



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU Succession Cause 72 of 1997**

**IN THE MATTER OF THE ESTATE OF M'MURAA MANGUA (DECEASED)**

**M'ANANUA M'ITERE.....APPLICANT**

**VERSUS**

**SILVANA KARIMI CHABARI.....1<sup>ST</sup> INTERESTED PARTY**

**DOMINICA MUTHONI M'IBARI.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**FABIAN KITHINJI .....APPLICANT**

**JUDGMENT**

When M'Ananua M'Itere (M'Ananua) petitioned for grant of letters of administration intestate for this estate, he described himself as the son of the deceased. Although I could not find the actual grant that was issued in the court file, I was able to see that on 22<sup>nd</sup> July 1997 the Deputy Registrar of this court ordered that a grant be issued to M'Ananua. Again, the Deputy Registrar on 23<sup>rd</sup> February 2000 ordered that the grant be confirmed. It ought to be noted that the Deputy Registrar had no jurisdiction to entertain M'Ananua in respect of his petition on a High Court file. That as it may be on the grant being confirmed, parcel number *Nkuene/Ngonyi/672* was awarded to Peter Gichobi Gachagua (Gichobi). An application dated 11<sup>th</sup> October 2006 was filed by Silvana Kirimi Chabari and Dominica Muthoni M'Ibari (interested parties). That application is the subject of this judgment. The application was brought under Section 76 of the Law of Succession Act (the Act). The interested parties seek the revocation or annulment of the grant

of letters of administration issued to M'Ananua. On 30<sup>th</sup> October 2009, the court directed that the application for revocation be heard by way of *viva voce* evidence. The issue to be determined was identified by the court as whether the grant should be revoked and to whom the deceased property should be distributed to. By the time the matter came up for hearing, M'Ananua had died. He had been substituted through an order of the court by his son Fabian Kithinji (Fabian). Fabian did not give evidence nor did he call witnesses to support his case. On the day the matter was fixed for hearing that is, on 10<sup>th</sup> March 2010, the interested parties and their witnesses adduced oral evidence. The matter was adjourned part heard for lunch but Fabian and his advocate failed to return to court for the hearing of this matter in the afternoon of that day. With that in mind, and in view of the directions given by the court, that the matter do proceed by way of *viva voce* evidence, the affidavit evidence of Fabian and his witnesses cannot have the same weight as the oral evidence adduced by the interested parties and their witnesses. The evidence of the interested parties and their witnesses was subjected to cross examination and will therefore be accorded more weight than Fabian's affidavit evidence. The first interested party, Silvana, stated that the deceased was her father. She said that M'Ananua wrongly described himself as the son of the deceased. She also stated that he failed to tell her and her sisters that he had petitioned for grant. She further said that M'Ananua proceeded to wrongly sell her deceased father's property to Gichobi. She was categorical that she was not related to M'Ananua. She further stated that her mother died when she was young and her father who is the deceased herein married his brother's wife M'Mwari. The said M'Mwari who was her aunt lived with them and brought them up. She denied that there was a relationship between M'Ananua, Fabian, her and her siblings. She said that M'Ananua had his own land which is 8 ½ acres which is presently occupied by Fabian. On cross examination, she stated that when her mother passed away, her father used to visit the mother of M'Ananua. The mother of M'Ananua also used to visit her father. She however denied that the two bore a son between them. She said they were by then both too old to bear children. She further stated that the deceased owned parcel number *Nkuene/Ngonyi/400* which M'Ananua transferred to his name. PW2 was the 2<sup>nd</sup> interested party, Dominica. She stated that her mother was called M'Mwari. She, like PW1 said that when her father died her mother moved in with the deceased herein. They lived together in that home and she was brought up by the deceased as a daughter. She even got married whilst she was still in his home. When cross

examined, she stated that her deceased father was a brother to the deceased herein. When her father died, her mother moved into the home of the deceased. She said that Gichobi purchased 2 acres of the deceased land from M'Ananua which land he occupies and cultivates today. She and her siblings cultivate the balance of 10 acres of the deceased land. She stated that it was Fabian who informed her and her siblings that M'Ananua had sold their deceased father's land. Fabian gave them that information because of a disagreement that arose between him and M'Ananua on how they were to divide the proceeds of sale. Fabian told them that the land had been sold by M'Ananua to Gichobi. Gichobi on buying that land told her and her siblings that he did not recognize them. It was suggested to this witness by counsel in cross examination that the deceased in his lifetime had transferred parcel number *Nkuene/Ngonyi/400* to M'Ananua. She responded by denying that suggestion. She further stated that her deceased father passed away when he was at the homestead of M'Ananua and that he was secretly buried on that land without their knowledge. She attributed that secret burial to the fact that M'Ananua wanted to get the deceased land. She also denied under cross examination that the deceased had children with M'Ananua's mother. PW3 although stated that the deceased lived with M'Ananua's mother, he did not state that they had children together. DW1 Gichobi stated that he began to buy the subject land in 1997 from M'Ananua. He paid the purchase price in 3 instalments. The last instalment he paid in the year 2000. That was the year he was issued with a title over parcel number 672. He stated that M'Ananua and the interested parties were related and it was their family squabbles that is causing the interested parties to claim his land. He accepted under cross examination that he had been told at the time he entered into the transaction with M'Ananua that the deceased herein had married daughters. He accepted that he did not get their consent before entering into the transaction with M'Ananua. Counsel for Fabian in his written submissions stated:-

***“On his part, (Fabian) he could give no good evidence as the issues before court touch on the time when his late father (M'Ananua) was a boy until when he grew up which he cannot be expected to know first hand (sic).”***



(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.”*

Section 93 (2) talks about the protection afforded to a purchaser who purchases land from a personal representative of a deceased. Justice Rawal in the case **Rebecca Veronica Adela Vrs. Prisca Khatambi Kibukosya & Ano** Succession Cause No. 2853 of 2003 in discussing the effects of Section 93(2) had this to say:-

*“The correct 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 RTA (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 short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”*

M'Ananua had no right over the deceased land which he was capable of transferring to Gichobi. This is so even if Gichobi can be found not to have known of M'Ananua's fraudulent act. In this regard, I rely on the case of **Jane Gachoki Gathecha Vs. Priscilla Nyawira Gitungu & Ano**. Civil Appeal No. 343 of 2002 The Court of Appeal found in that case that the petitioner who through fraud had obtained grant had no title on immovable property of the deceased which was capable of being transferred to a third party. The Court of Appeal stated thus:-

*“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 in 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 ab initio and the property is traceable..... Kabitau was a thief and fraudster simpliciter.”***

M’Ananua had no right to petition or to inherit the deceased land. The purchaser Gichobi according to PW2 after he purchased the deceased land from M’Ananua told her and her siblings that he did not recognize them. Presumably he meant that he did not recognize their interest in the deceased property. Gichobi admitted in evidence that he was informed the deceased had married daughters. All that evidence imputes knowledge on the part of Gichobi that the interested parties existed. Gichobi was not an innocent purchaser. He bought the land knowing those facts. It is also not coincidence that Gichobi and M’Ananua signed the agreement of sale of the deceased land on 4<sup>th</sup> March 1997 and then this succession was filed 10 days later, that is, on 14<sup>th</sup> March 1997. The succession seems to have been filed to facilitate that transaction. It is certainly true that had Gichobi been prudent he would at the time of signing the agreement of sale had confirmed at the land office who the land belong to. Such a discovery ought to have put him on notice and ought to have led him to carry out further investigation. He bares responsibility for the situation he finds himself in. I accept as correct that Philisika M’Nairobi sister of the interested parties does not desire to obtain a share of the deceased property. I find that the interested parties proved their case on a balance of probability that there is a basis of setting aside the grant issued to M’Ananua and that they were the rightful heirs of the deceased estate. I therefore grant the following judgment:-

- 1. That the grant issued to M’Ananua M’Itere herein is hereby revoked.***
- 2. A grant shall be issued to Silvana Karimi Chabari and Dominica Muthoni M’Ibari.***
- 3. That grant shall immediately be confirmed in the following terms:- Parcel number Nkuene/Ngonyi/672 shall be shared equally between Silvana Karimi Chabari, Dominica Muthoni M’Ibari, Magdalene Mwari Mwaja and Mwaromo Mugiria M’Mugambi.***

4. *To that end, I order the land registrar to rectify the register of Nkuene/Ngonyi/672 in terms of number 3 above. In so doing, leave is hereby granted to the land registrar to dispense with the necessity of having the original title of that parcel of land.*
  
5. *In order to meet the end of justice in this case, I order that Peter Gichobi Gachagua do vacate from parcel No. Nkuene/Ngonyi/672 within 30 days from today. In default, I order he, his servants and agents be evicted from that land after 30 days from today.*
  
6. *Since M'Ananua M'Itere is deceased, I order Peter Gichobi Gachagua to pay to the interested parties half of the cost of this suit.*

Dated and delivered at Meru this 28<sup>th</sup> day of May 2010.

**MARY KASANGO**  
**JUDGE**