



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.387 OF 2010**

**IN THE MATTER OF THE ESTATE OF MIRIAM GATHONI MWATHI**  
**(DECEASED)**

**PHILLIP WAMBAA KARANJA.....1<sup>ST</sup> OBJECTOR**  
**PRISCILLA NJERI KARANJA.....2<sup>ND</sup> OBJECTOR**  
**CLEMENT MWAURA GACHUNGA.....3<sup>RD</sup> OBJECTOR**  
**LOISE NJERI KAMAU.....4<sup>TH</sup> OBJECTOR**

**VERSUS**

**JOSEPHINE**

**MUTHONI.....ADMINISTRATOR/RESPONDENT**

**AND**

**GEORGE NG'ANGA'A MBUGUA.....INTERESTED PARTY**

**RULING**

1. The application dated 11<sup>th</sup> August 2010, is premised on the Provisions of Rule 49 of the Probate and Administration Rules and the Applicant/Interest party seeks the following orders

***“1. That the Objector’s application and claim against the interest party and the property Title Number DAGORETTI/THOGOTO/1287 be struck out in limine.***

***2. That the property Title Number DAGORETTI/THOGOTO/1287 be removed and expunged from the present proceedings.***

***3. That the costs of this application be provided.”***

2. From the grounds in support and from the Affidavit in support sworn on 5<sup>th</sup> July 2010 and 3<sup>rd</sup> August 2010 the following facts are alleged;

(i) That the interested party is the registered proprietor of land parcel number DAGORETTI/THOGOTO/1287.

- (ii) That the property is therefore not part of the deceased's estate and is unavailable for distribution.
- (iii) That there is no basis for the land parcel to be included in the proceedings for revocation of Grant which are the subject of the matter before this court.
3. I see no Affidavit in reply but the Objectors/Respondents filed the following grounds of objection.

1. ***The application is defective and bad in Law.***
2. ***The Objectors Application under Section 76 and rule 44(1) of the Succession Act is properly before the Court.***
3. ***The subject property DAGORETTI/THOGOTO/1287 was originally estate property and the interested party's remedy is to seek indemnity from the Administrator.***
4. ***The search reveals the property was subjected to a restriction by the Land Registrar which under Section 136(1) of the Registered Lands Act Cap 300 is for prevention of fraud or improper dealing which is alluded to in the proceedings.***
5. ***The interested party as a neighbor relative and Advocate had notice of the irregular transfer or had opportunity to exercise due diligence to a question the inavailability of the original title.***
6. ***The interested party sought to be enjoined in the proceedings, and cannot now seek to be excluded.***
7. ***The application is brought blatantly and after undue delay as several directions have already been given and numerous pleadings exchanged.***
8. ***In the interest of justice."***

4. I also note that no submissions were tendered by the Objectors/Respondents and on 24<sup>th</sup> May 2011, I directed that the matter be determined on the basis of Affidavits on record.

5. I should also note that in the Summons for Revocation of grant dated 3<sup>rd</sup> March 2010, the Objectors/Applicants clearly indicated that Land Parcel number DAGORETI/THOGOTO/1287 was at the time of filing the Summons registered in the names of George Ng'ang'a Mbugua, the Applicant. What is the law on the subject since the fact set above is uncontested? Section 3 of the Law of Succession Act, Cap.160 of the Laws of Kenya provides as follows;

***"'estate' means the free property of a deceased person"***

***'free property' in relation a deceased person means the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death'***

6. I understand the above provision to mean that the property capable of being transmitted and is therefore free property is that in which the deceased's interest had not been extinguished at the time of her death.

7. In the present case, the deceased died on 2<sup>nd</sup> November 1996 (death certificate is dated 29<sup>th</sup> November 1996). The transfer to the Applicant was made on 18<sup>th</sup> November 2009 and according to the Search Certificate dated 19<sup>th</sup> January 2009, a restriction was placed on the condition that the *"old title deed to be surrendered"*.

8. The question that confronts me is how did the Applicant acquire title and from whom? It cannot be

that he did so from the deceased because she was long dead. If it is true that Josephine Muthoni, Administrator/Respondent transferred the land to the Applicant upon registration as Administration, then the proceedings to revoke the grant are directed at her and it is argued that she obtained the certificate of title fraudulently and if that be so, that the title held by the Applicant may also be affected. I say this without pre-empting the revocation proceedings which are yet to be finalized.

9. Having said so, I am alive to the provisions of Section 93 of the Law of Succession Act which provides as follows;

**“(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 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.”**

10. The provision to the above Section seems to cover the Applicant in that he purchased the land from Josephine Muthoni who had the land registered in her name pursuant to a grant of representation issued in Kiambu CM’s Court Succession Cause No.137 of 2008. That grant is being challenged and it seems from a plain reading of Section 93 aforesaid that even if the grant were to be revoked, the transfer to the applicant shall remain valid. Unfair as that conclusion may be to a successful Applicant, the remedy open to him would be either a claim for the purchase price from the Administration/holder of the grant of representation or damages for any loss occasioned.

11. I have read the judgment of Kamau J. in HC Succession Cause No.935 of 2003 – Estate of Mwaura Mutingi in which the learned Judge found that the rights of a bona fide purchaser for value are protected by Section 93 aforesaid, even in proceedings for revocation of grant. I find that argument quite persuasive and I adopt it.

12. The other question that I must address is whether the Applicant is a bona fide purchaser for value. The issue is moot because the Applicant produced a transfer of land instrument signed by Josephine Muthoni and himself showing that the land was purchased at Ksh.600,000/- and thereafter title was issued to him. These facts have not been contested and seem to be admitted, on the contrary.

13. I should only state in conclusion that the objectors adopted a very casual attitude towards the application before me and have raised by way of an objection to it and elsewhere above I have said why.

14. In the event, I will accede to the Application dated 11<sup>th</sup> August 2010, and will order as follows;

**1. That the Objector’s application and claim against the interest party and the property Title Number DAGORETTI/THOGOTO/1287 be struck out in limine.**

**2. That the property Title Number DAGORETTI/THOGOTO/1287 be removed and expunged from the present proceedings..**

15. I will further order that each party bears its own costs.

16. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER,2011.**

**I. LENAOLA**

**JUDGE**