



REPUBLIC OF KENYA



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**Omollo v Ongoro (Succession Cause 366 of 2001)
[2023] KEHC 18999 (KLR) (13 June 2023) (Ruling)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 366 OF 2001
RE ABURILI, J
JUNE 13, 2023**

BETWEEN

SUSLIA AKINYI OMOLLO APPLICANT

AND

STEPHEN OKIRI ONGORO RESPONDENT

RULING

1. The initial petitioners in this cause were Tabitha Ongoro and Salina Ongoro, the two widows of the deceased Ongoro Okiri who died intestate on 8th March, 1989. The two widows as petitioners were issued with a grant of letters of administration intestate to administer the estate of the late Ongoro Okiri on 3/10/2002 by Justice B. Tanui –as he then was. The state of the deceased that was listed for administration comprised land parcel Nos. 927 and 975 at Tamu Scheme in Muhoroni. The petitioners listed Julius Ongoro as the only child of the deceased. Later, the grant was confirmed on 21st March, 2000, with the two widows and one son sharing in the estate exclusively as per the certificate of confirmation of grant.
2. On 3rd March 2008, one Stephen Okiri Ongoro filed Chamber Summons seeking for revocation of the grant issued to Tabitha Ongoro and Rusalina Ounga Ongor on 3rd October 2002 and confirmed on 21st March 2003 on the ground that the grant was obtained fraudulently by making of a false statement and or by concealment from court of something material to the case.
3. The applicant/objector claimed to be the grandson of the deceased Ongoro Okiri, being that his late father Tom Ongoro was the son to Ongoro Okiri and that his father had died aged 41 years old and his mother too, had died. he deposed that the administrators who were widows of Ongoro Okiri had intentionally left out the dependants of the deceased when they petitioned for grant.
4. The deceased’s dependants listed who were alive were Stephen Okiri, Emily Akumu, Charles Ongoro, Brian Otieno, Sarah Otieno and Maximilla Akoth all of whom were minors except the applicant/



- objector. The applicant annexed copies of death certificates for his father Tom Ongoro Ongoro and mother Roseline Hamisi Ongoro who had died on 5/10/1998 and 30th September, 2005 respectively.
5. the applicant claimed that the petitioners had threatened to evict the family of Tom Ongoro from their land in Muhoroni where their parents had left them hence the application.
 6. The petitioners instructed the firm of Ouma Njoga & Co Advocates who filed Notice of appointment but never gave sufficient instructions to enable the advocates file any affidavit opposing the chamber summons for revocation of grant hence the advocates sought leave of court to cease acting for the petitioners. Later, the 1st respondent appointed the firm of Kowinoh & Co Advocates to represent her.
 7. Vide a ruling rendered on 17th March, 2010, Aroni Ali J –as she then was nullified the grant issued to the petitioners as well as the certificate of confirmation of grant. She ordered that the three families do agree on who be administrators of the said estate for approval by the court and to oversee distribution of the estate.
 8. It turned out that the petitioners had left out other assets of the deceased when they filed the petition and in addition, they had left out many other dependants of the deceased as contained in the affidavit of Stephen Ongoro Ongoro sworn on 1/9/2011, proposing the mode of distribution of the said estate.
 9. It is observed that after the petitioners had obtained a grant, which grant was subsequently revoked and annulled, they sold part of the estate of the deceased after distributing the parcels of land amongst themselves and Tabitha Dulo Ongoro sold plot No. Kisumu/Tamu/ 972 to Nichanor Juma at kshs 400,000 hence the above purchaser sought by his application filed in court on 27/3/2012 to be enjoined to the proceedings as an interested party claiming that he was a purchaser for value without notice from Tabitha Ongoro who already had title which she transferred to him at a consideration. In the said period, the firm of Kowinoh advocate ceased acting for the petitioners and came on record for the interested party Nichanor Juma. That application by Nichanor Juma has never been heard and determined.
 10. On 9th February 2015, the fresh grant was issued in favour of Tabitha Ongoro, Stephen Okiri Ongoro and Jennifer Awino Ogeyo to administer the said estate.
 11. Vide an application dated 2nd March, 2018, the second administrator Stephen Ongoro Ongoro who is the respondent in this present application subject of this ruling sought for nullification of the transfers of properties belonging to the deceased's estate which had been transferred to the initial petitioners following the nullification of the first grant and certificate of confirmation. The properties in question are Kisumu/Tamu/971,972,973,974 and 975.
 12. It is on the basis of the above application that the court did on 19/11/2018 issue an order, further based on the nullification of the initial grant and the order confirming the said grant on 17/3/2010, to nullify and reverse the transfer of title made in favour of the initial petitioners and any other transferee.
 13. Following the above orders, the applicant herein Suslia Akinyi Omollo filed an application dated 3/6/2021 on 25/8/2021 seeking for setting aside of the orders made on 19/11/2018 and stay of enforcement of the said orders and that the application dated 2/3/2018 which gave rise to the said orders be heard afresh on merit.
 14. The applicant swore an affidavit in support deposing that she purchased land parcels Bo. Kisumu/Tamu/974 and 975 from Rusalia Ounga Ongoro and Tabitha Ongoro who had since died when they were already registered proprietors of the said parcels of land after carrying out succession, and obtaining grant, which parcels were subdivisions of the original Kisumu/Tamu/834.



15. That the said properties were not part of the estate of the deceased Ongoro Okiri since it had changed hands and that she had bought the land from legitimate proprietors and administrators. Further, that even if it was, the High Court sitting as a succession court had no jurisdiction to nullify titles already issued in her favour, as only the ELC had such jurisdiction. That she was never given a hearing prior to the nullification as she was never served with the application subject of the nullification order.
16. The Respondent Stephen Okiri Ongoro filed a sworn replying affidavit dated 1st November, 2021 deposing that the nullification was done by the court suo moto after an application was made but that the court having earlier nullified the grant, any subsequent actions by the petitioners was not lawful and therefore was amenable to be nullified as the parcels of land in question were subdivisions of the land parcel number 834 belonging to the deceased Ongoro Okiri.
17. Parties filed written submissions to canvass the application and when the matter came before me yesterday, this court asked the applicant's counsel to carry out a case search on whether there are decisions that support her client's position, legally.
18. Counsel was given time to research and when the file was recalled, she informed the court that there was no legal authority that supported her client's position. I therefore reserved this matter for ruling today.

Determination

19. I have considered the application, the grounds, supporting and opposing affidavit as well as the written submissions and the statutory and judicial authority on this subject.
20. The main issue for consideration in my view is whether the application is merited in law. I have set out the background to the application and therefore I shall not rehash the facts as laid out above. I will however first and foremost determine whether this court being a succession court had or has jurisdiction to nullify titles to land.
21. As earlier stated, on 19th November, 2018, this Court-Ochieng J-as he then was, nullified the titles registered in the names of third parties following the revocation of grant which was undertaken on 17/3/2010. the applicant in her submissions asserted that this being a succession cause, this court had no jurisdiction to revoke titles to land and that only the Environment and Land Court has such jurisdiction. the respondent maintained that this court had jurisdiction to nullify the titles.
22. Section 47 of the *Law of Succession Act* vests this court with wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person. the section stipulates as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
23. Similarly, Rule 73 of the Probate and Administration Rules provides that:

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
24. A reading of the above sections indicate that the High Court is clothed with wide powers to do what is necessary to ensure that the ends of justice are met. Thus, in a succession cause, the High Court has jurisdiction to issue any orders including cancellation of title deeds where the grant is revoked. The



Court of Appeal in *Floris Piezzo & Another –vs- TGiancarlo Falasconi (2014)* eKLR, while considering whether an injunction can issue in a Succession Cause expressed itself as follows:

“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the *Law of Succession Act* gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”

31. The upshot of the foregoing is that the High Court has jurisdiction to issue all manner of orders including the issuance of protective orders against the wrongful disposal and or intermeddling with the estate/free property of the deceased as enumerated under Section 45 of the *Law of Succession Act* where appropriate and necessary in order to preserve and safeguard, the estate of a deceased person.”

25. In *Jacinta Wanja Kamau v Rosemary Wanjiru Wanyoike and Another [2013]* eKLR where the appellant therein unsuccessfully sought protection under Section 93, the Court of Appeal sitting in Nyeri stated as follows:

“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case and as provided by Section 82(b) (11) of the Act, it would have been illegal for Beatrice Njeri Mugondu to sell the land before the confirmation of the grant.”

26. In *Jane Gachola Gathetha vs Priscilla Nyamira Gitungu and another [2006]* e KLR where a purchaser claimed that he was not aware of, and was not party to the fraudulent dealings with the title in issue and was therefore not only protected under Section 93(1) of the *Law of Succession Act* (Cap 66) but also Section 143 of the Registered *Land Act*, the court of Appeal 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 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.”

27. *In Re-Estate of Christopher Aide Adela (Deceased) [2009]* e KLR Rawal (as she was then) held that:-

“As per my considered view, Section 93(1) of the Act talks of interest for immovable or movable 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 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. Reading these provisions in the manner will be commensurate with provisions of Section 23 of the Registered *Land Act* (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.”

28. In *Monica Adbiambo v Maurice Odero Koko [2016]* eKLR, Nagillah J stated as follows in a matter involving sale and transfer of the estate property by an administrator without consent of other beneficiaries, after getting the said property registered in her name:

“In the instant case it is undisputed that the petitioner only transferred the suit property to the interested party after the grant of letters of administration were confirmed which is legally in order. However, a closer look at the process she took in applying for the said grant of letters of administration reveal that the said grant was obtained through fraudulent nondisclosure of material facts. The petitioner in form P & A 5 stated that she was the only beneficiary/survivor of the deceased estate while in reality the deceased had 3 children in total. It turns out that the deceased actually had 2 other children who were Margaret Ouko and Maurice Odero Koko. None of these two beneficiaries had given the petitioner consent in terms of Rule 7(7) (a) (b) and (c) of the Probate and Administration Rules which provides:

- 7) where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has:-
 - a) renounced his right generally to apply for a grant or
 - b) consented in willing to the making of the grant to the application; Or



- c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.

The petitioner in the instant case cause did not rank higher than the objector in priority in seeking a grant of administration intestate and was required before making of the grant to furnish this court with information and satisfy the court that the objectors having prior preferences to a grant being all children of the deceased, had renounced their right generally to apply for the grant or had consented with making of the grant to the petitioner or that they had been issued with a citation calling upon them either to renounce such right or to apply for a grant. The petitioner therefore acted in contrary to the mandatory provisions of Rule 7(7) of the Probate and Administration Rules and it's no wonder my sister Sitati J had to revoke the petitioner's grant for non-disclosure of material facts.

With that said, 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.”[emphasis added]

29. Musyoka in considering the above section stated as follows *In Estate of Veronica Njoki Wakegito (2013)* eKLR:

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a serious view of intermeddling and makes it a criminal offence.”

30. *In re Estate of Barasa Kanenje Many (Deceased) (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR)* (30 July 2020) (Ruling), Musyoka J stated as follows, in answering the question of whether an administrator of a deceased's estate could sell land belonging to the deceased's estate before confirmation of grant - whether a grant of probate and a grant of letters of administration applied retrospectively - what was the remedy available to a person who bought land belonging to a deceased's estate from the administrator of the estate before the confirmation of the grant of letters of administration - *Law of Succession Act* (cap 160) section 79 and 82.

31. The applicants in the above cited cause were persons who had allegedly bought portions of an asset of the estate of a deceased from a son of the deceased. The applicants filed the application subject of the ruling seeking joinder as interested parties in the succession cause whose subject matter was the deceased's estate. The learned Judge observed that:

“The applicants did not purchase the portions of the asset of the estate that they laid claim to from the deceased, but rather from a son of the deceased. They were not creditors of the



estate. They would only have a claim against the estate if they had transacted over the land with the deceased owner himself.”

“Section 79 of the *Law of Succession Act* should be read together with sections 82 and 83 of the Act, which set out the powers and duties of administrators. Once the assets of the deceased were vested in the administrators, the administrators would then be entitled to exercise the powers conferred upon administrators by section 82, and they were subject to the duties that were imposed by section 83. The powers included powers to enter into contracts with respect to assets of the estate, to sue and be sued with regard to estate assets, among others. Entering into contracts over estate assets would include converting estate assets by way of sale. However, section 82(b)(ii) of the Act outlawed the sale of immovable assets of an estate before the grant had been confirmed. That would mean that any such sale would be unlawful and unenforceable unless it happened with the leave of the court.”[emphasis added]

By dint of section 45 of the *Law of Succession Act*, any transaction between the deceased’s son and any other person amounted to intermeddling with the estate of the deceased, and those involved, therefore, would be deemed to have engaged in criminal activity and should have been prosecuted. The sales contravened sections 45 and 82 of the *Law of Succession Act* and there was no possibility that the applicants could have acquired any valid title from the sales, for the person who purported to sell the property to them had no title to it. He had nothing to sell and the applicants bought nothing from him.

The deceased’s son had no property to sell and he conferred no good title to the prompted buyer. The transaction was unlawful and amounted to a criminal offence according to section 45 of the *Law of Succession Act*. That he was subsequently appointed administrator of the estate did not help him, nor salvage the transaction, since the deceased had died intestate, and by dint of section 80 of the *Law of Succession Act*, a grant of letters of administration intestate did not relate back to the date of death, so as to authenticate any of the acts of the administrator, done between the date of death and the date of appointment. The transaction of May 26, 2003, was as dead as a dodo.

...The only remedy available to the buyers, with regard to the two transactions, was to pursue the person who purported to sell the property to them.

45. No intermeddling with property of deceased person(1)Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.(2)Any person who contravenes the provisions of this section shall —(a)be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and(b)be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of”[emphasis added]

In *Santuzabilioti alias Mei Santuzza (deceased) vs Giancarlo Felasconi* [2014] eKLR, the court stated as follows regarding the jurisdiction of the court in succession matters:

“This cannot be the case as 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 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.”

There is a host of decisions where courts have held that the High Court has jurisdiction to order cancellation of a title if a matter is a succession cause and the title has been fraudulently or irregularly transferred.

In Succession Cause 265/2004MunyasyaMulil vs Sammy Muteti Mulili, the court cancelled titles after revoking the grant. The court in the above case relied on the decision of J. Musyoka in Re Estate of Alice Mumbua Mutua (deceased) (2017) eKLR where the Judge considered when a case can be heard as a succession cause or when it can be heard in other courts with concurrent jurisdiction – like the ELC. The Judge said;

“The *Law of Succession Act*, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.
28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows ‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’
29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate



court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above."administration."

In *In re Estate of Andrea Ooko Tianga (Deceased)* [2019] eKLR, Njagi J stated:

"12. The jurisdiction of the High Court in succession matters is limited to disputes between the personal representative of the deceased and the deceased's survivors, beneficiaries, dependants and creditors. Where other parties such as purchasers are involved then the matter falls out of the realm of the succession court and should be heard before the Environment and Land Court. It has been recognized that both the High Court and ELC have concurrent jurisdiction in matters concerning land. In *Munyasya Mulili & 3 Others –Vs- Sammy Muteti Mulili* (2017) eKLR Nyamweya J. cited the case of *Salome Wambui Njau (suing as the administratrix of the Estate of Peter Kiguru Njuguna (Deceased) –Vs- Caroline Wangui Kiguru, ELC* (2013) eKLR, where it was held that:-

"In matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the Constitution and the High Court as the Succession Court under Section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute."

32. The court then concluded that:-

"It is thus my finding that since the dispute herein is one between the personal representatives of the deceased and the survivors, beneficiaries and dependants of the deceased, it is a succession dispute to be determined solely within the framework of the law of succession ...

On the second issue as regards this court's jurisdiction as a succession court to revoke title, this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties under Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules ..." [Emphasis added

33. From the above case law cited, it is clear that this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties under Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules.

34. In *Munyasya Mulili & 3 others v Sammy Muteti Mulili* [2017] eKLR where the issue was whether the High Court had jurisdiction to cancel title that was transferred by the administrator in favour of third parties without leave of court and or consent of beneficiaries of the estate of the deceased, Nyamweya J as she then was, applying section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules nullified all registrations, transfers, sales and dispositions of the deceased's Beth Muthei Mulili's properties known as Mavoko Town Block 3/1966, Mavoko Town Block 3/3010 and Mavoko Town Block 3/1052, and any sub-divisions arising therefrom and other subsequent dealings with the said properties and sub-divisions and declared the same as unlawful and null and void. She also revoked and cancelled all titles and subdivisions issuing therefrom and reverted to the deceased's names the title as it was before subdivision and transfer to third parties.



35. It follows that any purported sale and transfer of estate property before that property is legally distributed to all beneficiaries is a contravention of the law and is an act of intermeddling with the estate which should be punished under section 45 of the *Law of Succession Act*. It is, therefore an illegal transaction.
36. Accordingly, the applicant's claim that she was an innocent purchaser for value without notice is not tenable in law.
37. As earlier stated, the initial grant which was revoked was issued on 3/10/2002 in favour of the original petitioners. That grant was confirmed on 21st March, 2003. However, as the said grant as issued and confirmed was found to have been obtained fraudulently, the court, from the proceedings on record, found that Tabitha was a liar and that she had failed to disclose that there were other surviving beneficiaries of the estate and that she tricked her co wife to agree to the con game and that in fact, there were two different certificates of confirmation one dated 21/3/2003 and the other 25/10/2008 giving different details of distribution. the court also found that there were three widows but Tabitha had sold the land which the children of her co-wife Teresia were occupying hence disinheriting them.
38. I observe that the grant was confirmed on 21/3/2003 and rectified on 25/10/2005 with an order for rectification of the certificate of confirmation being made but no application was made. In the rectified certificate, Julius Ongoro was removed and Tabitha got two properties, the whole of 432 and 2.5 acres of 834 while the other portion went to Rosalia, her co wife. It is not clear why Julius Ongoro was removed from the initial distribution list yet in the affidavit in support of the petition, he was named as the only son of the deceased Ongoro Okiri.
39. Therefore, although the sale and subdivisions were made after confirmation of the grant, that grant having been nullified and revoked on application by one of the bonafide beneficiaries, the respondent herein, on behalf of many other persons who were entitled to a share in the estate of the deceased, the revocation and grounds for such revocation had a spiral effect of nullifying the subdivisions and transfer of land which did not solely belong to the petitioners.
40. The land in question was still the asset of the estate of the deceased Ongoro Okiri and was meant to be distributed to all the eligible legitimate beneficiaries hence it had to revert to his name, notwithstanding the subsequent sales by the administrators, which sales were in effect, without legal authority. I reiterate that the two administrators were not the sole beneficiaries of the estate of the deceased and therefore they had no legal authority to sell the estate property and transfer the same before ensuring that every beneficiary had received their fair share so that the administrators would only have sold that which legally was their exclusive share of the estate. Having excluded the bonafide beneficiaries in the distribution of the estate, the dispute that existed was between and among the beneficiaries and therefore the applicant herein cannot be allowed to bring her dispute against a beneficiary who merely sought to protect the estate of the deceased from being intermeddled by Tabitha. The applicant is at liberty to seek a remedy against Tabitha who sold to her the two parcels of land, in appropriate proceedings and not to descend into the succession arena as if she is one of the beneficiaries of the estate of the deceased ye she never bought the land from the deceased prior to his death.
41. *In re Estate of Paul M'Maria (Deceased) [2017]* eKLR, Gikonyo J had this to say on this subject and I agree that:

“These facts impels a re-statement of what courts of law have boldly stated; that, it is axiomatic under section 55 and 82 of the *Law of Succession Act*, no immovable property of the deceased shall be sold before confirmation of grant. For clarity, the relevant parts of Section 55 and 82 thereto are reproduced below:



55. No distribution of capital before confirmation of grant
- (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.
 - (2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.
82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers
- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;
 - (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that

- (i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;

[10] The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act* is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that:-

40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

The law contemplates that confirmation of grant is done only after the shares of each of those who are beneficially entitled to the estate are identified and assigned. Where the administrators fail to disclose to the court the existence of other beneficiaries and proceed to have the grant confirmed with a skewed distribution of the estate, that confirmation cannot stand in law and it will be taken that in fact, there was no such lawful confirmation. This was the case in the instant matter. [emphasis added]

42. In the same case of *re Estate of Paul M'Maria (Deceased)* ((supra), the learned judge further stated that:

“Therefore, applying the law and the Constitution, the sale of Plot 18A Mitunguu Market on 12th July 2004 was in contravention of the *Law of Succession Act* and therefore vitiated



by that illegality. It is thus invalid, null and void transaction. Such contract is ex facie illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute. Therefore, the argument that there was a suit by the 1st Respondent or a decree therefrom does not change this reality of the law or fetter the jurisdiction of a probate court to preserve estate property for purposes of succession. As long as the transaction is void, it is also futile to argue that subsequent transfer thereof was done by the 1st Respondent who was the administrator of the estate of the deceased. Such was not an act of relation back; and the 1st Respondent cannot purport to validate that which is illegal, null and void. What Lord Denning stated in the case of *Mcfoy CFOY vs. United Africa Co. Ltd (1961) 3 All ER 1169*- is true of this case, that:

“... If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay here. It will collapse.”[emphasis added]

43. I reiterate that albeit the subject property was sold after confirmation, the confirmation having been found to have been obtained fraudulently and without disclosure and distribution of estate property to all beneficiaries, the applicant cannot rely on that confirmation to lay a claim against the estate of the deceased.

44. Finally, on whether the applicant herein can claim to be an innocent purchaser for value without notice and seek refuge under the law, the learned Judge in the above same case had this to say and I have no reason to differ:

“(12) The tag “Innocent Purchaser for Value without Notice” often falls in our lips, but sometimes we attribute less to it than it really portend. This is one case where I find the 2nd Respondent to be striving to circumvent the requirements of the law and to validate an illegal contract by citing the defence of Innocent Purchaser for Value without Notice. Defence of innocent purchaser for value is only available to:

“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...” Black’s Law Dictionary, Eighth Edition.

45. In the instant case, the applicant claims that she bought land from Tabitha and that she is in occupation thereof. No evidence of occupation was displayed and in addition, there is no denial that respondent’s family from the said land hence his summons for revocation of grant.

46. For all the above reasons, I find and hold that the succession Court had jurisdiction to nullify the titles which were illegally registered in the name of Tabitha and any subsequent transfers were null and void as the registration by Tabitha was devoid of consent from the beneficiaries of the estate and therefore there is no valid legal ground upon which this court should set aside the nullification order issued by Ochieng J (as he then was).

47. I find the application herein dated 3//2021 to be devoid of any merit. It is hereby declined and dismissed. Each party to bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2023

R.E. ABURILI



JUDGE

