



IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO. 113 OF 2013

IN THE MATTER OF THE

ESTATE OF GABRIEL AYIENDA JALANGO (DECEASED)

BETWEEN

SEREVINA NYANCHWA MOYANCHA.....APPLICANT

AND

MOINDI OSEKO NYAKUNDI.....RESPONDENT

AND

1. MARY KERUBO ARUYA

2. WILSON ABUGA MOTUGUTWA

3. EDINAH KERUBO MAGWARO

4. JOSEPH MOMANYI

5. SAMSON ONYONKA

6. ANTHONY NYAKUNDI

7. CHARLES NYAKUNDI

8. THOMAS MAHEWA

9. ELKANA NYAERA

10. HENRY NYAKUNDI.....INTERESTED PARTIES

RULING NO. 2

1. Gabriel Ayienda Jalango (“the deceased”) died intestate on 14th July 2012. The grant of letters of administration for his estate were issued to the respondent, Moindi Oseko Nyakundi (“Moindi”) on 28th February 2014 and confirmed on 5th December 2014. The deceased’s only property, WEST KITUTU/BOGUSERO/1005 (“Plot 1005”) was distributed to Anthony Nyakundi Kamisi, Thomas Mahawa Getei, Charles Nyakundi Momanyi, Elkana Nyaera Momanyi, Henry Nyakundi Onger, Moindi Oseko Nyakundi and Joseph Momanyi Kamisi jointly with Samson Onyonka Momanyi.

2. Thereafter, Serevina Nyanchwa Monyancha (“Serevina”) filed the summons for revocation of grant dated 5th April 2019 seeking to revoke the grant and rectify the register. Her main contention is that Moindi obtained the grant fraudulently by claiming that Plot 1005 was part of the deceased’s estate yet the land was registered in her name at the time of his demise. She challenged the registration of the deceased as a proprietor of the land on 14th February 2013 and argued that the succession proceedings were intended to deprive her of her land.

3. Moindi opposed the application through his replying affidavit sworn on 17th August, 2016. He deponed that the application for revocation of grant had been overtaken by events as Plot 1005 has already been subdivided and no longer existed in the register. He stated that Serevina's husband, Henry Monyancha Sokoro ("Monyancha") stole the land from the deceased causing him to file **Mosocho Land Disputes Tribunal Claim No. 20 of 2011**. A decree was issued by the Tribunal and adopted by the **Kisii Chief Magistrate's Court in Misc. Application No. 90 of 2011**, nullifying Serevina's title thus reverting the title to the deceased. Moindi deponed that he applied for and was lawfully granted letters of administration of the deceased's estate and after confirmation, he and the other beneficiaries were rightly issued with title to Plot 1005 which they sold off. He was of the view that in the circumstances, Serevina cannot claim against him and the purchasers, who are protected under **section 93** of the **Law of Succession Act** ("the **LSA**").

4. It emerged from the parties' depositions and the oral evidence of the County Land Registrar that Plot 1005, had been subdivided and portions thereof sold to the 1st, 2nd and 3rd interested parties. By a ruling dated 7th August 2018, I summoned the respondent's guarantors Joseph Momanyi ("Joseph") and Samson Onyoka ("Samson") and ordered that the purchasers be joined to this suit as interested parties. The purchasers filed affidavits in response to the application for revocation of grant and also gave oral evidence. I am now called upon to determine whether the interested parties or purchasers were bona fide purchaser protected by **section 93** of the **LSA**.

5. Wilson Abuga Motugutwa (DW 1) testified that he purchased **WEST KITUTU/BOGUSERO/8397** ("Plot 8397") from Joseph and was unaware of Serevina's interest in the land as she did not intervene when he bought it. He stated that he had conducted a search before he purchased the property and confirmed that the land belonged to Joseph. He told the court that the surveyor, who had then done all the steps necessary for transfer, also handed to him the Land Control Board consent. He testified that had he known how Joseph had acquired the land, he would not have purchased it.

6. Mary Kerubo Abuya (DW2) testified that she had purchased land parcel **WEST KITUTU/BOGUSERO/8395** ("Plot 8395") from Moindi at a purchase price of Kshs. 2,800,000/- after conducting a search of the property. She stated that no one had laid claim on the land or placed a caution against the title when she bought it. She testified that she had purchased the land through legal means and had received the title from the Lands Registry. She maintained that she was an innocent purchaser and was not aware of Serevina's claim.

7. Edinah Kerubo Magwaro (DW3) averred that she purchased **WEST KITUTU/BOGUSERO/8396** ("Plot 8396") from Samson for a sum of Kshs. 370,000/=. She testified that when she purchased it, the parcel of land had no occupants and she had cultivated the land and fenced it without protest from anyone. During cross-examination, DW 3 could not recall her identity card number. She also testified that she had attended the Land Control Board meeting with the vendor. The matter was adjourned to enable her avail the Land Control Board documents and her identity card but she did not return with the documents forcing her advocates on record to file an application to cease from acting for her.

8. Serevina filed a further affidavit in response to the purchasers' averments reiterating that Plot 1005 had never been part of the deceased's estate. She averred that Moindi had caused the land to be registered in the deceased's name under unclear circumstances, after which he applied for letters of administration for the deceased's estate and purported to sell subdivisions of the land to the purchasers in cohorts with the other beneficiaries, Joseph and Samson. She deponed that she had written to the Land Registrar through her advocates for copies of the documents effecting the transfer to the purchasers but the documents including the application for consent and the consent of the Land Control Board, mutation forms and transfer instruments were unavailable.

9. Counsel for the objector filed written submissions in which he highlighted various facts which showed that Moindi was not a son of the deceased and therefore incapable of obtaining letters of administration. He submitted that the purchasers did not exercise diligence as they failed to show a link between Plot 1005 and the resultant titles to Plots 8395, 8396 and 8397. Counsel relied on **section 26 (1) of the Land Registration Act, 2012** which states that a proprietor's title to land is absolute and indefeasible unless it can be shown that there was fraud, misrepresentation or it can be proved that the title was acquired illegally. In conclusion, he submitted that Plot 1005 did not form part of the deceased's estate and that the interested parties could not acquire indefeasible titles to their respective plots by virtue of being innocent purchasers for value and for want of consents from the Land Control Board.

10. Counsel for the petitioner also filed written submissions in which he submitted that the Serevina's husband, the late Monyancha Sokoro, obtained Plot 1005 by fraud and that is why the Mosocho Land Disputes Tribunal had no problem giving an award in favour of the deceased. He submitted that Serevina did not show how the land was purchased by producing the sale agreement or Land Control Board consent. He maintained that the transfer of Plot 5001 in her name was fraudulent and that is why the **Kisii High Court in Misc. Application No. 91 of 2011**, cancelled all entries in her favour. Counsel contended that the proceedings in the High Court could not apply to the matter at hand because by the time the decision was delivered, the deceased had passed away and he had not been substituted in those proceedings and that the petitioner and interested parties did not participate in those proceedings.

11. Counsel for the petitioner further submitted that although the deceased was not married and did not have children, the petitioner took care of him and he regarded him as his son hence when he died on 14th July 2012, the deceased obtained the death certificate, burial permit and was buried. Thereafter the petitioner applied for and was granted letters of administration which were confirmed in his favour on 5th December 2014. He pointed out the purchasers were protected by the provisions of **section 93** of the **LSA**.

12. Counsel for the 1st, 2nd and 3rd interested parties case what they were innocent purchasers of their respective subdivisions of Plot 1005 and that they enjoy protection of **section 93** of the **LSA**. He pointed out that their respective purchases were evidenced by respective sale agreements and acknowledgment of payment executed by the vendors. Counsel cited several cases among them; **Kennedy Opiche Olela v William Ogida Ochuodho and Another [2014] eKLR, Re Estate of Shongo Omenda (deceased) [2018] eKLR** to support the principal that even the petitioner obtained the grant by fraud, under **section 93** of the **LSA**, the revocation or variation of the grant would not invalidate a transfer to an innocent purchaser.

13. As stated in the ruling dated 7th August 2018, the main issue this court has to grapple with is whether the titles acquired by the purchasers are protected under **section 93** of the **LSA** which provides;

93(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.

14. The records provided to the court by the Land Registrar show that Plot 1005 was initially registered in the name of the deceased. Title passed to the late Monyancha in April 1985 and was then transmitted to Serevina on 1st July 2011. The parties agree that during his lifetime, the deceased instituted **Mosocho Land Disputes Tribunal Claim No. 20 of 2011** against Serevina for the land. The Tribunal's decision to transfer the land back to the deceased was adopted as the order of the magistrate's court in **Kisii Magistrates Court Misc. 90 of 2011**. Title to the land reverted back to the deceased and he was registered as owner of the property on 14th February 2013. Moindi presented the certificate of confirmation of grant issued in this cause and he together with all other beneficiaries to the estate, being the 4th to 10th interested parties, were registered as proprietors of Plot 1005. Afterwards, Plot 1005 was subdivided into Plots 8395, 8396 and 8397. Moindi acquired Plot 8395, which he sold to the 1st interested party. Plot 8396 was registered in the name of Samson which he transferred to the 2nd interested party and Joseph was registered as the owner of Plot 8397 which he sold off to the 3rd interested party.

15. Undaunted, Serevina placed cautions on the subdivisions and finalized the prosecution of **Kisii High Court Misc. Application No. 91 of 2011** later, **Republic v Chairman Mosocho Land Disputes Tribunal & 2 others E.L.C Case No. 91 of 2011 [2017] eKLR**, which she had instituted against the Chairman Mosocho Land Disputes Tribunal and the Chief Magistrate's Court, Kisii. The deceased was enjoined to that suit as an interested party. In a judgment delivered on 31st May 2017, Mutungi J. found that the Tribunal's decision was *void ab initio* and issued the following orders;

1. *An order of certiorari to remove unto the High Court and quash the proceedings and decision of Mosocho Land Disputes Tribunal given on 27th day of April 2011 relating to land parcel No. West Kitutu/ Bogusero/1005 directing that a portion of the said land be carved out and re transferred back to the original owner one Gabriel Ayienda Jalango.*
2. *An order of certiorari to remove the decision and proceedings of the Chief Magistrate at Kisii in Misc. Civil Application No. 90 of 2011 seeking to confirm or adopt the award made by Mosocho Land Disputes Tribunal in Tribunal Case No. 20 of 2011 unto the High Court for purposes of quashing the same.*
3. *An order of prohibition to bar the Chief Magistrate's Court at Kisii from issuing a decree in Misc. Civil Application No. 90 of 2011 and/or allowing any further execution process in respect of the decree.*

16. At the time of his death, the deceased's proprietary interest in Plot 1005 had not been determined and was still pending the court's decision in **Kisii Misc. Application No. 91 of 2011** above. The court has now delivered itself on the matter and annulled the Tribunal's decision reverting title to Plot 1005 back to the deceased. It is therefore apparent that Plot 1005 did not form part of the deceased's estate and was not free property as defined in **section 3** of the **LSA**, capable of disposition to his beneficiaries.

17. Questions were also raised as to whether the respondent had the requisite locus to petition for letters of administration in the deceased's estate. The persons entitled to apply for grant where the deceased dies intestate are enumerated under **section 66** of the **LSA** as follows;

- (a) *surviving spouse or spouses, with or without association of other beneficiaries;*
- (b) *other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
- (c) *the Public Trustee; and*
- (d) *creditors;*

18. In Form P & A 5, Moindi was listed as a son of the deceased. Samson and Joseph also described themselves as sons of the deceased in their consents to the grant of letters of administration to the respondent and consent to the application for confirmation of grant. However, Serevina's claim that the deceased died without a wife or children stands uncontroverted and was affirmed by the Mond in his affidavit sworn on 23rd September 2013. In the proceedings before the Tribunal, the deceased had himself indicated that he did not have a spouse or children. Nothing has been placed before the court to clarify the kind of relationship the petitioner and the 4th to 10th interested parties, as beneficiaries, had with the deceased.

19. Under **Section 51(2) (g) (h)** of the **LSA** an application for grant is required to include;

- (g) *in cases of total or partial intestacy, the names and addresses of all previous spouses, children, parents, brothers and sisters of the deceased and of the children of any child of his or hers then deceased; and*
- (h) *a full inventory of all the assets and liabilities of the deceased;*

20. In this case, Moindi misrepresented himself as the deceased's son and was not entitled to apply for grant in his estate. He and the 4th to 10th interested parties were also not the survivors of the deceased as envisaged by the **LSA** and could not inherit from his estate. Moreover, Plot 1005 was not a part of the deceased's free property and could not have been disposed of as part of his estate had they been his legitimate beneficiaries. A grant of representation is liable to revocation on the grounds making false statements and for misrepresentation of facts by virtue of **section 76** of the **LSA**.

I also note that the subdivision of Plot 1005 in three parts following confirmation was inconsistent with terms of the grant which showed that the property was to be subdivided into two portions measuring 1.0Ha and 0.5Ha. It is for these reasons that I revoke the grant issued to Moindi.

21. I now turn to the issue whether the 1st, 2nd and 3rd interested parties as purchasers of the respective properties are protected by **section 93** of the **LSA**. In this respect two decisions of the Court of Appeal deal with the interpretation and application of the provision. In **Jane Gachoki Gathecha v Priscilla Nyawira Gitungu & Another Civil Appeal 343 & 345 of 2002 [2008] eKLR** the Court took the view that a purchaser was not protected when the procedure used to acquire the grant was fraudulent. It held as follows;

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”. 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

22. While in **Musa Nyaribari Gekone & 2 others v Peter Miyienda & another KSM CA Civil Appeal No. 2of 2014 [2015] eKLR**, the Court of Appeal after considering several decisions in which **section 93** of the **LSA** was invoked, reached the following:

[43] Those decisions support the position taken by the learned judge of the High Court in this matter when he stated that while under Section 93 of the Law of Succession Act a revocation or variation of the grant does not invalidate a transfer by the personal representative, other considerations, such as the disposal of the property in contravention of the confirmed grant may invalidate the transfer. Having found as he did that the transfer of the property by the personal representative to himself, the 2nd respondent and one Margaret Kerubo Orina was contrary to the provisions of the grant and having found evidence of fraud with regard to the representation in the application for grant and subsequent confirmation as to the persons beneficially entitled to the deceased’s estate, the learned Judge was correct to take the view that section 93 of the Law of Succession Act did not afford the 3rd appellant protection. There is therefore no merit in the complaint that the learned Judge erred in revoking, nullifying and cancelling the transfer and registration of the suit property in favour of the 3rd appellant in contravention of section 93 of the Law of Succession Act.

23. While I am doubtful that the 1st to 3rd interested parties were aware of Serevina’s claim to Plot 1005 or the fraudulent manner in which Moindi and the 4th to 10th interested parties acquired title to the land, the decisions of the Court of Appeal I have cited are clear that the purchaser’s titles are not protected by **section 93** of the **LSA** as Moindi, Samson and Joseph did not acquire good title to Plots 8395, 8396 and 8397 respectively and could not pass title to the purchasers. Had I reached a contrary decision, I would nevertheless have ordered Moindi and the 4th to 10th interested parties to compensate Serevina for the loss of the land.

24. For the reasons I have set out, I allow the Summons for revocation of grant dated 5th April, 2016 and order as follows:

- a. The grant of letters of administration intestate issued to Moindi Oseko Nyakundi on 28th February, 2014 and confirmed on 5th December, 2014 is hereby revoked.
- b. Title to land parcel numbers **WEST KITUTU/BOGUSERO/8395, WEST KITUTU/BOGUSERO/8396** and **WEST KITUTU/BOGUSERO/8397** are hereby cancelled and are declared void and shall revert to the original title **WEST KITUTU/BOGUSERO/1005** in the name of **SEREVINA NYANCHWA MONYANCHA**.
- c. The petitioner shall bear the costs of this application.

DATED and DELIVERED at KISII this 15th day of AUGUST 2019.

D.S. MAJANJA

JUDGE

Mr Bosire instructed by Bosire Gichana & Co. Advocates for the applicant

Mr Sagwe instructed by S. M. Sagwe & Co. Advocates for the respondent

Mr Nyamurongi instructed by Nyamurongi & Co. Advocates for the 1st to 3rd interested parties