



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

SUCCESSION CAUSE NO 103 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE ZEPHANIA KIBOR

ARAP TIMBOMEI alias ZEPHANIA KIBOR TIMBOMEI (DECEASED)

HANNA SAFIA CHEPKEMOI.....APPLICANT/RESPONDENT

VERSUS

ESTHER CHEPKEMOI BOR.....1ST PETITIONER/RESPONDENT

KENNEDY KIPLANGAT TONUL.....2ND PETITIONER/RESPONDENT

DENIS KIBET YEGON.....3RD PETITIONER

AND

JUSTINE YEGON.....1ST INTERESTED PARTY

ALFRED KIPKIRUI KURAT.....2ND INTERESTED PARTY

DENIS KIMUTAI.....3RD INTERESTED PARTY

BETSY CHEROTICH.....4TH INTERESTED PARTY

DORIS CHEBETI SITIENEI.....5TH INTERESTED PARTY

RULING

1. By their application dated 18th April 2018, the applicants seek the following orders:

(i) (spent)

(ii) That this Honourable Court be pleased to grant leave to the applicants herein JUSTINE YEGON, ALFRED KIPKIRU KURGAT, DENNIS KIMUTAI, BETSY CHEROTICH AND DORIS CHEBET SITIENEI to be enjoined as the interested partes in these proceedings.

(iii) That upon leave being granted, the applicant/Respondnet and the Petitioners be directed to serve the Interested Parties with their pleadings.

(iv) That the interested parties be granted leave to respond to the Applicant's/Respondent's pleadings and supporting affidavit.

(v) That costs of this application be provided for.

2. The application was based on the following grounds:

(a) That the application and the supporting affidavit involves a case of revocation of grant whereby the proposed interested parties/applicants herein, who have a bona fide interest in taking part in the proceedings.

(b) That the decision made by this honourable court emanating from summons for revocation or annulment of grant will directly affect the interested parties and it will have an impact on their lives.

(c) That the interested parties were condemned unheard against the cardinal rule of natural justice

(d) That no prejudice will be suffered by the applicant/respondent if the orders sought are granted

(e) That the application is made in good faith.

3. The application is expressed to be brought under the provisions of Article 158 and 159 of the Constitution, Order 53 Rule 3(2) and (4), Order 53(Rule (6) section 1A, 1B 3 and 3a of the Civil Procedure Rules and is supported by the affidavit of Ms Justine Yegon Sworn on 18th April 2018. In her affidavit, Ms. Yegon avers that she and her fellow applicants had been informed on 19th March 2018 by the Land Registrar – Kericho that she has been summoned to appear before the court on 27th March 2018 in respect of this matter.

4. They had realized, upon further inquiry, that the court had delivered a ruling on 15th November 2017 and an order issued on 10th January, 2018.

5. She avers that she and her co-applicants are innocent purchasers for value having purchased their respective pieces of land from the administrators and obtained title deeds for them. She annexes to her affidavit documents marked “ JY4 “ a, b, c, d, and e” which she avers are the titles they obtained upon purchase of the land.

6. It was her averment further that their advocates had advised them, which advice they believe to be true, that under section 93 of the Law of Succession Act Cap 160 Laws of Kenya that validity of the transfers to themselves were not affected by any subsequent revocation or variation of the grant.

7. She further submitted that the decision made by this Court will directly affect them and they will suffer irreparable loss and damage which cannot be compensated in monetary terms. She therefore urged the court to enjoin them in the succession cause as interested parties. It was her averment further that there would be no prejudice suffered by the respondent if the orders sought were granted.

8. This application was filed subsequent to the ruling of this court dated 15th November 2017 pursuant to an application for revocation of grant dated 30th July 2015 brought by the respondent, Hanna Safia Chepkemoi. In the said ruling, this court directed that the titles obtained after the petitioners subdivided land title number **Kerich/Litein/76** in contravention of a court order be cancelled, that the land reverts to the original title, and thereafter be shared equally between the beneficiaries of the estate of Zephania Kibor Arap Timbomei (Deceased).

9. In the submissions made in support of the application when the matter came up in court, Mr. Bii reiterated the contents of the application dated 18th April 2018 that the interested parties be enjoined in these proceedings. He submitted that the ruling delivered on 15th November 2017 will affect the interested parties as they are the holders of title deeds given after the succession was completed but before the ruling of the court. They were therefore effectively seeking to re-open the decision of the court. Should the ruling be implemented, the interested parties who obtained title deeds from the petitioners will suffer.

10. Mr. Koske for the respondent, Hanna Safia Chepkemoi, opposed the application on the basis of the grounds of opposition filed on 11th October 2018. His submission was that the application by the interested parties is overtaken by events as the court delivered its ruling on 15th November 2017 and had conclusively and substantially determined the issues in controversy between the petitioners and the beneficiaries.

11. He further observed that the interested parties purport to have purchased their respective portions of land from the beneficiaries prior to confirmation of grant and issuance of titles. He submitted that under the provisions of section 45 of the Law of Succession Act, the interested parties are intermeddlers in the estate of the deceased, and their purchase of the estate of the deceased is null and *void ab initio*. In his view, if the interested parties are aggrieved, they have an option to file suit in the Environment and Land Court and pursue the beneficiaries who sold the parcels to them.

12. It was Mr. Koske’s submission further that the interested parties were aware of the existence of this cause prior to the purchase of the properties from the petitioners. That on 30th July 2015, Ong’udi J had issued a temporary stay of execution of the confirmed grant and directed that the matter be mentioned on 24th September 2015 for directions on how the application for revocation of grant should proceed.

13. The petitioners had, however, continued to obtain the title deeds and to issue irregular titles to the interested parties. Mr. Koske submitted that the application by the interested parties has no merit and is an abuse of the court process.

14. In his submissions in reply, Mr. Bii observed that the applicants were not parties to the succession cause and were not aware of what happened. That they had obtained titles from the petitioners who had completed the succession process. That section 45 of the Law of Succession Act was not applicable as the interested parties purchased the property after the succession cause was complete. They were not aware of the order of 30th July 2015 issued against the petitioners. Mr. Bill urged the court to grant the orders sought by the applicants to join them to the proceedings as interested parties.

15. I have considered the application of the interested parties in this matter. They rely on section 93 of the Law of Succession Act, which provides that:

(1) 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.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

16. In her decision in **In Re-Estate of Christopher Aide Adela (Deceased) (2009) eKLR Rawal J** (as she then was) stated as follows:

This leaves me with provisions of section 93(1) of the Laws of Succession which on the face thereof preserves the validity of transfer of interest in immovable or moveable property made to a purchaser by a person to whom representation has been granted notwithstanding subsequent revocation or variation of the grant either before or after the commencement of the Act.

Then section 93(2) of the Act stipulates that the transfer of immovable property to a purchaser by the personal representative of the estate cannot be invalidated by reason only that the purchaser may have a notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.

These provisions shall have to be closely looked at. As per my considered view, section 93(1) of the Act talks of "Interest" for immovable or moveable property and section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of 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. (Emphasis added)

17. In this case, the court had given an order on 30th July 2015 staying implementation of the confirmed grant which had been confirmed on 15th June 2015. Despite this, the petitioners went ahead and subdivided and sold the land to the interested parties. I note that all the titles in contention were issued in the period September 2015 and November 2016, long after the orders of Ong'udi J. I agree with the sentiments of Rawal J that it would be to defeat justice to allow the fraudulent acts of a personal representative of a deceased person, undertaken in flagrant disregard of an order of the court, to stand on the strength of section 93 of the Law of Succession Act.

18. Accordingly, I find the application before me to be without merit. It is hereby dismissed with costs to the respondent.

19. The interested parties can pursue their claim against the petitioners who sold them property in violation of a court order. The orders issued in the ruling dated 17th November 2017, which has not been appealed against, shall remain in force.

Dated and Signed this 10th day of May 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 12th day of June 2019

GEORGE DULU

JUDGE