



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. 256 OF 2007**

**IN THE MATTER OF THE ESTATE OF JOHN GAKUNGA NJOROGE (DECEASED)**

**RULING**

**INTRODUCTION**

1. This is a ruling on two consolidated applications for Revocation of Grant filed by two sets of interested parties who claim to have bought portions of land on the estate property from the deceased and some of his beneficiaries after his death, and who have taken possession of such land and constructed thereon permanent structures. The specific prayers of the two applications are set out below:

**“CHAMBERS SUMMONS DATED 30<sup>TH</sup> NOVEMBER, 2004**

**ORDERS**

1. *That the grant of letters of Administration issued to the petitioners herein by this Honorable court on 25<sup>th</sup> May, 2004 be revoked and or annulled forthwith.*
2. *That the costs of this application be provided for.*

**Grounds**

1. *That the interested parties purchased their respective portions of land in land parcel number 27 Kitanga Settlement Scheme belonging to the estate of the deceased from the deceased and other beneficiaries of the estate.*
2. *That the said purchasers constituted liabilities to the estate of the deceased.*
3. *That the grant was obtained fraudulently as the petitioners and/or other beneficiaries did not disclose to court that the interested parties were creditors to the estate of the deceased.*
4. *That the petitioners did not include the names of the interested parties in the petition for grant of letters of administration as creditors to the estate of the deceased.*
5. *That the interested parties have been living on their respective portions they purchased for more than 10 years even at the time the petition was lodged in this Honourable court.*
6. *That the petitioners are now purporting to resale the land to the interested parties at the current market value and this is unfair and unconscionable.*
7. *That it will be in the interests of Justice that the orders sought herein be granted.*

**CHAMBER SUMMONS DATED 31<sup>ST</sup> DECEMBER, 2004**

**ORDERS**

1. *That the Grant of Letters of Administration issued to the Petitioners/Administrators herein on*

- 26<sup>th</sup> September, 2003 confirmed on 25<sup>th</sup> May, 2004 be revoked or annulled.*
2. *That the Interested Parties be joined as parties to this Succession Cause in their capacity as Purchaser/Creditors of the Estate of the deceased and the Petitioners ordered to recognize and take into account the rights of the said interested Parties during the distribution of the deceased Estate.*
  3. *That the costs of this Application be provided for.*

## **Grounds**

1. *The Interested Party purchased a total of 20 acres comprised in Land Parcel No. 27 Kitanga Settlement Scheme which parcel of land form part of the Estate of the deceased from the deceased and other beneficiaries of the Estate.*
2. *The aforesated Interested party were therefore Creditors/Liabilities of the estate.*
3. *The Petitioners herein applied for the cancellation of the Grant issued to the Public Trustee on 6<sup>th</sup> June, 1996 and confirmed on 18<sup>th</sup> July, 1996 and for the same to be issued in their names.*
4. *When applying for the said cancellation the Petitioners fraudulently did not disclose to this Honourable Court the interests of the Interested Parties herein as the Creditors to the Estate of the deceased and as a result the Grant herein was obtained fraudulently.*
5. *The Petitioners/Administrators herein fraudulently omitted to include the names of the Interested Parties herein in the petition for Grant of Letters of Administration as Creditors to the Estate of the deceased in their capacity as Purchaser of a portion of Land parcel NO. 27 Kitanga Settlement Scheme.*
6. *That the Interested Parties have been in physical possession of the aforesated portion of 20 acres for more than 10 years and their workers have been on the farm since then.*
7. *In February, 2004 one Muinde Gakunga who is the 2<sup>nd</sup> Petitioner herein started interfering with the Interested Parties portion of Land by cultivating on it.*
8. *The Petitioners have through their Advocate purported to resell the portion of land to the Interested Parties at the current market value which is not only unfair but unlawful and an act calculated to unjust fully enrich themselves.”*

2. The administrators opposed the applications by filing respectively replying affidavit by John Kinyanjui Njuguna sworn on 24<sup>th</sup> January 2005 and replying affidavit of John Muinde Kakunga sworn on 17<sup>th</sup> February 2005 raising, principally, issues of invalidity of sale transaction entered by the deceased while a caveat forbidding any such dealings was lodged against the title, lack of consent of the Land Control Board and want of authority to deal with the estate of a deceased person under the Law of Succession Act.

## **SUBMISSIONS**

3. Counsel for the parties – M/S. Sila & Co. Advocates for the interested parties/applicants in the Summons dated 30<sup>th</sup> November 2004; M/S. M. Masika & Co. Advocates for the interested Parties/applicants in Summons dated 31<sup>st</sup> December 2004; and M/S. Kitheka & Co. Advocates for the Administrators - filed respective submissions and when the matter came up for hearing on 5<sup>th</sup> October 2015 ruling was reserved for 12<sup>th</sup> November 2015.

4. For the applicants in the Summons dated 30<sup>th</sup> November 2004, Counsel submitted that –

*“The gist of the application is that the interested parties purchased various portions of land comprised in Land Parcel Number 27 KITANGA SETTLEMENT SCHEME from the deceased and beneficiaries of the estate of the deceased. Even as at the time the petitioners petitioned for Letters of Administration in 1995, the petitioners were well aware of the said purchases which constituted liabilities to the estate but failed to include the interested parties as creditors to the estate.*

*The purchases by the interested parties are well documented vide various sale agreements annexed*

to the supporting affidavits. Curiously the 2<sup>nd</sup> petitioner was a witness to the sale agreements when his mother and brothers sold their beneficial portions of land to the interested parties. After selling their beneficial portion of land, the 2<sup>nd</sup> petitioner's mother and brothers vacated from the land and relocated and as at now, only the 2<sup>nd</sup> petitioner resides on his beneficial portion of land.

It is important to note that the 2<sup>nd</sup> petitioner's mother and brothers have not sworn any affidavit denying that they never sold the land to the interested parties who have constructed permanent houses on the said land. From several letters dated 9<sup>th</sup> June, 2004 written by the petitioners advocate M/S KITHEKA & COMPANY ADVOCATES to the interested parties; the aim of the petitioners is laying claim to the land was to resell it to the Interested parties at the current market value and this is unfair as they cannot benefit twice from the portion sold by their deceased, mother and brothers when the real beneficiaries relinquished their interests to the said lands and are not claiming them either.

Further the issue of obtaining consent from the Land Control Board does not arise because at the time the beneficiaries sold the land to the interested parties, the same was registered in the name of the deceased and so no consent to transfer could legally be obtained by the interested parties.

The purchase of the land by the interested parties not having been denied by the 2<sup>nd</sup> petitioner and the beneficiaries, then the petitioners should be ordered to excise and transfer to the interested parties the respective portions of land sold to them by the deceased and the beneficiaries to the estate.”

5. Counsel for the applicants in Summons dated 31<sup>st</sup> December 2004 submitted as follows:

“The applicants bought 5 acres on 20<sup>th</sup> June, 1987 from the Deceased himself and his wife at a purchase price of Kshs. 85,000 and this paid in full and there is an agreement to that effect. The applicant on 30<sup>th</sup> September, 1990 bought 2 acres at a purchase price of Kshs. 50,000/= from Nyambura Gakunga wife of the deceased one of the beneficiaries of the state of the deceased and the purchase price was fully paid. Again on 29<sup>th</sup> July, 1994 the applicant bought a portion of 81/2 acres from the said plot No. 27 and there is a Sale Agreement attached. The said Nyambura Gakunga and Njoroge Gakunga John have done statements surrendering the portions of 5 acres each respectively making a total of 10 acres which we attach to these proceedings the copies of their letter of surrender.

The beneficiary called John Muinde Kakunga sold his 2 1/2 acres to the Applicants and there is a Sale Agreement attached to our Application.

Finally the Applicants were sold two (2) acres on 23<sup>rd</sup> December, 1995 at a purchase price of Kshs. 230,000/= and this was from Tilas Mutua who was a beneficiary of the Estate of the deceased by virtue of having bought the 2 acres from other beneficiaries of the deceased. The interested Party bought from the deceased and his members of his family a total of 20 acres, which should be extracted from the beneficiaries shares who sold their land to the Applicants.

The Petitioners failed to disclose these facts as regards the liability of the Estate and this amounts to unfair enrichment. The Petitioners have decided to deprive the interested Parties what justly belongs to them and therefore the Grant should be revoked on these grounds.

It is therefore the Applicants position that the Grant of Letters of Administration that was granted and confirmed should be revoked. The letters did not disclose the Liability of the Estate and was therefore obtained fraudulently and should be annulled and the interested parties be made the Creditors of the Estate of the deceased and the Petitioners be ordered to take into account the Liability of the Interested parties.”

6. Counsel for the Respondent Administrators responded that -

*“The Interested Parties have applied for the revocation of the grant of letters of administration and subsequent confirmed grant vide their applications dated 30<sup>th</sup> November, 2004 and 31<sup>st</sup> December, 2004. The Administrators have opposed the purported claim by the Interested Parties, represented by both Sila & Company and Manthi Masika Advocates on the grounds that there are no valid agreements of sale either between the deceased and/or between the beneficiaries of the estate and the alleged Interested Parties (buyers).*

*In response, both Administrators have filed Replying Affidavits to both applications dated 24<sup>th</sup> January, 2005 and 30<sup>th</sup> December, 2005 respectively. The said affidavits have not been responded to or the averments thereto been denied by the third parties. The reasons for the opposition are two-prolonged; there were no consents by the Land Control Board for each of the alleged sales; and secondly the alleged agreements for sale offended the Succession Act, Cap 150, Laws of Kenya as the purported sellers, beneficiaries had no capacity to transact about or concerning the estate of the deceased person without obtaining letters of administration”*

### **ISSUES FOR DETERMINATION**

7. The following issues arise for determination in the Summonses before the Court:

- a. Whether an agreement for sale of agricultural property from the deceased during his life without the consent of Land Control Board can support a claim for an interest in the estate property upon his death.
- b. Whether sale of estate property by beneficiaries without a Grant under the Law of Succession Act passes an interest capable of protection under the law of succession as creditors of the estate or they are mere intermeddlers in the deceased’s estate.
- c. What orders may be made in the circumstances of this case where the applicants have taken possession of the suit property and constructed permanent housing thereon in the event that their claim to the said property is unsuccessful.

### **PRINCIPLES OF LAW APPLICABLE**

8. The dispute before the court in this case is governed by well known provisions of law as to validity of transactions relating to agricultural land, the authority of persons dealing with the estate of a deceased person and provision for a person interested to seek revocation of a Grant whether or not the same has been confirmed, as the case here.

9. The Court has power to revoke a grant in the circumstances set out in section 76 of the Law of Succession Act, as follows:

#### ***“76. Revocation or annulment of grant***

*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;*

*(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

10. A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the Court to protect the estate of a deceased person is set out in section 45 of the Law of Succession Act as follows:-

**“45. No intermeddling with property of deceased person**

**(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.**

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

11. The validity of transactions relating to agricultural land is to be determined in accordance with the provisions of the Land Control Act cap. 302 which requires the consent of the Land Control Board of the particular area to validate the transaction. Section 6 of the Land Control Act provides for the consent of the Land Control Board for dealings in agricultural land, declaring as null and void for all purposes transactions which do not have the consent of the Land Control Board:

**“6. Transactions affecting agricultural land**

(1) Each of the following transactions that is to say—

**(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply; (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, **is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**”

12. Under section 7 of the Act, an aggrieved party may recover the money paid under the illegal contract only but the contract is otherwise void for all purposes in terms of the section 6 (1) of the Act, aforesaid:

**“7. Recovery of consideration**

*If any money or other valuable consideration has been paid in the course of a controlled*

*transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”*

## **DETERMINATION**

13. There was no dispute that the land the subject of these proceedings was agricultural land. For all the transactions for the sale of land between the applicants and the deceased, his widow and other beneficiaries, the sale was vitiated by the lack of consent of the Land Control Board by virtue of section 6 (1) of the Land Control Act. (see HCCC No. 2137 of 1999 Nairobi, ***Pius Mutinda Kithome v. Onesmus Musyoka Mbali***, per Githinji, J as he then was) As submitted by the counsel for the administrators, the provision for the consent of the land board does not make any exceptions with regard to the registered proprietor. The exception only relates to transmission of land without subdivision thereof and to Government land under section 6 (3) which provides as that-

*“(3) This section **does not apply to—***

*(a) the **transmission of land by virtue of the will or intestacy of a deceased person**, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or*

*(b) a **transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.**”*

14. Although there was correspondence dated 2<sup>nd</sup> December 1986 by the District Land Adjudication Officer warning the deceased not to sell the suit property, no formal caveat was produced as having been registered against the title, and I do not find that any sale offended a caveat on the title.

15. For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the Estate is restricted by the provisions on the powers duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:

***“(ii) no immovable property shall be sold before confirmation of the grant”***

The persuasive authority of Wakiaga J. in ***Stephen Waweru Ng’ang’a v. Kimani Ng’ang’a***, Nyeri HC P&A No. 1 of 2011 would be relevant in a claim against the beneficiaries who sold their interest so that they should not defraud the innocent purchasers of their money. The transactions would also be subject to section 7 of the Land Control Act for the refund of the purchasers of the purchase price under the void contracts of sale.

16. Although the term interested party under section 76 of the Law of Succession Act is to be given a wide interpretation, (see the Court of Appeal decision in ***Musa Nyaribari Gekone and 2 Ors., v. Peter Miyienda and Anor.*** (2015) eKLR ), as the applicants do not have valid contracts to support their beneficial claim to the estate of the deceased, they can only be creditors, not of the estate but, of the respective beneficiaries who may only be taken to have sold their respective shares to them. Having no interest in the estate of the deceased properly so called, the applicants cannot maintain an application under section 76 of the Law of Succession Act.

## **ORDERS**

17. Accordingly, for the reasons set out above, the two applications, respectively dated the 30<sup>th</sup> November and 31<sup>st</sup> December 2004, for revocation of the Grant confirmed on 25<sup>th</sup> May 2004 must be dismissed. Costs in the Cause.

## **WAY FORWARD.**

18. As a problem-solving court, the court must, in accordance with its duty to promote alternative dispute resolution under Article 159 of the Constitution, provide opportunity for the parties to negotiate a possible amicable settlement of the matter. In this regard, the beneficiaries of the estate who have sold their inheritance to the interested parties may, upon distribution to them of their respective shares of the estate property, transfer their interest to the interested parties to whom they sold their shares. For the interested parties who purchased land from the deceased without obtaining a consent for the transaction from the Land Control Board, their remedy lies in recovery of the purchase money, in accordance with section 7 of the Land Control Act unless they enter into a fresh valid contract with the administrators of the Estate. This Court considers that staying the implementation of the court's decision for a period of six (6) months will afford the parties ample opportunity to negotiate settlement of the dispute if so desired. In default, the administrators will be at liberty to proceed with the distribution of the Estate in accordance with the confirmed Grant.

19. For avoidance of doubt, this ruling does not authorize the forcible eviction of the interested parties from the lands which they occupy on the deceased's estate. The interested parties shall have six (6) months to negotiate a settlement with the administrators and the beneficiaries from whom they purchased the lands for agreements that may allow them to keep the portions of the Estate which they occupy and, failing such agreement, shall be required to vacate the estate property on expiry of said period of six (6) months from the date of this ruling.

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF NOVEMBER 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Ms Thiongo for Mr. Kitheka for Administrators

Ms. Mutuku for Interested Parties

Mr. Kimeu for Mr. Sila for Interested Parties

Ms. Doreen- Court Assistant.