



In re Estate of the Late Samurai Ole Oiboo Barta (Deceased) (Succession Cause E001 of 2022) [2023] KEHC 22616 (KLR) (4 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
SUCCESSION CAUSE E001 OF 2022
F GIKONYO, J
SEPTEMBER 4, 2023
IN THE MATTER OF THE ESTATE OF THE LATE
SAMURAI OLE OIBOO BARTA (DECEASED)**

BETWEEN

IBRAHIM KOMBO ANYONA ONCHONGA OBJECTOR

AND

KING'ASUNYE ENOLE BARTA 1ST RESPONDENT

JOSEPH BARTA 2ND RESPONDENT

JUDGMENT

Background

1. The deceased in this matter died in the year 1991. The petition was filed by Kingasunye Ene Barta and Joseph Barta in their capacities as wife and son respectively. Certificate of confirmation of grant was issued to Kingasunye Ene Barta on 3/11/2016.
2. The petitioners filed an application for amendment of the certificate of confirmation of grant dated 2/08/2017. An amended certificate of confirmation of grant was issued on 10/05/2018.
3. Before this court is a Summon for Revocation of Grant dated 13/10/2021 seeking the following orders;
 - a. The grants of letters of administration intestate issued on the 10th may 2018 and confirmed on the 10th may 2018 on the Kingasunye Ene Barta & joseph barta be nullified and or revoked.
 - b. Any subsequent registration and/ or dealing in respect of the parcel of land no. Transmara/ Enaenyeny /334.
 - c. Costs be provided for.



4. The application is expressed to be brought under Section 76 of the *Law of Succession Act* Cap 160 laws of Kenya, Rules 44 of the *Probate and Administration Rules* and is supported by the affidavit sworn by the objector/Applicant Ibrahim Kombo Anyona Onchong'a.
5. In response, the respondents filed a replying affidavit dated 8/12/2021 and grounds of opposition dated 16/2/2022.
6. The objector alleges that he purchased part of land parcel No. Transmara/Enaenyeny/334 measuring two (2) acres at a consideration of Kshs. 77,000 vide an agreement dated 28/09/2003. The said part of the parcel of land was 1st respondent's share. That in the said agreement the 2nd respondent was the vendor and the 1st respondent was a witness in the execution of the agreement. The objector took possession of the suit property and started developing the land and even planted trees which are big enough at the moment. The objector later purchased another part of the said parcel of land vide sale agreement dated 12/12/2006 which was hived from the 2nd respondent's share during the succession process.
7. The objector argued that the respondents concealed relevant materials from this court with intent of prejudicing the objector to their own benefit as a result duped the court into confirming the grant without any consideration of the objector's interest.
8. The objector contends that he has been in occupation since the purchase of the suit property uninterrupted and/or interfered. That it will be unfair if the respondents are allowed to disinherit the objector of his proprietary rights.

Directions of the court

9. The summons for revocation of grant was canvassed by way of written submissions.

Objector's submissions

10. The objector has elaborated on the averments in his supporting affidavit and has relied on section 76 of the *Law of Succession Act* and *in re estate of Justin Munyi Muriithi(Deceased)* [2019] eKLR.
11. The respondents submitted that the objector has no locus standi to institute these proceedings as he is not a beneficiary, administrator, survivor, dependant, and/or creditor of the estate of the deceased pursuant to the provisions of section 26 and 66 of the *laws of succession act*. Further that 79 and 82(b) (ii) the objector does not quality as creditor pursuant to the alleged sale agreement and in any case, he would have a rightful forum in another court other than the probate court in accordance with order 37 of the *Civil Procedure Rules* 2010. The respondents' placed reliance *in the matter of estate of James George Maruti (Deceased)*.
12. The respondents submitted that the objector ought to have first obtained a decision in his favour before the environment and land court so as to be certified as a creditor of the instant estate in order to bring in an application of this nature under section 76 *law succession act*. Further that the environment and land court have jurisdiction over the property in question is a subject of the *Land Act*. The respondents have relied on section 13 of the *Environment and Land Act* 19 of 2011 and articles 162(2) (3) of the *Constitution*. The respondents relied *Vincent Kibiwott Rono v Abraham Kiprotich Chebet & Lornah Jepchirchir Kiprotich (Suing as The Representative of the Estate of Priscillah Komen Kiprotich* (Dcd) Misc. Reference Application No. 8 Of 2022 At the High Court of Kenya at Eldoret.
13. The respondents submitted that the transaction was not between the deceased and the objector but between the respondents and the objector. The respondents were not administrators of the estate of the



deceased. Therefore, the transaction was unlawful and violates the provisions of section 45 and 82(b) (ii) of the *LSA*. The alleged sales took place on 28/09/2003 and 12/12/2006. At the time there was no confirmed grant or appointed administrators. The respondents relied *Virginia Mwari Thuraniira v Purity Nkirote Thuraniira* [2017] eKLR, *Re Estate of Paul M'maria(Deceased)* Succession Case No. 547 of 2009.

14. The respondents submitted that the objector's application is statutory time barred by dint of section 7 of *Limitation of Actions Act*, as the sale agreement was executed in 2003. That the claim of the land initiated through summons for revocation of the confirmed grant after a period of 18 years, which is outside 12 years' period provided by law.
15. The respondents urged this court to dismiss the summons the revocation of grant for want of merit declare the sale of the said portions to the objector illegal, null and void pursuant to the provisions of section 160 of the *LSA*.

Analysis and Determination

16. The overall issue in the application before the court is;
 - i. Whether there is any lawful ground on which to revoke or annul the grant of letters of administration issued to the respondents herein

Grounds of Revocation or annulment of grants.

17. Grounds for revocation or annulment of grant of Letters of Administration are set out in Section 76 of the *Law of Succession* thus:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) That the proceedings to obtain the grant were defective in substance;
- (b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) To proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) That the grant has become useless and inoperative through subsequent circumstances.



Persons who may apply

18. From the arguments by the respondents, a question has arisen as to whether the applicant can apply for revocation of grant under section 76 of the *Law of Succession Act*.
19. The first part of section 76 of the *Law of Succession Act* provides that: -

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion.
20. The section gives any interested party legal standing to apply for revocation or annulment of grant on the basis of grounds set out in the section (*Matheka and Another v Matheka* (2005) EA 251).
21. Therefore, contrary to the submissions by the respondents, section 76 of *LOSA* does not limit standing to apply to

“a beneficiary, administrator, survivor, dependant, and/ or creditor of the estate of the deceased.”

Grounds cited

22. The major ground cited for seeking revocation of the grant herein is that confirmation of the grant was obtained through concealment of material facts, namely;
 - i) that the objector purchased a piece of land in the estate; and
 - ii) as such purchaser, he has an interest in the estate.
23. The objector/applicant has annexed to his application copies of sale agreements between him and the respondents. The agreements are dated 28/09/2003 and 12/12/2006.
24. From the material placed before the court, three incidents are important; date of the death of the deceased, issuance and confirmation of grant, and the date of the sale of the estate land. The deceased died in 1991. Confirmation of grant herein was done in 2017. And, the estate land in question was sold vide agreements dated 28/09/2003 and 12/12/2006. These agreements have been exhibited in court. Notably also is that the land of the deceased was sold even before any succession case had been filed as this cause was filed in 2012. The estate property subject of the agreements herein was therefore, sold before any grant of representation had been issued and confirmed.
25. On the one hand, the objector is seeking for revocation of grant on the basis of non-disclosure by the respondents of the said sales of the estate landed property.
26. On the other hand, the respondents are claiming that the said sale of the estate property was contrary to section 82 of the *Law of Succession Act*, and therefore, unlawful.
27. There is every indication that both parties were aware that the sale of the estate's landed property before issuance and confirmation of grant was prohibited in law. Without doubt, the respondents are now taking advantage of the law.
28. Be that as it may, to the extent that the sale herein of land of the deceased was before issuance and confirmation of the grant, and without the approval of the court, is in contravention of the Law of Succession Act. In the circumstances of this case, the objector may not stack such claim as a basis for revocation of the grant herein.
29. Nonetheless, the objector may seek redress from the Environment and Land Court.



Intermeddling and breach of statutory duties

30. The court is also keen on the fact that, at the time the respondents sold part of the estate property subject of this application, they were not even administrators of the estate of the deceased. In fact, not even a succession cause had been filed. Nothing even shows that the sale of immovable property of the estate of the deceased was in exercise of the powers of a spouse under section 37 of the [Law of Succession Act](#) and that it received the approval or consent of the court. Inescapable conclusion is that, at the time, the respondents were not authorized by the Law of Succession Act, or by any other written law, or by a grant of representation under the [Act](#) or by the court in selling the estate property. The act of selling the estate property in the manner they did would be treated under section 45 of the [Law of Succession Act](#) for they willfully and knowingly sold the estate property in contravention of the law.
31. The bigger and current jurisprudential question emerging is whether such is a lawful or legal medium of acquisition of land in law, and the implication of article 40(6) of the [Constitution](#) on such acquisitions. This court does not however seek to answer these questions; these are for another forum.
32. The respondents are now simply trying to hide behind the law when they made arguments that the sale of the land herein was done before confirmation of grant and therefore unlawful. They have stated the law correctly but their actions are a mockery of the law they now pretend to vindicate. At this juncture, it is appropriate to state that, courts of law should be careful to always suppress and deal firmly with such stealth and conniving conduct by parties. Therefore, the respondents who sold the estate property without any lawful authority, should be made to suffer the consequences of their illegal actions by invoking the penal provisions applicable to intermeddlers with the estate of the deceased. Such course will help in protecting and preserving the estate property from unscrupulous individuals.
33. According to Musyoka, J in [Veronica Njoki Wakagoto \(Deceased\)](#) [2013] eKLR:
“The effect of [section 45] ... is that the property of a dead person cannot be lawfully dealt with by anybody unless such a 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 very serious view of intermeddling and makes it a criminal offence.”
34. But, before closing, the court noted a matter of great importance which arose from the arguments by the respondents about transactions done by the deceased but not completed before his death. The legal representative of the deceased may be called upon to complete any such lawful transactions. Similarly, it is this court’s view that noting of such lawful transactions in the petition for a grant of representation is not prohibited; such course may also be a matter of making full disclosure of the status of the estate of the deceased.

Conclusions and orders

35. The sale herein of the estate property is in contravention of the law. Accordingly, for purposes of section 76 of the [Law of Succession Act](#) and the application before the court, such sale cannot be used as a basis for revocation of grant by a purchaser especially where the purpose is to exclude the property from the estate of the deceased or to confer proprietary interest on such person. Those are matters for another forum but not probate court.
36. In the upshot, the application for revocation lacks merit and is dismissed with no orders as to costs given the offensive conduct of the parties.



37. In light of the findings of the court on the offending transaction herein, the Deputy Registrar, shall issue a notice upon the respondents to show cause why penal sanctions should not be imposed on them in accordance with the law.

38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 4TH DAY OF SEPTEMBER, 2023.

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F. GIKONYO M.

JUDGE

In the presence of: -

1. Okemwa T.N advocate for the objector/applicant
2. 2nd respondent
3. Liken C/A

