



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**  
**SUCCESSION CAUSE NO. 13 OF 2004**

IN THE MATTER OF: THE ESTATE OF TERESIA AUMA..... DECEASED

**AND**

IN THE MATTER OF: LR. NO. CENTRAL KITUTU/DARAJA MBILI/2674

**AND**

IN THE MATTER OF: APPLICATION FOR REVOCATION OF GRANT OF LETTERS OF  
ADMINISTRATION

**BETWEEN**

MONICA ADHIAMBO.....PETITIONER

**=VERSUS=**

MAURICE ODERO KOKO.....OBJECTOR

**AND**

FRED OMWOYO BAKORA.....INTERESTED PARTY

**JUDGMENT**

The genesis of this matter began in January, 2004 when the petitioner/respondent herein **Monica Adhiambo** commenced succession proceedings in respect of the estate of **Teresa Auma** (*hereafter also known as the deceased*) who was the registered proprietor of **LR No. Central Kitutu/Daraja Mbili/532** (*hereinafter referred to as the original parcel of land*). After commencing succession proceedings, the Honourable Court issued a gazette notice No.2266 and subsequently the petitioner was issued with the Grant of letters of Administration intestate in respect of the estate of the deceased.

Consequently the petitioner sought and obtained a confirmation of grant of letters of administration on **23<sup>rd</sup> May, 2005** and the said letters were duly confirmed in her favour. It seems that immediately after the petitioners grant was confirmed, she proceeded to register the original parcel of land to her name. Afterwards, the petitioner entered into a land sale agreement with the interested party whereby the petitioner subdivided the original parcel of land into inter alia **LR. No. Central Kitutu/Daraja Mbili /2674** (*hereinafter referred to as the suit property*) which property was subsequently transferred and registered in the name of the interested party on **22<sup>nd</sup> February, 2006**.

Afterwards, the objector herein **Maurice Odera Koko** filed and commenced summons for revocation of grant dated **12<sup>th</sup> October, 2012** whereby he sought revocation of the confirmation of grant and nullification of title in respect of the original parcel of land. However, the interested party was not enjoined in this proceedings and the said summons for revocation of grant were allowed in respect to the original parcel of land.

As a result of the nullification of the title in favour of the petitioner in respect of the original parcel of land, the interested party's title which arose from the original parcel of land was equally nullified.

The interested party has now filed summons for setting aside, review and variation of the above orders dated **30<sup>th</sup> May, 2014** under **Rules 49, 59, 63 & 73** of the **Probate and Administration Rules, Section 55, 93** of the **Law of Succession Act**, and **Articles 40(3), 47(1), 50(1) and 159(2) (d)** of the **Constitution, 2010** seeking:-

1. *Spent*
2. *Spent*
3. *Spent*
4. *Spent*
5. *Spent*
6. *The Honourable court be pleased to rescindh, recall, vary and/or set aside the proceedings, judgment, together with the decree of the Honourable Court rendered on the **31<sup>st</sup> October, 2013** and more particularly, the portion thereof touching and/or concerning **LR No. Central Kitutu/Daraja Mbili/2674**.*
7. *The Honourable Court be pleased to order, restore and/or restitute the title over and in respect of **LR. No. Central Kitutu/Daraja Mbili/2674**, which arose from the sub-division of the original parcel of land and which was lawfully and legitimately in the name of the interested party/applicant.*
8. *The Honourable Court be pleased to make such other and/or further orders/directions as may be just and expedient in the circumstances.*
9. *Cost of this application be borne by the objector.*

The above application was supported by a supporting affidavit from the applicant/interested party herein **Fred Omwoyo Bakoba** who deponed that his attention was drawn to the subject proceedings when he carried out a search over the suit land which property he had lawfully registered in his name having purchased it from the petitioner herein. He further deponed that upon carrying out the official search at Kisii Land Registry, he was surprised that his property (the suit land) had been cancelled and nullified pursuant to orders issued vide the instant cause. Thereafter, he instructed his advocates to prepare copies of the summons for revocation of grant, judgment and resultant decree issued on **31<sup>st</sup> October, 2013** and his advocates on record gathered that his title had been nullified at instance of the summons for revocation of grant filed by the objector.

He further contended that even though the objector was aware that the original parcel of land had been subdivided and portions thereof sold to various persons, he (objector) failed to join him in the proceedings hence the summons for revocation of grant proceeded to hearing and same was finally disposed of vide the judgment rendered on **31<sup>st</sup> October, 2013**.

He further contended that the Honourable Court was misled into granting orders and thereby impeaching title of 3<sup>rd</sup> parties without affording the 3<sup>rd</sup> parties an opportunity to be heard. That owing to the manner in which the summons for revocation of grant was presented the Honourable court condemned him without being afforded an opportunity to be heard.

He further deponed that the objector failed/neglected to disclose onto the Honourable Court the correct picture pertaining to the original parcel of land and as a result thereof, the orders rendered on the **31<sup>st</sup> October, 2013** were procured and obtained by way of fraud, misrepresentation, concealment and non disclosure of material facts which facts were within knowledge of the objector. He thus contended that as

the registered proprietor of the suit land he was entitled to audience which opportunity was neither availed nor offered. That the titles procured and obtained were through legitimate means hence the revocation thereof was irregular and illegal thus the necessity for the presentation of the status of the original parcel of land.

Lastly, he contended that unless the application herein is heard and granted, he is bound to be deprived of the suit land courtesy of illegal and fraudulent proceedings, originated and engineered by the objector herein.

The objector on his part did not file any grounds of opposition or replying affidavit after being served with the above application. When the matter came before me on **9<sup>th</sup> October, 2014**, it was agreed among the 3 advocates representing the parties that the above application be argued by filing and exchanging written submissions. When the above matter came before me again on **5<sup>th</sup> July, 2015**, only **Mr. Oguttu Mboya** appeared. I was then informed that the firm of **M/s Ochillo** for the objector upon being served with the mention notice dated **13<sup>th</sup> May, 2015** received the same but indicated that they no longer have instructions from the objector.

Nonetheless, I ruled that the matter should proceed. **Mr. Oguttu** submitted by stating that he wished to rely on his written submissions and authorities. Furthermore, he submitted that the court should take cognizance of the rule of natural justice and **Section 93** of the **Law of Succession Act** which protects the title of a purchaser for value notwithstanding revocation of the grant. He thus urged the court to allow the above application and the rights of the interested party under **Article 22(a)** as read together with **Article 40(b)** of the constitution.

I have now considered the interested parties application, the affidavit in support of the application thereof and the submissions from the interested party and the petitioner and the only issue this court needs to determine is whether the interested party's prayers should be granted.

**Rule 63(1)** of the **Probate and Administration Rules** provides that:

**“Safe as in the Act or in these rules otherwise provided, and subject to any order of the court a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order V, X, XI, XV, XVIII, XXV, XLIV and XLIX together with the High Court practice and Procedural Rules, shall apply so far as relevant proceedings, under these rules. Here the same applies Order 45 of the Court Procedure Act 2010 provides that a court can review an order as follows on:-**

- a. *Discovery of new and important matter or evidence which after the exercise of due diligence was not within the time when the decree was passed or the order was made;*
- b. *Mistake or error apparent on the face of the record;*
- c. *Or any sufficient reason;*
- d. *The application must be made without undue delay.”*

In the case of **James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 others (2005) e KLR Visram** (as he then was) held as follows:-

*“Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.*

In the instant case, the interested party in his application has averred that he did not know of the proceedings seeking revocation/ annulment of grant by the objector and only came to find out after he carried out a search in the suit land only to be informed that his title to the suit land had been cancelled. This originated from the revocation/nullification of the title in favour of the petitioner in respect of the original parcel of land on which the interested party's title arose.

I also note the fact that the interested party acquired title over the suit land in **February, 2006** and the objector only filed his summons for revocation of grant in **September, 2012**. In addition to this, in the summons for revocation of grant, the objector never joined nor applied during the proceeding for leave to join the interested parties. The petitioner on the other hand merely mentioned in her replying affidavit to the objections application for revocation that the said original suit land had been bought by third parties but did not attach any annexures in his replying affidavit to support this.

In my humble view it was incumbent upon the objector to join the interested party in his summons for revocations of grant since after he had confirmed that the title to the original parcel had been transmitted to the petitioner, it was incumbent upon him to search the said title of the original suit land and realize that the same had been subdivided, sold and transferred to other 3<sup>rd</sup> parties who were not members of his family.

In **Civil Proceedings Order 1 RULE 10(2)** of the **Civil Procedure Rules** empowers the court, at any stage of the proceedings, upon application by either party to summon, or order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of **Sarkar's Code of Civil Procedure (11<sup>th</sup> Ed. Reprint, 2011, Vol. 1 P 557**, states that:

*“The section should be interpreted liberally and widely and not be restricted merely to the parties involved in the suit but all persons necessary for a complete adjudication should be made parties.”*

Similar sentiments were also echoed in **Central Kenya Ltd v Trust Bank & 4 others, (A. No. 222 of 1998)**, when it affirmed that the guiding principle in amendment of pleadings and founder of parties is that:

*“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or founder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”*

The above authorities demonstrate the importance of joining a party to a suit whose rights will one way or another be affected by a court’s ruling or judgment. In the instant suit since the rights of the interested party over the suit property have been affected by the revocation of grant given it is therefore proper for the interested party to institute review proceedings in this court.

Counsel for the interested party has submitted the relevance of **Section 93** of the **Succession Act** to this proceedings. **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.”*

**Section 93** of the **Law of Succession Act** has been a subject of Judicial interpretation in a number of cases in **Adrian Nyamu Kiugu vs Elizabeth Karimi Kiugu and Another (2014) e KLR** the High Court at Meru 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 one has obtained the grant fraudulently. The purchaser in this cause came from the neighbourhood 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.”*

In **Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another (2013) e KLR** where the appellant therein unsuccessfully sought protection under **Section 93**, the Court of Appeal 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. In any case and as provided by Section 82(b) (11) of the Act it would have been illegal for Beatrice Njeri Mugondu to sell the land before the confirmation of the grant.”*

In **Jane Gachola Gathetha vs Priscilla Nyamira Gitungu and another (2006) e KLR** where a purchaser claimed that he was not aware of, and was not party for the fraudulent dealings with the title in issue and was therefore not only protected under **Section 93(1)** of the **Law of Succession Act (Cap 66)** but also **Section 143** of the **Registered Land Act** the court of Appeal 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 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 abinitio and the property is traceable.”*

In Re-Estate of **Christopher Aide Adela (Deceased) (2009) e KLR Rawal** and (as she was then) 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.”*

In the instant case it is undisputed that the petitioner only transferred the suit property to the interested party after the grant of letters of administration were confirmed which is legally in order. However, a closer look at the process she took in applying for the said grant of letters of administration reveal that the said grant was obtained through fraudulent non disclosure of material facts. The petitioner in form P & A 5 stated that she was the only beneficiary/survivor of the deceased estate while in reality the deceased had 3 children in total. It turns out that the deceased actually had 2 other children who were **Margaret Ouko** and **Maurice Odero Koko**. None of these two beneficiaries had given the petitioner consent in terms of **Rule 7(7) (a) (b) and (c)** of the **Probate and Administration Rules** which provides:-

**7) where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise. Its discretion under that section and shall also satisfy the court that every person having a prior**

**preference to a grant by virtue of that section has:-**

***a)renounced his right generally to apply for a grant or***

***b) consented in willing to the making of the grant to the application; Or***

***c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.***

The petitioner in the instant case cause did not rank higher than the objector in priority in seeking a grant of administration intestate and was required before making of the grant to furnish this court with information and satisfy the court that the objectors having prior preferences to a grant being all children of the deceased, had renounced their right generally to apply for the grant or had consented with making of the grant to the petitioner or that they had been issued with a citation calling upon them either to renounce such right or to apply for a grant. The petitioner therefore acted in contrary to the mandatory provisions of **Rule 7(7) of the Probate and Administration Rules** and it's no wonder my sister **Sitati J** had to revoke the petitioner's grant for non disclosure of material facts.

With that said, the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking **Section 93 of the Law of Succession Act**. The reality of the situation is that provisions of **Section 93** do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property.

With that said the interested party's summons for review dated **30<sup>th</sup> May, 2014** cannot be granted. The costs for this application shall be borne by the petitioner.

**Dated and delivered at Nyamira this 26<sup>th</sup> day of February 2016.**

**C. B. NAGILLAH**

**JUDGE**

**In the presence of:**

Nyamwange hold brief for Oguttu for the petitioner

Firm of Henry Kaburi (absent) for the objector

Mercy -Court Clerk