

The applicants closed their case.

The 1st respondent testified. He told the court that Kiunga Muriithi was his grandfather – that he had inherited the land Ruguru/Kiamariga/704 from his grandfather. He said he had lived with his grandfather who told him he had land in Kiamariga which he said he would show him but he died before he showed the land to him. He said he had been told by his grandfather the 'mzee' to ask about the whereabouts of the shamba. That his siblings were aware of what he was doing. He went to the chief, summoned the applicants – 1st and 2nd. He brought a certificate of search for the land together with the certificate of death for the deceased. That the chief told him he would get the land because he had the requisite documentation.

He heard the 1st applicant tell the chief that the land had been sold but he used the proper process to inherit the land. He said he sold the land to the 2nd respondent because he realized that the 1st and 2nd applicants would kill him if he lived there.

On cross-examination he confirmed that deceased was his grandfather – that his grandfather had 2 wives and children and he was the son of one of them, Gichini. He confirmed that PW2 was one of his uncles, a brother to his own father. He confirmed that on the P&A 5 he filed the only indicated himself and his 2 brothers as the only survivors of KIUNGA MURIITHI. He said that PW2 and 1st applicant lied about the sale of the land. He said his grandfather gave him the land when he was a boy – that in 1976 he was 17 years old – he said it was given to him in the presence of his father and one of his uncles Joseph Mwangi who was alive but he did not bring him to testify.

He claimed that his father had gone to the 1st and 2nd applicants to claim the land for him. He said that since 1976 he had not laid claim on the land. He said he knew that 1st applicant had been using the land since 1980. He said the land had tea and trees that his grandfather had planted that before that one Ngatia wa Muhindi had used the land. He said he only brought his 2 brothers to court to give consent to his application as an administrator and to the mode of distribution. He conceded he had sold the land very fast but explained that he did so because the 1st applicant had beaten him. He confirmed he had not made any report to the police about the alleged beating. He also confirmed that the 2nd respondent had not occupied the land because of this case- that he never told the applicant he had sold the land, that he only told them to stop using the land after he had obtained the title deed.

He confirmed that his father had land in Nyahururu- that his grandfather the deceased lived in Kabaru since 1970s. He claimed to have planted beans in 1991 which were uprooted by the applicants but he never reported anywhere.

On re-examination he told the court that he got the land alone because his siblings and uncles had their own, that they had no complaints. He closed his case.

Each counsel filed written submissions.

For the applicants Mr. Kimunya argued that the summon for Revocation of grant met the threshold of s.76 of the Laws of Succession Act- while for the respondent it was argued that the summons for revocation of grant did not meet the threshold of s.76 of Laws of Succession Act.

Upon reading the submissions, considering the same and evidence on record, the witness statements and affidavits the issues are;

i) Relying on **Mary Nanjala Muhalya -Vs- Ambrose Kipruto (2014) eKLR**, the respondents argued that these proceedings were a non starter because the applicants were not the legal representatives of their father Samuel Karanja Kiunga. **Whether these proceedings are a nonstarter for the fact that the applicants are not the legal representatives of estate of their father**

ii) Whether the 1st respondent was beneficiary entitled to the estate of the deceased to warrant his obtaining letters of administration.

iii) Whether the 1st respondent is guilty of any of the facts in s.76 of the Laws of Succession Act.

iv) Whether the deceased sold his land to the father of the applicants.

v) If so what is the fate of that sale?

vi) It was argued that the 2nd respondent's title was protected by s. 93 of the LOSA whether the 2nd respondent's title is protected under s.93 of the Laws of Succession Act see **Musa Nyaribari Gekene & Others Vs. Peter Muiyenda & another Court of Appeal at Kisumu Civil Appeal No.2 of 2014.**

vii) What orders should issue?

viii) Who should bear the costs?

On the 1st issue the applicants have established their interest in the estate as required by s. 76 of the LOSA which starts by saying:

*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— (emphasis added)*

The applicants are not busy bodies. Unlike in **Mary Nanjala Muhalya -Vs- Ambrose Kipruto (2014) eKLR** the authority cited for the petitioner respondent, they were not filing a suit on behalf of the deceased but seeking the revocation of the grant as interested parties as provided for under s. 76 of the Laws of Succession Act.

On the 2nd issue, see s. 66 Laws of Succession Act on priority: although as a grandson the 1st respondent could inherit the grandfather's Estate from his father or if his grandfather bequeathed him *inter vivos*, he did not have priority over the children of the deceased including his own father. He hid that fact from the court pretending that only he and his brothers were entitled to inherit yet deceased had many grandchildren. He produced no evidence to support the claim that he was given the land by the deceased when deceased was alive. He concealed the fact the deceased had children who were alive including PW3.

On the other issues: the manner in which he dealt with the estate is mirrored in the case **Musa Nyaribari Gekone & 2 others v Peter Muiyenda & another [2015] eKLR.**

Based on that evidence, we think the learned judge was right to hold as he did that the 1st appellant should have disclosed, when applying for the grant of letters ... of administration or when seeking its confirmation, that the 1st respondent had an interest in the property

From his own testimony, the 1st respondent here knew that the applicants had been in occupation of the land from the 1980s. He knew that there were other persons who were beneficially entitled to the estate including his uncles and the deceased's other grandchildren. He concealed all this from the court.

As soon as the same was transmitted to him he transferred it to a third party. He now argues that that interest is protected by s. 93 of LOSA.

In the **Musa** case above the Court of Appeal took a dim view of that kind of conduct. That respondent acquired the title fraudulently. He had no interest to pass on to the 2nd respondent.

93. Validity of transfer not affected by revocation of representation

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

Where a person has purchased property of a deceased person from the personal representative who has letters of administration, which were obtained fraudulently, surely that person's interest cannot be protected by the law.

The Court of Appeal in **the Musa case** found persuasiveness in the case of **Adrian Nyamu Kiuguvs. Elizabeth Karimi Kiugu and Anor [2014] eKLR** where the High Court at Meru referring to s. 93 LOSA stated:

*“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, **I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently.** The purchaser in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid. “(emphasis mine)*

The court went further to restate its position in **In Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and another [2008] eKLR** where a purchaser claimed that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore not only protected under S.93 (1) of the Law of Succession Act (Cap 60) but also section 143 of the Registered Land Act, this Court sitting in Nyeri stated this:

*” We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. **The section would only be applicable where, firstly, there is a “transfer of any interest in immoveable or moveable property” ...** A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”*

The 1st respondent herein acted dishonestly in obtaining the grant and in the transfer of the property to the 2nd respondent. The alleged purchaser is well aware of the problem on the ground because he ‘bought’ land occupied by other people and has never occupied the said land. It appears to me the manner of transfer was only to use him under the guise of s. 93 to push out the applicants without due process.

There was no evidence that the 2nd respondent was a purchaser. He did not testify. Neither did the 1st respondent produce any evidence of sale. The transfer per se cannot be evidence of sale/purchase. The Court in the Musa case also cited with approval

Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and Another [2013] eKLR where the appellant therein unsuccessfully sought protection under section 93, this Court sitting in Nyeri stated:

“Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser.

Hence the respondents' transaction is not protected by law.

The evidence that the applicants' father was sold the land by his brother was quite overwhelming. The deceased's own son confirmed this and including the fact that his father's family never utilized that land and they left the area in the 70s. The 1st respondent did not produce any evidence to controvert that. He conceded that the applicants had always lived and utilized that land that in fact he had not known where the land was and neither was it shown to him by his grandfather the deceased.

What the 1st respondent did falls squarely under s. 76;

(a) 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 and

(b) 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.

His unlawful actions cannot be allowed to stand as in the words of K.H. Rawal J (as she then was) In **Re Estate of Christopher Jude Adela (Deceased) [2009] eKLR** cited in the **Musa** case above, in reference to Section 93 of the Law of Succession Act;

“The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated... It shall be a very weak or unfair system of law if it gives a

Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal action prejudicing the interests and rights or right beneficiaries of the estate. In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”

I agree. It would be against the interests of justice to say that the illegal actions of a personal representative are protected by the law. In this case the 1st respondent’s fraudulent actions run through the cause from the date of filing, lying to the court, concealing material information, and engaging in suspect conduct of transferring the property to a 3rd party at lightning speed in an attempt to circumvent the law. The law does not agree to be circumvented. That is why,

1. The grant issued to the 1st respondent in Karatina SPM Succession Cause no. 83 of 2014 is revoked together with all the actions proceeding from it
2. The title **RUGURU/KIAMARIGA/704** to revert to the name of the deceased. The land registrar is directed accordingly.
3. Costs to the applicants

Signed, Delivered and Dated at Nyeri this 23rd day of May 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Jerusha

Mr. Kimunya for applicants

1st, 2nd and 6th applicants present

1st respondent present

Judge