



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 547 OF 2009**

**In The Matter of the Estate of Paul M'Maria (Deceased)**

**MARGARET NAANA MBAE.....1<sup>ST</sup> PETITIONER**

**WILIAM MURIUNGI.....2<sup>ND</sup> PETITIONER/APPLICANT**

**Versus**

**SILAS MUTHENGI.....1<sup>ST</sup> RESPONDENT**

**ELIUD GITONGA THURANIRA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Unlawful acquisition of land**

[1] By an application dated 28<sup>th</sup> July 2016, the following three significant orders have been sought:-

***a) An injunction to restrain the Respondents, their servants, agents, servants and or anyone else acting on their behest from disposing of, selling, transferring, or otherwise dealing with Plot No. 18A MAITUNGUU MARKET pending hearing and determination fo this cause;***

***b) Cancellation of title to or ownership of Plot No. 18A MITUNGUU by the 2<sup>nd</sup> Respondent, and the ownership of the said plot to revert to the deceased for purposes of distribution of the estate; and***

***c) Costs be borne by the Respondents.***

[2] The application is expressed to be brought under section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules and all other enabling provisions of the law. It is supported by the Supporting Affidavit and Supplementary Affidavit sworn by WILLIAM MURIUNGI on 28<sup>th</sup> July, 2016 and 12<sup>th</sup> September, 2017, the grounds set out in the application and others exemplified in the submissions filed in court.

**Claim of intermeddling**

[3] Gathering from the affidavits and submissions filed, the major argument is that plot number 18A

MITUNGUU MARKET belongs to the deceased and is therefore part of the estate of the deceased. Except, it was fraudulently dealt with and transferred by the Respondents into the name of the 2<sup>nd</sup> Respondent on 14<sup>th</sup> March, 2006- a person they have no relationship whatsoever. A copy of agreement for sale of the said property has been annexed as annexure **WM1a&b**. The sale thereof was after the death of the deceased who died on 20<sup>th</sup> August, 1999 and before confirmation of grant herein. In support of that proposition, the Applicant cited the case of **MUNYASYA MULILI & 3 OTHERS vs. SAMMY MUTETI MULILI [2017] eKLR**. According to the Applicant, the foregoing facts are not contested. Thus, the purported sale is an act of intermeddling with the estate which should be punished under section 45 of the Law of Succession Act. It is, therefore, illegal transaction. On this they relied upon the case of **RE ESTATE OF JOSPHINE MAGDALENA** and **RE ESTATE OF DAVID JULIUS NTURUBI MÍTHINJI**. On the basis of the foregoing, the Applicant takes the view that the claim by the 2<sup>nd</sup> Respondent that he was an innocent purchaser for value without notice is not tenable in law.

[4] The claim of fraud was reinforced further by the fact that the 1<sup>st</sup> Respondent who is the uncle to the Applicant has been selling the properties of the estate without the knowledge of the family of the deceased. And for this, he has been charged in Meru court with fraudulently transferring parcel number KIAMURI ‘A’ 995 which is estate property. They concluded that these are acts of intermeddling for which the court should act: cause police investigation, arrest and prosecution of the persons involved. On that basis, the Applicant beseeches the court to grant the orders sought.

### **1<sup>st</sup> Respondent: I sold my share**

[5] The Respondents opposed the application. They filed submissions in support of their respective positions on the matter. The 1<sup>st</sup> Respondent filed a Replying Affidavit on 4<sup>th</sup> October 2017. He stated that he is the son of the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> petitioners are wife and son of his late brother respectively. He averred that his late father gathered two properties, namely plot number 18A and 18B MITUNGUU MARKET. His late father gave him plot number 18A MITUNGUU MARKET which he occupied and developed. But, his father died before he could transfer the plot to him. He deposed that he later sold the property to the 2<sup>nd</sup> Respondent after he became impatient and could not wait for the filing of a succession cause. The 2<sup>nd</sup> Respondent consequently filed MERU CMCC NO 492 OF 2004 against the estate of the deceased and obtained a decree. After consultations with the family members they agreed that he files Succession Cause No 139 of 2005 where after a consent to transfer the suit land to the 2<sup>nd</sup> Respondent was recorded in the civil suit. He therefore wondered how the Petitioners could feign ignorance and lie about the transfer. He accused the petitioners of selfishness which he said should not trump a lawful contract of sale. He believed this cause is a conspiracy to defeat the transaction on the suit land because the correct procedure was for the petitioners to have challenged cause number 139 of 2005.

### **2<sup>nd</sup> Respondent: I am innocent purchaser**

[6] On 4<sup>th</sup> November, 2016, the 2<sup>nd</sup> Respondent filed: (1) Notice of Preliminary Objection; and (2) Grounds of Opposition to the application dated 28<sup>th</sup> July 2016 raising 10 points of objection and 11 grounds of opposition, respectively. In a nutshell he is saying:

1. That he is a bona fide purchaser for value without notice. He has no knowledge of the alleged fraud. As such, he enjoys protection of property rights under article 40 of the Constitution. He also carried business on the suit land. Therefore cancellation of his title to the suit land would be most unfair and drastic action- such action is only possible if this matter is adjudicated upon under order 37 of the Civil Procedure Rules.
2. That members of the family of the deceased have colluded to dispossess him of his property.
3. That an injunction cannot issue under the provisions of the law cited. The application has also been brought with inordinate delay. Thus, the application lacks in merit and should be denied.

[7] In their submissions, the Respondent reiterated the essential core of the Replying Affidavit, Grounds of Opposition and Notice of Preliminary Objection. They emphasized that the Applicant is cestui que trust as the 1<sup>st</sup> Respondent signed the transfer as the administrator of the estate of the deceased. The 1<sup>st</sup> Respondent was therefore the personal representative of the deceased until the grant was revoked. Again, the 1<sup>st</sup> Respondent was satisfied a court decree made in the civil suit against the estate. On that basis, they believe that the transfer is valid and as provided in section 80 and 93 of the Law of Succession Act, it is not affected by the revocation of grant. They also invoked Limitation of Actions Act to bar their claim on the property for it has now been over 12 years since the 2<sup>nd</sup> Respondent took actual possession of the plot. In any case, they argued that the two brothers were entitled to a plot each and so the petitioner cannot claim his plot.

[8] The Respondent argued further that the petitioners have tampered with the records of the suit land at the County Government Office and they cannot therefore claim clean hands for purposes of an injunction. Based on those reasons, they asked the court to reject the application.

## **DETERMINATION**

[9] At the center of this application is Plot No 18A MITUNGUU MARKET. The said plot is said to belong to the deceased except it was fraudulently transferred by the 1<sup>st</sup> Respondent into the name of the 2<sup>nd</sup> Respondent. According to the Applicant, the fraud is in the fact that the plot was sold by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent on 12<sup>th</sup> July 2004 before confirmation of grant of representation of the estate of the deceased. In this case, in a sale of land agreement dated 12<sup>th</sup> July 2004, the 1<sup>st</sup> Respondent agreed to sell and the 2<sup>nd</sup> Respondent agreed to buy the property known as PLOT NO 18A MITUNGUU MARKET at a consideration of Kshs. 140,000. As at the date of the agreement of sale of land, the deceased had died and the suit property stood in his name. As at that date also, no grant of representation had been applied for leave alone being issued or confirmed, in respect of the deceased. These facts impels a re-statement of what courts of law have boldly stated; that, it is axiomatic under section 55 and 82 of the Law of Succession Act, no immovable property of the deceased shall be sold before confirmation of grant. For clarity, the relevant parts of Section 55 and 82 thereto are reproduced below:

### ***55. No distribution of capital before confirmation of grant***

***(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.***

***(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.***

### ***82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers***

***(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;***

***(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:***

### ***Provided that***

***(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and***

**(ii) no immovable property shall be sold before confirmation of the grant; [underlining mine]**

[10] The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that:-

***40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.***

Therefore, applying the law and the Constitution, the sale of Plot 18A MITUNGUU MARKET on 12<sup>th</sup> July 2004 was in contravention of the Law of Succession Act and therefore vitiated by that illegality. It is thus invalid, null and void transaction. Such contract is *ex facie* illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute. Therefore, the argument that there was a suit by the 1<sup>st</sup> Respondent or a decree therefrom does not change this reality of the law or fetter the jurisdiction of a probate court to preserve estate property for purposes of succession. As long as the transaction is void, it is also futile to argue that subsequent transfer thereof was done by the 1<sup>st</sup> Respondent who was the administrator of the estate of the deceased. Such was not an act of relation back; and the 1<sup>st</sup> Respondent cannot purport to validate that which is illegal, null and void. What Lord Denning stated in the case of **MCFOY vs. UNITED AFRICA CO. LTD (1961) 3 All ER 1169-** is true of this case, that:

***‘... If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay here. It will collapse.***

### **Alleged gift inter vivos**

[11] It bears repeating that the suit land was estate property at the time of sale. The belief by the 1<sup>st</sup> Respondent that it was his did not make it his as only a court of law in a succession cause can distribute the estate of the deceased. From the material before court, the gift *inter vivos* claimed by the 1<sup>st</sup> Respondent was an incomplete gift in law for the land thereto was never registered into the name of the 1<sup>st</sup> Respondent. Such gift is subject to proof in this succession cause. Needless to state that, in law, the court will not compel the intending donor, or those claiming under him, to complete and perfect, incomplete and imperfect gifts, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. For such gift is to be valid, the donee must show that the donor did everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. See ***Halsbury's Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 67.*** Therefore, gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Accordingly, the claim by the 2<sup>nd</sup> Respondent that he occupied the plot and developed it is subject to proof in a succession proceedings relating to the deceased donor so that the court will determine distribution of the estate accordingly. So I repeat; it is not for the purported donee of incomplete or imperfect gift to declare or complete or perfect a gift to himself especially where the incomplete or imperfect gift has been challenged; it is the court to do so in the proper proceedings: in this case, the proper proceedings is a succession cause relating to the deceased donor since the donor is deceased and the donee is a beneficiary of the estate of the deceased. This is important in view of section 42 of the Law of Succession Act where such earlier settlements or bequests are taken into account in determining the share the 1<sup>st</sup> Respondent as a beneficiary is ultimately entitled to in the estate. Nonetheless, quite apart from the claim of gift *inter vivos*, the concern of the court within the scope of this application is the sale of estate property of the deceased before confirmation of grant, which I find to be

purely an act of intermeddling with the estate property and one which does not give any validity to the void transaction thereof. In light of the law, therefore, does a defence of innocent purchaser for value hold sway?

### **Defence of innocent purchaser**

[12] The tag ‘‘Innocent Purchaser for Value without Notice’’ often falls in our lips, but sometimes we attribute less to it than it really portend. This is one case where I find the 2<sup>nd</sup> Respondent to be striving to circumvent the requirements of the law and to validate an illegal contract by citing the defence of Innocent Purchaser for Value without Notice. Defence of innocent purchaser for value is only available to:

***One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims...’’ Black’s Law Dictionary, Eighth Edition.***

Applying this legal threshold, I resort to the sale agreement dated 12<sup>th</sup> July 2004. In the property clause it is stated clearly that:

***PROPERTY SUBJECT OF SALE: ALL that plot known as PLOT NO 18A at M Mitunguu MARKET REGISTERED IN THE NAME OF M’MARIA MÍKITHAKA (DECEASED) MEASURING 13’X 80 FT***

And clause 2 of the agreement recognized that:

***That the said plot that’s registered in the name of M’Maria Mikithaka (deceased) the father of the vendor shall be passed to the purchaser’s name after the vendor finalizes the succession process due to be initiated in the Meru High court for letters of administration to be granted to him.***

The parties further agreed in clause 4 of the agreement that the 1<sup>st</sup> Respondent will expedite the process of succession to enable smooth transfer of the suit land.

[13] Recapitulation of above facts brings me to ask: Whether the 2<sup>nd</sup> Respondent is the innocent purchaser he claims to be? First of all, the 2<sup>nd</sup> Respondent was fully aware that the suit land was registered in the name of the deceased. He was also fully aware as he should, that succession of the deceased was a fundamental term of the agreement. He must be taken to have been aware of and that the provisions of the Law of Succession Act governed the sale of immovable property of a deceased and his agreement. Notice may be actual or constructive. The 2<sup>nd</sup> Respondent ought to have been in knowledge of the provisions of the law herein or such knowledge would have come to him had he properly followed up the circumstances of the sale. Needless to state that the agreement was done by legal counsel. I, therefore, find it to be quite pretentious for the 2<sup>nd</sup> Respondent to consider himself an innocent purchaser without notice. The said defence can never whatsoever, be available to such purchaser of property he knew very well was registered in the name of the deceased. His grounds of opposition as well as objections in so far as they attempt to negate that reality, are futile and helpless in the circumstances of this case. In fact, the sale may as well be a subject of scrutiny under section 45 of the Law of Succession Act.

[14] Before I close, I have heard before and I am now hearing the argument that an injunction does not lie in succession causes. I am aware that some commentators argued and the Rules Committee on Civil Procedure has proposed that order 40 of the Civil Procedure Rules on **TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS** should be directly linked to the Law of Succession Act in order to obviate objections of this nature. I agree and the earlier this is done the better. Except, however, following after the maxim that law will not suffer wrong without remedy, there is nothing in the Law of Succession Act that prevents the court from issuing such orders- by whatever name they are called- as are necessary to preserve the estate. Again, with the advent of the Constitution of Kenya, 2010, courts are now

obligated to take a much wider view of justice and to serve substantive justice in accordance with the principles of justice enshrined in article 159 of the Constitution. You may also see section 45 and 47 of the Law of Succession Act as well as Rule 73 of the Probate and Administration Rules. Accordingly, a case for injunction has been made out in this application. Similarly, a case for cancellation of the transfer and title resulting from the illegal transaction on plot number 18A MITUNGUU MARKET has been made out. In the upshot, therefore, I hereby order:-

- a) An injunction to restrain the Respondents, their servants, agents, servants and or anyone else acting on their behest from disposing of, selling, transferring, or otherwise dealing with Plot No. 18A MAITUNGUU MARKET pending hearing and determination of this cause;*
- b) Cancellation of title to Plot No. 18A MITUNGUU if it stands in the name of the 2<sup>nd</sup> Respondent. The ownership of the said plot shall revert to the deceased for purposes of distribution of his estate in this cause; and*
- c) Costs shall be borne by the Respondents.*

**Dated, signed and delivered in open court at Meru this 19<sup>th</sup> day of December, 2017**

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**F. GIKONYO**

**JUDGE**

In the presence of:

Mr.Gitonga advocate for Mr. Kiamthi for Petitioners

Mr.Ngeno advocate holding brief for Mr.Kiogora advocate for Respondents

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**F. GIKONYO**

**JUDGE**