



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Waithaka Keru Peter (Deceased) (Succession Cause  
92 of 2018) [2023] KEHC 18735 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18735 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 92 OF 2018**

**A MSHILA, J**

**JUNE 16, 2023**

**BETWEEN**

**JAMES KARIUKI KINYANJUI ..... 1<sup>ST</sup> APPLICANT**

**DAVID WAIHAKA KINYANJUI ..... 2<sup>ND</sup> APPLICANT**

**STEPHEN THUO KINYANJUI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**TERESIA WANJIKU WAIHAKA ..... 1<sup>ST</sup> PETITIONER**

**JOSEPHAT KARIUKI ..... 2<sup>ND</sup> PETITIONER**

**PETER KIMANI KINYANJUI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**JUDY WAMBUI KINYANJUI ..... 1<sup>ST</sup> PROTESTOR**

**PENINAH WANJIKU ..... 2<sup>ND</sup> PROTESTOR**

**ALICE NYAKIA ..... 3<sup>RD</sup> PROTESTOR**

**CATHERINE MBAIRE KINYANJUI ..... 4<sup>TH</sup> PROTESTOR**

**LYDIA MUTHONI KINYANJUI ..... 5<sup>TH</sup> PROTESTOR**

**KENNEDY KIMANDO KINYANJUI ..... 6<sup>TH</sup> PROTESTOR**

**RULING**

1. By a Notice of Motion dated June 15, 2022, David Ngugi Kabati (applicant/intended interested party) sought to be enjoined in the succession cause as an Interested Party. He also prayed that the execution of consent order made in court on the 23<sup>rd</sup> day of March, 2022 be stayed pending the hearing of his



- application. Lastly he sought that the consent order made in court on the 23<sup>rd</sup> day of March, 2022 be set aside/reviewed and/or varied.
2. The applicant/intended interested party in his supporting affidavit deposed that on diverse dates in the year 2021, he bought land parcel number Ndumberi/ndumberi/3212 from David Waithaka Kinyanjui and was issued with a title deed on January 31, 2022.
  3. It is this application that caused the protestors'/respondents' to file their Preliminary Objection dated August 2, 2022, in opposition to the orders sought by the applicant/ interested intended party.
  4. The preliminary objection is based on the following grounds;-
    - a. That the Intended Interested Parties application for joinder is anchored on the wrong provisions of the law and the same should be dismissed with costs.
    - b. That this court lacks jurisdiction to hear and determine suits and application touching on sale, purchase, use and other issues relating to land preceding succession.
    - c. That the intended Interested Parties are precluded under section 93 of the [Law of Succession Act](#) hence the Honourable Court is bereft of jurisdiction to entertain 3<sup>rd</sup> parties and the application herein should be dismissed with costs.
  5. Subsequently, the Protestors'/Respondents' filed their written submissions dated 15<sup>th</sup> August, 2022. It was submitted that the application having been brought to court under the wrong provisions being that it was brought under section 47 and 93 of the [Law of Succession Act](#) and Rule 16, 47, 49, 59(2), (5) 60 and 73 of the [Probate and Administration Rules](#) instead of Order 1 Rule 10 of the [Civil Procedure Rules](#) which deals with joinder of parties in a suit ought to be dismissed with costs. Further, the Protestors submitted that the Interested Intended Party is precluded from placing reliance on section 93 of the [Law of Succession Act](#) as he is neither a creditor nor a beneficiary. His claim was said to be under David Waithaka Kinyanjui a beneficiary of the estate. In any case the sale was said to be in contravention of the court orders maintaining status quo and prohibiting any transactions. Letters of Administration or a Certificate of Confirmation of Grant had not been issued for the sale to be effected. Reliance was placed in the case of [Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu and another](#) (2014) eKLR. The protestors' also contended that the Intended Interested Party was an intermeddler of the deceased's estate making his sale agreement void ab initio. The Environment and Land Court was said to be the court clothed with jurisdiction to hear this matter as the applicant is not a beneficiary of the estate. It was submitted that the applicant should pursue a civil claim against David Waithaka Kinyanjui. Reliance was placed in the case of [Muriuki Hassan v Rose Kanyau and 4 others](#) (2014) eKLR where the intended interested party was asked to sue the beneficiary directly.
  6. The Intended Interested Party submitted that section 47 of the [Law of Succession Act](#) gives the court wide and inherent powers to handle any type of proceedings. Reliance was placed on the case of [Re Estate of John Mutio Mutua](#) (2021) eKLR where the court allowed an intended interested party to join in the proceedings. It was also submitted that the court has jurisdiction to determine that Ndumberi/ Ndumberi/3212 does not form part of the deceased's estate. The intended interested party was said to be an innocent purchaser having shown that he acted in good faith as provided in the case of [Re Estate of Kungu Waigi](#) (2020) eKLR as such is protected under section 93 of the [Law of Succession Act](#). Lastly, the applicant submits that the Protestors failed to lodge the prohibition orders at the Lands office as such intending purchasers would not be aware of the same.



## Issues For Determination

7. Having considered the prayers sought by the Intended Interested Parties, the grounds relied upon by the Protestors in their Preliminary Objection and the arguments by the parties in their submissions this court has framed only one issue for determination;
  - i. Whether the Preliminary Objection should be upheld;

## Analysis

Whether the Preliminary Objection should be upheld;

8. Section 93 of the *Law of Succession Act* provides that:-
  - (1) All transfers 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.
9. A proper reading of the above-mentioned Section shows that transfer of any interest in immovable or movable property made to a purchaser shall be by a person to whom representation has been granted.
10. In the instant case herein, the succession cause is still ongoing. Letters of Administration or a Certificate of Confirmation of Grant have not yet been issued. The said David Waithaka Kinyanjui is a beneficiary of the deceased's estate and not an administrator.
11. In the case *In Re Estate of Zephania Kibor Arap Timbomei (Deceased)* [2019] eKLR Mumbi J (as she then was) quoted the case *In Re-Estate of Christopher Aide Adela (Deceased)* (2009) eKLR where Rawal J (as she then was ) stated as follows:

“This leaves me with provisions of section 93(1) of the Law of Succession which on the face thereof preserves the validity of transfer of interest in immovable or moveable property made to a purchaser by a person to whom representation has been granted notwithstanding subsequent revocation or variation of the grant either before or after the commencement of the Act.

Then section 93(2) of the Act stipulates that the transfer of immovable property to a purchaser by the personal representative of the estate cannot be invalidated by reason only that the purchaser may have a 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.

These provisions shall have to be closely looked at. As per my considered view, section 93(1) of the Act talks of “Interest” for immovable or moveable property and section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and 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 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.” (Emphasis added)

12. Similarly, in the case herein, Hon. Justice Muchelule and Hon. Justice Gacheru on February 23, 2017 and June 13, 2016, respectively had issued orders maintaining status quo thus prohibiting any transaction. In the year 2021, the Intended Interested Parties bought land parcel number Ndumberi/ndumberi/3212 from David Waithaka Kinyanjui and was issued with a title deed on 31<sup>st</sup> January, 2022. This was after the court’s order for maintaining the status quo.
13. In the above-mentioned case, emphasis was made that section 93 of the *Law of Succession Act* does not prohibit the exercise of discretion of the court to invalidate a fraudulent action by a personal representative. Having established that status quo had been maintained by the court, prohibiting any transaction on the deceased’s estate, it goes to show that David Waithaka Kinyanjui in selling the suit land disobeyed the orders of the court thereby invalidating the sale.
14. In the circumstances, this court is satisfied that the Preliminary Objection by the Protestors is merited; having determined the preliminary objection it therefore follows that the application by the intended interested party for enjoinder to the instant proceedings and other orders seeking stay/set aside/variation/and /or review of the Consent Order cannot be sustained and comes to a premature end. He is directed to pursue his claim against David Waithaka Kinyanjui the beneficiary of the deceased’s estate who sold the suit land to him in contravention of a valid court order.

### **Findings & Determination**

15. For the forgoing reasons this court makes the following findings and determinations;
  - i. The Preliminary Objection is found to have merit and it is hereby upheld;
  - ii. The Notice of Motion dated 1 June 5, 2022, David Ngugi Kabati (Applicant/Intended Interested Party) seeking to be enjoined in the succession cause as an interested party and also seeking stay /setting aside/review and or variation of the consent order made in court on the 23<sup>rd</sup> day of March, 2022 is hereby struck out with no order as to costs.

Orders Accordingly.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 16<sup>TH</sup> DAY OF JUNE, 2023.**

**A. MSHILA**

**JUDGE**

In the presence of :-

Mourice Court Assistant



Mundia holding brief for Mrs. Morara for the Protestor/Respondent

No appearance by the applicant (Intended Interested Party)

