



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO.11 of 1991

IN THE MATTER OF THE ESTATE OF NZIOKA MUATHI (DECEASED)

ROSE PETER NTHENGE.....INTERESTED PARTY/APPLICANTS

ELIZABETH NZILANI PETER.....INTERESTED PARTY/APPLICANTS

VERSUS

PETER MATHEKA NZIOKA.....ADMINISTRATOR/RESPONENT

RAPHAEL NGEI NZIOKA.....ADMINISTRATOR/RESPONENT

AND

AGEOGINA NTHENYA NZIOKA.....INTERESTED PARTY/RESPONENT

RULING

1. By a Summons for Revocation of Grant dated 1st November, 2019, the Applicants herein seek the following orders:

(1) THAT the Honorable court do stay operation of the confirmed grant issued to Peter Matheka Nzioka & Raphael Ngei Nzioka on 25/2/2019 and dated 25/2/2019 or any other confirmed grant for this succession cause of the Late Nzioka Muathi pending the hearing and determination of this application interparties.

(2) THAT the Honourable Court do revoke the grant dated 25/2/2019 and issued on 25/2/2019 to Peter Matheka Nzioka & Raphael Ngei Nzioka or any other grant issued herein.

(3) THAT upon revocation of the grant, the estate be re-distributed and in particular Plot No.14 MUPUTI/KIIMA-KIMWE be issued and confirmed to Rose Peter Nthenge and Elizabeth Nzilani Peter.

(4) Costs do abide the application.

2. The Summons were supported by two affidavits sworn by the applicants. According to **Rose Peter Nthenge** one of the Applicants, **Peter Matheka Nzioka** and **Raphael Ngei Nzioka** are the administrators to the estate of the **Nzioka Muathai** (Deceased) their father and the owner of **Plot No.14 Muputi/Kiima-Kimwe**. According to the deponent, she was informed by **Gedion Wambua Masta** that he bought 1/3 portion of **Muputi/Kiima-Kimwe/14** (hereinafter referred to as the Plot) from **Thomas Mutiso** who had purchased the same from **Nzioka Muathi** (deceased). She was also informed by the said **Gedion Wambua Masta** that he further purchased the remaining portion of the Plot from **Peter Matheka Nzioka** one of the administrators herein.

3. It was deposed by the deponent that she bought the land from the said **Gedion Wambua Masta** which was measured as 1/3 of the Plot and took possession. Later, her daughter **Elizabeth Nzilani Peter** purchased the remaining portion of the Plot measuring 2/3 from **Gedion Wambua Masta** and took possession.

4. It was therefore averred that the applicants are the legal owners of the said land whole of it upon purchase and have occupied the same since the year 2000 to-date hence the actions of the said administrator do contravene the powers granted to him under the law in

administering the estate of the deceased as he is ready to dispose of the property to a stranger depriving the rightful owners.

5. It was averred that the co-administrator, **Peter Matheka Nzioka**, is not opposed to my ownership of the said land and that is why he has refused to sign the consent of transfer as he knows the plot belongs to the applicants and that **Gedion Wambua Masta** is even ready to come and testify in court that he sold the property to the applicants and he doesn't have any interest in the plot. However, the applicants were apprehensive that they stand to lose their right of ownership if the consent to transfer their land to a stranger is signed noting they have extensively developed and built on the plot.

6. In her affidavit, **Elizabeth Nzilani Peter**, the second applicant supported the averments of the 1st Petitioner hereinabove.

7. In her oral evidence, the 1st applicant relied on her affidavit and asserted that he had been using the plot since 2000 and that she was staying nearby. In her evidence, no one else was using the plot as she was cultivating the same and had a construction therein.

8. In cross-examination, she stated that bought the plot from **Gedion Wambua Masta** in 2000 and when she did the search the Plot was indicated to be in the name of **Nzioka Mwathe** though **Gedion** was not related to **Nzioka**. She was informed by **Gedion** that **Nzioka** was not present. By then the plot was unoccupied and she started staying therein in 2000. It was her evidence that she was unaware of the Succession Cause then and only became aware of the same in 2019.

9. She admitted that she was aware that a deceased's property should not be sold but was informed that the owner had sold the same. According to her information even **Gedion** had purchased it from one **Thomas** and he gave the applicants the agreement between the two. Her information was that it was **Thomas** who bought the plot from the deceased herein. She testified that she had an agreement with **Thomas** who also swore an affidavit deposing to how he acquired the plot.

10. According to the 1st applicant, initially people used to agree before the clan and though she admitted that she was not at the clan meeting, she stated that she had the minutes of the meeting at which **Peter** and his family were present. She however admitted that apart from **Peter Nzioka** who assisted her in purchasing the Plot, she did not know the children of **Nzioka**. In her evidence she constructed in 2002 and by then there was no need for approvals for domestic construction. In her evidence, no one had ever complained about her occupation.

11. In re-examination she referred to the clan meeting minutes of 1991 in which it was stated that the Plot had already been sold by **Nzioka, Peter's** father. According to her **Peter, Nzioka's** first child was involved in the transaction and insisted that the plot was not on lease.

12. On her part, the 2nd applicant, **Elizabeth Nzilani Peter**, reaffirmed that the 1st applicant was her mother and that she was aware of the Plot in question which her said mother purchased and sold a portion thereof to her. By then the Plot was bare but she later constructed thereon and installed water and power thereon. According to her, during the process of the purchase, **Peter Nzioka**, the 1st administrator was involved. Referred to the 1991 minutes, she confirmed that **Peter** was present. She also stated that no one had complained about their occupation.

13. In cross-examination, she stated that she bought the Plot from **Gedion Wambua Masta** but never carried out a search since she knew it was **Gedion's** Plot having sold it to her mother when she was 20n years old. She however became aware during the proceedings that a deceased's property ought not to be sold though she still believed that the Plot belonged to **Gedion** since she did not know **Nzioka Mwathe**. Asked about the minutes, she stated that she never saw the same till a few years ago.

14. According to her, the agreement for sale between her and the said **Gedion** was entered into before an advocate. However, the same plot had been sold to **James Makau** who had not paid for it by the time **Gedion** approached her to purchase part of the Plot which he said he would resell and the 2nd applicant paid for it and constructed a permanent house thereon in 2010. Using the same agreement for sale, she installed both water and electricity.

15. Referred to the minutes of the clan meeting, she stated that she came to know that **Peter** was a son of the original owner of the plot and that the minutes indicated that **Nzioka's** family agreed that **Peter Nzioka** should give his siblings another Plot.

16. In re-examination, she explained that the plot that she bought and that which her mother bought were the same.

17. The applicants called **Gedion Wambua Masta** as their witness. According to him, he bought 1/3 of the said Plot from **Thomas Mutiso** in 1989 and started using it. By then the Plot was vacant. It was his evidence that **Thomas** had bought the Plot from **Nzioka Muathai Mbondo** and took possession and occupation of the said portion of land. Upon taking possession, **Peter Matheka Nzioka**, son to the late **Nzioka Muathai Mbondo** sold to him the remaining portion of the said Plot.

18. It was his testimony that the first portion which he bought from **Thomas Mutiso** was sold by him to **Rose Peter Nthenge**, the 1st applicant who took possession thereof and has been using the same without any interference from anyone. The second portion that he bought from **Peter Nzioka**, he sold to **Elizabeth Nzilani Peter**. In his evidence the two portions are now occupied by the applicants and he has no claim over the same.

19. The witness disclosed that he was told that the transfer of the plot would be by **Peter**, the son of the deceased but he did not know the connection between **Peter** and the said Plot. Later **Peter's** family laid claim over the land and on 23rd October, 1999, they had a clan meeting to sort out the issue of the land and **Peter Nzioka** as the surviving son was found to have legally sold his father's portion. At the meeting was **Peter** and his brother with their wives though he was unaware if the daughters were present. At the time of the sale, he knew that the owner of the Plot was **Thomas Mutiso** who sold it to him. Since they trusted each other, there was no search done.

20. After putting up a slab, he was unable to finish the house and after selling the plot to the applicants, he handed over to them the documents relating to the transaction. In his evidence all along he knew the Plot belonged to Thomas and only became aware of the claim by **Nzioka's** family during the clan meeting. In his view, since the first son is supposed to succeed the father, Peter was the owner of the land.

21. **Peter Matheka Nzioka**, the deceased's son, was the second witness called by the applicants. According to him, though the deceased had several children, he was the only surviving child of the deceased and her mother was also dead. In his statement he stated that the deceased had plot Muputi/Kiima-Kimwe/14 measuring 0.17 Ha from which the deceased sold approximately 1/3 portion to **Thomas Mutiso** in 1980's and Thomas took possession of the same. The said Thomas also sold his portion to **Gedion Wambua Masta** in 1989 who also sold the same to **Rose Peter Nthenge** in 2000 and Rose took possession thereof which she utilises to date.

22. According to him, as a family, they have no objection to the sale of the said land as the 1/3 portion legally belongs to **Rose Peter Nthenge**. He stated that on 23rd October, 1999 they had a clan meeting to try and solve the land issue at which it was found that the surviving son of the deceased, he had rightfully sold his father's portion. Again the remaining portion was sold by him to **Gedion Wambua Masta** in 1989 who took possession of it without any objection from anyone. Accordingly, the whole of the said Plot which initially belonged to the deceased was wholly sold off and he had no claim over it. He was informed by **Gedion** that he sold the second portion to **Elizabeth Nzilani Peter**, the daughter of **Rose Peter Nthenge** in 2003 hence the said Plot is not part of the deceased's estate.

23. In his oral evidence he stated that the plot was sold by the deceased to **Thomas Mutiso** who sold it to **Wambua** who in turn sold it to the applicants. Though it was his evidence that he was entitled to inherit the property, it was sold off by the deceased and is now in occupation of the applicants for many years. He confirmed that the grant was however confirmed to **Ageogina Nzioka** but stated that he was not in court despite being an administrator. In his evidence he was unaware of the confirmation and did not sign any consent. He therefore did not agree with the proposal to have the Plot given to **Ageogina**.

24. It was his testimony that his father had two wives and the clan meeting held in 1991 resolved that the Respondents vacate the applicants' Plot. According to him, there was a plot at Mtito Andei measuring 12 acres which the Respondents' brother sold and they were given another ancestral land where they were staying. He stated that the Respondents have 15 acres while he also has 15 acres. He confirmed that Plot No. 14 was still in the deceased's name though it now belonged to the applicants.

25. In cross-examination, he stated that he had step-brothers but was the one who filed the Succession Cause. He confirmed that **Kilonzo Mwathe** and **Nzuki Wambua** are his uncles. He stated that he was unaware that he disclosed that it was only him and his uncles who were the beneficiaries to the estate of the deceased. He denied having filed any case in court before and that he has been summoned to court before. He admitted that **Ageogina** is his step sister and did not deny that they are beneficiaries. She however did not know where she was staying since 1991 but insisted that she is supposed to get her share from their house. In his evidence, he has 15 acres while the second house also has 15 acres. He reiterated that part of Plot 14 was sold by the deceased to Thomas while he also sold another part to Thomas.

26. While he agreed that he would give his step brothers a plot, they did not go for it. Since Plot 14 had been sold, it was his position that it cannot be subdivided. According to him, the proceeds of the sale was utilised by him in repaying the debts of the funeral.

27. In re-examination, he stated that his father sold part of Plot 14 when he was alive while he himself sold 2 portions being the eldest son authorised to do so.

28. **John Thomas Mutie Nthenge**, who was also called as a witness in his statement stated that the deceased approached him in 1980 and proposed to sell to him a parcel of land being Plot 14 at Five Hills known as Muputi/Kiima-Kimwe/14. An agreement was made with the deceased before the area assistant chief, a **Mr Kavoi**, a mechanic and friend of the deceased and the witnesses' manager, **Mr Katiku**. The agreed purchase price was Kshs 15,000/- on the smaller portion which he paid and the deceased instructed his son, Peter to transfer the said portion in event that he died before the transfer.

29. Some times in late 1988, he met **Gedion Wambua Masta** who wanted to buy land in Machakos and he offered to sell the said portion which he eventually did and the said **Gedion** proposed that the land be registered in the name of his wife, **Alice Wambua** instead. The witness wrote to **Peter** informing him of the transaction and then moved from Machakos to venture into other businesses. In the process, he misplaced most of his personal documents including the sale agreement and was surprised at the turn of the events. Later **Gedion** informed him that he sold the Plot to **Rose Peter Nthenge** who took possession thereof.

30. In cross-examination, he stated that he brought the said Plot from the deceased in 1986 during the lifetime of the deceased and three witnesses attested the transaction. He paid for the land in cash and later sold it in 1989 before effecting transfer. He reiterated that it was agreed that the deceased's children would transfer the plot to him in the event of the deceased's death and he himself authorised the deceased's children to do the same to the person to whom he sold it, **Masta**, and gave the letter to the buyer. According to him, **Masta** informed him that he intended to give the plot to his wife. Though he had entered into an agreement with the deceased, the same got lost while he was relocating his business and he was not aware of the case till few months before he came to court since it was his belief that the plot had already been transferred as he was not well versed in the transfer process. He however did not know the applicants but knew **Masta Ndemo** and **Peter Matheka Nzioka**.

31. In their replying affidavit, **Raphael Ngei Nzioka** and **Ageogina Nthenya Nzioka**, swore that they are beneficiaries of the deceased estate and that the grant of letters of administration in respect of the estate of the deceased was confirmed on 25th September, 2018 and before the confirmation, all parties who were rightly entitled to have a share of the deceased's estate were involved in the process.

32. They however denied that the applicants are entitled to a share in the estate and in particular the Plot in question and that the applicants' claim is untrue, unfounded and is calculated to disinherit **Ageogina Nthenya**, the rightful heir of the land. They averred that their brother, **Peter Matheka Nzioka**, has been using all means to disinherit them of their rightful share of the deceased's estate in collusion with the applicants in order to take the subject Plot. According to them, to the best of their knowledge, the deceased never sold the Plot to anyone before his demise and to the contrary, had expressed his interest to have the subject land inherited by **Ageogina Nthenya**.

33. When **Raphael Ngei Nzioka** realised some construction activities in 2015 and protested to the 2nd Applicant, he was informed that the 2nd applicant had bought the land from **Peter Matheka Nzioka** and despite protests, the applicants went ahead with the construction. However, over the years, the said **Peter Matheka Nzioka** has over the years tried to sell the same to other persons but after protestations, they pulled out. It was therefore averred that the allegation that the Applicants got into the land in 2001 is false and misleading as no one was using the land till 2015.
34. It was contended that the applicants have together with the said **Peter Matheka Nzioka** intermeddled with the estate during the pendency of these proceedings hence no legal right has been vested in the applicants over the said Plot. The said Respondents therefore averred that the application is unmerited and prejudicial to them and should be dismissed with costs.
35. At the close of the applicant's case, the 1st Respondent, **Ageogina Nthenya Nzioka**, opened the case for the Respondents. In her oral evidence, she adopted the contents of the replying affidavit and added that she learnt that plot no. 14 Kiimwa-Kimwe which was given to her by her father, the deceased, was said to have been sold by her step brother. It was her evidence that when she was in class 5 or 6, the deceased wanted to leave her a gift and gave her money which she gave to her step brother, Peter, but later Peter informed her that he had used half of it. She was then told that since Peter had used the money, she should build on the plot. She insisted that the deceased did not sell the Plot but she heard it was sold by her step brother, Peter. She therefore demanded that she be given her plot.
36. In cross-examination, she stated that she was born in 1965 though her ID Card indicated 1970. In 1983, she stated that she was in Class 3 when she was allocated the Plot. During that time, they were staying in Manyani and not on the said Plot. She was told by the deceased that since her brother had spent the money, she should build on the said Plot but could not tell if the same was recorded. Though she had 10 siblings, her evidence was that the other 9 were not given any plot. She admitted that in 1991 she was an adult but was not aware of the clan meeting in 1991 and could not recall if her brother, **Raphael**, went to the meeting. She admitted that some of the names mentioned in the minutes were those of her brothers, sister, step brother and sister in law but was not aware of the resolutions.
37. According to her, the deceased died in 1988. She revealed that she had never stayed on the said Plot, which is near town, as she was staying in Yumba. Though they consented to the mode of distribution, **Peter** declined to do so and she was unaware of his reasons for doing so. He indicated that she was only aware of plots nos. 1184 and 1185 and she did not conduct any search at the lands office but insisted that her father did not sell plot no. 14 and she did not know **Gedion Wambua** or **Thomas Mutiso**.
38. In re-examination, she stated that it was her father who told her that the plot in question was hers. Though the original petition was filed by Peter, she stated that they objected to the same and when they made their claim to Peter, Peter refused to sign succession documents. She disclosed that the other plots mentioned in the grant are Plot 970, 1185 and 1186 and that Peter was also a beneficiary.
39. **Raphael Ngei Nzioka**, on his part in addition to the contents of the replying affidavit, stated that the plot in question was given to her sister, **Ageogina** in his presence. He also insisted that the deceased did not sell the plot till his death. He did not know the applicants but stated that **Ageogina** had never stayed on the said plot as she was in school and they used the plot till 1973. After that, he did not know those who entered the property till 2017 when he was informed by the neighbours that people were constructing there. He stated that the was notifying **Peter** of the proceedings and Peter was aware of the same.
40. In cross-examination he stated that his father, **Nzioka Mwathe**, had two wives both of whom were not alive. **Ndinda**, **Peter's** mother had 3 children while in their house, they were 12 children. He stated that the deceased's property was to be divided amongst two houses save for plot 14 which was given to **Ageogina**. According to him the plot was inherited from his grandfather and he found them cultivating it. However, the registered owner was his father who did not purchase any other plot. He could not however recall any clan meeting in 1991 since he never attended it. He however, confirmed that **Francis Muli** and **Francis Mbithi** were his brothers.
41. He confirmed that the grant was confirmed that both himself and Peter were the administrators and they were to hold the three properties which though not registered in the name of their father, belonged to him, in trust. However, Plot No. 14 was given to **Ageogina**. In his evidence, he was always with his father and there was no family meeting due to tension. The deceased however stated that he would not sell Plot No. 14 since he had no money to make the transfer. He denied any knowledge of **Wambua** and stated that Plot 970 is at Manyani. He was however unaware of any replacement of the plots. It was stated by him that he was staying near Plot No. 14 in September, 2015. Between 1973 and 1985, they used to cultivate the said plot. He stated that he had no permanent place of bode. Apart from **Ageogina** who was younger than him, all his other siblings were past school going age and in 1978 he was 10 years old.
42. In cross examination, he stated that his brother, **Francis**, was present during the confirmation as well as the widows of his brothers and that everyone was aware of the succession.
43. On behalf of the applicants it was submitted that the Applicants herein have proved how they legally acquired Plot no. Muputi/Kiima Kimwe/14 in good faith and for value, and as such they are the *bona fide* owners of Plot no. Muputi/Kiima Kimwe/14. Moreover, the clan meeting held in the year 1991 whereby the administrators/Respondents were present, ratified that Plot no. Muputi/Kiima Kimwe/14 was already sold out and that **Peter Matheka Nzioka** do find another plot to give to the Interested Party/Respondent. The 1st administrator/Respondent **Peter Matheka Nzioka** has never objected or refused to give an alternative plot to the Interested Party/Respondent **Ageogina Nthenya** or his siblings. Even during hearing of this case, it was submitted, the 1st Administrator/Respondent was ready and willing to sit down and give a piece of land but the 2nd Administrator/Respondent categorically stated in court he cannot sit down and talk over anything with his brother the 1st Administrator/Respondent in this case.
44. It was submitted that the principle of estoppel operates as defensive doctrine preventing one party from taking unfair advantage over another party from false conduct and language. The 2nd Administrator/Respondent was present during the clan meeting held in 1991 whereby the clan ratified that Plot no. Muputi/Kiima Kimwe/14 was already sold out and that **Peter Matheka Nzioka** should find another plot to give to the Interested Party/Respondent **Ageogina Nthenya** rather than Plot no. Muputi/Kiima Kimwe/14 as it now belonged to another person who bought in good faith and for value.

45. According to the Applicants, the doctrine of proprietary estoppel is applicable and the 2nd Administrator/Respondent and the Interested Party/Respondent cannot renege that they were not aware that Plot no. Muputi/Kiima Kimwe/14 was already sold out and that it now belonged to the 1st & 2nd Applicants as bonafide purchasers for value.

46. The court was invited to take note of the fact in the application for revocation of grant, it is indicated that the grant herein was confirmed in the absence of the 1st Administrator/Respondent, **Peter Matheka Nzioka**. That also among the properties confirmed by the Honourable court being land parcels nos. Muputi/Kiima Kimwe/1186 and Muputi/Kiima Kimwe/1185 do not belong to the deceased, **Nzioka Muathi**. The land searches brought to court during confirmation of grant clearly show the registered owners since the year 1970's were different people hence the 2nd Administrator/Respondent misled the honourable court. Had the 1st Administrator/Respondent been summoned during the confirmation of grant, it was submitted that he would have pointed out that aspect. The court was invited to look at the land searches filed in court by the 2nd Administrator/Respondent, **Raphael Ngei Nzioka** and revoke the confirmed grant issued on the 25/2/2019 as it gives out property of other people but not the deceased's herein.

47. According to the Applicants, the deceased, **Nzioka Muathi**, having sold the land Plot no. Muputi/Kiima Kimwe/14 to PW5 **Thomas Mutiso** during his lifetime and witnessed by the 1st Administrator/Respondent clearly it means Plot no. Muputi/Kiima Kimwe/14 does not form part of the deceased's estate.

48. It was therefore contended that this Court is bound by inherent duty to enforce legal rights between litigants as stipulated under **Section 1A, 1B & 3A** of the **Civil Procedure Act**. In particular, section 1A provides that the overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act and the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective under which the court is required to administer justice where it is due and in this case it is imperative that the ends of justice must be met without unreasonable delay. In this respect, it was submitted that the Applicants herein have proved how they legally acquired the said plot in good faith and for value, and as such they are the bona fide owners of Plot no. Muputi/Kiima Kimwe/14.

49. It was argued that the common law retains its inherent flexibilities which empowers this honourable court, as a custodian of justice and fairness, to proceed on case-by-case basis invoking equitable principles to every dispute arising between litigants. For this reason, this honourable court is empowered with jurisdiction and inherent discretion to invoke equitable principles such as the humble orders sought in the Applicants' summons for revocation of grant dated 29/10/2019 and filed in court on the 1st November 2019.

50. The Applicants also sought for the costs of the application.

51. The Respondents submitted that from the supporting affidavits in the application dated 29/10/2019, the first applicant, Rose Peter, admits that she relied on word of mouth and did not conduct any due diligence to ascertain the owner of the property in question. She claims that **Gedion Wambua** had bought the land from **Thomas Mutiso**, yet there is no documentary evidence presented before court to show that there was any sale made. There is also no record of any payment presented to the court to this effect. While the first applicant also claims that **Nzioka Muathi** (deceased) sold the land to **Thomas Mutiso**, none of the children of the deceased were aware of the sale and none of the witnesses to the sale were called to testify. Further, there is no sale agreement or other documentary evidence to prove that this is the case.

52. It was submitted that whereas **Peter Nzioka** claimed to have sold part of the land in question to **Gedion Masta** in 1989, he sought to convey title that he does not have since the letters of administration of the estate were applied for in 1992 and issued on 24/08/1992. Any sale therefore made before this is therefore null and void.

53. According to the Respondents, the principle *nemo dat quod non habet* applies to this case and that the real owner of the property could have been ascertained by a mere search. The alleged purchaser **Gedion Masta** could also have delayed the purchase to allow the process of succession. At the time of the sale of this property, it was submitted that **Peter Nzioka** did not have any power to sell this property as he had no title to transfer to anyone seeing as he was not the owner of the property and had not even applied for the grant. Therefore, there was no valid title transferred to **Gedion Masta**. It also follows that **Gedion Masta** did not transfer a valid title to the 2nd applicant herein.

54. It was in any case submitted that since there is no documentary evidence of the transfer from **Peter Nzioka** to **Gedion Masta**, the purported transfer of the property to the 2nd applicant is therefore not valid. It was further noted there was no documentary evidence to support the transfer from the deceased to **Thomas Mutiso** as purchaser testified that he misplaced the documents of the subsequent sale. While he stated that there were 2 witnesses to the sale, none of the two witnesses could be called to the stand to verify this claim. There is also no evidence presented the court to satisfy the court that there was consideration paid for the property by **Thomas Mutiso** to the deceased or by **Gedion Masta** to **Thomas Mutiso**. While there is an alleged clan meeting where it was held that the property in question had been disposed of, none of the beneficiaries are aware of the same being convened.

55. It was submitted that the testimony of PW1, PW2 and PW3 that the applicants enjoyed possession of the property with the knowledge of the respondents and without any protests was rebutted in the replying affidavit dated 17/12/2019, where the second administrator protested after developments by a third party begun on the land in 2015 but they were not heeded. It was his sworn testimony that he and the interested party/ respondent are in the process of seeking eviction orders by first obtaining confirmed grant.

56. The Respondents noted that since any transfer made on the suit property before 2017 was revoked by the ruling given by **Justice Nyamweya**, the application for revocation of grant cannot be used as a guise for a review/ appeal of the ruling of this court.

57. In support of the submissions the Respondents relied on **Katana Kalume & Another vs. Municipal Council of Mombasa & Another [2019] eKLR** and **Republic vs. The Registrar of Titles, Mombasa & 2 others Exparte EMFIL Limited [2012] eKLR**.

58. Seeing as no sale agreements were produced in support of the purported sale agreements and seeing as no witnesses to the transaction testified, it was contended that we cannot confidently say the said transactions happened and that the omission to produce any documents in support of the alleged sale was deliberate.

59. Assuming that the transactions indeed happened, it was submitted that the applicants herein did not acquire legal title to the 2/3 of the property in question since it was sold by a person who did not have legal title in the property. The land was allegedly sold by **Peter Nzioka** in 1989 and this was after the death of his father and it therefore follows that he did not have title in the property hence was for all intents and purposes an intermeddler who sought to unjustly enrich himself by disposing of the estate of a deceased person without valid letters of administration. It was noted that by then the application for the grant of letters of administration intestate was had not even made and was not to be made until 3 years later and the same was objected to before it was issued and later revoked.

60. As to whether the applicants are bona fide purchasers, the Respondents cited **Lawrence Mukiri vs. Attorney General & 4 Others [2013] eKLR**, **Katende vs. Haridar & Company Limited [2008] 2 E.A.173**, **Falcon Global Logistics Co. Limited vs. Management Committee of Eldama Ravine Boarding Primary School [2018] eKLR**, **Joseph Muriithi Njeru vs. Mary Wanjiru Njuguna & Another [2018] eKLR** and *Black's Law Dictionary 9th Edition*.

61. It was submitted that the fact that it was incumbent upon the applicants to establish that they conducted due diligence before buying the suit property. According to the Respondents, this is a case where the applicants were taken for a ride by the 1st administrator who sold a property where he did not have a good title to pass. The remedy for the applicants would be at the doorstep of one 1st administrator who purportedly sold to the person who in turn sold the land to them. It was submitted that the conditions laid down in the **Lawrence Mukiri** case have not been met in the instant case as the applicants do not hold a certificate of title; the vendor **Gedion Masta** did not have apparent title, the applicants merely relied on his word of mouth; and the applicants did not exercise due diligence in purchasing the property. A simple search would have shown that the land was not registered in the names of the seller.

62. As regards the doctrine of estoppel, the Respondents relied on **Serah Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR** and **First Assurance Company Limited vs. Seascapes Limited [2008] eKLR**, that representation must be acted upon by the opposite side to its detriment. However, in this case, the applicants are claiming that they relied on the word of **Gedion Masta** that he was the owner of the land, yet they did not take any steps to verify whether this was the position. It was submitted that a party who has been negligent by failing to exercise due diligence cannot rely on the doctrine of promissory estoppel. As regards the disputed clan meeting, it was submitted that since the third respondent gave her sworn testimony that she was not aware of or attended, any resolution from such a meeting, cannot form a basis for her to be estopped. Further, the clan members also had no power to make any such representation on her behalf as is implied since a clan cannot distribute the property of a deceased person and therefore any distribution made by the clan is null and void ab initio.

63. Having already established that there is no legal basis or argument put forth by the applicants, to entitle them to protection as bona fide purchasers and that they did not exercise due diligence, the doctrine of estoppel cannot therefore apply in the circumstances.

64. According to the Respondents, this case is distinguishable from the case relied on by the applicants with the instant case, being **Re Estate of Lesinko Sokorte Kiaiyo**, where the judge revoked the grant for the reasons that there was concealment of material facts – the administrator had not disclosed that there was another property belonging to the deceased; that only one beneficiary, the administrator, was present in court and also no other beneficiary consented to the confirmation of letters of grant; and that there were elements of fraud.

65. In this case, it was submitted that the grant was not obtained fraudulently as there was no concealment of material facts and there are no elements of fraud that have been proven or pointed out by the applicants. The confirmation of grant was made before this honourable court after it was satisfied that there were enough grounds for it and all other interested parties appended their signatures and appeared in court.

66. According to the Respondents, it is evident that the 1st Administrator wishes to frustrate the distribution of property in the right manner and wishes to disinherit the 2nd & 3rd respondents who come from a different house. After the grant was confirmed, he refused to sign the transfer documents for transfer to be done to the interested party and is using the excuse of the alleged sale to third parties as the reason why he failed and/or refused to sign the same and relied on **Re Estate of Stephen Kurgat Kimwei** and submitted that there is in fact no defect to be cured, it has not been demonstrated that the grant in this matter was obtained in a manner that renders it defective in substance. There is no element of fraud pointed out or claimed.

67. It was disclosed that in the ruling dated 18th September, 2017, the learned judge invalidated all transfers made in the estate of the deceased while revoking the previous grant. For the applicants to seek to rely on a transfer made in that period and that is subject to that ruling of the court, is an abuse of court process since it amounts to a thinly veiled disguise at attempting to appeal the decision of the court in the same court.

68. Based on the foregoing it was submitted that the application is not merited and the same ought to be dismissed with costs.

Determination

69. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

70. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

71. It is clear that the gravamen of the applicants' Summons is that Land Parcel No. **Muputi/Kiima-Kimwe/14** belongs to them, **Elizabeth Nzilani Peter** and **Rose Peter Nthenge** upon lawful purchase and have been in constant use and occupation since the year 2000 to date, with knowledge of the administrators and interested party. In this case it is not in doubt that the deceased died in 1988. The Applicants' case is that before his death, the deceased had in 1980's sold 1/3rd of the said property to **Thomas Mutiso**. However, no transfer took place and the land remained in the name of the deceased who, it is alleged, instructed his son, **Peter Matheka Nzioka**, to do so in the event that he passed away before effecting the transfer. As fate would have it, the deceased died before the said transfer. The said **Thomas Mutiso**, in 1989, sold the said portion of land to **Gedion Wambua Masta**. The same year, the said **Peter Matheka Nzioka**, purportedly sold the remaining 2/3rds of the said land to **Gedion Wambua Masta**.

72. By this time, no grant of representation had been applied for or issued since the Summons for the same was not filed till 1992 by **Peter Matheka** and following the filing of the Objection, on 17/08/1992, the grant was eventually issued on 24/08/1992. In the meantime, in 2000, **Rose Peter Nthenge**, the 1st applicant was purportedly sold 1/3rd of the suit property to by **Gedion Wambua Masta**. Come 2003 and the remaining portion of 2/3rds was purportedly sold by **Gedion Wambua Masta** to **Elizabeth Nzilani Peter**, **Rose Peter Nthenge's** daughter.

73. It is clear that as at 1989, when **Peter Matheka Nzioka** purportedly sold the 2/3rds portion of land to **Gedion Wambua Masta**, the deceased had died in 1988 and an administrator of his estate was yet to be appointed. Section 45 of the *Law of Succession Act* provide as follows:

(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 administration.

74. Section 79 of the same Act, on the other hand provides that:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

75. In **Muriuki Musa Hassan vs. Rose Kanyua Musa & 4 others [2014] eKLR, Makau, J** held that:

“The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased beneficiaries and the sale of the land to them is challenged in this application. In such circumstances the interested parties interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan. That in any event Muriuki Musa Hassan is entitled to share of the deceased estate and he will definitely be interested in the interested parties interest so as to legitimize the sale of the land to the interested parties.”

76. In **Re Estate of John Gakunga Njoroge (Deceased) [2015] eKLR Muriithi, J** was of the view that:

“A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act...For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the Estate is restricted by the provisions on the powers duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:

(ii) no immovable property shall be sold before confirmation of the grant.

The persuasive authority of Wakiaga J. in *Stephen Waweru Ng'ang'a v. Kimani Ng'ang'a*, Nyeri HC P&A No. 1 of 2011 would be relevant in a claim against the beneficiaries who sold their interest so that they should not defraud the innocent purchasers of their money.”

77. In the same vein, **Gikonyo, J** in **Paul Gituma Kiohora vs. Doris Mukiri Magiri & Another [2017] eKLR** held that:

“I see the claim by the Protestors is that of a purchaser and is based on a sale of land agreement with the widow of the deceased. Doubtless, the agreement was done after the death of the deceased and before confirmation of the grant herein. Such purchaser is not a beneficiary of the estate and should not be tried in a succession cause...As the protestors are not beneficially interested in the estate, their claim cannot be litigated in this succession cause or even be set aside by this court under rule 41(3) of the Probate and Administration Rules. Given the circumstances of the case and the fact that the sale of the land violated the Law of Succession Act, the court cannot draw from its inherent jurisdiction to assist an unlawful transaction. I do not, however, wish to say much about the legality or otherwise of such transaction or the validity and enforcement of the agreement in question in order to avoid any prejudice to any future litigation on it. There are, however, ample judicial decisions on the matter and I do not wish to rehash them.”

78. In arriving at the said decision, the learned judge cited the decision of **Musyoka J** in **Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

79. Just like my learned brothers above, I find that the said **Peter Matheka Nzioka**, had no powers to dispose of the deceased’s properties before he was appointed as the administrator of her estate. In the premises, resolutions of the alleged clan meeting were not binding on the estate of the deceased.

80. It is contended that the Applicants were *bona fide* purchasers for value. In **Lawrence Mukiri vs. Attorney General & 4 Others [2013] eKLR**, the court, quoting **Katende vs. Haridar & Company Limited [2008] 2 E.A.173**, held that:

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

81. In this case, the person from whom the Applicants purportedly obtained title to the said 2/3rds portion had no title to the land and the person from whom the seller purportedly obtained his title had no legal right to dispose of the same. **Peter Matheka Nzioka** had no title to pass off to **Gedion Wambua Masta** in respect of the 2/3rds portion. It therefore follows that **Elizabeth Nzilani Peter**, could not get a better title than that of either **Peter Matheka Nzioka** or **Gedion Wambua Masta**. This is the position in **Katana Kalume & Another vs. Municipal Council of Mombasa & Another [2019] eKLR** where the court stated that:

“A person cannot give a better title than what he has, except in rare cases such as, a sale under an order of court, transfer of negotiable instrument to a holder in due course.”

82. A similar view was expressed in **Republic vs. The Registrar of Titles, Mombasa & 2 others Ex parte EMFIL Limited [2012] eKLR** where the court held that: -

“Moreover, the private law principle of *nemo dat quod non habet* ...[is] a general principle that where goods are sold by a person who is not the owner and who does not sell under the authority of the owner or with the consent of the owner, the buyer acquires no better title to the goods than the seller.”

83. Secondly, it is clear that **Elizabeth Nzilani Peter** did not carry out any due diligence before entering into the transaction with **Gedion Wambua Masta**. In **Joseph Muriithi Njeru vs. Mary Wanjiru Njuguna & Another [2018] eKLR** the court stated that:

‘A purchaser who does not hold a title to a property and who did not exercise due diligence in acquiring a registered property cannot be described as a bona fide purchaser or innocent purchaser.’

84. As regards estoppel, it is trite that estoppel is a shield and not a sword. As was held in Serah Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR:

‘The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.’

85. In this case the alleged representation was made by **Gedion Wambua Masta** as opposed to the Respondents. It cannot therefore bind the Respondents particularly when the same was patently unlawful. Equity, it is trite, follows the law.

86. As regards the role of the clan in Succession matters, I must point out that it would be unfair to dismiss the role of culture and customs offhand. Article 11 of the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and obliges the state to promote the same. As was appreciated in the South African Constitutional case of Shilubana vs. Nwamitwa [2008] ZACC 9; 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC) at para 45:

“It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.”

87. The same Court in Bhe v Khayelitsha Magistrate (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission vs. President of the Republic of South Africa [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) held that:

“[41] Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution...It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

[45] The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the Constitution.”

88. I agree with the same Court in Sigcau and Another vs. Minister of Cooperative Governance and Traditional Affairs and Others (CCT167/17) [2018] ZACC 28 that:

“[76] If we are serious about giving customary law its rightful place under the Constitution, it would be prudent to allow it to develop in its own intrinsic way in accordance with the fundamental values and rights protected in the Constitution.”

89. Having said that, while I have no problem with clan elders mediating between the warring parties, to adopt the decision of the clan elders line, hook and sinker, would amount to this Court abdicating its judicial mandate and that the Court cannot do. In this case, the disputed clan meeting had no binding force of law since the clan had no power to distribute the deceased’s property. In any case, since the third respondent gave her sworn testimony that she was not aware of or attended that said meeting, any resolution therefrom cannot form a basis for her to be estopped. See M’kiara vs. M’ikiandi [1984] KLR 170.

90. In Nurani vs. Nurani [1981] KLR 87, the Kenyan Court of Appeal was of the view that:

“The High Court has jurisdiction over all matrimonial causes and suits arising out of Mohamedan marriages. In the absence of express legislation to that effect, the High Court cannot be divested of jurisdiction in any matter because similar proceedings are pending before quasi-judicial or non-statutory tribunal howsoever constituted. It was, however, the position that proceedings for custody of children and maintenance were in fact concurrently before the court and the Ismailia Provincial Council. The Court has jurisdiction vested with under statute and the council because Ismailis voluntarily submit to its jurisdiction in respect of the subjects relating to their personal law as stated in their constitution...There are no statutory provisions which prohibit a sect within the general society from setting up their own tribunal for the settlement of matrimonial or other permitted disputes between its own members; a tribunal thus constituted has a duty to act fairly and justly and if it fails to do so there are ample safeguards, and remedial actions available, for example, it would be the easiest of matters to obtain an order for a prerogative writ under the Law Reform Act (Cap 26) to quash its decision or to compel it to act according to law. It is laudable if such non-statutory tribunal functions impartially and as an independent forum as the High Court in the exercise of its jurisdiction. There is nothing derogatory in that to the powers or prestige of the High Court. The council remains subject to the supervisory jurisdiction of the High Court and its jurisdiction does not impugn or curtail, nor could it do so in any way, the jurisdiction under the Guardianship of Infants Act. By definition in Section 2 of the said Act “Court” means the High Court and certain matters specifically stated in the provisions of the Act are brought under its jurisdiction. Section 17 states that where in any proceedings before any court the custody or upbringing of an infant, etc, is in

question, the court shall decide the question as directed in that section...The Council is empowered under the constitution to entertain proceedings relating to custody of children. It is incorrect to argue that the council cannot apply the provisions of the Act. Under Article 311 of the constitution the council is expressly enjoined to decide questions of custody of children in accordance with the provisions of the Act and it may not deviate without acting in breach of the constitution and if it were to do so, the High Court could either rectify the situation itself, or order the Council to desist and act in compliance with the provisions of the Act...In an orderly society the High Court gives, as it ought to give, recognition to a tribunal which is set up by consent of members of a sect to administer their personal law. Such non-statutory tribunals are useful adjuncts to courts of law, which administer justice under their inherent jurisdictions. They useful reduce the burden of the courts of law in an ever-increasing complex society...The only unfettered right which the wife had was to have the existence or extent of any civil right or obligation determined independently and impartially by an independent court or other adjudicating authority prescribed by law for that purpose as stated in section 77(9) of the constitution of Kenya provided she chose to submit it for determination to such court or other adjudicating authority. A person is free to have, or not to have a legal representative in civil proceedings. He is free to choose. The wife did not have the fundamental right to be represented by a legal representative of her own choice like a person charged with a criminal offence under section 77(1)(d). Whether the proceedings are of civil or criminal nature the court will not protect an imaginary deprivation of a fundamental right or allow it to be capriciously pushed to absurd lengths like importing a legal representative from Peking or Pakistan. The basis of good reasoning is to disregard absurdities which are usually trite and unimportant and which obscure the point and purpose of life. The foundation for the stability and progress of the human society is the observance of rules of conduct, which are the subject laws. The society needs stability for its continuance...The wife freely submitted herself to the jurisdiction of the Council to hear the Petition and the choice was her own. She did not have a fundamental or unfettered right to split up her matrimonial disputes and inflict upon her husband the inconvenience and expense of pursuing and defending himself half in the High Court and half before the Council. The reservation made by her in regard to the issues of maintenance and custody of the children could not, and did not, oust the inherent jurisdiction of the High Court to exercise its overall supervisory powers to ensure smooth and orderly operation of institutions administering justice in the general interest of the society. This was the power of the High Court, which the learned Judge invoked to avoid both deviation and disruption...True, orders made by the court are effective, because once made, they are enforceable as they brook of less argument than a morally binding order though also effective. A court order is backed by the authority and administrative power of the state while a disciplinary action, ordered by a certain tribunal, carries behind it the certainty of obedience arising from the immense might of moral sanctions which may be imposed by the united society backed through its power to order ostracism, excommunication, economic boycott, etc. It is a power, which has been and is still practised effectively since the early days of human history. It is a truism, for it is the fact that morally binding orders are usually obeyed rarely disobeyed and that is something, which also happens to court orders... The husband and wife have ceased to think of the present jointly. The agony of divorce between a married couple must be the worst of all. What better than the Conciliators or the Council should succeed, in which event the Court's task will happily turn into one of academic interest. The Council should expedite its task. If occasion arises necessitating an injunction, or an order for the arrest of a party, or to enforce an order made by the council, the court could and would make an appropriate order. Always alert, justice never sleeps.”

91. However, as was stated by the East African Court of Appeal in Mohamed vs. Yasmin [1973] EA 533, whereas a High Court will, no doubt, give full consideration to any views or principles of any religious body connected with the matter in carrying out its duties, such a decision is not necessarily binding upon the Court. The practice of the Courts rubberstamping decision made by other bodies was deprecated in Attorney General vs. Oriental Construction Co. Ltd. SCCA No. 9 of 1991 where the Uganda Supreme Court held that:

“The manner in which this suit was conducted creates an impression that the Chambers of the Appellant put in half-hearted defence so as to bless the expected result with the stamp of a decision of the court. It is surprising that the arguments put before the Supreme Court by counsel for the Appellant were not advanced in the court below. On the facts of this case as they appear on the record some issues raised before the Supreme Court arise naturally and require no particular legal process to discover. There is no objection to parties settling their disputes outside the courts. In fact parties should be encouraged to do so, but exception would be taken to the courts being used to stamp deals already worked out by the parties as decisions of the court.”

92. Further, the clan cannot distribute the property of a deceased person and therefore any distribution made by the clan is null and void ab initio.

93. It is therefore my finding and I hold that the 2nd Applicant's prayer to have the Grant revoked based, as it is, on her alleged interest in respect Land Parcel No. Muputi/Kiima-Kimwe/14, cannot be sustained.

94. As regards the 1/3rd portion that was purportedly sold to the 1st Applicant, it is contended that the same was sold to her by **Gedion Wambua Masta** who himself acquired the same from **Thomas Mutiso**. According to **Thomas Mutiso**, he obtained his title from the deceased himself in 1980 though no transfer took place and the land remained in the name of the deceased who, it is alleged, instructed his son, **Peter Matheka Nzioka**, to do so in the event that he passed away before effecting the transfer. It is therefore the position of **Thomas** that he acquired the same during the lifetime of the deceased. If that position is correct, he would no doubt have acquired an interest therein which the beneficiaries of the estate of the deceased could be compelled to take into account in distributing the estate of the deceased. In Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002, **Makhandia, J** (as he then was), while revoking the grant in question expressed himself as hereunder:

“Section 76(c) of the Law of Succession Act and rule 44(1) of the Probate and Administration Rules allows any person interested in the estate of the deceased to have a grant revoked or annulled. The grounds upon which a grant can be annulled are set out in section 76 thereof. It is also important to note that a grant of representation, whether or not confirmed may at any time be revoked. In the instant case the applicants are purchasers for value of a portion of the deceased's estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and

uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises. Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years."

95. In this case, the fact of the agreement between the deceased and the said **Thomas Mutiso**, was denied by the Respondents. I have considered the evidence on record and observed the witnesses testify before me. **Thomas Mutiso** struck me as a truthful witness. I believe him when he stated that there was an agreement between him and the deceased in respect of 1/3rd of Land Parcel No. **Muputi/Kiima-Kimwe/14**. As fate would have it, the deceased passed away before he could transfer the said portion to **Thomas Mutiso**. However, **Mutiso** also disposed of the same to **Gedion Wambua Masta** who eventually off-loaded the said portion to the 1st Applicant. Based on the decision in **Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira** (supra), I find that the 1st applicant has interest in respect of 1/3rd of Land Parcel No. **Muputi/Kiima-Kimwe/14** that ought to have been taken into account in distributing the estate of the deceased and to that extent the Summons for Revocation succeeds.

96. It does not however, necessarily follow that in that event the grant must be revoked or annulled in its entirety. In **Re the Estate of the Late Suleman Kusundwa [1965] EA 247**, it was held that:

"The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance."

97. As appreciated by **Khamoni, J** in **Re Estate of Gitau (Deceased) [2002] 2 KLR 430**:

"Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them."

98. In the matter before me, **Peter Matheka Nzioka**, who put into motion the process by which the 2nd Applicant was duped into purchasing the remaining 2/3rds of the said land from **Gedion Wambua Masta**, admitted that he got 15 acres from the deceased's estate. It is therefore unfair and unjust that the 2nd Applicant ought to be left without remedy.

99. Therefore, having considered the material placed before me in this matter, I hereby partially allow the summons dated 1st November, 2019. I hereby set aside registration of 1/3rd of Land Parcel No. **Muputi/Kiima-Kimwe/14** in the name of **Ageogina Nthenya Nzioka**. In other words, only 2/3rds of the said parcel to remain in the name of **Ageogina Nthenya Nzioka** with the other 1/3rd being registered to **Rose Peter Nthenge**. In determining the part to be registered to her, account shall be taken of the developments undertaken by her on the said land. I however direct that the developments in the portion falling out of the said 1/3rd portion eventually determined to belong to **Rose Peter Nthenge** be valued and the same be reimbursed to the Applicants so as to avoid unjust enrichment. Of course parties are at liberty to agree to have more than 1/3rd carved out to the applicants in order to compensate them for the said developments.

100. I further direct that remaining 2/3rds portion be valued and land (without developments) of similar value be carved from the share due to **Peter Matheka Nzioka** and be registered in the name of **Elizabeth Nzilani Peter**.

101. Only to that extent does the Summons succeed. There will be no order as to costs.

102. Liberty to apply granted.

103. It is so ordered.

Read, signed and delivered virtually at Machakos this 9th day of June, 2021.

G. V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Mutua Makau for the Objector

CA Geoffrey