



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO. 166 OF 2017

IN THE MATTER OF THE ESTATE OF CYRUS KINGORI NGOTHO (DECEASED)

JULIA MUMBI KARIUKI.....ADMINISTRATOR/APPLICANT

VERSUS

NANCY MUKUNYA (Representative of the Estate of

Samuel Ndung'u Mukunya).....RESPONDENT

RULING

INTRODUCTION

1. The matter before Court is an application by Julia Mumbi Kariuki, the Applicant herein brought through Summons dated 18/08/2020 seeking to recover monies collected by the late Samuel Ndung'u Mukunya from Muhotetu Farmers Company relating to 2 shares belonging to Cyrus Kingori Ngotho, the deceased herein under Membership No. 161 between 2016 and the late 2017. The grounds upon which this application is based are listed as follows; -

I. Spent.

II. That a declaration do issue to the effect that all the monies collected by the late Samuel Ndung'u Mukunya from Muhotetu Farmers Company relating to 2 shares belonging to the deceased under Membership No. 161 between 2016 and late 2017 was an illegality.

III. That the Respondent being the representative of the estate of the late Samuel Ndung'u Mukunya refunds all the monies totaling kshs. 824,000 collected by the late Samuel Ndung'u Mukunya in respect to the 2 shares in Muhotetu Company Limited to the estate of the deceased for inclusion in the distribution of the estate of the rightful beneficiaries.

IV. That the said kshs 824,000 plus compound interest at the commercial bank rates calculated from the various periods when the money was collected be paid to a bank account which shall be provided upon being opened by the Applicant/administrator within 14days of determination of this application.

V. That failure to remit the money plus the compounded interest within 30 days of the determination of this application, execution do issue against the estate of the late Samuel Ndung'u Mukunya.

VI. That the costs of the application be borne by the Respondent.

APPLICANT'S CASE

2. The Applicant herein is a co-administrator and beneficiary of the deceased's estate. Through her Affidavit dated 18/8/2020, she averred that the court having nullified the previous grant, all the properties of the deceased reversed to the estate of the deceased including the 2 shares in Muhotetu Company Limited and therefore there was a need to have all the monies collected from the company by the late Samuel Ndung'u Mukunya to the detriment of the rightful beneficiaries returned to the estate to enable distribution to the proper beneficiaries.

3. She maintained that the court had established that the sale of the aforesaid shares was null and void in its ruling dated 19/12/2017 delivered on 28/5/2020 and that the estate of the late Samuel Mukunya should not bestow in itself an undeserved illegal benefit with a view of conferring itself an unjust enrichment from a transaction laced with illegality.

4. Furthermore, the Applicant asserted that she was aware through a letter dated 9/6/2018 from Muhotetu Farmers Company (***annexed and marked JMK-1***) that in the course of the period between the year 2016 and late 2017 the late Samuel Ndung'u Mukunya had collected a total of kshs 824,000/- from Muhotetu Farmers Company in respect of the 2 shares belonging to the deceased. She claimed that the principal amount of money collected plus interest on the same should be refunded to the estate of the deceased through herself as an administrator within 30 days of this court's determination and in case of failure by the Respondent, execution proceedings should immediately commence to recover the same from the estate of the late Samuel Ndung'u Mukunya. The Applicant averred that the monies should be deposited to a bank account whose details she will provide and that she would hold the monies as a stakeholder pending determination on the mode of distribution of the deceased's estate.

5. Lastly, the Applicant maintained that there is no justifiable cause as to why the estate of the late Samuel Ndung'u Mukunya should continue holding or retaining money acquired out of an illegality yet the court had pronounced itself on the same and that aside from that there is need to finalize the distribution of the deceased's estate and bring closure to this case.

RESPONDENT'S CASE

6. The Respondent's case was set out in her replying affidavit, a further replying affidavit dated 24/11/2020 and 9/12/2020 respectively and the Respondent's reply to the Applicant's written submissions dated 4/2/2021.

7. The Respondent averred that the Applicant who described herself as a beneficiary and administrator of the deceased's estate had cunningly and deliberately excluded Joseph Muriithi Kingori, the 1st administrator herein, who had sold the shares in Muhotetu Farmers Company Limited to Samuel Ndung'u Mukunya by an agreement dated 1/10/2011 when he represented himself as the registered shareholder and for a consideration of kshs. 800,000/-. The seller did not disclose that there were other beneficiaries interested in the estate of his late father at the time of making the agreement for sale dated 1/10/2011 and the variation of agreement of sale of shares dated 27/2/2012 and the subsequent payment made on 15/1/2013.

8. She further asserted that Muhotetu Farmers Co. Ltd transferred the two shares to the late Samuel Ndung'u Mukunya and later paid him dividends as a shareholder. She maintained that the latter was a bonafide purchaser for value without any notice of adverse claims and that at the time of issue of grant of letters of administration intestate, issue of certificate of confirmation of grant and transfer of the two shares to Samuel Ndung'u Mukunya there were no subsisting rulings or judgements invalidating the sale transaction and that the Applicant cannot purport that the purchaser was receiving the dividends illegally.

9. The Respondent averred that she believes that the two administrators had colluded to keep the purchase money and at the same time claim dividends that were legally paid to Samuel Ndung'u Mukunya, a situation that is untenable and clearly calculated to unjustly enrich themselves. Further, she claimed that the 1st administrator as a beneficiary of the deceased cannot illegally continue holding the money belonging to the estate of the late Samuel Ndung'u Mukunya which was paid to him for transfer of the said two shares. She asserted that there should be a set off since the estate of the deceased got back their 2 shares and receive dividends and emoluments and still continue holding the consideration.

10. She denied that there was an agreement to pay compound interest as sought by the Applicant and that the latter had not advance any plausible grounds for claiming such interest and it would be against or repugnant to public interest to award such punitive interest. She concluded that if the orders sought are issued, she would have no avenue of recovery of the said consideration and therefore unjustly enriching the estate of the deceased to the detriment of the estate of Samuel Ndung'u Mukunya.

1ST ADMINISTRATOR'S CASE

11. The 1st administrator, through his replying affidavit dated 25/11/2020, asserted that he had no objection to the application save that the Applicant cannot seek to operate an account alone since there are two administrators of the deceased's estate. He maintained that the money sought in the application should be deposited in a joint account to be opened in the name of the 1st and 2nd administrator's advocates pending the confirmation of the grant.

12. Through his written submissions dated 4/2/2021 the 1st administrator averred that the late Samuel Ndung'u Mukunya misled him into selling what he did not have and proceeded to receive proceeds belonging to the estate herein and that those are the proceeds which this application seeks to revert back to the estate. He maintained that this court doesn't have jurisdiction to collect a debt between him and the respondent which is a civil dispute between the two. Lastly, he averred that the question as to whether the Respondent is owed money by any of the administrators in their personal capacity, is neither here nor there and it is not even the business of this court to delve into such issues.

ANALYSIS OF THE ISSUES

13. The core issue for determination is whether the monies totaling kshs. 824,000 collected by the late Samuel Ndung'u Mukunya in respect to the 2 shares in Muhotetu Company Limited should be refunded to the estate of the deceased?

14. First and foremost, the court in its earlier ruling delivered on 28/5/2020 concluded that:-

a. ".....As submitted by counsel for the 1st respondent, the applicant being an advocate of the High Court of many years standing, was aware of what he was entering into, that the 1st respondent had no capacity to pass any rights in the shares at Muhotetu Farmers to the applicant. Under Section 45 of the Law of Succession Act, the 1st respondent was an intermeddler and incapable of passing any rights to the applicant. The sale of the shares was therefore null and void *ab initio*. Under Section 76 of the Law of Succession Act, the court has a discretion to revoke a grant on an application by an Interested Party or on its own motion if grounds for revoking a grant exists....."

b.Even if the court had not been moved by the 2nd to 5th respondents to revoke the grant, there were good grounds to revoke the grant issued to the 1st respondent because first, the sale of the shares to the applicant was null and void, there having been no confirmed grant at the time of sale and then based on the application by the 2nd to 5th respondents, the court could revoke it.....

c.Applying the above authorities to the instant case, the court would be doing an injustice to protect the illegal acts perpetrated by the 1st respondent in transferring land to the applicant with the full knowledge of the applicant. The applicant cannot find protection under Section 93 of the Law of Succession Act.”

15. In Macfoy vs United Africa Ltd (1961) 3 Il. F.R. 1169 Lord Denning said at page 1172 that:

“If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to it aside. It is automatically null and void without more ado, though 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 there. It will collapse”

16. Moreover, according to the Latin maxim, *ex turpi causa non oritur actio*, based on the doctrine that no legal remedy or benefit can flow from an illegal act, explained succinctly by Lord Mansfield CJ in Holman vs Johnson (1775) 1 Cowp 341, as follows: -

“The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex dolo malo non oritur actio* [“no action arises from deceit”]. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa* [“from an immoral cause”], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both were equally in fault, *potior est conditio defendentis* “stronger is the position of the defendant.”

17. **Section 82 of the Law of Succession Act** provides that no immovable property of a deceased person shall be sold before confirmation of grant. The deceased's 1st administrator perpetrated an illegal act by acting as an intermeddler under **Section 45 of the Law of Succession Act** and therefore the estate of the deceased cannot move the court for benefits on the basis of an illegal contract; the maxim of *ex turpi causa non oritur actio* comes into play.

18. It follows therefore, that the application in pursuance of the monies collected by the late Samuel Ndung'u Mukunya from Muhotetu Farmers Company relating to 2 shares belonging to the deceased's estate arising from a sale that was declared null and void thus having no legal effect due to the illegal acts perpetrated by the 1st administrator in transferring land to the late Samuel Ndungu Mukunya cannot be pursued as from the aforementioned case law no legal remedy or benefit can flow from an illegal act.

19. The court will therefore not lend its hand to assist a party that is seeking to benefit from an act that was declared illegal ab initio. It is immaterial for the purposes that the 2nd administrator acted alone in moving the court as the 1st administrator still stands to benefit from the refund of the shares to the deceased's estate. Further, the court already pronounced itself in its ruling on the sale of the 2 shares finding the transaction a nullity in law.

CONCLUSION

(i) Consequently, I find that the application dated 18/08/2020 is untenable. The same is hereby dismissed with costs to be borne by the Applicant.

Dated, Signed and Delivered at NYAHURURU this 13th day of May, 2021.

.....

CHARLES KARIUKI

JUDGE