



REPUBLIC OF KENYA



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Wambugu v Ireri; Njagi & another (Interested Parties) (Miscellaneous Application 12 of 2002) [2024] KEHC 9463 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 12 OF 2002
LM NJUGUNA, J
JULY 24, 2024**

BETWEEN

DAVID MURIITHI WAMBUGU APPLICANT

AND

CHARLES NDWIGA IRERI RESPONDENT

AND

HENRY IRERI NJAGI INTERESTED PARTY

DAVID MBUI MBOGO INTERESTED PARTY

RULING

1. The applicant filed summons dated 26th June 2020 seeking the following orders:
 1. Spent;
 2. Spent;
 3. That the honourable court be pleased to order for cancellation of titles for land parcel nos. Ngandori/Kiriari/3941 and Ngandori/Kiriari/3942 respectively and do revert to the original number Ngandori/Kiriari/1686;
 4. That the Honourable court be pleased to order that a new grant of letters of administration intestate be issued to the applicant and one Ephantus Nyaga Nderi; and
 5. The costs of this application be provided for.
2. The application is premised on grounds that the respondent fraudulently obtained a grant in the estate of the deceased using a fraudulently obtained death certificate which was never presented before the court. That consequently, he subdivided the land of the deceased into the 2 named parcels and sold



parcel number Ngandori/Kiriari/3941 to the 1st interested party. That the applicant sought revocation of the grant and the application was allowed through Embu succession cause no. 79 of 1998 on 31st March 2003 through a consent order.

3. That the court, having revoked the grant, did not give directions on issuance of another grant. That the respondent sold parcel number Ngandori/Kiriari/3942 to the 2nd interested party after revocation of the grant, in total disregard of the court order. That if the orders sought are not granted, there is the risk of wastage of the estate of the deceased to the disadvantage of the rightful beneficiaries and it will result in great loss and irreparable damage. He stated that the beneficiaries have agreed to appoint the applicant and Ephantus Nyaga Nderi as legal representatives of the estate of the deceased.
4. The application was opposed through a replying affidavit sworn by the 2nd interested party who stated that at the time of purchasing land parcel no. Ngandori/Kiriari/3942, he conducted due diligence and found that the land was in the name of the vendor. That he is a stranger to the fact that the grant issued to the respondent was revoked and that if this is the case, the applicant did not act on the order of the court for a period of 17 years without good reason. It was his case that in any event, cancellation of titles is a preserve of the Environment and Land Court and that this court lacks jurisdiction to grant the orders sought. That there are no new facts that have come to the knowledge of the applicant from the time the grant was revoked to the time of filing the application herein and so the court should not entertain his indolence. He urged the court to dismiss the application.
5. The application was canvassed by way of written submissions.
6. The applicant submitted that the deceased herein went missing in the year 1994 and he was presumed dead on 09th March 1998 through an order of the court. That when the respondent applied for a grant in the estate of the deceased, he made the court to believe that he was the only beneficiary of the estate which comprised of parcel number Ngandori/Kiriari/1686. That the grant was later revoked on the grounds that the rightful beneficiaries of the estate of the deceased according to the hierarchy set out in section 39 of the [Law of Succession Act](#), were not involved in obtaining the grant.
7. That the respondent, who is an uncle of the deceased, did not have priority to petition for a grant in the estate of the deceased and so the grant was revoked by consent on 31st March 2003. That after the revocation of the grant, the respondent subdivided the property of the deceased into land parcel nos. Ngandori/Kiriari/3941 and Ngandori/Kiriari/3942 and sold them to the interested parties. That the respondent did not have capacity to sell property that he did not own in the first place and so, the titles held by the interested parties are held illegally.
8. He relied on the case of *Trusted Society of Human Rights Alliance v. Cabinet Secretary for Devolution & Planning & 3 Others* (2017) eKLR where the court held that orders of the court are not made in vain. It was his submission that according to section 66 of the Law of Succession Act, it is the brothers of the deceased who should benefit from the estate of the deceased and they have consented to appoint the applicant and Ephantus Nyaga Nderi as administrators of the estate of the deceased. He urged the court to grant the orders as prayed.
9. The 1st interested party submitted that he is an innocent purchaser of parcel no. Ngandori/Kiriari/3941 for its value from the respondent who was administrator of the estate of the deceased. That his interest in the estate is protected under section 93 of the [Law of Succession Act](#) and section 28 of the [Land Registration Act](#). That it is parcel number Ngandori/Kiriari/1686 which was transmitted fraudulently and that he was not a party to that process. That parcel no. Ngandori/Kiriari/3941 was obtained legally through a lawful purchase. He urged the court to dismiss the summons.



10. The 2nd interested party submitted that the applicant is not capable of proving that the deceased is dead and that there is no court order or death certificate in his custody. That the applicant does not have locus standi to move this court for cancellation of title to parcel no. Ngandori/Kiriari/3942 since he cannot prove who the previous owner was. That he is an innocent purchaser, having conducted the relevant due diligence before purchasing the property from the respondent. That the property was hived from parcel number Ngandori/Kiriari/1686 and that if there was any fraud, he is not a party to it. That he is a bona fide purchaser under section 26 of the [Land Registration Act](#). He urged the court to dismiss the application with costs.
11. The issues for determination herein are as follows:
1. Whether the court has jurisdiction to determine the application;
 2. Whether the rights of the interested parties are protected under section 93 of the [Law of Succession Act](#); and
 3. Whether the properties should be reverted to the estate of the deceased for the benefit of the rightful beneficiaries.
12. The interested parties' case herein is in regards to ownership of the land which was transferred to them by the respondent following revocation of the grant. The issue appears to be one to be placed before the ELC as submitted by the interested parties. However, this court bears jurisdiction to determine the application herein since it arises within a succession cause. In the case of Santuzza Bilioti alias Mei Santuzza (Deceased) v Giancarlo Falasconi [2014] eKLR the court held:
- “.....the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”
13. Looking at the issue of jurisdiction from the perspective of section 93 of the [Law of Succession Act](#), the succession court is vested with jurisdiction to determine this application since the available evidence should be examined in order to determine whether or not the rights of the interested parties are protected. In the case of Monica Adhiambo v Maurice Odero Koko [2016] eKLR (In the Matter of the Estate of Teresiah Auma (Deceased)) the court stated:
- “.....the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the [Law of Succession Act](#). The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the [law of Succession Act](#) is to ensure that beneficiaries of deceased persons inherit the property.”



14. As to whether the interested parties' rights are protected under section 93 of the [Law of Succession Act](#), the provision states thus:

“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 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.”

15. The interested parties provided copies of official searches for the various properties: the 1st interested party proved that he acquired parcel number Ngandori/Kiriari/3941 and that he is the registered owner through a search dated 10th March 2020. A search dated 10th March 2020 shows that the 2nd interested party is the registered owner of parcel number Ngandori/Kiriari/3942. The properties were sold to them by the respondent. The 2nd interested party produced a copy of sale agreement dated 03rd January 2020. This background of the transaction is necessary because it is important to note the point in time when the respondent subdivided and sold the properties to the interested parties.

16. As stated earlier, the deceased having been presumed dead, the respondent, who is an uncle of the deceased petitioned for a grant of letters of administration in his estate. The same was issued and a certificate of confirmation of grant was consequently issued on 26th March 1999, bequeathing the whole estate of the deceased to the respondent (one acre of Ngandori/Kiriari/1686) and the 1st interested party (2 acres of Ngandori/Kiriari/1686). According to the greencard of the parcel number Ngandori/Kiriari/1686, the applicant herein placed a caution on the land and he claimed interest as a beneficiary on 06th April 1998. Regardless, the greencard shows that the land was subdivided and the title closed on 04th August 1999. The applicant then moved the court for revocation of the grant issued to the respondent. The grant was revoked through a consent order issued on 31st March 2003.

17. The question arising from this history is whether the respondent had legal capacity to transfer the properties to the interested parties. It has been argued that the properties purchased by the interested parties are to be protected under section 93 of the [Law of Succession Act](#). This provision offers protection for purchasers who purchased from an administrator who had the legal capacity to administer the estate, or who would be a legitimate beneficiary of the same. In this case, the respondent, being an uncle of the deceased, does not rank higher than the deceased's siblings in the hierarchy of beneficiaries. That is to say that he did not have capacity to transact on the estate of the deceased whether before or after the grant was revoked.

18. It could be argued that the interested parties were bona fide purchasers for value without notice of fraud. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”



19. The Court of Appeal in Uganda in the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, defined a bona fide purchaser for value as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he purchased for valuable consideration;
4. the vendors had apparent valid title;
5. he purchased without notice of any fraud; and
6. he was not party to the fraud.”

20. In *Re Estate of Christopher Aide Adela (Deceased)* (2009) eKLR the court stated thus:

“...Section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The aspect 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....”

21. The interested parties stated that prior to purchasing the properties, they conducted due diligence. Allegedly unbeknown to them, the respondent misrepresented himself to them as the legitimate owner when in fact he had no capacity to sell the property since it was acquired fraudulently. The purchaser’s due diligence should have revealed the respondent’s interest in the property. It is key that the purchasers prove that they acquired a valid and legal title. The Court of Appeal in the case of *Samuel Kamere v. Lands Registrar, Kajiado Civil Appeal No 28 of 2005* (2015) eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

(see also the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR))

22. It is my view, that the respondent could not have passed a valid title to the interested parties since he acquired the land fraudulently through succession, hence he did not have proper legal title to it. Therefore, no valid titles existed or were passed to the interested parties. The case would have been otherwise if the respondent was a legitimate beneficiary of the estate of the deceased under section 66 of the *Law of Succession Act*. If that had been the case, the rights of the interested parties over the land would have been protected even after revocation of the grant. In the case of *Re Estate of Salim Islam Saadan (Deceased)* [2016] eKLR, the court referred to the Court of Appeal’s interpretation of Section 93 of the *Law of Succession Act* as follows:

19. Section 93 of the *Law of Succession Act* has been the subject of judicial interpretation in a number of cases. In *Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and another* [2008]



eKLR where a purchaser claimed that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore protected under S.93 (1) of the [Law of Succession Act](#) (Cap 60) Court of Appeal sitting in Nyeri 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.”

- 20 The Respondent was not the sole beneficiary of the property and therefore had no property to transfer to the Interested Party. It is evident to me that the Interested Party purchased the property with his eyes open. He was not a bona fide purchaser for value without notice as he would want this Court to believe. He was fully aware of the circumstances surrounding the property. The sale and transfer of Lamu/Block I/582 by the Respondent to the Interested Party is therefore void ab initio and the property is traceable.”
23. The 2nd interested party relied on Section 26 (1) of the [Land Registration Act](#) and argued that a certificate of title is indefeasible and cannot be challenged except for 2 instances; one being “where the certificate has been acquired illegally, unprocedurally, or through a corrupt scheme”. Even going by this argument, it is still evident that the titles were obtained through a process that was void ab initio, as I have already discussed hereinbefore.
24. To the final issue for determination, having determined that parcel numbers Ngandori/Kiriari/3941 and Ngandori/Kiriari/394 were obtained illegally and that the transactions were void ab initio, it is only prudent that the registrations of the said titles be cancelled and the interest be reverted to the name of the deceased for the benefit of the rightful beneficiaries of the estate. As it is, there is no legal representative to the estate of the deceased following revocation of the grant. Through the application herein, the applicant has deposed that the legitimate beneficiaries of the estate of the deceased have signed a consent form agreeing that the applicant and Ephantus Nderi Nyaga be appointed as administrators. Section 47 of the [Law of Succession Act](#) and rule 73 of the Probate and Administration Rules bestow wide discretionary powers to the court to consider any application and make any orders it considers expedient or necessary in the interest of justice.
25. In the end, having considered the evidence and the relevant laws, I find that the application has merit. The following orders shall issue:
1. The Land Registrar Embu is hereby ordered to cancel the registration of parcel numbers Ngandori/Kiriari/3941 and Ngandori/Kiriari/3942 and revert the interests therein to the original number Ngandori/Kiriari/1686 in the name of the deceased;
 2. A grant of letters of administration in the estate of the deceased is hereby issued jointly in the names of David Muriithi Nyaga and Ephantus Nyaga Nderi;
 3. The newly appointed administrators of the estate of the deceased to file summons for confirmation of grant within 45 days of this ruling; and
 4. There shall be no order as to costs.
26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2024.



L. NJUGUNA

JUDGE

..... for the Applicant

..... for the Respondent

.....for the 1st Interested Party

.....for the 2nd Interested Party

