



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO.36 OF 2017

IN THE MATTER OF THE ESTATE OF IBRAHIM HASSAN ALIAS SHEIKH IBRAHIM HASSAN (DECEASED)

KHALID ABDI IBRAHIM.....APPLICANT

VERSUS

ASHA IBRAHIM HASSAN.....RESPONENT

CHARLES KIMENYI MACHARIA.....INTERESTED PARTY

JUDGEMENT

This is a succession matter in respect of the estate of IBRAHIM HASSAN Alias SHELKH IBRAHIM HASSAN who died on the 10th June 1975. The Objector herein seek to revoke the grant of letter of administration pursuant to section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The said grant was issued to the Petitioners on 22nd April 1997 and it was confirmed on the 15th May 1998. The grounds for revocation as depicted in the summons for revocation of grant are as follows:-

- 1. THAT the aforementioned grant of probate letters of Administration to Asha Ibrahim Hassan be revoked and annulled under the provision of Section 76 (b) of Cap 160 laws of Kenya upon the basis that the same was obtained fraudulently and by concealment from court of material facts relating to the Estate.**
- 2. THAT all the steps taken by the said Administrator pursuant to the said order granting the letter of Administration & Certificate of Confirmation and which may have changed the assets of the estate subject of this application be declared nullity in law.**
- 3. THAT the Court do declare that the beneficiaries named by the applicant who were left out in the application for the grant and are beneficiaries to the estate are entitled to share the assets of the estate.**
- 4. THAT the currency status of L.R NGONG TOWNSHIP BLOCK 2/156 be preserved.**
- 5. THAT costs be provided for.**

The Applicant herein is a son of the late Abdi Ibrahim Hassan who was the son of the late Ibrahim Hassan who passed on the 10th June 1975 in Mecca. He therefore brought this Application as a beneficiary of the Estate of his late father Abdi Ibrahim Hassan. The Estate of the late Ibrahim Hassan Sheik Ibrahim Hassan comprised of 5 beneficiaries with Abdi Ibrahim Hassan as the 3rd born and had an asset L.R 4480/79 Ngong/Township measuring approximately 0.0459 Ha as the only asset. The late Abdi Ibrahim Hassan left several beneficiaries namely:-

- 1. Asha Ibrahim Hassan**
- 2. Kadija Ibrahim Hassan**
- 3. Abdi Ibrahim Hassan**
- 4. Fatuma Ibrahim Hassan**
- 5. Zahra Ibrahim Hassan.**

The Respondent petitioned for letter of Administration and a grant issued on 22nd April which was later confirmed on 15th May 1998. In the

certificate of confirmation of a grant, three beneficiaries were entitled to the property being L.R 4480/79 Ngong Township as Asha Ibrahim Hassan (Respondent), Sarah Ibrahim Hassan and Kadija Ibrahim Hassan Sharing 1/3 of the property each. The Applicant is of the view that the above move had an impact of disinheriting Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan who were also beneficiaries of the estate. It was also brought to the attention of the court that the lease period of L.R 4480/79 Ngong Township would later on expire and Asha Ibrahim Hassan, the Respondent herein renewed herein the same as an Administrator of the Estate of the late Ibrahim Hassan and the title assumed another number being Ngong/Township Block 2/156. The suit property was thereafter sold to Charles Kimenyi Macharia at a price of Kshs. 6, 000, 000/= without the involvement of all beneficiaries. The Respondent would later move to the Khadhi Court at Nairobi with a view of having the proceeds of Sale of the sold property distributed to the beneficiaries.

This application seeks to revoke and annul the grant of probate of letters of administration to Asha Ibrahim Hassan on 22nd August 1997 and confirmed on 15th May 1998 since it was obtained fraudulently by concealment from court that the estate comprised of only three beneficiaries instead of five. It further challenges all the steps taken by the Respondent herein pursuant to the said order granting the letter of Administration and Certificate of Confirmation and which may have changed the assets of the estate subject of this application be declared a nullity in law.

In the Applicant's view, the Respondent moved to the Khadhi's Court with a clever view of advancing fraud and it would not make sense why a mode of distribution already confirmed by a High Court would find its way to a Khadhi's Court and this time including names of beneficiaries that are not in the estate of the deceased.

Further that the Respondent moved to the High Court seeking for the property to be distributed as she had indicated in the mode of distribution and the High Court in total belief that before it was the true position as regards the estate of the late Ibrahim Hassan confirmed the Grant. It was asserted that the Respondent craftily moved back to the Khadhi's Court and without disclosing to the Khadhi that the matter had been dealt with in the High Court and this time she went with a new number being L.R. Ngong Township Block 2/156 approached the court for another mode of distribution. The Applicant asserted that the action by the Respondent was fraudulent in the sense that if she wanted the matter to be handled by the Kadhi's Court she ought to have petitioned for letters of administration in the Kadhi's Court and not in the High Court.

The Applicants submitted on article 76(b) of the Law of Succession Act which provides for revocation or annulment of grant. It is the law that in the event that a grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the case. In the respect, it was argued that the Respondent upon filing the petition indicated that there were only three beneficiaries to the estate when she knew very well that the estate did comprise of 5 beneficiaries.

In the Applicant's view the above ground remains unshaken or unchallenged and there is no doubt in the applicant's mind that the proceedings which led to the issuance of the grant on 22nd April 1997 were defective in substance. It is for that reason the Applicant urges this court to use its inherent powers granted under article 159 of the Constitution, section 76 of the Law of Succession Act and section 73 of the Probate and Administration Rules which stipulates that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice to prevent abuse of the process of the court.

The Applicant cited the decision in In the matter of estate of Isaac Kireru Njuguna (deceased) Nairobi in Succession Cause No.1046 of 1994 where the court found out that a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed. Further reliance was placed in In the matter of the estate of Azakel Mulanda Masai Eldoret P&A 4 of 1992 in which the estate of the deceased has not been distributed to all his surviving widow and children of the deceased and for that reason the grant that had been issued to the petitioner/respondent in that case was revoked. The Applicant herein urged this court to find as such.

THE RESPONDENT'S CASE.

The Respondent's case is couched in her replying affidavit as well as submission dated 20th December 2018. It was asserted that the Applicant refers to that a certain asset known as LR. No. 4480/79 Ngong Township which the Respondent and the Interested Party refer to a different asset known as land parcel Title No. Ngong/Township/Block 2/156. The Counsel for the Respondent submitted that the summons as framed by the applicant creates the impression that there is a parcel of Land Sic (4480/79 Ngong Township) that was fraudulently dealt with to the detriment of the applicant and the estate of his father through which he claims in the instant estate subject thereto.

Counsel for the Respondent took reference of the supporting affidavit sworn by the Applicant to the summon herein dated 23rd January, 2018 and submitted that the applicant acknowledges the estate that was distributed is the parcel of land known as LR.No.Ngong/Township Block 2/156 which is the only asset that comprised the estate.

It was asserted that the record at Ngong Land Registry as furnished in the Affidavit of the Interested Party, sworn on 29th February, 2018, marked as "CMK-7" reveals as following:-

- 1. The property was on 1.9.1998, registered for the very first time in the names of the Respondent herein and her sisters Sara Ibrahim Hassan (deceased) and Kadija Ibrahim Hassan (deceased) and a certificate of title issued on even dates.**
- 2. On 12.9.1998 a caution was registered in favor of one Abdi Ibrahim Hassan, claiming beneficial interest and the same was withdrawn on 14.12.2012 vide entry No.4.**
- 3. The property was ultimately sold to Charles Kimenyi Macharia, transferred and registered in his names on 25.1.2013.**
- 4. On 28.1.2013 a restriction was registered "no dealing to be registered without the consent of Abdi" which restriction was**

removed on 25.7.2013.

5. On 8.5.2013, some of distribution of the Estate of Ibrahim Hassan (deceased) in respect of the parcel LR. No. Ngong/Township Block 2/156, which the Applicant, states that his father was not aware of.

6. On 13.11.2014 the applicant's father; Abdi Ibrahim Hassan passed on, being the son of the late Ibrahim Hassan.

The Counsel for Respondent submitted that the property which is indicated on the certificate of confirmation as LR.No. 4480/79 NGONG TOWNSHIP, was distributed in equal shares to the Respondent, Sara Ibrahim Hassan (deceased) and Kadija Ibrahim Hassan (deceased). It was further asserted that at the time of applying for the grant and subsequent confirmation, the Respondent was of mistaken belief that the property known as LR.No.4480/79 NGONG TOWNSHIP, existed and belonged to her deceased father. On carrying out searches in various registries it turned out that the same did not exist as all, hence there was nothing indeed to distribute as anticipated then. Further that it is due to this reason that the Applicant's father; Abdi Ibrahim Hassan (deceased) abandoned the summons for revocation he had filed 20.11.1998.

Counsel cited section 76(e) of the Law of Succession Act (Cap. 160) Laws of Kenya, which provides that grant maybe revoked or annulled where it has become useless and inoperative through subsequent circumstance. It was therefore argued that there being no inheritance benefit whatsoever arising from the grant herein to any of the would be beneficiaries of the estate of the deceased person herein to whom this matter pertain and on the account of the foregoing, the Respondent does not wish to stand on the way of this court to oppose the Revocation.

The Respondent has also argued that the title to the parcel of land herein was issued to the Respondent and her two deceased sister on 1.9.1998, being a first registration, which registration and consequential title if it were to be impeached for any alleged fraud, then such impeachment does not lie within the jurisdiction of this court. Further that there is no record provided to intimate that in actual sense the property herein is an asset of the deceased. Counsel cited article 162(2) (a) of the Constitution of Kenya 2010 as well as section 13 of the Environment and Land Court Act, 2011 Law of Kenya, which clothed the Environment and Land Court with jurisdiction over matters touching on the Land title. It was therefore submitted that this honorable court lacks jurisdiction in as afar as the question of title L.R No. Ngong/Township Block 2/156 and for the more so because of the reason forwarded above.

INTERESTED PARTY'S CASE

The Interested Party's position is that the Applicant lacks locus standing to bring this application for the reasons that; since the Applicant was a grandson of the deceased, he is therefore not a beneficiary of the deceased's estate. The Interested Party understood the Applicant's main contention is that the grant left out two beneficiaries, his late father Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan (both deceased).

It was also argued that the Applicant brought the instant application on behalf of Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan and there is no indication that the Applicant was appointment as an executor under a Will or appointed by the court as an Administrator *ad colligenda bona* to act on behalf of the estate of Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan to enable him initiate this proceedings on behalf of the two estate.

In view of the above reasons, the Counsel for Interested party submitted that the Applicant lacks locus standi to bring these proceedings and the same should be dismissed *limine*. In that respect, Counsel relied on the Court of Appeal decision in **Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama (2014)eKLR**, where the Court addressed itself on the issue of locus standi in succession matters as follows:-

"... But in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of Letters of Administration in cases of Intestate succession. In Otieno v Ougo (supra) this court differently constituted rendered itself thus;

'.....an administrator is not entitled to bring any action as administrator before he has taken out Letters of Administration. If he does, the action is incompetent as of the date of inception.'

It was therefore submitted that the instant case is incompetent for want of locus standi to commence these proceedings on behalf of the estates of Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan and for that reason this court was urged to dismiss the suit *ex debito justitiae*.

Counsel submitted on whether the Interested Party has acquired an indefeasible title to the property. On this limb, the interested party's side of story is that he was approached by a land selling broker on December 2012, who informed him that there was a property on sale in Ngong Town. The Interested party then reviewed the property and after a meeting with the owners of the property declared his interest in buying it. The Interested party claims to have done a search on property on the property and confirmed that the registered owners of the property were Asha Ibrahim Hassan and Sara Ibrahim Hassan.

The Interested party further adduced evidence to the effect that on the 25th of January 2012, a sale was agreement was executed between the Respondent and Interested Party for the sale of the property at Kshs. 6, 000,000/=. The transfer the property and a certificate of lease over the property was obtained forthwith. The interested party took possession of the property and started developing it. He claims to have made huge investments on the suit property through savings and bank loans and the building he erected on the suit land is now worth more than Kshs. 45 million. The Interested party's testimony suggest that he acquired the suit property more than four years before he was enjoined in this suit, which seeks among others to revoke the said transfer. The revocation of the grant which was confirmed 20 years ago would mean that the transfer of the suit property to the interested party is null and void.

Counsel for the interested Party also submitted that Charles Kimenyi Macharia (Interested Party herein) is the registered proprietor of the suit property and the property that the applicant is seeking to revoke the transfer is registered as title number 4480/79 Ngong Township suggesting that the two properties are distinct.

Counsel further argued that the Interested Party's title for the suit property is indefeasible for the reason that the Interested Party is a bona fide purchaser for value without notice of the alleged fraud and/or irregularly obtained grant. Further that the certified copy of the green card that the property had never been registered in the name of the Applicant's grandfather and similarly, upon the purchase of the suit property by the Interested Party, the same was registered in the joint names of the Respondent and Sarah Ibrahim Hassan. For that reason the Interested Party's view is that he cannot be faulted for purchasing the suit property from the registered owners at the time of sale.

The Counsel for the Interested Party cited section 93(1) of the Law of Succession Act which states that 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. Counsel also cited Article 40 of the Constitution which guarantees an individual's right to property which cannot be deprived on flimsy grounds.

It was the Interested Party's argument that the Applicant failed to prove that the Interested Party was aware of any fraudulent dealings on the part of the Respondent (if any) in relation to the suit land. Reliance was placed on the case of **Shimoni Resort -vs- Registrar of Titles & 5 Others (2016) eKLR**, where the court was of the view that a property in the hands of a bona fide purchaser would be protected even if it is shown that at some point in the past before the bona fide purchaser acquired the suit property the same had been fraudulently transacted. Counsel cited section 26(1) of the Land Registration Act, 2012 however provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

It was therefore argued that the Applicant has not demonstrated that the Interested Party had knowledge that title in favour of the Respondent and Sarah Ibrahim Hassan was defective, if at all. It was further argued that the Interested Party carried out due diligence, which includes a search on the property and discovered that the property was registered in the joint names of the Respondent and Sarah Ibrahim Hassan. Reliance was placed on the case of **Petition No. 29 of 2012 and Civil App. No.12 of 2013 Charles Karethe Kiarie & 2 Others -vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 Others (2013) eKLR** restated that the Torrens System of registration was applicable in Kenya and acknowledged that under the system the title of a bona fide purchaser for value without notice of fraud could not be impeached. The judges in that case observed thus:-

"The Registration of Titles Act is entirely a product of the Torrens system of registration. The word 'Torrens' is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1858. This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved."

Reliance was also placed on the High Court case of **Zebak Limited -vs- Nadem Enterprises (2016) eKLR** which adopted the definition of bona fide purchaser in the Ugandan case of **Ketende -vs- Haridas & Company Ltd (2008) 2 EA 174** where it had held as follows:

"A bona fide purchaser 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: He holds a certificate of title; he purchased the property in good faith; he has no knowledge of fraud; He purchased for valuable consideration; The vendors have apparent good title; He purchased without notice of any fraud; He was not party to any fraud."

The Counsel for the Interested Party therefore submitted that the Interested Party has met all the requirements of a bona fide purchaser as enunciated in the above cited and being a bona fide purchaser for value, his rights to the property are protected both under the Law of Succession Act and the Constitution hence he should not be deprived of the property in which he has heavily invested in.

On whether the Applicant is entitled to the orders sought, the Counsel for the Interested Party cited section 76 (b) of the Law of Succession Act. The said provision provides 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... "

It was therefore submitted that the operative words herein are 'may' and 'interested party'. Counsel argued that it is at the discretion of the court, after considering the merits of the case, to revoke or annul the grant. Further that an applicant in an application for nullification or revocation of a grant must demonstrate his/her interest in the estate of the deceased. In the Interested Party's view, it is not enough for one to make an application to nullify/revoke without demonstrating his/her interest in the estate. The Interested Party therefore urged the court not to exercise its discretion in favour of the Applicant for the reasons that the Applicant lacks locus standing to this suit, neither was he an interested party within the meaning of section 76 (b) of the Law of Succession Act as he is not a beneficiary of the estate of his grandfather; that revoking the grant will serve no useful purpose as the only asset of the estate, the suit property has since been sold and equitably shared among the bona fide beneficiaries of the estate and the applicant is not one of them and lastly, it was argued that there was an inordinate delay on the Application in bringing the application herein, the same was brought nearly 19 years ago after the grant had been confirmed and 4 years after the Interested Party had acquired the property and commenced the process of developing it hence the application has been brought in bad faith.

Who shall bear costs of this suit? The Interested Party submitted that the unsuccessful party shall meet the costs of the successful party. The Interested Party however admits that the award of costs is at the discretion of the court.

ANALYSIS AND DETERMINATION.

I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter. The issues for determination herein are:

- a) Whether or not the Applicant lacks locus standi to institute these proceedings.**
- b) Whether or not the Applicant is entitled to the relief sought.**
- c) Whether or not the Interested Party has acquired an indefeasible title to property.**

The first point for determination is whether or not the Applicant herein lacks locus standi to bring this application as alleged by the Counsel for the Interested Party in his submissions. His argument is that the Applicant is the grandson of the deceased and therefore he is not a beneficiary to the suit property. My understanding of the matter at hand is that the Applicant herein brought this suit before court as a Beneficiary of the Estate of his late father Abdi Ibrahim Hassan. The Applicant's father (name aforementioned) initially brought an action challenging the issuance of the grant in question in Succession cause No.2269 of 1998, a case which was not concluded to date. It was further argued that the Applicant brought this application on behalf of Abdi Ibrahim Hassan and Fatuma (both deceased) when there is no indication that he was appointed an executor under a will or appointed by the court as an administrator ad colligenda bona to act on behalf of them.

Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.

The position in law as regards *locus standi* in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo [1986-1989] EALR 468*, the Court rendered itself thus:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

Under Section 76 of the Law of Succession Act, any party interested in the estate of the deceased may bring the application contemplated under that section and/or Rule 2 as read with Rule 17(1) of the Probate & Administration Rules. Rule 17(1) of the Probate & Administration Rules provides that:-

“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has already applied for by another person may do so.”

The evidence on record suggest that the Applicant herein brought these proceedings on behalf of his father; Abdi Ibrahim Hassan (deceased) who was the beneficiary to his father's estate. The Applicant's interest emanates from the fact that his father was a beneficiary to the suit property, thus the Applicant being dependent to his father Abdi Ibrahim Hassan's estate within the provisions of section 29 of the Law of succession Act, he acquires an interest in his grandfather's estate; the suit property by virtue of his father's share. Therefore, in the court's view, the instant Application is properly before this court.

On whether the Grant of Letters of Administration issued to the Respondent on 22.4.1997 and a certificate of Confirmation of Grants dated 15.5.1998 are valid instruments capable of being revoke, the Applicant resorted to section 76 of the Law of Succession Act which provides for revocation and annulment of grant and the same provides as follows:

76. Revocation or annulment of grant

“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.”

The Applicant made reference of subsection (b) cited above and argued that the respondent was aware that the estate did comprise of five beneficiaries at the time of filing the petition but she indicated that there were only three beneficiaries to the estate thereby she concealed material facts. For that reason the Applicant strongly took the position that the proceedings leading to the issuance of the grant on 22nd April 1997 were defective in substance. On the other hand the submissions by the Counsel for the Respondent suggests that the property indicated on the certificate of confirmation as LR.No. 4480/79 NGONG TOWNSHIP, was distributed in equal shares to the Respondent, Sarah Ibrahim Hassan (deceased) and Kadija Ibrahim Hassan (deceased) and at the time the of applying for the grant and subsequent confirmation, the Respondent was of mistaken belief that the property known as LR.No. 4480/79 NGONG TOWNSHIP, existed and belonged to her father. Further that upon carrying out searches in various registries it turned out that the same did not exist at all, hence there was indeed nothing to distribute as anticipated and for that reason, the Applicant's father (deceased) abandoned the summons for revocation he had filed on 20.11.1998. It was therefore argued that there being no inheritance benefit whatsoever arising from the grant herein to any of the would be beneficiaries of the estate of the deceased person herein to whom this matter pertain and on the account of the foregoing, the respondent does not wish to stand in the court's way to oppose the revocation.

The Interested Party's submissions suggest that land title parcel title LR.No. 4480/79 NGONG TOWNSHIP is distinct from Ngong/Township Block 2/156.

At this juncture, this court endeavor to trace the history of the suit property as depicted by the evidence on record. A perusal of the evidence on record shows that in an application for injunction and a supporting affidavit sworn and filed by Asha Ibrahim Hassan against Khalid Abdi Hassan in Succession Cause No. 2269 of 1996 dated 6th day of March 2013 which sought to restrain Khalid Abdi Hassan from taking an action or transaction with parcel of land known as LR.No. 4480/79 NGONG TOWNSHIP and in those proceedings it was indicated that the title of the same property has been changed to Ngong Township Block 2/156. This defeats the Interested Party and the Respondent's contention that the LR.No. 4480/79 NGONG TOWNSHIP and Ngong Township Block 2/156 are distinct titles. Further that the Applicant could not have mistaken the suit property since he has been staying at the suit property at the time they were served with a notice of eviction send through Kwengu & Co. Advocates dated 5th February 2013 which also advised all the tenants of Ngong Township Block 2/156 that the Interested Party by virtue purchase had acquired ownership. The same is captured in the Affidavit sworn y the Applicant on the 5th day of March.

I have also considered an affidavit to petition for confirmation of grant of letters of administration sworn by the Respondent(Asha Ibrahim Hassan) on the 19th March 1998, she deponed that on the 22nd April 1997, a grant of letters of administration of all estate of her deceased father was made and that the shares of all beneficially entitled to the said estate have been ascertained and determined and only three beneficiaries were named which were; Asha Ibrahim Hassan, Sara Ibrahim Hassan and Kadija Ibrahim Hassan. The named persons were to get equal shares of the property known as LR.No. 4480/79 NGONG TOWNSHIP. A certificate of Confirmation of a grant was therefore issued to the Respondent herein on 15th day of May 1998 which gave each of the above named beneficiaries a third of the only property of their father; LR.No. 4480/79 NGONG TOWNSHIP.

The Applicant's Father; Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan filed separate summons for revocation or annulment of the said grant dated 14th of July 1999 on the basis that the same was obtained fraudulently and by concealing from court of material facts relating to the said estate that is the fact that the two Applicants were left out in the application for the grant in which they were entitled to share the assets of the estate. On 8th day of March 2000, the Respondent herein filed a replying affidavit in response to the abovementioned summons for revocation or annulment of the grant issued and confirmed to her. The said replying affidavit suggest that she admitted that the said two beneficiaries had been left out. She deponed all the beneficiaries of the deceased's estate are thereunder;-

(a) Asha Ibrahim Hassan;

(b) Sara Ibrahim Hassan;

(c) Khadija Ibrahim Hassan;

(d) Fatuma Ibrahim Hassan; and,

(e) Abdi Ibrahim Hassan.

She therefore stated that all the above heirs should share the deceased's estate and denied having attempted to disinherit them which is clearly contrary from what is depicted by the Grant of Letters of Administration issued to her on 22nd April, 1997, which was confirmed on the 15th May, 1998 which suggests that only three hires were entitled to the estate of their deceased father.

The evidence on record further depict that Respondent, Sara Ibrahim Hassan and Kadija Ibrahim Hassan proceeded to jointly register the suit

property on the 1st September 1998, upon renewal of the lease the Title number of the property changed to NGONG/TOWNSHIP BLOCK 2/156 which is the current title of the suit property. A certificate of lease was issued on the 21st January 1999; a caution was registered in favor of Abdi Ibrahim was registered claiming beneficiary interest and on the 4th of December 2012 there was a withdrawal of the caution by the cautioner under entry number three (3); on the 17th of December 2012, Asha Ibrahim Hassan and Sarah Ibrahim Hassan were registered as joint proprietors of the suit property and a certificate of lease was issued on the same day. The property was then transferred to Charles Kimenyi Macharia the Interested Party herein on the 25th January, 2013 and a certificate of lease was issued thereof on the 28th of January 2013. On the same day, a restriction was registered on the suit property to the effect that no dealings to be registered without the consent of Abdi Ibrahim Hassan. The said restriction entry number 9 was removed under section 73(2) of the Land Registration Act, 2012.

In the foregoing, I have no doubt that the Respondent herein had all the intention to disinherit the Applicant's father; Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan of the estate in question herein as seen in the about account. She deliberately left out their names on the list of beneficiaries when she applied for the Grant of Letters of Administration and the subsequent Confirmation of the same. Therefore this court finds that the Grant of Probate or Letters of Administration to Asha Ibrahim Hassan on 22nd April 1997 and confirmed on 15th May 1998 was defective as the same was obtained fraudulently and by concealment from court of material facts, that is the exclusion of Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan on the list of beneficiaries. The said grant is hereby revoked and annulled under the provisions of section 76(6) Cap Laws of Kenya.

Having made the above finding, the court finds that the beneficiaries namely Abdi Ibrahim Hassan (represented by the Applicant herein) and Fatuma Ibrahim Hassan who were left out in the Application for the grant are beneficiaries to the Estate in question and are entitled to a share of the same. Thus the beneficiaries of the Estate of Ibrahim Hassan Alias Sheikh Ibrahim Hassan (deceased) are as under:-

- (a) Asha Ibrahim Hassan;**
- (b) Sara Ibrahim Hassan;**
- (c) Khadija Ibrahim Hassan;**
- (d) Fatuma Ibrahim Hassan; and,**
- (e) Abdi Ibrahim Hassan.**

The above findings renders the all dealings including transfers of the title to the suit property null and void since the title that was held by Asha Ibrahim Hassan; Sara Ibrahim Hassan and Khadija Ibrahim Hassan was defective since the same was acquired by a defective Grant of Letters of Administration. . That's means the suit property reverts back to the above-mentioned beneficiaries of the Estate in question herein. The court notes that the suit property had already been exchanged hands and it is currently in the hands of the Interested Party who purchased the said property for value. Counsel for Interested Party contended that the Interested Party acquired an indefeasible title to the suit property. It was stated that the sell was concluded having conducted a search on the property which confirmed that the registered owners of the property were Asha Ibrahim Hassan (the Respondent) and Sarah Ibrahim Hassan. The suit property was purchased at a value of Kshs. 6,000,000.00/= which was paid in full and a transfer of title was made thereof. Further that the Interested party has already done huge investments on the property up to an estimated worth of Kshs. 40,000,000.00/= and that he was not aware of the alleged fraud/or irregularly obtained grant. Having found and recognized that an illegality had been perpetrated – what is the remedy? **W. MUSYOKA** in his casebook on the Law of Succession at page 581 states that:

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property.”

However, the author goes onto cite ***RE Diplock –VS – Wintle [1984] ch 485*** which makes an exception to this general rule in a case where the holder of such property is a bona fide purchaser for value. In the court's view a Bona Fide Purchaser is one who purchases something for value without notice of another's claim to the property or without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title. In the Uganda Court of Appeal case of ***Katende V. Haridar & Company Ltd*** cited with approval in Kenya ***High Court Case Of Lawrence Mukiri V. Attorney General & 4 Others [2013] eKLR*** on who is a bona fide purchaser for value. 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.”***

Under section 26(1) of the Land Registration Act 2012 that the title is prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, and such title can only be challenged on the ground of fraud ,misrepresentation or if proved that the title

had been acquired illegally, unprocedurally or through corrupt scheme. In the instant case, the Interested Party relied heavily on the search he claims to have conducted as well as the green card that was produced as part of the evidence on record. These two depict that Asha Ibrahim Hassan; Sara Ibrahim Hassan and Khadija Ibrahim Hassan were the first registered proprietors of the suit property and at the time the Interested Party purchased the property, Asha Ibrahim Hassan (the Respondent) and Sarah Ibrahim Hassan were the joint proprietors of the suit property.

In my view, a search at various registry alone was not enough to curb the risk of acquiring property that has a defective title. It must be noted that a search alone is not proof of title to a parcel of land. For instance in the circumstances of this case, when the Interested Party did a search at the various registry as he claims, he found the above mentioned persons as the first registered proprietors of the suit property from the year 1999. He never bothered himself to find out the mother title of the suit property since it is practically impossible that the suit property was never registered into someone's names before that. Furthermore, it apparent that the interested party never conducted a search at the relevant court registries to find out if there were pending cases touching on the suit property. That way in my view the Interested party ought to have figured out that there were protracted unsettled disputes touching of the suit property. In the premises, I find the Interested Party not to be a bona fide purchaser for value without notice of the defective grant and title for want of due diligence. In my view the interested party ought to have done much better as far as the quest to find out the rightful owners of the suit property.

Having made the above findings, pursuant to the circumstances of this case, the court took cognizance of the fact that the Interested Party despite the fact that he lacked due diligence, he has already invested heavily in the suit property. I'm alive to provisions of Section 73 of the Probate and Administration Rules which provides that:

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

It must be noted that the object of the court is uphold substantive justice. It is my considered view that substantive justice will be done by ensuring that the beneficiaries who were left out when the proceeds of the suit property were shared are given their share of the Estate in question. It is for that reason, that I invoke the inherent powers of this court granted under Article 159 of the Constitution, Section 76 of the Law of Succession Act and Section 73 of the Probate and Administration Rules and make the following orders:

a) That the Grant of Probate or Letters of Administration to Asha Ibrahim Hassan on 22nd April 1997 and confirmed on 15th May 1998 was defective as the same was obtained fraudulently and by concealment from court of material facts, owing to the exclusion of Abdi Ibrahim Hassan and Fatuma Ibrahim Hassan from the list of beneficiaries. The said grant is hereby revoked and annulled under the provisions of section 76(6) Cap Laws of Kenya.

b) A declaration that the beneficiaries namely; Abdi Ibrahim Hassan (represented by the Applicant herein) and Fatuma Ibrahim Hassan are entitled to a share of their deceased father's Estate.

(a) That a proper Probate account be filed within 6 months.

(b) That a proper distribution of the Estate of IBRAHIM HASSAN Alias SHELKH IBRAHIM HASSAN who died on the 10th June 1975 be done.

(c) The current status of the title to the suit property be reserved.

Dated, signed and delivered in open court at Kajiado this 13th day of February, 2019.

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R. NYAKUNDI

JUDGE

Representation:

Ibrahim Khalid – the applicant

Mr. Ronoh for the interested party

Nzaku for the respondent