



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**SUCCESSION CAUSE NO. 285 OF 1995**

**MADISON MOROKO NYAMWEYA.....PETITIONER**

**AND**

**BENARD MAGARA MAROKO &**

**JUDSON NYABOGA OGWORA.....INTERESTED PARTY**

**RULING**

**Background**

1. Nyamweya Matara (hereinafter “the deceased”) died on 23<sup>rd</sup> March 1994. Representation of the deceased’s estate was obtained by his only son, the petitioner herein, on 27<sup>th</sup> July, 1995. On 28<sup>th</sup> August 1995, the petitioner’s two wives who are also the daughters in-law to the deceased, applied for a revocation of the said grant on grounds that the petitioner had failed to administer the estate properly.
2. On 7<sup>th</sup> February 1996, this court (differently constituted) revoked the grant that had been issued to the petitioner.
3. No further proceedings were initiated in this cause after the revocation of grant until 8<sup>th</sup> January 2016 when the applicant herein, Bernard Magara Maroko, who is the petitioner’s son and therefore a grandson to the deceased, filed the application that is now the subject of this ruling.

**Application**

4. This ruling relates to the application dated 8<sup>th</sup> January 2016 brought under **Section 45 of the Law of Succession Act Cap 160** laws of Kenya (hereinafter “the Act”) and **Rule 44 of the Probate and Administration Rules**. The applicant seeks the following orders:

**i. Spent.**

**ii. That pending the hearing and determination of this Application the Petitioner/Respondent be restrained from transferring, disposing of and/or changing ownership of LR. NO. WEST MUGIRANGO/BOSAMARO WEST/1802 until this application is heard and determined.**

**iii. The deceased objector herein MONICA NYABOKE MAROKO be substituted for BENARD MAGARA MAROKO.**

**iv. Title NO.LRWESTMUGIRANGO/BOSAMARO WEST/1802 be cancelled and the same**

**do revert to NO.LR WEST MUGIRANGO/BOSAMARO WEST/896 being the original number prior to the grant of letters of administration.**

**v. The costs of this Application be provided for.**

5. The application is premised on the applicant's supporting affidavit sworn on 8<sup>th</sup> January 2016 in which he depones that one of the initial objectors to the petition, Monica Nyaboke Maroko, who was his biological mother, had since died and therefore the need to have him substitute her in this case in view of the fact that he had obtained letters of administration ad litem in respect to her estate.

6. The applicant contends that despite the fact that the grant of letters of administration issued to the petitioner had been revoked on 7<sup>th</sup> February 1996, the petitioner still went ahead to colluded with the land registrar to irregularly remove a restriction that had been placed on the deceased's land being **LR. NO. West Mugirango/Bosamaro West/896** (hereinafter "the suit land") which he subdivided into 3 portions to wit, **West Mugirango/Bosamaro West/1801, 1802 and 1803** out of which the petitioner allocated to himself **LR NO. West Mugirango/Bosamaro West/1801** as seen in the Certificate of official search attached to the applicant's affidavit and marked as "**BMM-4**"

7. The applicant further depones that he currently resides on **LR NO. WEST MUGIRANGO/BOSAMARO WEST/1801** in his capacity as the grandson of the deceased and that his intention is to apply for grant of letters of administration in respect to the deceased's estate but is unable to do so in view of the fact that the suit land is no longer in the name of the deceased.

8. The applicant seeks the cancellation of the new titles that were created out of the sub-division of the suit land after the revocation of the grant issued to the petitioner.

**Replying affidavits**

9. One Judson Nyaboga Ogwora, who was named by the applicant as an interested party in the application filed a replying affidavit dated 14<sup>th</sup> April, 2016 in which he depones that he **purchased LR. NO. West Mugirango/Bosamaro West/1802** from the Petitioner who was then the registered proprietor of the suit land and that he was aware that one Daniel Manoti had similarly bought **LR. NO. WEST MUGIRANGO/BOSAMARO WEST/1803**. The interested party contends that under those circumstances, it would be unfair and unjust to cancel their titles as they played no role in the alleged fraud or wrong-doing.

10. The petitioner filed his replying affidavit on 17<sup>th</sup> May 2016 in which he depones that he was not served with any court documents in respect to the cancellation of the grant and further that the order revoking the grant was not served on him or the land registrar- Nyamira.

11. The petitioner further depones that upon obtaining the grant he subdivided the suit land into 3 portions after which he retained 1801 and sold 1802 to the interested party and 1803 to one Daniel Angwenyi Manoti who are in occupation of the said parcels to-date.

12. The petitioner states that the initial objectors, Monica Nyaboke Maroko and Dorcas Moraa Maroko were his wives but that had both died. The petitioner contends that as the only son of the deceased, he was the only rightful heir to inherit his estate.

**Analysis and determination**

13. I have carefully considered the applicant's application and the response made by the respondent and the interested party together with the parties' respective written submissions.

14. The main issue that presents itself for determination is whether the applicant has made out a case to warrant the granting of orders of injunction, substitution and cancellation of title number 1802 so that the

same can revert back to the suit land, and to the name of the deceased.

15. On injunction, the applicant has sought orders to restrain the respondent from alienating, transferring disposing of and or changing ownership of **LR No. West Mugirango/Bosamaro West/1802** until this application is heard and determined. Ordinarily, an order for injunction would be sought pursuant to **Order 40 of the Civil Procedure Rules**. The **Probate and Administration Rules** do not provided for an injunctive relief because **Order 40 of the Civil Procedure Rules** is not one of the Civil Procedure Rules stipulated as being applicable to succession matters. (See **Rule 63(1) of the Probate and Administration Rules** in the **Estate of Kibomen Komen (deceased) NKR Succession Cause No.500 of 1997**.)

16. However, by virtue of the provisions of **Section 47 of the Law of Succession Act**, this court must determine the issue brought before it in a fair manner.

17. **Section 45 (1) of the Law of Succession Act**, under which this application has been brought, on the other hand, provides as follows:

**“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”**

18. **Section 47 of the law of Succession Act** gives the High Court the jurisdiction to entertain any application and determine any dispute under the act and to produce such decrees and make such orders therein as may be expedient. The reasons given for this application fall within the ambit of **Section 45(1) of the Law of Succession Act**. It has been shown that the respondent has disposed of part of the estate of the deceased and is therefore capable of continuing to waste the property in question so as to warrant the issuance of conservatory orders to preserve the estate of the deceased.

19. In view of the provisions of the above Sections and Rules, I am satisfied that this court has inherent jurisdiction to grant the orders sought by the applicant in order for the ends of justice to be met.

20. The main ground upon which the applicant’s case is anchored is that the respondent irregularly and unlawfully dealt with, subdivided and transferred a portion of the suit land to the interested party when the grant issued to him had in fact, been revoked by a court order made way back on 7<sup>th</sup> February, 1996.

21. The respondent on his part did not deny that there was a revocation of the grant that had earlier on been issued to him. The respondent however denied having been served with the said order of revocation which he also contended, was not served upon the land registrar of Nyamira Land Registry.

22. I have however perused the court proceedings and order dated 7<sup>th</sup> February 1996 which was attached to the applicant’s affidavit as annexure **“BMM2”**. I note that before the order for revocation of the respondent’s grant was made, the court was informed that the respondent’s counsel, then Mr. Abobo, had been served with a hearing notice. It is therefore my finding that under those circumstances, the respondent cannot feign ignorance of the court order that revoked the grant that had been issued to him. Furthermore, even assuming that the respondent was not aware of the proceedings of 7<sup>th</sup> February 1996, I still find that he was not justified to subdivide or sell the suit land before the confirmation of the grant issued to him on 27<sup>th</sup> July 1995.

23. Indeed **Section 82 (b) (ii) of the Act** stipulates that; **“No immovable property shall be sold before confirmation of grant.”**

24. In the case of **Njoki Gicheru Ndiuni vs Dadson Githenji Wahome & 3 others [2016] eKLR** it was held:

***“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by law. Such authority emanates from a grant of***

***representation, and any such person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”***

25. In the present case the grant obtained by the respondent on 27<sup>th</sup> July, 1995 had not been confirmed and was revoked on 7<sup>th</sup> February 1996. Clearly therefore, the respondent was not authorized by law to deal with the property of the deceased. The mere fact that the respondent is the only rightful heir to inherit the deceased's property did not give him the latitude to flout the Rules/Laws of succession governing the administration of the estates of deceased persons.

26. Musyoka J. had the following to say on the effect of Section 45 (1) of the Act in the case of the Estate of **Veronica Njoki Wakagoto** – deceased.

***“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.***

***In this matter the respondent sold property belonging to a dead person without authority as letters of administration had not yet been made. The fact of having petitioned for letters did not clothe him any authority. He and Felix Kinuthia intermeddled with the estate, and they no doubt committed an offence under Section 45 (2) (a) of the Act. It is unfortunate that the prosecutorial authorities do not focus on offences of this kind as prosecutions are hardly mounted over them. This explains why property of dead persons is routinely intermeddled with.”***

27. The respondent concedes that he subdivided the estate of the deceased part of which he sold to the interested party. The interested party has relied on the provisions of Section 93 of the Act to shield him from the cancellation of his title as sought by the applicant on the basis that he was a bona fide purchaser since he bought the land from the petitioner who ranked in priority to administer the deceased's estate.

28. **Section 93 of the Act** stipulates as follows:

**“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.”**

29. It is clear to me from the above section that a purchaser's interest would only be protected under the Act, if such purchase took place after the confirmation of the grant issued to the petitioner. A perusal of a copy of the green card in respect to the suit land (applicant's annexure "BMM3") shows that the subdivision of the suit land was done on 6th June 1998, more than 2 years after the revocation of the grant issued to the applicant.

30. In the present case, the grant issued to the respondent was not only revoked, but had also not been confirmed so as to entitle the respondent and the interested party to enter into a legally enforceable land sale agreement.

31. It is my finding that the actions of the respondent herein, in dealing with the deceased's estate without grant of letters of administration amounted to intermeddling with the estate of the deceased and this court cannot countenance or ratify such intermeddling by allowing the subdivisions and transfer of the suit land to stand.

32. Section 80 of Land Registration Act stipulates as following:

**Rectification by order of Court.**

**“80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge**

**of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”**

33. The applicant sought not only the cancellation of the new titles created out of the sub division of the suit land, but also a restoration of title in the name of the deceased herein.

34. In the case of **Mumbi Mwathi vs Stephen Ndungu Mwathi [2012] eKLR**, it was held:-

***“By reason of what has been stated in number (5) above, upon cancellation of resulting titles, the old Title namely Kiambaa/Muchatua/T 237 shall revert and be restored in the names of the deceased namely Kariuki Kiriso.”***

35. In the case of **Santuzza Billoti Alias Mei Santuzza (deceased) vs Giacanio Balasconi [2014] eKLR** it was held:

***“Further, a Succession Court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before the grant is confirmed.”***

36. Going by the dictum in the above cases, I am satisfied that the applicant herein has made out a case to warrant the granting of the orders sought. The subdivision and transfer of the suit land offends the provisions of **Sections 45 (1) and 82 (b) (ii) of the Act** and these are points of law which go to the root of the validity of said transfers and titles held by the respondent and the interested party.

37. The respondent cannot feign ignorance of the court order issued on 7<sup>th</sup> February 1996 revoking the grant issued to him because the said order was entered in the land register as shown in applicant's annexure marked **“BMM3”** attached to the applicant's affidavit in support of the application. In the said annexure, I note that entry No. 4 to the green card in respect to the suit land is a restriction on any dealing in the land pending an order to revoke the grant issued to the respondent.

38. It is noteworthy that the restriction was placed on 17<sup>th</sup> June 1996, 4 months after the grant was revoked on 7<sup>th</sup> February 1996.

39. It is my finding that even though the respondent/petitioner was, by virtue of being the only son of the deceased, entitled to apply for grant of letters of administration, and to inherit the estate of his deceased father, the said inheritance had to be conducted within the parameters of the Law of Succession Act and I reiterate that the respondent was not at liberty to distribute the estate of the deceased before the confirmation of the grant.

40. Having found that the grant issued to the respondent was revoked on 7<sup>th</sup> February 1996 and having found that the respondent contravened the provisions of the Act by dealing with the property of the deceased contrary to the Act, I find that the instant application is merited and I allow it in the following terms.

**a) That Benard Magara Maroko is hereby substituted at the objector in place of Monica Nyaboke Maroko- deceased.**

**b) That titles to LR NOS. WEST MUGRANGO/BOSAMARO WEST/1801, 1802 and 1803 are hereby cancelled and ownership of the suit land shall revert to the names of the deceased in the original title being to LR NO. WEST MUGIRANGO/BASAMARO WEST/896.**

**c) That an order for inhibition do issue to inhibit any dealings on the suit land pending the issuance and confirmation of the grant.**

**d) Each party shall bear his own costs of the application considering that the disputing parties are a father and his son.**

41. As a rider to order in (d) herein above, this court notes that since this case involves a dispute between a father (petitioner) and his own son (applicant), it would be desirable and indeed advisable for the parties to pursue Alternative Dispute Resolution (ADR) mechanism in this matter in order to reach an amicable settlement in line with Article 159 of the Constitution. The court is however not suggesting that the parties are barred from approaching it for a determination should the ADR fail to materialize.

**Dated, signed and delivered in open court this 13 day of December, 2016**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Abisai for Petitioner
- N/A Masese for the Respondent
- Omwoyo: court clerk