



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.60 OF 2017

(Formerly H.C Nakuru Succ.31/2007)

(Originating from Nyahururu SPMs Succ.13/2005 Before Hon. S.M. Mungai – Ag.SPM)

**IN THE MATTER OF THE ESTATE OF JOSEPH MACHARIA NGARIOKO ALIAS JOSEPH MACHARIA NGARIUKU
(DECEASED)**

MUTHONI MACHARIA NGARIOKO

JOHN MAINA MACHARIA.....PETITIONERS/RESPONDENTS

-VERSUS-

ISAIYAH MWANGI MACHARIA

PETER KINYUA MACAHRIA.....PROTESTORS

JUDGMENT

This matter relates to the estate of *Joseph Macharia Ngarioko alias Joseph Macharia Ngariuku* who died on 27/12/2003 at Shamanei in Laikipia (*See death Certificate*). He was survived by his wife Muthoni Macharia Ngarioko and the children. Two of the children Isaiyah Mwangi Macharia and Peter Kinyua Macharia (1st and 2nd Interested Parties) are from the deceased's first marriage to the late Wangechi Macharia who died in 1941. Thereafter, the deceased married the 1st Respondent with whom he sired the applicants *Esther Nyagaki Gachuhi, Alice Wanjiku Kanyongo, Susan Wangui Mwangi, Anne Nyambura Ng'ang'a, Margaret Wacheke Njenga and Mary Wanjiru Kamau*, the 2nd Respondent *John Maina Macharia and Francis Karimi*.

Before me is the application dated 19/12/2006, and filed on 22/01/2007 by the applicants. It is expressed to be brought under **Section 76 (B) and (C) and Rule 49 and 73 of the Law of Succession Act and Rules**. The applicants seek the following orders;

1) That the letters of administration intestate made to Muthoni Macharia Ngarioko and John Maina Macharia, 1st and 2nd Respondents in Succession Cause No. 13/2005 at Nyahururu on 27/11/2005 and confirmed, therefore be reviewed and/or amended on the following grounds;

- a) That the Succession Cause 13/2005 in respect of the deceased person was filed without the consent of the beneficiaries;**
- b) That the petition was filed secretly and the other beneficiaries have not given their consent nor were they informed;**
- c) That the applicants were not given a chance to be heard on their part nor were they mentioned during the hearing;**
- d) That the applicants being entitled to the estate and daughters of the deceased have been disinherited;**

2) That the grant be reviewed and issued to the applicants.

3) Costs of the application be provided for.

The applicants swore a joint affidavit dated 19/12/2006.

This matter has a long history from 2005 which I need to set out before I proceed to consider the evidence and issues.

The background of this case is that it was first initiated by the 1st and 2nd Respondents Muthoni Macharia and John Maina, wife and son to the deceased respectively. They belong to the 2nd house together with the applicants. The 1st and 2nd Respondents filed petition No. 13/2005 in the PM's Court Nyahururu in January, 2005, and petitioned for letters of administration of the deceased's estate intestate. The only asset listed in the petition was **Laikipia/Nyahururu/2497**. The grant of letters of representation was issued to the 1st and 2nd Respondents on 24/04/2005. By a summons dated 27/10/2005, the 1st and 2nd Respondents applied for confirmation of the grant issued to them on 24/04/2005. However, on 10/12/2005, the 1st and 2nd Interested Parties filed an affidavit of protest. The protest was to the effect that the Petition had been filed secretly without consulting with them or obtaining the consent of the 1st and 2nd Interested Parties. The 1st and 2nd Interested Parties also complained that the 1st and 2nd Respondents had ignored the Chief's advice to include the 1st and 2nd Petitioners as beneficiaries of the deceased's estate.

The trial court gave directions on 04/05/2006 that the protest proceed by way of viva voce evidence. The property available for distribution was 8 ½ acres. The evidence was that the deceased had been allotted 22 ½ acres of land in 1965, **LR. Laikipia/Nyahururu/130**. He sold 5 acres to clear the loan taken to purchase the land and he was left with 17 ½ acres which were registered as LR.Laikipia/Nyahururu/423. On 06/03/1996, the deceased allocated each of his four sons 2 ¼ acres of land that were carved out of the 17 ½ acres. In total, he gave away 9 acres and was left with 8 ½ acres which are the subject of these proceedings. After considering the evidence before court, the court rendered its judgment on 02/11/2006 and ordered that the suit land, 8 ½ acres, be shared equally between the two houses of the deceased, namely, of the 1st Petitioner (1st Respondent) and that of the late **Wangechi Macharia** mother of the Protestors (Interested Parties). The court ruled that the sharing would enable the 1st Respondent bequeath her share to her daughters should she wish to do so now or in future in line with the wishes of her husband.

The 1st and 2nd Interested Parties on 02/11/2006 applied for and were issued with certificate of confirmation of grant of 24/11/2006 which confirmed that the 1st and 2nd Respondents were the administrators of the estate.

On 23/01/2007, the applicants filed this cause HC Succession Cause 31/2007 which is an application for revocation of grant. On 26/11/2007, the Judge gave directions that there was no dispute on who the beneficiaries were, the administrators and the deceased's property. Parties were directed to file further affidavits on the preferred mode of distribution of the estate and lastly that Peter Ndung'u Muhindi the 3rd Interested Party be served to attend court for the hearing. The matter was to proceed by way of viva voce evidence.

Following the above directions, the 1st and 2nd Respondents filed a replying affidavit dated 09/01/2008 in which they admit having failed to inform the applicants of filing Cause 13/2005 in Nyahururu PM's Court; that though they had listed the applicants as beneficiaries of the estate, when the Protestors filed a protest and the matter was directed to be heard by viva voce, their advocate did not advise them that all beneficiaries were to be informed to attend or consent. It was further deponed that the applicants as children of the deceased were entitled to a share of the deceased's estate and that it was the deceased's wish that plot 2497 remain for the applicants and the 1st Respondent; that the Protestors irregularly obtained the Land Control Board consent to transfer ½ of the land to themselves; that the Protestors forged the 1st Respondent's signature on the mutation form because she is illiterate and cannot write and that therefore the subdivision of plot 2497 was tainted with fraud and forgery and hence they want the subdivision and transfer nullified.

The 1st Interested Party also swore a replying affidavit on 18/10/2007 in which he deponed that Nyahururu Succession Cause 13/2005 was filed without his knowledge but on learning of it from their area Chief, filed a protest. The case was heard resulting in the courts judgment of 02/11/2006. Pursuant to the said judgment, they applied to be supplied with a certificate of confirmation of grant dated 02/11/2006. They applied to Land Control Board for consent to effect the court's orders; that a mutation form was drawn and was registered in accordance with the subdivision, which resulted in following parcels of land;

1) Laikipia/Nyahururu/7702 – 1.75 Hectares to Muthoni Macharia

2) Laikipia/Nyahururu/7703 – 0.85 Hectares to Peter Kinyua Macharia

3) Laikipia/Nyahururu/7704 – 0.85 Hectares to Isaiyah Mwangi Macharia

The Protestors applied to have the title released from the court for purposes of subdivision but they were informed by the court that it could only be released to the 1st and 2nd Respondents. They wrote to the 1st and 2nd Respondents' advocate letter dated 04/11/2007 requesting for the title but the advocate indicated that he was seeking instructions and on failing to get a reply, the Protestor's advocates wrote to the Land Registrar to declare the title lost. It was gazetted and a fresh title was issued, new title was issued in terms of the court's judgment whereby the 1st Respondent got 4 ½ acres while the 1st and 2nd Interested Parties shared their 4½ acres. The Interested Parties then disposed off their portions to the 3rd Interested Party vide a sale agreement and he has since taken possession of the said land; the Interested Parties further deponed that the applicants were part of the Succession proceedings in P.M.s Court Nyahururu and fully participated and only turned around when the judgment was not in their favour; that the application for revocation was an afterthought and is a connivance between the Respondents and applicants.

The 3rd Interested Party also filed a replying affidavit dated 5/11/2008 confirming having bought land from the 1st and 2nd Interested Parties. He obtained titles for the land which were merged on 11/10/2007 into L.R.Laikipia/Nyahururu/7893 and registered in his names. He has since developed the said land by building a permanent house and it is his family home.

He denied having acquired the land fraudulently but that he is an innocent purchaser for value without notice and his interest should be protected.

Justice Mugo took the evidence of the applicants and the Respondents. **PW1 Alice Wanjiru Kanyongo and PW2 Margaret Wachuka Macharia** (both applicants), testified on behalf of the applicants. The gist of their evidence is that when the 1st and 2nd Respondents filed the Succession Cause in respect of their father's estate, the Respondents were appointed as administrators of the parcel of land **LR. Nyahururu/Laikipia/ Section 2497**. That they were not notified of the petition, did not consent to it and did not consent to the distribution; that their father had two parcels of land. One parcel at Malewa Scheme for the first house for the Interested Parties and the other for their mother's house and their claim is part of their mother's parcel of land.

They reiterated the contents of their joint affidavit in support of the application.

DW1 Muthoni Macharia, the 1st respondent told the court that she filed Succession Cause 13/2005 with the 2nd respondent and her intention was that the 8½ acres which had been bequeathed to her by the deceased be registered in her names so that she could subdivide it amongst her daughters as had been agreed by her and the deceased; that she would give an each and acre and the balance would be registered in her name, the 2nd respondent, her adopted son Peter Maina and the Interested Parties. According to her, the Interested Parties fraudulently transferred 4½ acres to that the Interested Parties forged her signature on the consent and she did not sign any documents for transfer of the land. She admitted in cross examination that all parties were aware that the Succession Cause was to be filed and who the beneficiaries were. She further told the court that on 21/12/2005, a day before the judgment in the lower court, she met all her children including her daughters who agreed that the whole share be transferred to her and she would then transfer to them; that all her children were in court on 22/12/2005 and none protested against confirmation. She agreed that these proceedings were filed by herself and her daughters. She also admitted to witnessing the 1st and 2nd Interested Parties taking their 2½ acres each while she got 4½ acres of both Interested.

She saw when the fencing was done, ploughing and construction of semi-permanent house.

DW1 also testified that the deceased made his wishes known and had the 1st Interested Parties write down but he wrote something else as she is illiterate and could not read, she insisted that her husband wanted the 8½ acres to remain with her and her unmarried daughters.

DW2 agreed with DW1 that the 8½ acres were bequeathed to DW1 and the daughters by the father and that it is the 1st Interested Party who wrote the Will. He admitted to having advised his sisters about the hearing of the summons for confirmation and that they attended court and had not filed any objection. DW2 confirmed to having signed the document that the 1st Interested Party wrote but never read it. He agreed that whole the whole family were agreed in the presence of the Chief.

The 1st Interested Party, Isaiah testified on behalf of both 1st and 2nd Interested Parties. He reiterated the contents of his affidavit.

He explained in detail how they got to have the land transferred to themselves after the respondents proved un-co-operative. The 3rd Interested Party too, reiterated the contents of his affidavit and maintained that he is an innocent purchaser for value without notice.

After reviewing the evidence and submissions of all the parties, the issues that arise for consideration are:

- 1. Whether the applicants have met the requirements for revocation of grant;**
- 2. Whether there was any intermeddling in the deceased's estate;**
- 3. Whether the applicants have inherited any part of the deceased's estate;**
- 4. Whether the 3rd Interested Party is entitled to retain the land he allegedly purchased from the 1st and 2nd Interested Parties;**
- 5. What reliefs will the court grant.**

Whether the requirements of Section 76 of the Laws of Succession Act have been satisfied

The grounds upon which the application under consideration was brought are:

That the Succession Cause No.13/2005 in respect of the beneficiaries of the deceased person was filed without the consent of all the beneficiaries; that the applicants did not give consent to the filing that the applicants were not given a chance to be heard and have been disinherited.

Grounds upon which a grant may be nullified are provided for under Section 76 of the Laws of Succession Act. I echo the observation by J. Ngaah in **Jesse Karaya Gatimu v Mary Wanjiku Githinji Succession Cause No.95/2014** where he observed that:

“the grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of whatever the case may be.”

Section 76 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:

(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 order or allow; 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.”

In the application, the applicants specifically invoked Section 79(b) and (c).

As observed above, it is up-to the applicants to bring themselves within the provisions of Section 76(b) and (c).

The applicants are adamant that they were never notified of the proceedings filed in P.M.C.C.13/05 by the respondents. However, their evidence and that of DW1 and DW2 say the contrary. It is evident that Francis Njenga Ndarire, a husband to PW2 was one of the sureties for the 1st respondent (DW1) when she filed the Succession Cause. See Form P & A 57 filed in court on 30/8/2004, known as Guarantee by personal sureties. I do not believe that PW2's husband would have been a surety in the cause without PW2's knowledge.

Besides, DW1 and 2 tell a totally different story. In her testimony, DW1 stated **“I remember what I have previously testified before this court. The chief had visited me at my home before the Nyahururu Succession Cause was filed. It is true that I welcomed the chief and hosted him in company of my daughter and two sons and both the objectors/respondents herein. The meeting was for the purpose of discussing the Nyahururu Succession Cause. I confirm to the court that all parties were aware that the cause was to be filed and who the beneficiaries were.”**

On his part, DW2 admitted that the applicants were aware of the Succession proceedings in PMC.13/2005. In cross-examination, he stated:

“...I do not agree that it was agreed that the agreement reached before the chief was that my mother and Isaiah would file the petition together. I was the one to do so. Every member of the family agreed. This was because the others were busy. The chief was present when that was agreed.”

From the above statement, it is clear that all the deceased's family members appeared before the chief before the Succession proceedings were filed. Further, in the same testimony, DW2 when replying to questions about his sisters, said **“..we advised them of the hearing date. They attended court.....I confirm that my sisters attended court at the confirmation. They had not filed any objection either...”**

DW1 and DW2's testimony sharply contradicts their averments in their joint affidavit dated 9/1/2008 where by at paragraph 3, they deposed as follows:

“paragraph 3 that we wish to state that it is true that the applicants were not informed of the hearing of the Succession Cause No.13/2005 at Nyahururu nor did they give their consent written or otherwise to the mode of distribution nor were they given an opportunity to be heard by the Nyahururu Court.”

All along, DW1 has maintained that the land in issue, 8½ acres which forms the deceased's estate the subject of the subdivision was meant to devolve to her and her children alone. DW1 and DW2 also confirmed that the sisters agreed to the land being inherited by the mother.

It means that when the court gave a different verdict, it is not go well with them. DW1 did confirm in her testimony that the instant proceedings have been filed by her and her daughters.

From an analysis of the above evidence, it is my finding that the applicants were always aware of the intention to file the Succession proceedings. They actively took part in the decision to file the same when they met with the chief. They later attended the confirmation proceedings. They cannot therefore be heard to claim that they were not aware of the proceedings or never took part. They were dissatisfied with the decision that the magistrate made and hence colluded and connived with DW1 and 2 to bring this application. DW1 and 2 were merely hiding behind the applicants. I find that the applicants have not proved the allegations made in their application that petition was filed fraudulently by making false information or that it was obtained by making false statements, if there were any false statements, they were party to them. The applicants have failed to satisfy the grounds for revocation of grant under Section 76(b) and (c) of the Law of Succession Act. The grant cannot be revoked based on those unfounded allegations.

Whether there was intermeddling with the deceased's estate:

Although intermeddling was not one of the issues raised in the application, since both the applicants and Interested Parties counsel made it an issue, I will go ahead and consider it.

There is no doubt that the trial court rendered a judgment on 2/11/2006 in which it ordered that the two houses share the only property belonging to the deceased between the two houses of the late Wangechi Macharia, mother to 1st and 2nd Interested Parties and DW1's house. Each house was to get 4½ acres.

Although the applicants seem to argue that no certificate of confirmation was issued, the 1st and 2nd Interested Parties have explained that they applied for and were issued with one. There is a certificate of confirmation of grant on record in terms of the court's judgment dated 24/11/2006. Although it is not stamped, I have seen one with a certification stamp. It is similar to the one on record. It accords with the courts judgment.

The applicants allege that by selling part of the estate property, the 1st and 2nd Interested Parties intermeddled with the estate. Section 45(1) of the Law of Succession Act offers protection against intermeddling with the deceased's property. The Section provides as follows:

“Section 45(1)

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

The court in ***Benson Mutuma Muriungi*** attempted at defining what intermeddling means. The court said:

*“[5] There is not specific definition of the term intermeddling provided in the Law of Succession Act. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person **by any person unless with the express authority of the Act, any other written law or a grant of representation under the Act.** But in my understanding, the use of wide and general terms such as; ‘for any purpose’ and ‘or otherwise intermeddle with’ in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as: **taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act or any other written law.** I do not pretend to close the list either or make it exhaustive. The list could be long. However, any act or acts which will **dissipate or diminish or put at risk** the free property of the deceased are acts of intermeddling in law.”*

Anyone without lawful authority or Grant of Letters of Administration has no power to deal with the deceased's property. Such dealing is a criminal offence and the consequences are that the intermeddling actions are rendered null and void.

In this case, the 1st and 2nd respondents are the administrators of the deceased's estate and that has not been in issue. I wish to point out that the trial court, having noted the differences between the two houses, should have appointed an administrator from either house. This is because, due to the differences, one may have been un-co-operative and hence frustrate the administration of the estate. The differences between the two houses is what is playing out in this application.

The duties of the administrators are provided for under Sections 79, 82 and 83 of the Law of Succession Act.

Section 79 provides as follows:

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

The other duties and responsibilities are found in Section 82 of the Act and the relevant one is 82(b)(c) which provides:

Section 82

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:

(a)

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that

(i) Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) No immovable property shall be sold before confirmation of the grant;

(c) To appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will:

(i) No appropriation shall be made so as to affect adversely any specific legacy;

(ii) No appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required."

In this case, the administrators (1st and 2nd respondents) had the duty to distribute the deceased's estate in accordance with the court's judgment of 2/11/2006.

After the judgment was delivered, the Interested Parties with the help of their advocate applied for and were issued with the certificate of grant. Though the respondents who were the administrators ought to have applied for it, they never did.

After the 1st and 2nd Interested Parties got the certificate, they embarked on the subdivision and eventual issuance of titles in their names and the 1st respondent which was done on 11/9/2007 as evidenced by the Green Card (I.P.Ex.12 & 13). No doubt the 1st and 2nd Interested Parties undertook and executed a task that they were not supposed to. It was the duty of the 1st and 2nd respondents to undertake the above exercise. Although the respondents were aware of the interference, they never lifted a finger to stop it by challenging these actions in court. I say so because M/S. Ndegwa Advocates asked for the original title deed from the respondents' counsel to which replied that he was getting instructions from the respondents but never made a follow-up.

Thereafter, the 1st and 2nd Interested Parties sold the land to the 3rd Interested Party. The respondents and applicants saw the 3rd Interested Party fence off, till the land, construct on it and never moved the court for orders to stop him yet they were represented by an advocate. The 1st and 2nd Interested Parties too, were represented by an Advocate even as they intended in the estate.

Although the 1st and 2nd Interested Parties intermeddled in the deceased's estate, the respondents sat back and did nothing. They sat on their rights.

The 3rd Interested Party testified that he took possession immediately after the sale. The respondents were aware that the land was sold and occupied by the 3rd Interested Party but again, they did not seek any injunction or preservation orders from the court. The respondent's reaction to the 1st and 2nd Interested Parties' actions is questionable and in my view, they gave up their right to challenge the Interested Parties' actions.

Of importance is that, though the 1st and 2nd Interested Parties were not the administrators, they subdivided the land and only sold what was due to them in terms of the judgment of the court dated 2/11/2006. The said judgment is still in force. It has not been appealed against and is binding on the parties. In terms of the said judgment, the respondent and applicants have not suffered any prejudice by the 1st and 2nd Interested Parties' action of subdividing the suit land and selling their portion.

In the case of ***Benson Mutuma Muriungi (Supra)***, the court in considering Section 45 of the Law of Succession Act, said, acts of intermeddling are those that would ***'dissipate, or diminish or put at risk'*** the free property of the deceased.

In this case, the 1st and 2nd Interested Parties' acts, though they amount to intermeddling, did not dissipate, diminish or put the estate at risk because the 1st and 2nd Interested Parties only dealt with the land as per the judgment of the trial court. Although it is questionable how they got the Land Control consent without 1st respondent's involvement, the respondents have acted despite notice of it when the 1st and 2nd Interested Parties were looking for the title deed.

As properly pointed out by the applicant's counsel, intermeddling can attract criminal sanctions or severe penalties. In light of the fact that the subdivision and subsequent not sale could not prejudice the applicant's rights in light of the court's judgment, my view is that it will remain in the court's inherent power to know how to deal with the 1st and 2nd Interested Parties.

Whether the 3rd Interested Party is an innocent purchaser for value:

The 3rd Interested Party bought plots 7703 and 7704 from the 1st and 2nd Interested Parties after doing due diligence, and ascertaining that they were the registered owners in terms of the Green Card, they entered into an agreement dated 27/7/2007 and he paid for the land to wit Kshs.1,289,000/=. He then had the two parcels merged into plot LR.Laikipia/Nyahururu/7893. The question therefore is whether he is a bona fide purchaser for value without notice. Black's Law Dictionary defines a '**bona fide purchaser**' as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or information, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

There is no evidence to show that the 3rd Interested Party was aware of the allegations made by the applicants and respondent or that the 1st and 2nd Interested Parties had obtained the titles irregularly. The applicants questioned the speed at which the 1st and 2nd Interested Party acted in obtaining the titles. Even if that is questioned, it is not certain whether 3rd Interested Party knew of it.

The Ugandan case of *Katende v Haridar & Co. Ltd (2008) 2 EA 173* which was cited with approval in *Weston Gitonga & 10 others v Peter Gugu Gikanga & another (2017) eKLR*, held as follows:

“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 the 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.**

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

There is no evidence adduced by the applicants and respondent that they were aware of any fraud committed by the Interested Parties. Section 26(1) of the Land Registration Act 2012 declares a certificate of title as exclusive evidence of propriety. Such certificate cannot be challenged except on grounds of fraud or misrepresentation or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Even if the 1st and 2nd Interested Parties acted irregularly or un-procedurally, there is no evidence that the 3rd Interested Party was party to it.

Justice William Musyoka in his Book, *Case Book on the Law of Succession at Page 581* states:

“Where the assets have been misapplied by personal representative 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 ahead to cite the *Diplock v Wintle (1984) CH 485* where an exception to the general rule is a case where the property is held by a bona fide purchaser for value.

In this case, the 3rd Interested Party has developed the said land extensively. He has been on it since about 12 years ago. As observed earlier, the portion belonged to the 1st and 2nd Interested Parties in terms of the court's judgment of 2/11/2006. So the respondent and applicants have not suffered any prejudice. This court is alive to Rule 73 of Law of Succession Act which gives the court wide powers to do justice. It provides:

“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.”

This court is convinced that the 3rd Interested Party is an innocent purchaser and his rights must be protected.

I must reiterate at this stage, that there exists the judgment of the lower court, arrived at on merit after taking viva voce evidence on the issue of distribution. The court rendered its judgment on 2/11/2006. All the issues as to whether the deceased left the land to the 1st respondent or not were considered. The judgment cannot be challenged by way of application for revocation of grant.

Whether the applicants have been disinherited:

The court has a discretion under Section 27 of the Law of Succession Act to make any order it deems fit during the distribution of an estate. The Section reads as follows:

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”

In exercise of its discretion on distribution, the trial court decided to share the suit property equally between the two houses. The court could have decided to share the estate in accordance with Section 35 of the Act where each child and spouse would be considered as a unit and the property divided amongst them equally. The exercise of the court’s discretion could not be challenged by way of an application for revocation but by an appeal.

The trial court held:

“I am persuaded that considering the particulars and peculiar circumstances of this case, the said parcels of land should be shared equally by the two houses of the deceased, namely, that of the 1st petitioner on one hand and that of the late mother of the protestors (Interested Parties), Wangechi Macharia on the other. This will enable the 1st petitioner to bequeath her share to her daughter(s) should she wish to do so now or in future in line with the risks of her late husband.”

Clearly, the 1st respondent was to hold 4½ acres for herself and in trust for her children who include the applicants.

I find that the applicants were provided for in the judgment.

In conclusion, the court has found that the applicants have not satisfied the grounds for revocation of a grant under Section 76 of the Law of Succession Act.

Having done my best to consider all the issues raised in this application, my findings are that the applicants’ summons for revocation did not meet the threshold under Section 76 of the Law of Succession Act and it must fail. It is dismissed. Both parties did not act bona fides and each party will bear their own costs.

It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 20th day of November, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutakha for applicant

Mr. Maina Kairu for 1st and 2nd Interested Parties and holding brief for Mr. Mathea for 3rd Interested Parties