



## SUCCESSION

Ø S. 93 of the Law of Succession Act does not provide protection to purchase of deceased's property where such transaction is tainted in illegality.

### REPUBLIC OF KENYA

#### IN THE HIGH COURT OF KENYA

#### AT MERU

#### MISC. SUCCESSION NO. 65 OF 2000

#### IN THE MATTER OF THE ESTATE OF CEASER RIUNGU (DECEASED)

JANET KARIMI.....APPLICANT

VERSUS

CEASER RIUNGU.....1<sup>ST</sup> RESPONDENT

MISHECK M. RIUNGU.....2<sup>ND</sup> RESPONDENT

### JUDGMENT

Following the death of Iringo Mwituu, deceased, on 16<sup>th</sup> February 1978, Ceaser Riungu M'Iringo petitioned for letters of administration intestate. His petition, although undated, is supported by an affidavit sworn in March 1986. He petitioned in the Senior Resident Magistrate Court Succession Cause No. 55 of 1986. In that petition, he described himself as a son of the deceased. The only asset of that estate was *Abogeta/U-Kithangari/746*. A grant was issued to the petitioner on 29<sup>th</sup> September 1986. The petitioner sought the confirmation of that grant by his Chamber Summons dated 29<sup>th</sup> October 1986. In support of the chamber summons, he stated that he was the '*only heir who survived the deceased.*' He further deposed in his affidavit in support of the summons for confirmation as follows:-

*"That the deceased was not survived by any other dependants..... That I wish*

***to sell the same land (suit land) to one Misheck Muriira Riungu who has already bought me another piece of land.”***

The petitioner by his application for confirmation of grant sought that the court would order the suit land be registered in the name of Misheck. The grant was confirmed on 9<sup>th</sup> December 1986. What the petitioner informed the court on the day when the grant was confirmed is of interest to the present judgment. He stated that his mother, the wife of the deceased, was divorced by the deceased in 1968. The relevance of that information will become clear in this judgment. On confirmation of the grant, the suit land was registered in the name of Misheck. Misheck was present before court when the grant was confirmed. He informed the court that he had paid the full purchase price to the petitioner. The right of the petitioner to inherit the deceased property was challenged by J.N. M'Magiri. M'Magiri swore an affidavit where he stated that the deceased had by an oral will bequeathed his property the suit land to him. He further deponed that Janet Karimi, the daughter of the deceased, was in occupation of the suit land which information the petitioner had failed to disclose to the court when he petitioned for grant. Another affidavit was sworn by M'Imanene s/o Mwituu. M'Imanene as stated in his affidavit that he was a brother of the deceased. He too confirmed that Karimi was in occupation of the suit land. He further stated that the deceased was survived by his daughters who are as follows:-

- (a) *Tirindi M'Iringo*
- (b) *Martha Muthoni*
- (c) *Wanja M'Iringo*
- (d) *Nkirote M'Iringo*
- (e) *Karimi M'Iringo*

In that affidavit he deponed that the petitioner was not the son of the deceased. He also stated that the deceased had left an oral will whereby he left his property to be inherited by M'Magiri. Julieta Kaimuri M'Iringo the wife of the deceased and who is now herself deceased deponed in her affidavit that she and the deceased had six children which are the five daughters stated above and their son the petitioner. She stated in other affidavit that the petitioner was the son of the deceased. The petitioner by his affidavit dated 15<sup>th</sup> October 1987 stated that he was the son of the deceased and the deceased educated him. He attached to his affidavit his Kenya Junior Secondary Examination Certificate of 1969 which reflected the name of the deceased as his surname. Unlike the affidavit in support of the petition, the petitioner in the latter affidavit, he confirmed that the deceased had daughters but that they were all married. He also attached a letter from Abogeta Farmers Co-operative Society Limited, which letter, according to him, confirmed that the deceased had nominated him to take his membership. That letter, however, confirmed that the deceased nominated a person called Chezary. That name is not the name of the petitioner and that document did not assist the petitioner. What is before court for determination is the summons for revocation filed in this cause seeking to revoke the grant issued to the petitioner by the Senior Resident Magistrate Court. The summons for revocation is dated 24<sup>th</sup> May 2000. That summons for revocation was filed by Janet Karimi M'Iringo. In that application, Karimi sought the revocation of the grant issued in S.R.M.CC Succession Cause No. 55 of 1986 and for an order of rectification of the title of the suit land by canceling the name of Misheck and registering it in the name of Karimi. The summons for revocation was heard by the court by way of *viva voce* evidence. By the time that summons came up for hearing, the petitioner had died and had been substituted by his wife Joyce Wanja Ceaser. Karimi in evidence stated that the deceased who was her father had divorced her mother in 1968. It will be recalled that that was the same information that the petitioner gave before the lower court when he appeared for the confirmation of the grant. Karimi continued to state that the petitioner was her half brother, that is, he was born by her mother before her mother married the deceased. Further, Karimi stated that the deceased had informed her that the petitioner was not his son. Karimi said that the deceased had been told by her mother that the petitioner was not his son. On being told by her mother that the petitioner was not his son Karimi stated that the deceased requested her mother to take the petitioner to his father. That was when her mother and the deceased separated and the petitioner also left the home of the deceased. On the death of the deceased, Karimi said because she was young she was left under the care of a guardian, M'Magiri who is now himself deceased. Karimi said that she had all along been in occupation of the suit land. Apart from the house that had been built by the deceased, she had built other houses and had carried out development on the land. Karimi stated that her other sisters were married and were not interested in the suit land. Nkirote, also a daughter of the deceased stated that their mother separated from the deceased in 1968. In that year,

her mother had left the deceased home in the company of the petitioner. Nkirote confirmed that Karimi was left on the deceased property when the deceased died. She had continued to occupy the land to date. PW3 was a nephew of the deceased. He too confirmed that the deceased was separated from his wife in 1968. He stated that Karimi was left on the suit land when the deceased died. He also stated that Karimi had carried out a lot of development on the suit land. PW4 corroborated the evidence of the other witnesses by stating that the deceased wife was separated from the deceased and that she left the deceased home with the petitioner. DW1 Martha Muthaini a daughter of the deceased stated that Karimi was married but confirmed that she was on occupation of the suit land. She denied that their mother was divorced by the deceased. She stated that the petitioner was a son of the deceased. Agnes Wanja DW2 was also a daughter of the deceased. She too denied that the deceased separated with their mother. DW3, Joyce Wanja was the wife of the petitioner. She stated that when she got married to the petitioner, they lived at a place where the petitioner was teaching. She claimed that she had a right to inherit the suit land on the basis that she was the wife of the petitioner. Misheck in evidence stated that he got to know the petitioner when he was looking for land to buy. He was informed by his neighbour that the petitioner was selling land. He requested the petitioner to show him his national identification card for him to verify that the petitioner was the son of the deceased in whose name the land was registered. When they reached an agreement on the transaction, he and the petitioner went to an advocate who prepared an agreement for sale of the property. He stated that he paid the petitioner Kshs. 59,500/=. Before purchasing the land, Misheck said that he severally visited the suit land and found that there was no one in occupation. It should be noted that the evidence in this case was recorded by Justice Emukule. Justice Emukule was transferred from High Court Meru and the responsibility of writing the judgment fell on him. I therefore did not have the opportunity to see the witnesses when they adduced evidence. Bearing in mind the evidence adduced, I believe that the issue which falls for determination is whether the transfer of the suit land to Misheck can be traced and be cancelled. The prayer in Karimi's application for revocation of grant does not fall for my consideration because the Senior Resident Magistrate Court revoked the grant on 25<sup>th</sup> March 1985. Having perused the lower court file, I was unable to find any indication that the order revoking the grant was appealed against or set aside. That revocation therefore still stands. The witnesses that were called by Karimi and her two sisters who gave evidence on behalf of the respondent all confirmed that Karimi resides on the suit land. I therefore reject Misheck's contention that there was no one on the land when he visited it severally. When Misheck entered into the agreement for sale of the suit land with the petitioner on 8<sup>th</sup> March 1996, the petitioner had not filed the petition for grant. Despite having the knowledge that the petitioner had not obtained grant Misheck entered into an agreement to buy the suit land from the petitioner. In my view, Misheck had a responsibility to carry out due diligence to confirm the correct status of the suit land. In the agreement for sale, the petitioner was described as the legal representative of the deceased. This is despite the fact that the court had not appointed him as a legal representative. At the time when the agreement for sale was entered into, the petitioner had not inherited the suit land and therefore he had no interest in the suit land which he could transfer to Misheck. The inconsistencies surrounding the agreement for sale all point to a collusion between Misheck and the petitioner to proceed with an illegal transaction. The agreement was tainted with illegality and in that regard, Misheck cannot escape the consequences of that illegality. Misheck, despite having purchased the suit land in 1986, did not state that he had been in occupation of the land even at the time when he gave evidence. In respect of the petitioner's paternity, I find that he did not neither did his wife prove that he was the son of the deceased to the required standard. The evidence that comes out clearly is that the petitioner left the deceased home with his mother in 1968. The fact that he bore the deceased name as his surname did not suffice in the test of his parentage. I find that the petitioner just as his mother informed the deceased was not the son of the deceased and was therefore not entitled to inherit the suit land. It is for that reason that I find that the transfer of the suit land into the name of Misheck can be traced and can be cancelled. The respondent's counsel argued that the transfer into Misheck's name of the suit land was protected by section 93 of the Law of Succession Act. That section provides as follows:-

***“93 (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 re-representative to a purchase 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.”**

It has been held both in the High Court and in the Court of Appeal that section 93 does not provide blanket protection to a purchaser of deceased immovable property. In the case **Rebecca Veronica Adela Vs. Prisca Khatambi Kibukosya & Ano**. Succession Cause No. 2853 of 2003 Justice Rawal in discussing the provisions 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 prohibit the discretion of the court to invalidate a fraudulent action by a person representative.”**

The Court of Appeal in the case **Priscilla Nyawira Gitungu Vs. George Kariuki Kabugu & Ano**. Civil Appeal Case No. 343 of 2002 also considered the provisions of section 93. The court found that a transfer of the deceased property carried out by an administrator who had no legal basis of being an administrator is traceable. The court made the following statement:-

**“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 immoveable 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.”**

It is therefore clear that since I have made a finding that Ceaser Riungu the petitioner was not the son of the deceased the transfer of the deceased immovable property can be traced and can be cancelled. I find that the rightful heir of the deceased immovable property is Janet Karimi M’Iringo. She had been in continuous occupation of the suit land from her birth. The following therefore is the judgment of this court.

**1. The court orders that parcel number Abogeta/U-Kithangari/746 be rectified by canceling the registration of Misheck Muriira Riungu and registering the same into the name of Janet Karimi M’Iringo. In that regard, the land registrar is granted leave to dispense with the necessity of the original title of Abogeta/U-Kithangari/746 in carrying out the said cancellation and the said registration.**

**2. There shall be no orders as to costs.**

Dated and delivered at Meru this 22<sup>nd</sup> day of October 2010.

**MARY KASANGO**

**JUDGE**