



**Kogo & 2 others v Kolil (Succession Cause 103 of 2003)
[2023] KEHC 22399 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 103 OF 2003
RN NYAKUNDI, J
SEPTEMBER 20, 2023
IN THE MATTER OF THE ESTATE OF THE LATE KIPKIOS ARAP
BUNGEI**

BETWEEN

**PHILIP KIMUTAI KOGO 1ST PETITIONER
GRACE CHEPKORIR KOECH 2ND PETITIONER
JUSTINE KIPKOROS 3RD PETITIONER**

AND

ROSEBELLA CHEMEEI KOLIL OBJECTOR

JUDGMENT

1. What is pending before this court is the objection proceedings instituted vide an Answer to Petition of a Grant dated June 14, 2006, filed on August 4, 2006. The answer was premised on the grounds set out therein and the contents of the supporting affidavit sworn by the Objector.
2. The objector is the Administratrix of the estate of the late William Kipkoech Sirma Kolil, who was a purchaser for value of 46 acres which are comprised in land parcel number Kapseret LR.No.9909/4. This parcel forms part of the estate of the deceased. The objection is premised on the grounds that the petitioners failed and or deliberately omitted the name of his late husband, the purchaser, in the application for grant. In a nutshell, the objector seeks orders that the court declare her as a beneficiary of 46 acres out of the deceased's Land parcel number Kapseret LR.No.9909/4 on behalf of the estate of her late husband.



Objector's case

3. It is the objector's case that her deceased husband purchased the property in question between 1996 and 1999. Further, that the beneficiaries of the late William Kipkoech Sirma Kolil have been in actual possession of the said land to date and have been cultivating on this piece of land since then.
4. The objector submitted that the Hon Justice I.K. Ibrahim, in his ruling dated May 28, 2008 found that the petitioner, then Samuel Kenduiywa Kios, having sold the deceased's land before obtaining grant of letters of administration, was liable to account for all the proceeds of the sale thereof. In such event, the objector had the right to trace any beneficial rights that she has in the estate of the deceased and to attach the same to the extent of the acreage that her husband had purchased. While making the above determination, Hon Justice I.K. Ibrahim noted that in the sale agreements, the former petitioner, Samuel Kios Kenduiywa, purported to sell the portions of land to the objector's husband as a shareholder of a portion of LR.No.9909/4. He stated that the questions that needs to be answered in the affirmative were whether the vendors are beneficiaries in the estate of the deceased and or if they have shares in the deceased's estate herein.
5. It was the objector's case that Hon Lady Justice G.W. Ngenye while determining the application dated September 28, 2009, being summons for substitution of the petitioner, agreed in her ruling of 2012 that the objector had proved that the late husband had purchased 46 acres out of Kapseret LR No.9909/4. Therefore, being the Administratrix of her husband's estate, she is beneficially entitled to the purchased share of the land. Hon Lady Justice Ngenye further confirmed that the objector's interest having been admitted by the former petitioner, Samuel Kenduiywa Kios, shall be catered for during distribution of the estate herein and in the alternative, the objector may apply as an interested party after grant is issued for purposes of ensuring that her interests are well catered for during the distribution of the estate.
6. The objector urged that the rulings of Justice I.K. Ibrahim and Justice Ngenye are to the effect that even though the 46 acres of land was sold to the objector's husband before the sellers thereof obtained grant of letters of administration, the objector is entitled to trace the 46 acres purchased by her late husband from the estate of the deceased. Counsel urged the court order that the objector is entitled to trace the 46 acres purchased by her late husband from the estate of the deceased and the same be catered for during distribution of the estate.
7. The objector submitted that she filed the objection as the petitioners had failed to recognize her interest as a purchaser in the estate and therefore, her prayer was that the Honourable court do find that she was a purchaser of 46 acres out of the estate and hence, a beneficiary to the estate hereof to that extent. She maintained that she took occupation of the land in 1996 with her husband after he had purchased the land from the deceased herein. She produced agreements dated 23/4/1996, 23/9/1996, 9/1/1997, bundles of acknowledgement, agreement dated 13/2/1997 and supplementary agreement dated 8/1/1999 as exhibits. The Objector cited section 93(1) of the *Law of Succession Act*, section 62(1) of the *Land Registration Act*, 2012, section 6(1)(a) and 6(1) (c) of the *Land Control Act* and section (8(1) of the *Land Control Act* in support of this submission.
8. The objector urged that it is clear that section 93 of the *Law of Succession Act*, cap protects the title of a purchaser for value from a person to whom representation has been granted notwithstanding revocation of the grant. The *Land Control Act* on the other hand, requires any purchaser from a land proprietor or a person to whom representation has been given, to obtain the consent of the Land Control Board within six months in cases of agricultural land failure to which the transactions thereof shall be void. Section 61(1) of the *Land Registration Act*, 2012 provides that any dealing by personal



representative on a - deceased's land shall be deemed to have been the dealing by a registered proprietor with all the rights conferred by the *Land Registration Act*. It is evident from the foregoing authorities that section 93 of the *Law of Succession Act*, cap 160, does not oust the provisions of the *Land Control Act*, cap 302 and the *Land Registration Act*, 2012 but they all work together towards achieving the same goal, that is, protecting the purchaser thereof. Counsel for the objector urged that the objector has clearly demonstrated that her husband purchased 46 acres out the deceased's land parcel number Kapseret LR No.9909/4 from Samuel Kenduiywa Kios and Kebenei Hosea after the estate land herein had long been shared out by the Deceased and clan elders and which fact, the 2nd petitioner confirmed during cross-examination.

9. The objector's case is that it is clear in view of section 29 (a) and 29 (b) that Samuel Kios and Hosea Kebenei were dependants of the deceased and or beneficiaries in the estate thereof. The former, by virtue of being the son of the deceased and the latter by virtue of being the nephew of the deceased and whom the deceased had taken into his family as his own, as confirmed by the objector and the 2nd petitioner during cross-examination. Therefore, the selling of the 46 acres by Samuel Kios and Hosea Kebenei out of their share should not be an issue as the said sale only affected their own share of the estate and not that of the other beneficiaries.
10. The objector submitted that it is also true that the objector's husband never obtained the consent of the Land Control Board after the subject sale transactions due to the fact that he unfortunately passed on shortly after the said transactions following a tragic road accident and, by virtue of the fact that grant of letters of administration and confirmation had not been issued. Notwithstanding that, the objector submitted that the deceased's estate created a constructive trust in favour of the objector's late husband when they allowed the objector to take possession and enter occupation of the 46 acres from 1996 to 2021 despite knowing that the same had been sold to the Objector's husband by one Samuel Kios and Hosea Kebenei who had not taken out grant of letters of administration. As such, the subject sale transaction cannot be held as void for failure of the objector's late husband to obtain the consent of the Land Control Board consent within 6 months of the transaction . In support of the foregoing, the objector relied on the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR.
11. The objector urged the court to allow the objection.

Respondent's case

12. Learned counsel for the respondent filed submissions on July 5, 2023. He submitted that the deceased lacked the capacity to enter into any binding contract, with anybody, over any of the assets making up the estate of the late Kipkios Arap Bungei. The mere fact of being a son to the deceased did not vest him with the right to dispose the assets of the estate. Counsel urged that without a Grant of Letters of Administration, he lacked the requisite capacity to enter into the purported Agreements for Sale. The deceased had not been appointed an administrator of the estate of the deceased and therefore could not confer an interest to the Objector's husband. It is the Respondent's case that the purported sale transaction were unlawful and amounted to intermeddling with the estate of the deceased herein as envisaged under section 45 of the Act. He cited the case of *Re estate of Kanenje Manyu* [2020] KEHC1 (KLR) in support of this submission.
13. The respondent brought it to the attention of the court that the deceased admitted in his replying affidavit sworn on November 30, 2006 that he entered into a Sale Agreement with respect to the Estate of the deceased despite the fact that he had not obtained Letters of Administration. Further, that the objector equally admitted that her late husband (William) bought the land from Samuel and not the deceased as the deceased had already died. Counsel submitted that he sold the parcel of land without getting consent from the other beneficiaries and the proceeds of the same were not shared to the other



- beneficiaries. That it is even worse that at the time of the purported sale most beneficiaries were minors which meant that there was a continuing trust. The respondent urged that it will be detrimental to the other beneficiaries should this court allow the illegality perpetuated by late Samuel Kios and the objector's husband to be visited the innocent bona fide beneficiaries of the estate of the deceased.
14. The respondent stated that the Honourable Justice Mohamed Ibrahim (as he then was) rendered himself on the legality of the transaction between Samuel Kios and the objector's husband. His decision has never been reviewed or overturned hence there is no justifiable reason to depart from it.
 15. It is the respondent's case that Hosea Kenduiywo is a stranger to the estate of the deceased. Further, that the purported sale of land transactions dated February 13, 1997 and January 8, 1999 between Hosea Kenduiywo and the objector's husband were done after the demise of the deceased herein before commencement of succession proceedings with respect to the estate, hence, the transactions are void ab initio. He cited the case of *David Kamunya Kingori & another v Wambui Nderitu & 4 others* [2020] eKLR in support of these submissions. Further, that Hosea Kenduiywo was not an administrator of the estate of the deceased herein so he lacked capacity to sell the subject parcel of land. It therefore follows that his actions amounted to intermeddling with the estate of the deceased. The respondent urged that Hosea Kenduiywo is alive hence the objector can put forth a claim against him if indeed he took money from her husband under false pretence.
 16. Learned counsel for the respondent submitted that the objector and her husband are neighbours to the late Kipkios Arap Bungei as admitted on oath before this honourable court. They knew very well that the owner of the subject parcel of land had died at the time of the purported sale transactions dated April 23, 1996, February 13, 1997 and January 8, 1999. The respondent stated that this is an admission that was made by the objector in her testimony hence she cannot plead the protection of this honourable court as whoever comes to equity must come with clean hands. The respondent maintained that the sellers did not have good title to pass to the purchasers and urged the court to find that the objector's husband cannot be deemed as an innocent bona fide purchaser.
 17. The respondent urged that the objector's Claim is enforceable against the estate of the Late Kipkios Arap Bungei. She stated that no court ought to enforce an illegal contract or make itself an instrument of enforcing obligations arising from such a contract as held in the case of *Standard Chartered Bank (k) Ltd vs Intercom Services Ltd & 4 others* (2014) eKLR. It is very clear that the purported sale transactions amounted to intermeddling with the deceased's estate by Samuel Kios, Hosea Kenduiywo and the objector's husband. the same cannot be protected or sanctioned by this honourable court to the detriment of the bona fide beneficiaries.
 18. The Respondent submitted that the suit property was agricultural land. No consent was obtained from the Land Control Board within the 6 months after the purported sale transactions in accordance with the provisions of the *Land Control Act*. Section 6 of the *Land Control Act* provides for the consent of the Land Control Board for dealings in agricultural land, declaring as null and void for all purposes transactions which do not have the consent of the Land Control Board. Further, that there being no evidence of payment for the value of the land, there is every reason to believe that he was basically acting as a conduit to ship the subject parcel of land out of the estate hence disenfranchise the other bona fide beneficiaries.
 19. The respondent urged the court to dismiss the claim with costs.

Analysis & Determination

20. Upon considering the application, responses thereto and submissions, the following issues emerge for determination;



1. Whether the late William Kipkoech Sirma Kolil was entitled to a share of the estate of the deceased as a purchaser for value.
2. Whether there was a constructive trust

Whether the late William Kipkoech Sirma Kolil was entitled to a share of the estate of the deceased as a purchaser for value

21. The objector's claim is founded on the claim that her husband, the late William Kipkoech Sirma Kolil, purchased forty-six acres of land parcel No. Kapsabet L.R No. 9909/4. The deceased passed away on January 15, 1976. The objector contended that the purchase took place in 1996. Given that the deceased had passed on twenty years prior to the purchase of the suit land. In order for the late William Kipkoech to have purchased the property, the same would only be possible if there was an administrator appointed to administer the estate. It is not in dispute that there was no administrator until 2003 when the petitioner sought to be appointed an administrator of the estate.
22. The objector referred the court to the ruling of Hon. Justice M.K. Ibrahim delivered on May 28, 2008 in support of her claim. I have perused the ruling and it reveals that the court found that the petitioner therein, Samuel Kenduiywo, had intermeddled with the estate of the deceased by selling portions of the estate. I am in agreement with the sentiments of the court that the objector may have a right to trace any beneficial rights she has in the estate. However, these rights are to be traced from the individual who sold the property to the objector and not from the estate. By virtue of the fact that the late William Korir purchased property from Samuel Kenduiywo and not the deceased, there can be no discussion on the validity of the sale agreement as he did not have title to pass. Section 93 of the [Law of Succession Act](#) 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 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."
23. In [Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu and another](#) (2014) e KLR the High Court at Meru stated:-

Whereas the above section states that a transfer by 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, I am of the considered view that such transaction can only be relied upon where one has obtained the grant fraudulently. The purchaser in this cause came from the neighbourhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid."



24. In *Jacinta Wanja Kamau v Rosemary Wanjiru Wanyoike and another* (2013) e KLR where the appellant therein unsuccessfully sought protection under Section 93, the Court of Appeal sitting in Nyeri stated:-

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 Mugundu to sell the land before the confirmation of the grant.”

25. *In Re Estate of Paul M'Maria (Deceased)* [2017] eKLR, where the court held that;

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. 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”

26. As the objector’s husband purchased the property in question from someone who did not have good title or authority to deal in the properties of the estate, she cannot claim that she is entitled to that portion of the estate.
27. It is my considered view that the objector is not entitled to any share of the estate as a beneficiary.

Whether there was a constructive trust

28. The law as to the principles to be applied regarding when a court should infer a constructive trust are now well settled. The doctrine of constructive trust was further expounded upon in the case of *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others* [2015] eKLR

... A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.” (emphasis mine)

29. In *Willy Kimutai Kitilit v Michael Kibet* (2018)eKLR the court of appeal reviewing preceding authorities on the same doctrine pronounced itself as follows:

Thus since the current Constitution has by virtue of article 10 (2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle amongst others, It follows that equitable doctrine of constructive trust and proprietary estoppels are applicable to and supersede the



Land control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the land control board. In essence lack of the consent of land control board does not preclude the court from giving effect to equitable principles in particular the doctrine of constructive trust."

See also the holding in the case of Macharia Mwangi Maina and 87 others v Davidson Kagiri 2014 eKLR.

30. In the present case the first bone of contention is that the vendor did not have capacity to enter into the sale agreement as he did not have good title to the parcel of land. He had not been appointed an administrator of the estate and therefore could not pass good title. As there was no capacity to contract, there is no need to go into the issues of the land control board approval as they cannot approve an illegal transaction. The claim of a constructive trust existing is far-fetched and unmerited. The court cannot regularize an illegality under the guise of the objector's husband being a purchaser for good value yet it is evident that a sale would have been intermeddling with the estate. The objector sought protection of section 93 of the Law of Succession Act which provides as follows;
31. However, these provisions are not applicable in the present scenario as there was no grant issued to the vendors before the purchase. The Supreme Court of Kenya addressed the limitations to the right to property in scenarios where property that has been irregularly obtained is passed on to another party in Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) The apex court expressed itself as follows;

Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.

Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.

33. It is also imperative to note that the import of the decision of Hon. Justice M.K. Ibrahim delivered on 28th May 2008 was that the sale of the portions of the estate was illegal. Therefore, a constructive trust cannot arise as the parties' intention was clearly to defraud the estate as it would be tantamount to sanctioning an illegality. Further, the vendors did not have indefeasible title as they were not administrators and as such, the alleged transaction was void ab initio.
34. In the premises, the objection is dismissed in its entirety. Each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF SEPTEMBER 2023

R. NYAKUNDI

JUDGE

