



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 4 OF 2017

IN THE MATTER OF THE ESTATE OF PRISCILLA WANGU GICHENGE (DCD)

MARGARET WAINOI KIMOTHO.....1ST APPLICANT

PETER KIMANI GICHENGE.....2ND APPLICANT

SUSAN WANGUI MURIITHI.....3RD APPLICANT

V E R S U S

JAMES KARIMI GICHENGE.....1ST RESPONDENT

JOEL MWANGI MUNYIRI.....2ND RESPONDENT

RULING

1. This matter relates to the estate of Priscilla Wangu Gichenge, deceased. A Grant of Letters of Administration intestate was issued to James Karimi Gichenge on 3/9/2010 and confirmed on 7/7/2011. The estate of the deceased comprised in land Parcel No. Inoi/Kariko/1451 devolved to the petitioner.

2. An application under **Section 76(a),(c) iii of the Law of Succession Act** was filed by Margaret Wainoi Kimotho, Peter Kimani Gichenge and Susan Wangui Muriithi who claim that the proceedings to obtain the grant were defective in substance. The grant was obtained fraudulently by making false statement by concealment from court something material to the case. It is further alleged that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. The applicants are children of the deceased Priscilla Wangu Githenge. The petitioner who is their brother failed to disclose that the deceased had other children and that he was not entitled to get a share as he had been given land parcels No. Inoi/Kariko/1450 and 1449 with the 2nd applicant respectively. This is shown by the certificates of official search annexures MWK 2a-c. The petitioner transferred land parcel No. Inoi/Kariko/1451 to the 2nd respondent who is a stranger in the estate. The petitioner sold land parcel No. Inoi/Kariko/1449 to a 3rd party. The applicants pray that the grant be annulled and a fresh grant be issued distributing the estate to 1st& 3rd respondents.

1st Respondent's case

He confirmed that applicants are his siblings but that after the deceased's death, they agreed that he succeeds her since he was using the suit land while taking care of her. That they appeared before the assistant chief and they declined to be included in the succession cause. That all steps were followed in filing succession cause. After the succession, he transferred the land to the 2nd respondent by way of sale.

2nd Respondent's case

In response he stated that in October 2011, he inquired about a land for sell and was informed of the suit land. He was shown the seller, that is the 1st respondent, and confirmed from land's office that the suit land was registered in his name. he entered into sale agreement dated 29/11/2011, paid the whole purchase price and is now the registered owner. He is not aware of any fraud on the part of the 1st respondent and his title would not be affected since he is an innocent purchaser for value without notice. That the applicants' recourse should be against their brother and not against him if they feel aggrieved by his actions.

3. This matter proceeded by way of oral evidence. The parties adduced evidence and filed submissions. I have considered the application.

4. For the applicant it is submitted that the 1st respondent filed succession No. 241/2010 at Embu without notice to the applicants. The 1st respondent sold land parcel No. Inoi/Kariko/1451 to the 2nd respondent. That the 1st respondent had benefitted during his lifetime as he had been allocated land parcel No. Inoi/Kariko/1449. He further submits that the transfer to the 2nd respondent has serious defects or irregularities and ought to be invalidated.

5. For the 2nd respondent it is submitted that **Section 93 (1) of the Law of Succession Act** protects an innocent purchaser for value without notice it is submitted that the 2nd respondent did due diligence and was an innocent purchaser for value without notice and his title is protected by **Section 93 of the Law of Succession Act**.

Issues arising;

1. Revocation of grant

Section 76 of the Law of Succession Act Cap 160 states;

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

6. The Section gives the grounds upon which the grant whether confirmed or not will be revoked. The applicant is supposed to prove that the proceedings were defective in substance, the grant was obtained fraudulently by making of a false statement or by concealment from court something material to the case or by means of a untrue allegation of fact essential on a point of law. The court will revoke the grant upon an application by a party or on its motion.

7. In his evidence in court the 1st respondent testified that land parcel No. Inoi/Kariko/1451 belonged to his mother, the deceased in this cause. He also admitted that he was allocated land parcel No. Inoi/Kariko/1449 during the lifetime of the deceased. The parcel No. 1449 was one of the resultant parcel of the sub-division of Inoi/Kariko/112 which was owned by the deceased, annexure MWK 2a to the applicants affidavit.

8. The respondent does not deny that the land parcel No. Inoi/Kariko/1451 belonged to the deceased. He claims that the applicants appeared before the Assistant Chief and declined to be included in the succession cause. However no proof has been adduced in that regard. The Chief's letter states that the applicant was the only surviving son of the deceased. There is nothing to show that the applicants ever appeared before the Chief. Furthermore, the application which he filed for confirmation of grant, he indicated that he is the only surviving dependant of the deceased. This was clearly a false statement. The 1st respondent filed the succession cause No. 241/10 at Embu without notice to the applicants. He obtained the grant on 7/7/2011 and soon thereafter he sold the land to the 2nd respondent for Kshs 900,000/-.

9. The applicants have proved that the 1st respondent obtained the grant fraudulently by making of a false statement, concealment from the court of something material to the case and by making untrue allegations. These are sufficient grounds to warrant the setting aside of the grant.

Refer to **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] eKLR**

The court stated;

The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

10. The issue of beneficiaries and distribution of the estate of the deceased are material factors and where they are overlooked the grant is flawed and cannot be allowed to stand.

Rule 44(1) of the Probate and Administration Rules provides:-

“(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.”

11. The applicants are persons who are interested in the estate of the deceased and are therefore entitled to come to this court to seek relief.
12. The second issue is whether the title of the 2nd respondent is protected. The Court of Appeal in the case of **Musa Nyaribari Gekone & 2 Others –v- Peter Miyianda & Another (2015) eKLR** while dealing with the issue of innocent purchaser.
13. In **Jane Gachoki Gathecha –v- 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 immovable or moveable property”. Kabitau had no interest in Plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”

14. The High Court in **Rose Jiamat –v- Rurithi Muronga & Another (2009) eKLR**. The Court stated that followed the decision in **Musa Nyaribari Gekone & 2 Others –v- Peter Miyianda & Another** which I have cited above.

15. The respondent has cited **Stephene Mwangi Wanjiru –v- Joyce Wanjiru Wathua & Another.H.C (2007) eKLR and Godfrey Mbuba Kirai –v- Julieta Maruta Mbungu & 6 Others (2012) eKLR** which held that the title of a purchaser for value is protected. However the case of **Musa Nyaribari Gekone** by Court of Appeal has stated that though the title is protected under **Section 93(1) of the Act**, a person who had obtained the grant fraudulently does not acquire a good title which is transferrable and the transaction would be void ab initio.

In Re Estate of Christopher Jude Adela (Deceased) [2009] eKLR

The Court held;

As per my considered view, Section 93(1) of the Act talks of interest for immovable or movable property and Section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and Section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The aspect reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of Section 23 of the Registered Land Act (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.

16. The title of a purchaser for value will be protected if the administrator had obtained a good grant with which he could transfer his interest to another person. If the administrator obtains a grant through a flawed process he does not acquire a good title which he can transfer. The sale is null and void and the purchaser does not acquire good title.

In Re Estate of Christopher Jude Adela (Deceased) [2009] eKLR

The Court held;

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17. It should also be noted that the 1st respondent had received a portion of the land belonging to the deceased during her lifetime. The 1st respondent was given land parcel No. Inoi/Kariko/1450 measuring 0.34 Ha, Inoi/Kariko/1451 measuring 0.34 Ha. **Section 42 of the Law of Succession Act** provides:

“Where

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

There are two applicants who had not received anything from the estate. If what 1st respondent obtained during the lifetime of the deceased is taken into consideration, he would not be entitled to any share of the estate. The 1st respondent had no interest in the estate. The grant could not therefore not confer any interest on him which he could pass to a purchaser.

18. For these reasons I come to the following conclusion:

- The grant issued to the 1st respondent on 7/7/2011 be revoked.

19. The 2nd respondent could not acquire a good title from the 1st respondent. I therefore order that the title for land parcel No. Inoi/Kariko/1451 issued to the respondent Joel Mwangi Munyiri shall be cancelled and the property be restored to the estate of the deceased.

20. The applicants Margaret Wainoi Kimotho and Susan Wangui Muriithi are appointed as Administrators of the estate and to apply for the grant in the usual way.

Costs to the applicants.

Dated at Kerugoya this 29th day of July 2019.

L. W. GITARI

JUDGE