



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 55 OF 1999

IN THE MATTER OF THE ESTATE OF M'MBWIRIA M'MAIRANYI

BETWEEN

MARETE MAIRANYA.....PETITIONER

VERSUS

GEDION GITONGA NKABU.....1ST APPLICANT

FLORENCE GACHERI ELIAS.....2ND APPLICANT

AND

MUTUA JAPHETH NDATHO.....1ST INTERESTED PARTY

FELICITY MPINDA MIRITI.....2ND INTERESTED PARTY

GRACE IGOKI MBAE.....3RD INTERESTED PARTY

JOSHUA MURETI MBAE.....4TH INTERESTED PARTY

RUTH NKATHA NKANATA.....5TH INTERESTED PARTY

STEPHEN KITHINJI JASPER.....6TH INTERESTED PARTY

JAPHETH MUTHOMI MUGWIKA.....7TH INTERESTED PARTY

J U D G M E N T

1. **M'MBWIRIA M'MAIRANYI** He left his sons, **Marete Mairanyi** and **Benson Muriungi** as well as his daughter in law **Flora Gacheri Elias** as his survivors. Parcel No. **Abogeta/L-Kiungoni/334** (hereinafter "**the suit property**"), measuring about 5.5 acres, was the only asset forming his estate.

2. On 28th April, 1999 a grant of Letters of Administration was issued to **Marete Mairanya** ("**the petitioner**"). The grant was subsequently confirmed on 11th November, 1999 as follow:-

- a) **Marete Mairanya** - 1.5 acres
- b) **Benson Muriungi** - 1.5 acres
- c) **Flora Gacheri Elias** - 1.5 acres

d) Gedion Gitonga Nkabu - 1 acre

3. Although a certificate of confirmation of grant was issued to that effect, it was never effected. To the contrary the petitioner was to subdivide the suit property and sell the subdivisions thereof to the interested parties. On 10th July, 2009, the applicants applied for the revocation of the grant, the cancellation of the subdivisions arising out of the suit property. A similar application was made by the 1st Applicant on 30th January, 2018. The grounds for the application were that; despite the grant having been confirmed in 1999, the petitioner had not yet distributed the shares to the beneficiaries in terms of the grant and that he had sold parts of the property to the interested parties.
4. The said Summons were heard together and determined by way of *viva voce* evidence whereby, the witnesses filed their affidavits on which they were cross-examined.
5. **A1W1 Victor Mutwiri Gitonga**, a son to the 2nd applicant told the court that he was the personal representative of the estate of the late **Gedion Gitonga Nkabu**. That in terms of the Certificate of grant issued on 29th November, 1999, the said **Gedion Gitonga Nkabu** was entitled to 1 acre. That up to the time he was testifying, the petitioner had not shown him the share belonging to his late father.
6. **A2W1 Florence Gacheri Elias** told the court that she was a widow of one of the sons of the deceased, the late **Elias Nkonge**, That she was entitled to 1.5 acres as her share of the estate but the petitioner had subdivided the suit property and sold portions thereof to the interested parties. That she had discovered that the portion she was occupying had been sold to the 1st interested party when the latter sued her in **Meru HCCC No. 69 of 2000 Mutua Japheth Ndatho vs. Florence Gacheri Mpirine** seeking to evict her.
7. **A2W2 Benson Muriungi**, a son of the deceased, told the court that although they had agreed as a family on the distribution as per the Certificate of grant, the petitioner had not given him his share. That when he asked him about it, the petitioner set upon him with a digging hoe and badly injured him. He ended up in Kanyakine hospital where he was admitted for over 5 years. He was only discharged in June, 2017. He was living on a road between two of the portions the petitioner had sold to 3rd parties.
8. **A2W3 Perpetual Mary Kagweni Kaburu** told the court that she was a fellow church member with **A1W1**. That after **A2W3** was discharged from hospital, he did not have any accommodation. He was living under a tree on a footpath. The church sought to construct a dwelling for him only to meet stiff resistance from the buyers of the estate land. Together with others, she reported the matter to the authorities whereby the registrar of land inhibited the titles that resulted from the subdivision of suit property and the present proceedings were accordingly lodged.
9. **P1W1 Marete Mairanya**, the petitioner, told the court that he had not yet effected the grant. That the suit property was subdivided to **Abogeta/L-Kiungone/994, 995, 996, 997, 998, 1102, 1103, 1104 and 1105**, respectively. That he had sold **Abogeta/L-Kiungone/994** to **Mutua Japheth Ndatho** who had since been issued with his title thereto. That the 2nd applicant's share was **Abogeta/L-Kiungone/995** but she had failed to pay transfer fees to have it transferred to her.
10. He further admitted that he had transferred the subdivisions to five other buyers and had not transferred any share to any of the beneficiaries. That **Gedion Gitonga Nkabu** had not paid any consideration for the one acre distributed to him. That he sold the shares of the other beneficiaries on their own behalf. He admitted that **Benson Muriungi** was currently living on a road under a tree. He denied having assaulted him.
11. **PW2 Grace Kainda Mwamba** told the court that she was the widow of **Mutua Japheth Ndatho**. That her late husband purchased the property from the petitioner and did not involve the beneficiaries of the estate. That her husband had purchased from the petitioner 2 acres. That she entered the property only in 2017. She also admitted that she and her husband never investigated about the other beneficiaries. (out of confusion, this witness seem to have testified twice but this did not cause any prejudice to any of the parties).
12. **IP1W1 Grace Igoki Mbae**, the 3rd interested party, testified that **Joshua Mureti Mbae** and **Ruth Gakii Mbae** (the 4th and 7th interested parties, respectively), were her children. That she purchased **Abogeta/L-Kiungone/1102** and **1103**, respectively from the petitioner and **Mr. and Mrs. Alfayo Kaburu** in 2007 and 2008, respectively.
13. **IP2W2 Ruth Nkatha Nkanata**, the 5th interested party, testified that on 22nd May, 2007, she purchased **Abogeta/L- Kiungone/1105** and has since been cultivating that portion.

That she started constructing thereon in 2017 and was a purchaser for value without notice.
14. **IP3W1 Justus Kimathi Mbui**, told the court that in 2003 and 2008, respectively, he purchased a ¼ acre each from **Kenneth Githinji Jasper** and **Felicity Mpinda**. That he had been in occupation thereof since 2008 and had substantially developed the same.
15. **IP5W1 Japheth Muthomi Mugwika**, the 8th interested party, testified that he was an innocent purchaser for value without notice of **Abogeta/L-Kiungone/1104**. That he ascertained that the land was in the name of the petitioner from the lands office. That the petitioner told him that the 2nd applicants property was **Abogeta/L-Kiungone/995**.
16. At the instance of the court, **C1W1 Catherine Makau**, the Land Registrar incharge of Buuri, North, South and Central Imenti appeared and produced the register in respect of the suit property and the resultant sub-divisions. She told the court that the petitioner was registered as the administrator on 31st January, 2000. That on 7th November, 2003, the title for **Abogeta/L-Kiungone/334** was closed on sub-division with the resultant sub-divisions being **Abogeta/L-Kiungone/993, 994, 995, 996, 997 and 998**, respectively.

17. She further testified how the petitioner further sub-divided **Abogeta/L-Kiungone/993 and 996** to produce **Abogeta/L- Kiungone/1102, 1103, 1104, 1105 and 1106**, respectively. That the petitioner had transferred all the said subdivisions save for **Abogeta/L. Kiungone/995 and Abogeta/L. Kiungone/1106**, measuring approximately 0.40 ha and 0.62 ha, respectively that still remain in the name of the petitioner.

18. **C1W1** visited the *locus in quo* together with the district surveyor and filed a report dated 5th July, 2018. The report showed that the suit property, which had now been severally sub-divided as aforesaid was occupied as follows:-

- a) **Abogeta/L-Kiungone/994** was built on and occupied by the 2nd applicant;
- b) **Abogeta/L-Kiungone/1106** was built on and occupied by the petitioner;
- c) **Abogeta/L-Kiungone/998** was built on and occupied by Justus Kimathi;
- d) **Abogeta/L-Kiungone/995, 1104 and 1105** were neither built on nor occupied by anyone;
- e) **Abogeta/L-Kiungone/997** was not built on but was being used by Justus Kimathi; and
- f) **Abogeta/L-Kiungone/1102 and 1103** was being used by Grace Igoki.

19. **C1W1** told the court that the Certificate of confirmation of grant dated 29th November, 1999 was not adhered to and that the petitioner had acted irregularly. She produced the certified copies of the register for the said subdivisions as **CExh1 to 12** and the report as **CExh13**.

20. The parties filed their respective submissions. It was submitted on behalf of the interested parties that they were innocent purchasers for value without notice. That they had satisfied themselves that the petitioner was the registered owner before committing themselves to the sales. The cases of **Consolata Pande & Another vs. Ashish Bhupendra Patel & 4 Others [2018] eKLR, Monica Adhiambo Maurice Odero Koko [2016] eKLR and In re Estate of Fredrick Njeru Zakayo (Deceased) [2018] eKLR** were relied on in support of those submissions.

21. For the nd applicants, it was submitted that; the petitioner had acted in breach of **sections 82 and 83 of the Law of Succession Act, Cap 160 (“the Act”)**; that the applicants had satisfied the provisions of **section 76 of the Act** to warrant the revocation of the grant. Finally, that the claim by the interested parties was untenable as the entire transaction was littered with illegalities. The cases of **In re Estate of Thiong’o Nginyayu Muthiora (Deceased) 2013, In re Estate of David Kyuli Kaindi (Deceased) [2016] eKLR and Monica Adhiambo Maurice Odero Koko [2016] eKLR** were cited in support of those submissions.

22. Having considered the evidence on record and the able submissions of Learned Counsel, the issues that fall for determination are; **have the applicants met the threshold to warrant the revocation of the grant, what is the position of the interested parties and what orders should be made?**

23. The jurisdiction to revoke or annul a grant is provided for under **section 76 of the Act**. That jurisdiction is exercisable whether the grant has been confirmed or not provided that the grounds set out therein are established. One of such grounds is where the person to whom the grant was made *has failed to proceed diligently with the administration of the estate*.

24. The grant was confirmed on 29th November, 1999. Nearly twenty years later, the petitioner has done absolutely nothing to administer the estate as required in law. To the contrary, he has completely failed in his duties set out in **section 83 of the Act** and has acted arrogantly and criminally against the beneficiaries. There was evidence that when **Benson Muriungi**, his brother, demanded his share, he together with his children set upon him with crude weapons and left him for the dead. The said brother remained admitted in hospital for five years and is now crippled. The petitioner told the court that the 2nd applicant was ‘big headed’ that is why he had not processed any title for her.

25. It must be firmly made known to the administrators that being appointed administrator of the estate of a deceased person does not give one any superior right to the estate than the other beneficiaries. The role of the administrator is that of a trustee and like in all other trusts, he is accountable to both the court and the other beneficiaries. That trusteeship is revokeable at any time either at the instance of the court on its own motion or at the instance of any beneficiary for good cause.

26. In this regard, there was no reason that was advanced by the petitioner why he had not effected the grant 19 years after it had been confirmed. He not only exuded arrogance and contempt to his brother and sister in law, but was altogether dismissive of them. To my mind, he is a classic example of the worst ever administrator any estate could have. To say the least, he not only acted criminally in relation to the suit property, he was a fraudster *per excellence*. The grant cannot stand. It is for revocation.

27. The next issue is the position of the interested parties. They all pleaded that they were innocent purchasers for value without notice. It was submitted that they were protected by **section 93 of the Act**.

28. **Section 93 of the Act** has been a subject of interpretation in various cases. In **Adrian Nyamu Kiugu vs. Elizabeth Karimi Kiugu and Another [2014] eKLR**, Makau J held:-

“Whereas the above section states that a transfer by 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, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to legal representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the

neighbourhood 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.”

29. In Re Estate of Christopher Jude Adela (Deceased) [2009] eKLR, Rawal J held, of sections 93 (1) and (2) of the Act, as follows:-

The correct reading of those provisions will indicate that the transfer to a purchaser, if shown to be fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in that manner will be commensurate with the provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immoveable property. It shall be a very weak and unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immoveable properties of estate by a personal representative, it shall be against all notions of fairness and justice. No court can encourage such an interpretation where a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of the right beneficiaries of the estate.

In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative”.

30. In Monica Adhiambo vs. Maurice Odera Koko [2016] eKLR Nagillah J stated:-

“The fact remains that the petitioner stole a match over the other beneficiaries who were also to benefit on equal status on the property of the deceased and would be unfair to validate the illegal actions of the petitioner by invoking section 93 of the Law of Succession Act. The reality of the situation is that provisions of section 93 do not validate unlawful acts and what was intended by section 93 was where a grant is properly and lawful (sic) issued then, Section 93 can come to the rescue of such a purchaser. In my humble view, the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit property.”

31. And, in Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu & Another [2008] eKLR, the Court of Appeal held:-

“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 immoveable 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. ...”

32. What comes out from the foregoing pronouncements is that; **section 93 of the Act** is not a panacea for fraudulent dealings with estate property. That provision was meant to protect bonafide purchasers for value without notice. It was not meant to shield fraudulent administrators and their cohorts from innocent beneficiaries. It was not an exception to the intention and spirit of the **Law of Succession Act**, that the rightful beneficiaries of the estate do inherit the estate property.

33. Further, it must not have been the intention of the Legislature that **section 93 of the Act** be used as a vehicle for fraud.

34. In this regard, any transfer of estate property will be set aside if it is shown that; the transferor had not been lawfully issued with the grant and confirmed under **section 71 of the Act**; or, the grant had been fraudulently obtained; or, the purchaser was not an innocent purchaser for value without notice.

35. Who is an innocent purchaser for value without notice? In Midland Bank Trust Co. Ltd and another v. Green and another [1981] 1 ALL ER 155, the House of Lords held:-

“... the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened on his conscience and the composite expression was used to epitomise the circumstances in which equity would, or rather would not, do so. ... Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice.... it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or when notice came to be regulated by statute the requirement for good faith became obsolete. Equity still retained its interest in, and power over, the purchaser’s conscience. ... good faith there is stated as a separate test which may have to be passed even though absence of notice is proved.”

36. In the case of Katende v. Haridar & Company Limited [2008] 2 E.A. 173, the Court of Appeal of Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as 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 a bona fide doctrine, ... (he) must prove that:-

a) he holds a certificate of title;

b) he purchased the property in good faith;

c) he had no knowledge of the fraud;

d) he purchased for valuable consideration;

e) the vendors had apparent valid title;

f) he purchased without notice of any fraud;

g) he was not party to any fraud.”

37. I reiterate the foregoing in toto and add that he must show that, such purchaser must show that he made reasonable inquiries not only of the register but also physical inspection of the property. When a property is in the possession of another, that *per se* is constructive notice and should raise a red flag on the conscience of an intended purchaser.

38. The question before court then is whether the interested parties were innocent purchasers without notice. This can only be answered by looking at the the evidence on record. One thing that is clear is that, all the interested parties produced copies of sale agreements and titles in respect of what they contended they had purchased.

39. As already stated, one must prove that he is a bonafide purchaser for value without notice. I am satisfied that all the interested parties had proved that they had purchased the properties they claim for valuable consideration. The issue is whether they had no notice and whether the purchase was in good faith.

40. The evidence on record is clear of the following:-

a) that none of the interested parties told the court, that they carried out a search at the Lands Registry to confirm the sanctity of the title they sought to purchase, and if they carried out such searches, none was produced in evidence;

b) that had the interested parties carried out searches, they would have discovered that the petitioner was registered as owner vide **RL 19**. That *per se* meant that, the petitioner was only an administrator and had no authority to sell the property to 3rd parties;

c) that none of the interested parties, save for **Grace Igoki Mbae** the 3rd interested party, produced the local **Land Board Consent** to the alleged transfers in their favour. The transactions having been controlled, it was incumbent upon them to seek such consent which would have elicited queries from the board about the ownership of the suit property. It was incumbent upon the interested parties to produce the same to show that the transactions were legal and above board;

d) none of the interested parties produced a copy of the transfer by which their purported interest was transferred. This is so because, some of the sub-divisions (**Abogeta/L. Kiungone/994, 997 and 998**) were transferred by way of **RL 7**. The transferees of the said portions therefore purported to be beneficiaries of the estate which they were not;

e) all the interested parties are but neighbours to the estate land. They knew the petitioner, his brother **Benson Muriungi** and the 2nd applicant. They must have known that the petitioner was not the exclusive owner of the property as he was only one of the children of the deceased. By pretending to purchase from the petitioner the various portions, the interested parties were but assisting the petitioner to perfect his fraud on the beneficiaries of the estate;

f) as regards possession, all the interested parties were in agreement that the 2nd applicant and **Benson Muriungi** were in possession of the property at the time they purchased the sub-divisions. They admitted not having made any inquiries from those in occupation before they purported to purchase the sub-divisions. Indeed, it is after the 1st interested party had purchased Plot. 994 that he attempted to evict the 2nd applicant from possession thereof;

g) it came out clear at the trial that, none of the interested parties had taken possession of the various sub-divisions before the applicants filed the 1st application in 2012. While the purchases occurred between 2003 and 2008, none of the interested parties attempted to take possession until 2012 when the 1st interested party applied for the eviction of the 2nd applicant. The delay in taking possession showed that there was something afoot with what they had “purchased”;

h) it would seem however that Justus Kimathi Mpuu, **IP3** is the only one who has settled on the property on a house built by his predecessor. However, he has no title for the portion he purchased and under the dictum in the **Katende v. Haridar & Company Limited case** (supra), the doctrine of the bona fide purchaser cannot apply to him.

41. In view of the foregoing, I hold that the case of **In re Estate of Fredrick Njeru Zakayo (Deceased)** (supra) is not applicable. In that case, the property had been wholly distributed to the beneficiaries who had transferred to themselves in accordance with the grant before they sold to the purchasers. In the present case, where the petitioner was only entitled to a share and not the whole estate. Further, in that case, the property was vacant and the objector was not in possession, unlike in the present case.

42. I am therefore satisfied that the interested parties were not innocent purchasers for value without notice. They had constructive notice of the claim by the 2nd applicant and **Benson Muriungi** who were in possession of the property. They only woke up in arms when the church goes attempted to settle **Benson Muriungi** after he had been discharged from hospital where the petitioner had dispatched him to. They exhibited absolutely no bona fides for reasons I have already stated. Surely, equity will fasten their conscience for having had constructive notice.

43. Accordingly, the protection of **section 93 of the Act** is not available to the interested parties. Obviously they were not innocent purchasers for value without notice. They were out to help the petitioner perfect and conclude his fraud upon the other beneficiaries. It defeats logic that they would pass **Benson Muriungi**, lying down dejected under a tree that passed for his residence, and go to purchase property from his brother, the petitioner, without their conscience pricking them.

44. The interested parties have a claim against the petitioner who led them on the path of fraud. They have no claim whatsoever against the suit property.

45. Accordingly, I allow the applications and make the following orders:-

- a) the grant issued to Marete Mairanya is hereby revoked and a fresh one issues to Flora Gacheri Elias forthwith.
- b) the said grant is hereby confirmed in terms of the Certificate of confirmation of grant issued on 29th November, 1999 save that the share of Gedion Gitonga Nkabu will be issued in the name of his Estate.
- c) All the entries made on title no. **Abogeta/L- Kiungone/334** after 29th November, 1999 are hereby cancelled, nullified and set aside. Consequently, all the sub-divisions arising from the said property are hereby nullified and the titles therefor revoked.
- d) the Lands Registrar, Meru do forthwith effect the said Certificate of confirmation of grant in the normal manner.
- e) the costs of the applications be borne by the petitioner and the interested parties.

It is so decreed.

DATED and **DELIVERED** at Meru this 16th day of May, 2019.

A. MABEYA

JUDGE