



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 261 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE NKURARU

MUTWAMARI (DECEASED)

ROONEY MUGAMBI (Suing as the legal

representative of the late ZIPPORAH)

NTAMA (DECEASED).....1ST APPLICANT

PATRICK MWENDA.....2ND APPLICANT

NANCY MUTHONI.....3RD APPLICANT

BENARD MUTUMA.....4TH APPLICANT

FAITH KARIMI.....5TH APPLICANT

JACKSON KIOGORA.....6TH APPLICANT

VERSUS

MARGARET KARAMANA MBURUNGA.....PETITIONER

MARTIN MWENDA MURIUKI.....INTERESTED PARTY

R U L I N G

1. **M’Kuraru Mutwamari (“the deceased”)** died on 3/9/1972. According to the letter of introduction by the Area Chief dated 13/8/2006, the deceased left behind two dependants i.e. **Margaret Karamana Mburunga (“the petitioner”)** and **Zipporah Nthama M’Mwithiga**.
2. The petitioner took out letters of administration on 22/8/2006 listing the beneficiaries of the estate as **Margaret Karamana Mburungu & Zipporah Nthama M’Mwithiga**. She also listed **Nyaki/Munithu/199** as the only asset of the estate of the deceased.
3. A grant of letters of administration was issued to the petitioner on 23/1/2007. Barely a month later, the petitioner applied for confirmation of that grant on 20/2/2007 wherein she listed herself as the only beneficiary of the estate. The grant was confirmed on 28/3/2007 before the mandatory waiting period of six months.
4. On 11/4/2018, the applicants applied to revoke the grant claiming to be a son and daughters of the now late **Zipporah Nthama M’Mwithiga**. The same was however, struck out for the reason that the applicants had not been appointed as administrators of the estate of their late mother.
5. The applicants have now filed a fresh application dated 4/11/2019 with a Limited Grant attached and issued to **Rooney Mugambi** in respect of the estate of the late **Zipporah Nthama M’Mwithiga**.
6. The application was opposed by the petitioner and the interested party. The petitioner averred that the deceased left behind two daughters as mentioned by the applicants and one son Jackson. That the applicants were born by **Zipporah Nthama Mwithiga** through different fathers who took care of them during their lifetime. That she also took care of the applicants in that; she educated, taught and lived with

them, immediately after the demise of their mother on 17/11/2000. That she had sold the estate property to the interested party for the best interest of the applicants.

7. The interested party claimed that he bought the estate property i.e. **Nyaki/Munithu/199** from the petitioner in 2010. That at the time, the petitioner was the registered proprietor of the same. That he bought the same after conducting due diligence and has utilised the same for the last nine (9) years. He sought protection as an innocent purchaser under **section 93 of the Law of Succession Act**. He also averred that the property has been charged twice to the Agriculture Finance Corporation.

8. In the ruling dated 10/4/2019, this Court made findings that the petitioner had clearly misled the Court that she was the only beneficiary; that her late sister died without leaving any child. The Court concluded that that was sufficient to revoke the grant. That finding has not been appealed against and is still binding. It is still good today as it was when it was pronounced.

9. The grounds for the revocation of grant are set out in **section 76 of the Law of Succession Act**. The applicants have proved that the proceedings to obtain the grant were defective; the grant was obtained fraudulently and by means of untrue allegation of fact essential in a point of law. The fact that they may have been born to different fathers, that in itself does not impair or affect their mother's right to half share of the estate property to which they are entitled. The grant cannot stand.

10. I note that the grant was confirmed on 26/3/2007. The petitioner then sold the property to the interested party on 7/12/10, three years after confirmation. By that time, she had not only caused it to be registered in her name, she had even had it charged to the Agricultural Finance Corporation which charge was discharged vide part of the purchase price paid by the interested party.

11. The interested party contended that he did due diligence before he purchased the property and had found that the petitioner was the registered owner. That he has been in possession and has extensively developed the property. He seeks protection under the law.

12. **Section 93 of the Act** provides: -

“All transfers 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.”

13. In **Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu & another [2014] Eklr**, the Court held that: -

“Whereas the above section states that a transfer by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant... I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood 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”.

14. In **Jane Gachoki Gathecha v Priscilla Nyawira Gitungu & another [2008] Eklr**, the Court of Appeal delivered itself thus: -

“We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immovable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio”

15. It would therefore seem that **section 93 of the Act** is not a *carte blanche* licence to purchasers to acquire interest from rogue administrators of deceased's estates. The protection will only be extended to bona fide purchasers who would have carried out all necessary due diligence in ensuring that no fraud is being perpetrated against innocent beneficiaries. Where a purchaser would have discovered an irregularity if he bothered either to make inquiries on the estate property or like manner, that section will be out of his reach for him.

16. In the present case, the grant was obtained and subsequently confirmed on 27/3/2007. The petitioner is said to have evicted the applicants from the property shortly thereafter. There was no evidence to show that anyone was in occupation when the interested party showed up in 2010 to purchase the same. There was evidence that the interested party carried out a search at the Land Registry and confirmed that the petitioner was the registered owner and not otherwise. The petitioner had even taken a loan from the Agricultural Finance Corporation. There was proof of sale and purchase of the subject property for Kshs. 440,000/-

17. It would therefore seem that the interested party was truly innocent. He undertook due diligence and since the applicants were not in occupation, the fraudulent acts of the petitioner cannot follow the interested party.

18. Accordingly, I hold that the transfer of the estate property in 2010 was valid.

19. In view of the foregoing, revoking the grant will serve no purpose. The petitioner has proposed that the property she bought i.e. **Kiirua/Ruiri/6987**, measuring $\frac{1}{4}$ acre be given to the applicants in lieu of their share in the estate property. This Court notes that the applicants' share in the estate property would have been equivalent to 0.3 ha (0.741 acres). The petitioner did not disclose the value of the latter property.

20. As a result of the deliberate and fraudulent acts on the part of the petitioner, the applicants have been disinherited. At the time the

petitioner came to Court, **Stephen Timitu Mwongera and Stephen M'Ikirima M'Bui** executed a guarantee and stood surety for her. They bound themselves to cover any loss suffered to the tune of Kshs. 200,000/-.

21. The purchase price for the estate property was disclosed as being Kshs. 440,000/-. That does not necessarily mean that that was the value of the subject property. A correct value of the property as at the date of sale must be established having in mind that it measured 0.6ha. On the other hand **Kiirua/Ruiri/6987** was said to measure only a $\frac{1}{4}$ acre.

22. In view of the foregoing, I find that the application has merit and I allow the same on the following terms: -

- a) the applicants were entitled to half share in Nyaki/Munithu/199 (0.3 ha) being the share of their late mother, Zipporah Nthama M'Mwithiga;**
- b) the applicants and the petitioner do agree on a valuer who should forthwith value Nyaki/Munithu/199 to ascertain its true value as at 7/12/2010;**
- c) the said same valuer in a) above do also value Kiirua/Ruiri/6987 to establish its current value;**
- d) an inhibition is hereby issued against the property known as Kiirua/Ruiri/6987 forthwith;**
- e) the petitioner does execute a transfer and do forthwith hand over to the advocates for the applicants all relevant and necessary documents to effect the transfer of Kiirua/Ruiri/6987 to the applicants;**
- f) the petitioner, Stephen Timitu Mwongera and Stephen M'Ikirima M'Bui do appear before the Deputy Registrar of this Court on date to be appointed to show cause why they should not compensate the applicants for any shortfall in the difference in the value of their share in the estate property and Kiirua/Ruiri/6987.**
- g) the cost for the valuations and the transfer of Kiirua/Ruiri/6987 shall be borne by the petitioner.**
- h) Although this is a family matter, because of the fraudulent acts of the petitioner and her deliberate lies to Court when she applied for confirmation, she shall bear the costs of the application.**

DATED and DELIVERED at Meru this 14th day of April 2020.

A. MABEYA

JUDGE