



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 993 OF 2013
IN THE MATTER OF THE ESTATE OF
JAMES OKOTH OMOLLO (DECEASED)
AND IN THE MATTER OF APPLICATION
BETWEEN
ISAAK CHARLES OTIENO APPLICANT/ADMINISTRATOR
AND
CAREN OTIENO APUT RESPONDENT/ADMINISTRATOR

RULING

1. This matter concerns the estate of **JAMES OKOTH OMOLLO** (“the deceased”) of Bondo in Siaya County. He died on 3rd March 2002. During his lifetime, the deceased married two wives. His surviving wife, Caren Atieno Aput (“Caren”), applied for representation of his estate. In her petition, she stated that the deceased was survived by her and the following children; Joash Otieno, Isaak Charles Otieno, Edwin Otieno, Kennedy Arika, Kelvins Odhiambo, Grace Akello, Claris Adhiambo, Daisy Awuor and Kesia Awino. The grant of letters of administration was issued to her on 2nd September 2013 and confirmed on 26th March 2014. The two properties of the deceased; **SAKWA/BARKOWINO/4030** and **4410** (“Plots 4030 and 4410”) were inherited by her.

2. In due course, the deceased son from his first wife, Isaak Charles Owino, moved the court through a summons dated 24th August 2015 seeking revocation of the grant issued and confirmed on the grounds that the adult children of the deceased never gave their consent to the administration and that Caren made false representation of facts. As it was clear that the consent of the adult members of the family was not sought, I did revoke the grant on 22nd June 2016 and re-issued it to Caren, Isaak Charles Otieno (“Isaak”) and Doreen Anyango. I directed the administrators or any of them to apply for confirmation of the grant. Isaak filed summons for confirmation dated 21st October 2016 which the application for consideration in this ruling. The supporting affidavit sworn by Isaak included two other properties of the deceased; **NORTH SAKWA/AJIGO/912** and **977**.

3. On 22nd September 2017, Caren filed her replying affidavit protesting the confirmation of grant. She stated that the children of the deceased from the first house frustrated her efforts to educate her children causing them to drop out of school. She therefore decided to dispose of the properties in order to educate her children and to purchase her own plot. I directed that she be cross examined on her deposition. Caren admitted that she forged the signatures of the deceased’s children and proceeded to file an application for confirmation of grant in their absence. After obtaining the confirmed grant, she sold the two plots to Edward Odhiambo Were (“Edward”). I summoned Edward to testify on how he acquired the two plots. He testified that he bought the two plots of land from Caren at Kshs. 1,850,000/- and paid the amount in instalments with the first instalment being made in April 2014 and the last being made in July 2014. He told the court when Caren approached him with the offer, he exercised due diligence and conducted a search at the Lands Registry and confirmed that indeed the parcels had been transmitted to her names following which he began making payments. Edward stated that he was not aware of the forgery or the family disputes at the time the land was transferred to him.

4. The issue for consideration is whether Plots 4030 and 4410 are part of the free property of the deceased and therefore available for distribution. The starting point for consideration of Edward’s interest in this matter is **section 45** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** (“the Act”) which provides:

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.

(2) Any person who contravenes the provisions of this Section shall

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

5. The effect of this provision is that no one is entitled to intermeddle with the free property of a deceased person and any act of intermeddling which includes taking possession and disposing of the property must be met with appropriate sanctions. Where immovable property is sold such a sale is void. I would quote what the court stated in **Estate of John Gakunga Njoroge MKS Succession Cause No. 256 of 2007[2015]eKLR** stated as follows;

[10] A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the Court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act

[15] For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under section 82 (b) Proviso (ii), which provides that: "no immovable property shall be sold before confirmation of the grant."

6. Since Edward purchased the property from Caren after she had registered the transmission, the question next port of call is **section 93(1)** of the **Law of Succession Act** which provides:

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.

7. Although these provisions imply that the purchaser of a property transferred by an administrator enjoys the protection of indefeasibility, there is a catena of judgments from our courts that suggest that property of a deceased's estate transferred by an administrator is traceable to the purchasers in certain circumstances.

8. In **Musa Nyaribari Gekone and Others v. Peter Miyianda and Another Civil Appeal No. 2 of 2014 [2015]eKLR**, the Court of Appeal affirmed the position that the deceased's property transferred by an administrator may in certain circumstances be traced to the beneficiary of a fraudulent transaction. In **Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu and Another MRU Succession Cause No. 209 of 1994[2014] eKLR**, the Court dealing with **section 93(1)** aforesaid, stated:

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 grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood 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.

9. This position is illustrated by the case of **Jane Gachoki Gathecha v Priscilla Nyawira Gitungu and Another NYR CA Civil Appeal No. 343 & 345 of 2002 [2008] eKLR** where a purchaser claimed that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore not only protected under **section 93 (1)** of the **Act** but also **section 143** of the **Registered Land Act (Repealed)**. The Court of Appeal, in response to that argument, remarked that:

We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where; firstly, there is a "transfer of any interest in immovable or moveable property". Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.

10. The sum of the authorities I have cited were approval by the Court of Appeal in **Keneth Litswa Asega v Alice Muhonja KSM CA No. 80 of 2014 [2016]eKLR** where the court observed that:

26. Like the court below, we are not ourselves satisfied that the appellant can be considered to be an innocent purchaser for value without notice. As the learned Judge found, the appellant is a neighbour to the respondent and was no doubt aware that Samuel was not the sole heir of the estate of the deceased. He made no attempt to make enquiries from the other heirs before dealing exclusively with Samuel. He was, as the Judge found, aware that the respondent was cultivating the property. We are therefore not persuaded that there is merit in the appellant's complaint.

11. From the evidence on record, plots 4030 and 4410 are already registered in the names of Edward. Caren did not dispute that she sold the land to Edward and she received payments for the parcels. By the time Edward bought the parcels from Caren, she held a confirmed grant and although the same was acquired through forgery and misstatement of facts, Edward claims that he was not aware of the forgery or the

family disputes. Edward stated that although the sale of the plots was consummated by a formal agreement dated 25th June 2014, he had begun making payments in April 2014. He denied that he assisted Caren in processing the grant of representation.

12. The evidence is clear that by the time Edward entered into the transactions, Caren was the holder of the confirmed grant and that she was entitled to sell the property. He exercised due diligence by conducting searches and only made payments for the land after ascertaining that Caren had a confirmed grant and the plots had been transmitted to her name. I therefore find and hold that that the applicant has not established, on the balance of probabilities, that Edward was not a buyer for value without any notice of any fraud or imperfections in the title or succession process. Consequently, I find and hold that that Plots 4030 and 4410 are not part of the deceased's estate.

13. In this case it is clear that Caren contravened the law obtaining and confirmed that grant without involving the other beneficiaries. **Section 94** of the **Law of Succession Act** imposes on a personal representative the duty to account in the event of loss or damage to the estate. It states;

94. When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies such an asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

14. In addition, the sureties, **TOM OCHIENG MASAWA** and **PAUL EVANS OTIENO** are obliged to indemnify the petitioner in the event of loss to the estate.

15. Following the findings I have made above, the summons for confirmation dated 21st October 2016 is adjourned to enable the applicant consider the next course of action.

DATED and DELIVERED at KISUMU this 7th day of March 2018.

D. S. MAJANJA

JUDGE

Mr Anyul instructed by D. O. E. Anyul and Company Advocates for the applicant

Caren Aput in person.

Mr Omondi instructed by Omondi Abande and Company Advocates for the interested party.