



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**(Coram: A. C. Mrima, J.)**

**SUCCESSION CAUSE NO. 126 OF 2014**

**(Formerly Rongo Principal Magistrates Succession Cause No. 181 of 2013)**

**IN THE MATTER OF THE ESTATE OF ROSE AKUKU AOKO (DECEASED)**

**- BETWEEN -**

**PHINIAS OKELLO MIREMBE.....APLICANT/OBJECTOR**

**-VERSUS-**

**RUTH OTIENO.....RESPONDENT/PETITIONER**

**RULING**

1. The Objector/Applicant herein, *Phinias Okello Mirembe*, (hereinafter referred to as '**Phinias**') joined this cause as a purchaser. He alleged that he purchased part of the estate property from *Rose Akuku Aoko* (hereinafter referred to as '**the deceased**'). *Ruth Atieno*, the Petitioner/Respondent herein, (hereinafter referred to as '**Ruth**') was a daughter of the deceased.
2. This matter has a winding history. That aspect was well captured by Phinias in his Summons for revocation of the grant. The summons was dated 07/11/2019. It was also supported by the affidavit of Phinias.
3. The summons was opposed by Ruth. She filed a Replying Affidavit.
4. For ease of the discussion herein I will, *albeit* briefly, revisit the history of this matter. As said, the deceased herein was Rose Akuku Aoko the mother of Ruth. The deceased died intestate on 09/02/2012.
5. Ruth petitioned for the administration of the estate of her mother. That was vide *Rongo Principal Magistrates Court Succession Cause No. 181 of 2013*. The Cause was however transferred to this Court in 2014. The cause was assigned *Migori High Court Succession Cause No. 126 of 2014*.
6. A grant of letters of administration intestate was issued to Ruth by this Court on 20/11/2014. The grant was confirmed on 19/06/2017. A certificate of confirmation of the grant was accordingly issued. The then net estate of the deceased which comprised of the parcels of land known as Suna East/Wasweta II/2174, Suna East/Wasweta I/4358 and some money in Account No. [...] at Barclays Bank Migori Branch fully and wholly devolved to Ruth.
7. On 11/09/2018 Ruth transferred the parcel of land known as Suna East/Wasweta I/4358 (hereinafter referred to as '**the suit property**') to a third party one *Omar Feisal Mohamed Jamaa* (hereinafter referred to as '**Omar**'). Omar was then registered as the proprietor of the suit property.
8. Phinias alleged that Ruth dealt with the estate of the deceased to his total exclusion despite knowledge that he had purchased the suit property.
9. As Ruth progressed on with the administration of the estate of the deceased Phinias, then anxious that he might lose the suit property which he allegedly purchased, together with a co-purchaser one *J.E. Odongo Ogembo*, instituted citation proceedings before the *Chief Magistrates Court at Migori in Succession Cause No. 75 of 2016*. They cited Ruth and *Richard Arina* to take out succession proceedings in respect of the estate of the deceased.

10. The court granted an order on 07/04/2017 to Ruth and Richard Arina to take out the proceedings within 30 days. They did not comply. On 19/05/2017 the court allowed Phinias and J.E. Odongo Ogembo to take out succession proceedings in respect of the estate of the deceased.

11. Phinias petitioned for the grant of administration of the estate of the deceased through *Migori Chief Magistrates Succession Cause No. 211 of 2018*. A grant of letters of administration intestate was issued to Phinias by the court on 29/01/2019. The grant was confirmed on 20/06/2019. A certificate of confirmation of the grant was accordingly issued. The suit property was wholly devolved to Phinias. Consequently, the proprietorship of Omar was terminated on or about 16/09/2019.

12. Omar protested the proprietorship of the suit property. He filed *Migori ELC Case No. 126 of 2019* against Phinias, the Land Registrar Migori County and the Attorney General. Omar sought for a declaration that the revocation and/or cancellation of his proprietorship in the suit property was fraudulent and illegal. He also prayed for restoration of his proprietorship over the suit property. That suit is still pending.

13. Phinias sought for the revocation of the grant issued to Ruth on the contention that he was a lawful beneficiary to the estate of the deceased but Ruth disinherited him.

14. Ruth opposed the summons for revocation. She deponed that the suit property had been lawfully disposed of to a third party. As a result, Ruth deponed further that the disposition to the third party was protected under **Section 93** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Succession Act**').

15. Ruth also contested the allegation that Phinias was a beneficiary to the estate of the deceased. Ruth further deponed that she was not under any obligation to take out any succession proceedings on the basis of the citation proceedings undertaken by Phinias since she had long taken out appropriate succession proceedings in respect of the estate of the deceased. She prayed that the summons be dismissed.

16. Directions on the hearing of the application were taken to the effect that the application be heard by way of written submissions. Both parties were duly represented by Counsels. Phinias filed his written submissions, but Ruth did not. Phinias relied on **Kisumu Court of Appeal Civil Appeal No. 2 of 2014 Musa Nyaribari Gekone & 2 Others vs. Peter Miyianda & Another (2016) eKLR** and **Nairobi High Court Civil Suit No. 367 of 2010 Phoebe Wangui vs. James Kamore Njomo (2012) eKLR** in support of the summons.

17. **Section 76** of the **Succession Act** provides for revocation and annulment of grants of representation. The provision states as follows: -

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

**a. That the proceedings to obtain the grant were defective in substance;**

**b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case**

**c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either-**

**i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or**

**ii. to proceed diligently with the administration of the estate, or**

**iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

**e. that the grant has become useless and inoperative through subsequent circumstances.**

18. The law provides five grounds upon which a grant, whether confirmed or otherwise, can be revoked or annulled. In this case Phinias settled for the ground that Ruth obtained the grant '*by concealment and/or non-disclosure of material facts.*' According to Phinias the concealed fact was that he was a beneficiary by virtue of the purchase of the suit property from the deceased; a fact well known to Ruth.

19. Ruth contended that Phinias was not a beneficiary of the estate of the deceased. Ruth did not deny the alleged sale of the suit property by the deceased to Phinias. She also did not refute Phinias' position that Ruth was fully aware of the sale of the suit property by the deceased to Phinias. What Ruth stood for was that Phinias was not a beneficiary and that Omar was protected under the **Section 93** of the **Succession Act**.

20. The issue as to whether a purchaser of land forming part of the estate of the deceased during the lifetime of the deceased is a beneficiary to the estate of the deceased was well canvassed and settled by the Court of Appeal in **Musa Nyaribari Gekone & 2 Others vs. Peter Miyianda & Another** case (supra). The Court in paragraph 19 stated as follows: -

The expression 'any interested party' as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of section 66 and 39 of the Law of Succession Act. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an 'interested party' for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the Law of Succession Act. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the law of Succession Act when he held that the 1<sup>st</sup> respondent has the locus standi to present the application for revocation of the grant. We agree with the learned Judge that the 1<sup>st</sup> respondent's interest as a purchaser of the property of the deceased qualifies him as an 'interested party' with standing to challenge the grant.

21. Phinias was therefore entitled to the estate as a purchaser and/or an interested party.

22. I will now deal with the issue as to whether Ruth obtained the grant 'by concealment and/or non-disclosure of material facts' to the Court. Phinias deponed in **paragraph 5** of his affidavit as follows: -

**That the respondent [Ruth] knew or ought to have known my interest in the estate of the deceased, annexed hereto and marked POM 3' is a copy of judgment in High Court Civil Case No. 1 of 1984 Kisii.**

23. The *Kisii High Court Civil Suit No. 1 of 1984* (hereinafter referred to as '**the High Court suit**') was instituted by one *David Onyango Bange* against *Rose Akuku Aoko, Mohammed Jama Salah, Phineas Okelo Mirembe* and the Attorney General. The deceased was a party to the High Court suit. Ruth was not a party to the High Court suit.

24. Ruth however did not depose the issue of knowing that Phinias had purchased the suit property from the deceased. In that case therefore this Court can only safely conclude that Ruth was indeed aware that Phinias had purchased the suit property from the deceased. With such knowledge, Ruth was obligated in law to disclose Phinias' interest when she petitioned for the grant or at confirmation thereof.

25. The Court **Musa Nyaribari Gekone & 2 Others vs. Peter Miyianda & Another** case (supra) upon evaluation of the evidence held that '... the 1<sup>st</sup> respondent should have disclosed, when applying for the grant of letters of administration or when seeking its confirmation, that the 1<sup>st</sup> Respondent had an interest in the property. At the very least, the 1<sup>st</sup> Respondent should have been considered a creditor of the estate, having paid part of the purchase price with respect to the property to the deceased and the balance of the purchase price to the deceased's mother subsequent upon the death of the deceased.'

26. Ruth did not disclose to the Court as required in law. As such it can only be found and held, which I hereby do, that Ruth obtained the grant 'by concealment and/or non-disclosure of material facts' to the Court.

27. On the issue of **Section 93** of the **Succession Act** several Courts have expressed themselves to the effect that if the transfer by an administrator to a third party is clouded with fraud or is in any other manner contrary to law then the protection availed by the law shall not apply.

28. The Court of Appeal in **Kisumu Civil Appeal No. 53 of 2015 Benson Manani Mahinye vs. Waiganagana A. Kendi (2016) eKLR** in an appeal against the decision by yours truly wherein I had reaffirmed the above position reviewed several decisions and eventually held that: -

**28. The position taken by the learned Judge of the High Court in this case is therefore a correct interpretation and application of section 93(1) of the Law of Succession Act. We have no basis for interfering with the Judge's decision in that regard.**

29. The Court of Appeal further at **Nyeri in Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu & Another (2008) eKLR** stated as follows: -

**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 and the property is traceable.**

30. Other relevant decisions on the subject include **Musa Nyaribari Gekone & 2 Others vs. Peter Miyianda & Another** case (supra), **Kakamega High Court Succession Cause No. 18 of 2005 In the Matter of the Estate of Rispah Ngaira Waiganagana (Deceased) (2015) eKLR, Adrian Nyamu Kiugu vs. Elizabeth Karimi Kiugu & Another (2014) eKLR** among many others.

31. In this case Ruth deliberately withheld crucial information from the Court both at the petitioning for the grant and at confirmation. She was aware that Phinias had an interest in the suit property but disregarded that interest with impunity. The action taken by Ruth was contrary to law. The estate of the deceased upon which the confirmation of the grant was made was not in respect of the net estate of the deceased's estate. Therefore, **Section 93** of the **Succession Act** cannot sanitize such conduct.

32. I am hence persuaded that the application is merited. The remedy thereof is in re-hearing the Summons for Confirmation such that all

parties are given equal opportunities in the fresh confirmation proceedings. As the estate has two grants this Court is called upon to settled that position as well.

33. I am also aware that the suit property is no longer in the name of Omar, but in the name of Phinias.

34. Resulting therefrom and with a view to attain a quicker determination of this matter, this Court now makes the following orders: -

**a. The grant of letters of administration intestate issued to Ruth Otieno in Migori High Court Succession Cause No. 126 of 2014 on 20/11/2014 and the grant of letters of administration intestate issued to Phinias Okello Mirembe in Migori Chief Magistrates Court Succession Cause No. 211 of 2018 on 29/01/2019 be and are hereby revoked.**

**b. A fresh grant shall forthwith issue in the joint names of Ruth Otieno and Phinias Okello Mirembe.**

**c. The confirmation proceedings undertaken in the High Court and in Migori Chief Magistrates Court Succession Cause No. 211 of 2018 be and are hereby set-aside and the property known as Suna East/Wasweta I/4358 shall be registered in the name of the deceased herein.**

**d. Migori Chief Magistrates Court Succession Cause No. 211 of 2018 shall be availed before this Court.**

**e. The Administrators and/or any of them shall apply for the confirmation of the new grant within 30 days of this ruling. The application shall be served upon all the beneficiaries and/or interested parties to the estate of the deceased.**

**f. Directions on the contemplated application for confirmation shall be on 24/09/2020.**

**g. Ruth Otieno shall shoulder the costs of the summons for revocation.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 02<sup>nd</sup> day of July 2020.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered electronically through: -**

**1. ezra.awino@yahoo.com** for Messrs. Ezra Awino & Company Advocates for the Applicant.

**2. jeremiah.soire@yahoo.com** for Messrs. J. O. Soire & Company Advocates for the Respondents.

3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

**A. C. MRIMA**

**JUDGE**