



NO.767

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE NO.142 OF 2012**

**IN THE MATTER OF THE ESTATE OF:**

**LATE JAMES AKUMU NYAMONDO ..... DECEASED**

**AND**

**IN THE MATTER OF PETITION FOR GRANT OF LETTERS OF  
ADMINISTRATION INTESTATE**

**BETWEEN**

**MONICA ACHIENG AKUMU ..... 1<sup>ST</sup> OBJECTOR/1<sup>ST</sup> APPLICANT**

**JOSEPHINE ADHIAMBO AKUMU ..... 2<sup>ND</sup> OBJECTOR/2<sup>ND</sup> APPLICANT**

**ELIZABETH ATIENO AKUMU ..... 3<sup>RD</sup> OBJECTOR/3<sup>RD</sup> APPLICANT**

**ROSE PAMELA AWUOR ..... 4<sup>TH</sup> OBJECTOR/4<sup>TH</sup> APPLICANT**

**AND**

**DISHON OMINDI NYAMONDO ..... PETITIONER/RESPONDENT**

**AND**

**JOHNSON OGOI WERE ..... 1<sup>ST</sup> INTERESTED PARTY**

**JANET AKINYI OTIENO ..... 2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The deceased herein, James Akumu Nyamondo died on 7<sup>th</sup> July 2007, domiciled at Kamuma sub location. Before his death, the deceased was the registered owner of land parcel number Central Kasipul/

Kamuma/4796 for which he was registered on 15<sup>th</sup> September 2006.

2. On 13<sup>th</sup> July 2010, the Petitioner/Respondent herein petitioned the Principal Magistrate's court at Oyugis for Grant of Letters of Administration Intestate. The Respondent, Dishon Omindi Nyamondo described himself in Form P&A 5 as son of the deceased. He made the application jointly with one Janet Akinyi Otieno whose relationship in Form P&A 5 was not given. Janet Akinyi Otieno is the 2<sup>nd</sup> Interest Party in this application.
3. The petition for Grant of Letters of Administration being cause No.103 of 2010 was published in the Kenya Gazette vide Gazette Notice No.9014 of 30<sup>th</sup> July 2010. The Grant was issued on 24<sup>th</sup> February 2011. It is not clear whether the date "**24<sup>th</sup> February 2011**" was typed or handwritten because there are two copies of the same document showing one to be typed and the other to be handwritten. On the 8<sup>th</sup> February 2012, the Grant was confirmed and the deceased's estate shared out as follows:-
  - *Dishon Omindi Nyamondo – C/Kasipul/Kamuma/4796 – 0.81 hectares*
  - *Johnson Ogoi Were – C/Kasipul/Kamuma/4796 – 0.04 hectares*
  - *Janet Akinyi Otieno – C/Kasipul/Kamuma/4796 – 0.03 hectares*
4. By a transfer dated 9<sup>th</sup> February 2012 and registered on 13<sup>th</sup> February 2012, the whole of the deceased's estate was transferred to Dishon Omindi Nyamondo, Johnson Ogoi Were and Janet Akinyi Otieno, all of Kamuma sub location. The application for registration of transfer was however made on 24<sup>th</sup> February 2011 by Dishon Omindi Nyamondo.

#### The application

5. By summons filed before this court on 27<sup>th</sup> April 2012, the objectors/

applicants herein Monica Achieng Akumu, Josephine Adhiambo Akumu, Elizabeth Atieno Akumu and Rose Pamela Awuor moved the court under **sections 47 and 76** of the **Law of Succession Act, Cap 160** of the **Laws of Kenya** (the Act) and **Rules 73, 44 and 59** of the **Probate and Administration Rules (the Rules)** for revocation or annulment of the Grant of Letters of Administration Intestate issued to Dishon Omindi Nyamondo herein on 24<sup>th</sup> February 2011 and confirmed on 9<sup>th</sup> February 2012 vide Oyugis PMC Succession Cause No.103 of 2010. The applicants also seek annulment and cancellation of the registration and/or transfer of LR Central Kasipul/Kamuma/4796 into the names of Dishon Omindi Nyamondo, Johnson Ogoi Were and Janet Akinyi Otieno. The applicants also want an order directing the Land Registrar Rachuonyo District to rectify the land register by deleting the names of the petitioner and the 2 Interested Parties therefrom and reverting the said title to the name of the deceased, James Akumu Nyamondo, so that a fresh grant is issued in the names of the objectors/applicants who are daughters of the deceased.

6. The application is supported by the grounds appearing on the face thereof. It is averred in the said grounds that the Grant herein was obtained fraudulently by the making of a false statement and/or by concealment from the court of material facts, and in particular by concealing the facts that the deceased was survived by four children, namely the objectors/applicants herein. In addition, the application is supported by an affidavit sworn by Josephine Adhiambo Akumu the 1<sup>st</sup> objector/applicant. She swore the affidavit on her own behalf and on behalf of her co-objectors/applicants. She states in the said affidavit that when the deceased died on 7<sup>th</sup> July 2007, he left behind herself and her three sisters, Monica Achieng Akumu, Rose Pamela Awuor and Elizabeth Atieno Akumu, surviving him; that the petitioner/Respondent is the deceased's brother and not son as indicated in Form P&A 5 and that when the petitioner petitioned for Grant of Letters of Administration Intestate to deceased's estate, he did so secretly and without either the objector's/applicants' consent or knowledge. The deponent avers that the law allows her and her

sisters to inherit their father's estate even as women and whether they are married or not. She further depones that because of the concealment of important material from the court regarding the real beneficiaries of the deceased's estate, the petitioner/respondent was issued with the grant and subsequent thereto proceeded to have the same confirmed on 8<sup>th</sup> February 2012, distributing the deceased's estate to himself and the 2 interested parties. She prays that the grant be revoked to enable her and her co-objectors obtain their rightful shares of the estate of the deceased and says that unless the order of revocation/cancellation is done expeditiously, the petitioner in cahoots with the interested parties is bent on obtaining the Land Control Board consent with a view to obtaining three separate title deeds in respect of the deceased's only asset.

7. In her Supplementary Supporting affidavit, Josephine Adhiambo Akumu exhibited a copy of a plaint filed in Oyugis PMCC by the 1<sup>st</sup> Interested Party against Monicah Achieng Akumu and the District Land Registrar. In that suit being Oyugis PMCC No.62 of 2012, the plaintiff seeks to have the caution placed on land parcel LR NO. Central Kasipul/Kamuma/4796 removed. She also exhibited to the court as annexure **JAA 2** a copy of the agreement dated 28<sup>th</sup> July 2010 between the petitioner/respondent and the 1<sup>st</sup> Interested Party herein for the sale of part of the deceased's estate measuring 25ft by 100ft. A copy of the caution placed on the suit land is also exhibited as annexure **JAA4**.

#### Response to the Application

8. The 1<sup>st</sup> Interested Party, Johnson Ogoi Were swore a replying affidavit dated 15<sup>th</sup> October 2012 in opposition to the summons for revocation.

His case is that he is a purchaser for value without notice following grant of letters of administration intestate and upon an application for confirmation thereof vide Oyugis SPM's Succession Cause No.103 of 2010. He depones that the applicants are being mischievous by first placing a caution on the deceased's suit property and secondly by bringing this application for revocation. He asks the court to dismiss the summons on the basis of **sections 92 and 93** of the **Law of Succession Act**.

9. The Petitioner/Respondent and the 2<sup>nd</sup> Interested Party did not file any replying papers.

#### Parties' submissions

10. The objectors/applicants and the 1<sup>st</sup> Interested Party filed their respective written submissions. Unfortunately the submissions by the objectors/applicants are not signed by their advocates though they were filed on 29<sup>th</sup> October 2012.
11. The 1<sup>st</sup> Interested Party, through M/s Bana & Company Advocates contends that by virtue of **section 93 (1)** of **Cap 160** of the **Laws of Kenya**, the transfer made to him by the petitioner/respondent in this case is valid and no subsequent revocation of the grant would affect the same. **Section 93** of the **Law of Succession Act** provides that:-

**“93 (1) A transfer of any interest in immovable or moveable 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. [Emphasis is mine]**

**(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.”**

12. It is thus the Interested Parties' case that the applicants have not adduced any evidence showing that the 1<sup>st</sup> Interested Party had notice of any irregularities on the part of the petitioner or that the said 1<sup>st</sup> Interested Party acted fraudulently or with impropriety in concert with the petitioner. That in any event the provisions of **section 93** of the **Act**, which is couched in mandatory terms protects him as an innocent purchaser for value, more so since the transfer was made to him after confirmation of the grant.
13. The 1<sup>st</sup> Interested Party also contends that without taking viva voce evidence from parties, it would be difficult for the court to determine whether or not the 1<sup>st</sup> Interested Party's conduct was irregular and/or fraudulent. He prays that the application be dismissed as it relates to the Interested Party so that the applicants can seek redress against the petitioner directly.
14. In their reply to the Interested Party's submissions, the applicants, through the firm of O.M. Otieno & Company Advocates contend that though all the transactions touching on the subject property were carried out in the year 2010, it was not until 9<sup>th</sup> February 2012 that the petitioner/1<sup>st</sup> respondent obtained the Grant of Letters of Administration Intestate. This, according to the applicants the transactions were carried out some 2 years before representation had been granted to the petitioner. The applicants argue that the fact of dealing with the deceased's estate by the petitioner before representation was granted to him coupled with the fact that the petitioner concealed certain material facts from the court at the time of petitioning for the grant is sufficient ground to warrant the revocation of the grant herein.
15. Counsel for the applicants cites **section 82 (b) (ii)** of the **Act** which provides that no immovable property of a deceased person shall be sold before confirmation of the grant. He submits that the petitioner herein has fallen foul of these provisions. It is further contended that in the circumstances of this case, this court should find that the respondents were fraudulent in their dealings with the deceased's estate and as such they should not be allowed to reap from their illegal acts.

#### Findings and conclusions

16. I have considered the law and the submissions. The issue that arises for determination is whether the 1<sup>st</sup> interested Party has brought the transactions between himself and the petitioner within the purview of **section 93** of the **Act**.
17. First, it is clear that **section 82 (b) (ii)** of the **Act** forbids the transfer of any immovable property of a deceased person before grant is confirmed. On the other hand **section 93** provides that where a transfer of any interest in immovable property is made to a purchaser by a person to whom representation has been made, then such a transfer shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.
18. The issue that now arises is whether it is true as alleged by the 1<sup>st</sup> Interested Party that the transfer to him of a part of the deceased's estate was made to him by a person to whom a representation had been granted.

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19. From the record, the following facts emerge. The petition for grant was filed on 13<sup>th</sup> July 2010. The grant was then issued on 24<sup>th</sup> February 2011. The agreement for sale between the petitioner and the respondent was made on 28<sup>th</sup> July 2010, long before the petitioner was issued with the grant. It is therefore clear that as at the time of the said sale, the petitioner had no good title which

- he could lawfully pass on to the 1<sup>st</sup> Interested Party. The petitioner had no power under **section 82** of the **Act** to sell or otherwise deal with the deceased's estate. A mere application for a grant by the petitioner did not mean he had been issued with the grant and in the circumstances, **section 82 (b) (i)** is applicable. That sale is voidable as all that the petitioner was doing then was intermeddling with the deceased's estate contrary to **section 45 (1)** of the **Act**.
20. In **Gitau & 2 others –vs- Wandai & 5 others [1989] KLR 231**, Tanui J held, and I entirely agree with him, that **“any act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate.”** It was also held in **The matter of Wilson Nzuki Ayolo (deceased) Machakos High Court Probate and Administration Cause No.152 of 2000** by Mwera J (as he then was) that **“only a person who has a grant or other legal authorization may handle the property of a deceased person.”** The petitioner/Respondent in the instant case had neither the grant issued to him nor any other legal authorization to handle the deceased's estate.
21. In my view therefore, the purported transfer of 1<sup>st</sup> February 2012 had nothing to stand on, premised as it was on a criminal act by the petitioner. It simply has neither legs nor a body on which something else can stand. In this regard, I agree with the decision of Hon. H.I. Ongudi in the case of **Alice Wanjiru Thika & Others –vs- Joseph Gichono Mwangi & others – Embu HC Misc. Application NO.84 of 2007**.
22. That brings me to the next question: whether the grant issued to the petitioner vide Oyugis PMCC Succession Cause No.103 should be revoked. The answer is yes, first because the petitioner made two fundamental mistakes. In the first place, the petitioner presented himself as a son to the deceased when he was infact a brother to the deceased. Secondly, he failed to disclose to the court that the deceased was survived by the 4 applicants herein, and the reason why he did so was to disinherit the applicants who were all daughters of the deceased. The petitioner has been shy to respond to the applicants' application. The only logical inference the court can make is that he has no answer to the applicants' case.

#### Orders and Directions

23. Accordingly and for the reasons above given, the summons dated 27<sup>th</sup> April 2012 be and is hereby allowed in its entirety. In keeping with prayer (6) of the said summons, the Oyugis PM's Court is directed to issue fresh grant of Letters of Administration Intestate in the names of the objectors/applicants.
24. Costs of the application shall be borne by the petitioner.
25. It is so ordered.

**Dated and delivered at Kisii this 11<sup>th</sup> day of July, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

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**In the presence of:**

Mr. Owade for O.M. Otieno (present) for Objectors/Applicants

N/A for Petitioner/Respondent

M/s Bana & Co. (absent) for Interested Parties

Mr. Bibu - Court Clerk

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