



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN NAIROBI
FAMILY DIVISION
IN THE MATTER OF THE ESTATE OF ANDREW KISA SAIKWA (DECEASED)
SUCCESSION CAUSE 599 OF 1986
JUDGMENT

INTRODUCTION:

Andrew Kisa Saikwa died on 19th June, 1985 as evidenced by death certificate Number 428450.

He died testate by the Will dated 11th July 1974.

He was survived by;

- a) Grace Cheptay Saikwa (widow) (now deceased)
- b) John Saikwa
- c) Moses Saikwa
- d) Esther Saikwa
- e) Peter Saikwa(now deceased) represented by Dorcas Saikwa
- f) Drusilla Saikwa (now deceased) represented by Amos Potendo Saikwa.

The deceased appointed in his Will Grace Cheptay Saikwa his wife and mother to the children of their marriage and John Saikwa their eldest son as joint executors.

The grant of Probate with Will annexed was issued on 10th June 1987 and certificate of confirmation was issued on 16th November 1989. After the deceased's widow died in 2004, the grant was rectified with the deceased's son John Saikwa as sole executor of deceased's estate on 4th August 2011.

Although the Will did not contain the actual properties of the deceased's estate, the deceased's Will outlined the mode of distribution of all assets that comprised of his estate as follows among other requirements;

1. If my wife Grace Cheptay Saikwa survives me, I APPOINT my wife Grace Cheptay Saikwa and my son John Mtay Saikwa to be the Executors and Trustees of this my Will.....

3. My trustees shall hold the residuary estate upon the following trusts:-

a. Upon trust to invest the residue after such payment in their name in any investment authorized by law and to stand possessed of such investments and all parts of my estate for the time being unsold

b. Upon trust to pay the income from such residuary estate unto my wife during her lifetime

c. The trustees whether appointed or substituted as provided by the law that will be in force at the time shall hold my residuary estate in trust in equal shares if more than none for my children who attain the age of 18 years; provided that if

any child shall have died in my lifetime leaving issue living at my death such issue as and when they attain the age of 18 years or marry under that age shall take by substitution and if more than one in equal shares per stirpes the share of my residuary estate that such deceased's child of mine would have taken had he or she survived me

BACKGROUND/PROCEDURAL FACTS

After confirmation of grant beneficiaries shared assets of the deceased's estate. However, one of the beneficiaries Esther Saikwa transferred the suit property L.R. 209/8558 to her Company Talai Holdings Ltd. The matter was brought to Court. On 15th December 2011 Hon Justice GBM Kariuki granted order that;

“The Chief Land Registrar forthwith cancels entries 5 & 6 dated 15th October 2004 and 21st June,2007 respectively in the Register of Titles relating to Parcel Number L.R. 209/8558 (Grant No I.R.8222); so as to restore the said title to the Executors of the deceased as shown in entry number 4 dated 15th October 2004 of the Register to the said title.”

The matter was reported and criminal proceedings commenced vide Criminal Case number 1115 of 2011 Republic vs Esther Saikwa.

Esther Saikwa through Talai Holdings Ltd filed application on 1st July, 2013 against Registrar of Titles, Commissioner of Lands & Attorney General as Respondents and interested party John Mtay Saikwa. Hon Justice W. Musyoka granted temporary orders among them the following on 22nd August 2013;

“3. That temporary conservatory orders be and are hereby issued restraining the respondents and the interested parties, their agents, employees, servants and or any person claiming and or deriving title from the said interested parties and respondents from selling, transferring, alienating, charging, developing and/or dealing with L.R Number 209/8558 and or any subdivision created therefrom in any way howsoever or in any manner whatsoever to last till 3rd September 2013.”

Talai Holdings filed application on 4th April 2014 against Registrar of Titles, Commissioner of Lands & Attorney General as Respondents and John Mtay Saikwa as Interested Party. Hon Justice W. Musyoka certified the application urgent and was to be served to Respondents and interested party and to be heard on the date of Ruling of applications of 12th July 2012 and 7th December 2012. The Trial Court granted the following order as follows;

“3. That in the meantime temporary injunction be and is hereby issued, restraining the Respondent and Vomorono Limited, their agents, employees, servant and or any person claiming and deriving title from the said Respondent and interested parties from selling, transferring, alienating, charging, developing and or dealing with L.R Number 209/8558 and or any subdivision created therefrom in any way howsoever or in any manner whatsoever pending the delivery of the ruling referred to in paragraph two(2) hereinabove of this order.”

Esther Saikwa filed application on 12th July 2012 seeking to set aside Court order of 15th December 2011 and alleged that the Executor John Saikwa moved secretly and *ex parte* to be appointed sole Executor and applied for cancellation of transfer of LR 209/8558 to Talai Holdings. She alleged that the Executor was also offering the said property for sale.

Moses Kiplangat Saikwa filed application of 7th December 2012 and sought orders that the Executor, John Saikwa and Esther Chepkemoi Saikwa be restrained from dealing with L.R. No 209/8558 in a manner prejudicial to the common interests of all beneficiaries of the Deceased's estate. He alleged that after the Executor saved the suit property, he began his own scheme to sell the said property.

Hon Justice W. Musyoka in his Ruling of 9th May, 2014; ordered as follows;

1. The application dated 12th July 2012 is dismissed.
2. That Esther Chepkemoi Saikwa be and is hereby directed to render to this Court within 30 days of the date of this order on her own behalf and on behalf of Talai Holdings Limited in which she is a Director, do furnish an accurate account of the entire rental and any other income in respect of the premises on Land Reference No. 209/8558, Nairobi from 15th October, 2004 to-date.
3. That any sale or transfer of L.R. No 209/8558 whether by the executor or by Esther Chepkemoi Saikwa during the pendency of the 2 applications be and is hereby nullified and the title to the said property do revert to the Executor pending further orders of this Court.
4. That the Executor, and with the other parties shall within 45 days of the date of this order agree on the distribution of L.R.No 209/8558, in default of which this Court shall make orders regarding the distribution of the said asset.
5. That this matter shall be mentioned after 45 days for the purpose of monitoring compliance with order (b) & (d) above and;
6. That there shall be no orders as to costs.

At this time, the Executor during the pendency of the applications before Hon. W Musyoka entered into sale of the suit property L.R. No 209/8558 to Vomorono Ltd and the Sale agreement was on 3rd December 2013 annexed as MKS 3; Applicants bundle filed on 3rd May 2016.

The Trial Court was not informed by the executor of the new development that occurred during pendency of the Ruling culminating from the 2 applications filed by parties.

On 22nd September 2014, parties filed Summons and on 24th October 2014, advocates representing the parties; namely Messrs Burton Isindu & Co Advocates for Moses Kiplangat Saikwa, Messrs Ongicho Ongicho Advocates for John Mtay Saikwa and Messrs Wamalwa Abdi for Dorcas Mwalila Munabi (widow of late Peter Saikwa) signed and filed a Consent on 27th October 2014 marked SKS-A3 annexed to Purchaser's letter to Chief Justice of 22nd June 2017 compromising the Summons as follows;

- 1. Land Reference No 209/8558 (Grant No I.R.28222) Nairobi be sold by the beneficiaries and the proceeds of sale be shared equitably among the beneficiaries in the deceased's Will.*
- 2. John Mtay Saikwa, as Executor of the deceased's Written Will, do execute The Agreement for Sale, transfer and all other necessary documents in respect of the Sale to a Third party, and in default, the Deputy Registrar of the Court do sign the same on behalf of the said Executor.*
- 3. The parties to the said Consent herein being Moses Kiplangat Saikwa, John Mtay Saikwa and Dorcas Mwalila Munabi must give their express consent to the terms of the sale of the said Plot of land herein, by them or their advocates on record herein, signing on the Sale Agreement.*
- 4. The proceeds of sale be deposited in a bank account to be opened in the names of the Advocates for the respective parties pending equitable sharing among the beneficiaries named in the deceased's Will.*

In the meantime, after Trial Court's orders of 9th May 2014, the Purchaser of suit property L.R.No 209/8558 Vomorono Ltd filed suit against John Mtay Saikwa as Respondent respectively in Environment and Land Court (ELC) in ELC Misc. Case No. 183 of 2015 and the parties entered into a Consent of 20th July 2015 which was adopted as an order of the Court.

The Applicant Moses Kiplangat Saikwa filed Notice of Motion of 30th September 2015 and the Applicant sought to be joined to the proceedings as interested party. Secondly, he brought to the attention of the Court that Succession Cause 599 of 1986 was pending in the Family Division of the High Court and the Trial Court issued orders on 9th May 2014 nullifying and cancelling sale transfer or transaction undertaken by John Mtay Saikwa or Esther Chepkemai Saikwa and therefore the purported sale to Vomorono Limited by John Mtay Saikwa was cancelled. The Applicant informed Court that Vomorono Ltd filed Notice of Motion on 11th May 2015 in Succession Cause 599 of 1986 which was scheduled for hearing on 22nd July 2015. 2 days before hearing, the parties moved the ELC Court in the said application and filed consent of 20th July 2015. The effect of the Consent rendered the orders of 9th May 2014 and 27th May 2015 ineffective.

The Purchaser, Vomorono Ltd filed Grounds of Opposition on 31st October 2015 and deposed that it was a party in Succession Cause 599 of 1986. It was/is Purchaser of the suit property L.R. No 209/8558 and did not collude with the Executor of the deceased's estate John Mtay Saikwa and it was an innocent purchaser, for value without notice.

By the Court's Ruling of 23rd June 2017, Hon. Justice Mary.M. Gitumbi granted the Applicant to join the said proceedings by virtue of Order 1 Rule 10(2) Civil Procedure Rules 2010, set aside consent of 20th July 2015 as it amounted to rendering ineffective orders of Hon Justice W. Musyoka of 9th May 2014 and pursuant to filing of Application of 11th May 2015, the Trial Court's orders of 27th May 2015 maintaining status quo of the suit property until hearing and determination of the application of 11th May 2015 on 22nd July 2015. The Court also transferred the said matter ELC Misc 183 of 2015 to be heard and determined with Succession Cause 599 of 1986.

In the Family Court, upon the Purchaser filing application dated 11th May 2015 seeking to be enjoined to the Succession proceedings, the parties sought to have this issue heard and determined first. On 18th December 2015, the Trial Court granted the Purchaser joinder to the proceedings under inherent powers vested by Rule 15 & 73 of Probate and Administration Rules and Article 159 of Constitution 2010.

Prayers 3 & 4 of the application of 11th May 2015 were pending hearing and determination. Parties agreed on 26th January 2016 to dispose of the same through written submissions to be highlighted on 1st March 2016. All parties had not filed submissions and the same was postponed to 30th March 2016 when the party sought that the Trial Court recuse itself from these proceedings and the same was stood over to 4th May 2016 and later to 11th May 2016. Leave was sought to cite parties for contempt of Court and stay of proceedings and it was not granted. The application of 11th May 2015 was to be heard vide Ruling of 11th of May 2016.

On 12th May 2016 parties reiterated that the Trial Court disqualify itself from these proceedings on allegation of bias as contempt of Court proceedings ought to be conducted first before the pending application of 11th May 2015. The Executor objected to the application as the issue before Court was how to proceed and this did not amount to bias. The purchaser was of the view that the application was meant to antagonize the Court and was an abuse of Court process. By Ruling delivered by Trial Court on 17th March 2017, the review application of 11th May 2015 was to proceed as this an old matter and thereafter the issue of contempt would be addressed. On 2nd May 2017, the Trial Court recused itself from hearing of this matter.

APPLICATIONS

1) APPLICATION FOR REVIEW/SET ASIDE COURT ORDERS OF 9TH MAY 2014

The intended interested party/Applicant, Vomorono Limited filed application to be enjoined to these proceedings as interested party. The

Applicant also sought that the orders annulling the sale and transfer of the Applicant over land known as L.R.209/8558 (I.R.28222) made by Hon. Justice W. Musyoka on 9th May 2014 be vacated and/or set aside pending hearing and determination of the application or further orders of the Court. The Applicant sought that Court stays proceedings in this Cause pending hearing and determination of the Application.

The application was grounded on the following facts;

The Applicant has a stake in the estate having purchased the property L.R.209/8558 (I.R.28222) on 31st December, 2013 and a Transfer was registered on the land Register at Entry 10 on 31st January 2014. This was after a copy of provisional Title was issued on 14th January, 2013 vide Gazette Notice No 11159 dated 8th August, 2013.

ORAL SUBMISSIONS

Mr. Langat for the interested party /Applicant relied on Affidavit in support of the Application for review, Supplementary Affidavit filed on 20th June 2015 and Further Supplementary Affidavit filed on 22nd October 2015, and Affidavit by Loaning Bank through Ms Grace Mbogo filed On 20th July 2015 and Written Submissions of 20th July 2015.

The gist of the application is in reliance of Order 45 (1) CPR 2010 and Section 80 of CPA and the Executor relying on Section 93 of Law of Succession Act and Rule 73 of Probate & Administration Rules; they sought to introduce new evidence touching on the suit property and it is in the nature of a sale transaction undertaken on 3rd December 2013 and was not presented to Court and was not disclosed.

The right to be heard is a valued right and the Court order of 9th May 2014, was granted without participation of the 3rd Party.

The facts before Court then related to Esther Saikwa T/A Talai Holdings who interfered with the beneficial interests of other beneficiaries over the suit property. The interested party was not involved.

Following the Ruling of 9th of May 2014, the interested party suffered significant injustice, incurring a Ksh. 300 million loss following a sale of willing buyer and willing seller. The interested party was ordered by the Bank to furnish another security/replacement security of similar amount of Ksh 300 million as evidenced by letter dated 3rd July 2015 marked GM1& 2.

The interested party continues to incur pecuniary losses.

For a litigant to be deprived the benefit of a sale transaction after conducting due diligence and shown in this Court, the Sale Agreement, The Transfer, The Legal Charge, confirms that the interested party acted in good faith and there was no collusion, fraud as suggested by the Respondents. Fraud can only be proved beyond the balance of probabilities and beyond reasonable right. The sale transaction was in accordance of the law.

There has been undue delay in this matter attributed to the parties and advocates as demonstrated by the various Rulings in the Court file. Therefore, the Court ought to set aside and review the Orders of 9th May 2014.

Mr Mutai for Executor submitted in reliance of written submissions filed on 29th March 2016 as follows;

The Executor supports the review of the orders granted on 9th May 2014, the Court was not aware of and it was not disclosed that an interested party had acquired an interest in the suit property. When the Court granted these orders it caused manifest injustice to the interested party. The Court's mind was not drawn to the deceased's Will which captures the Executor as the sole surviving Executor who had lawful authority to dispose of the suit property. The Executor acted within his powers in disposing the suit property. His Exercise of power was lawful and remains lawful to date. Therefore, to the extent, the Trial Court delivered the Ruling and impeached the power of the Executor to deal with the sale of the suit property which is protected by Section 93 & 94 of Law Of Succession Act Cap 160 the orders should be reviewed. This matter has been in Court for 31 years now and the Executor ought to be allowed to complete distribution of the deceased's estate.

Mr Oduor for Esther Saikwa, one of the beneficiaries, submitted in reliance of her affidavit filed on 11th August, 2015 and Grounds of opposition filed on 25th September, 2015 as follows;

He opposed the application for review and stated that the Applicant orally submitted on the grounds for review. The smoking gun is that the transaction was vitiated by the seller who had no right over the suit property when he sold it to the interested party.

Referring to the case of IN THE ESTATE OF SALIM ISLAM SACDAN 2016 EKLR HIGH COURT –MOMBASA which sets clear guidelines on powers of personal representative of the estate; failure to adhere to Executor's right, the sale is vitiated and the Executor has approached this Court in bad faith and unclean hands. The Succession matter ought to proceed without further delay.

Mr Isindu for Moses Saikwa, one of the beneficiaries relying on Replying Affidavit filed on 26th May 2015, Further Affidavit filed on 16th July 2015, Replying Affidavit of 21st October 2015, Written Submissions of 29th February 2016, Supplementary Submissions of 14th March 2016 and Skeletal Submissions of 15th January 2017 stated as follows;

He opposed the application for review and stated that the issue is whether or not the orders of Hon Justice Musyoka were made in error to warrant setting aside. The main reason that this application was filed was that the interested party was not heard and the orders made affected

the said party. The rest are moot points. The reasons are on record why the matter delayed. The main question the Court should answer is; can a Court of Law and Justice countenance and enforce fraud and illegalities against interests of lawful beneficiaries?

The Sale Agreement paragraphs 4:1, 4:2 & 4:3 confirms the Executor disclosed to the Purchaser that there are contentious proceedings in Court pending Ruling. The Agreement drawn by the interested party's Lawyers made reference to Ruling of the Court as condition-precedent to the sale transaction.

The Sale Agreement was signed on 3rd December 2013 and instrument of transfer was signed on 31st December 2013 before the outcome of this case. They intended to subvert the course of justice. The Executor had information of the sale and he did not disclose to the Court. He later swore affidavits and consented to all properties being distributed among the beneficiaries. The case against the interested party rises and falls in the interpretation of Clause 4 of the Sale Agreement.

Reliance on Section 93 of Law of Succession Act is not lawful, the provision protects and applies to *bonafide* transactions carried out within the law diligently by Executor and not fraudulent transactions.

The conduct of Executor and interested party is that they had no regard for the Court of law and justice. The ELC Court set aside the consent and this was fraud. The Order has not been appealed against.

Mr Langat for the interested party reiterated that though the Clause in the Sale Agreement referred to the case in Court, the interested party was not aware of the nature of the proceedings. The Court file was not available for perusal as it was pending delivery of Ruling and was not available in the Registry and therefore could not familiarize with the content. The proceedings In ELC court were to secure the title from any other interference. All parties were aware of the sale as there is Consent signed by advocates for all parties attached to the Supplementary Affidavit.

2) APPLICATION FOR CONTEMPT OF COURT FILED ON 3RD MAY 2016.

The Applicant Moses Kiplangat Saikwa filed Summons on 3rd May 2016 and sought leave to institute contempt proceedings against John Saikwa, Vomorono Limited and its Directors.

The Applicant also sought stay of proceedings in respect of Notice of Motion dated 11th May 2015, Notice of Motion dated 17th August 2015 by Vomorono Limited and Chamber Summons dated 1st October 2015 Filed by Moses Saikwa pending hearing and determination of the application.

The Applicant sought that John Saikwa, Vomorono Limited and its Directors are in contempt of the Court orders made in Court on 22nd August 2013, 9th April, 2014, 9th May 2014 and 27th May 2015 and the Court do mete out against them punishment or sanctions as it deems fit and just, and order them to forthwith purge such contempt.

The application is grounded on the following facts;

The suit property L.R.No 209/8558 (I.R. No 28222) is part of the estate of Andrew Saikwa who is survived by John Saikwa, Moses Kiplangat Saikwa, Esther C. Saikwa, Dorcas Mwalila Munabi W/O Peter Bresio Saikwa (deceased) and Drucilla Cheruto Saikwa (deceased)

The Sole surviving Executor, John Saikwa, without any power in Law or consulting other beneficiaries, colluded with Vomorono Ltd to fraudulently and unlawfully enter into the sale and transfer of the suit property on 3rd December 2013 and 31st December 2013 respectively.

John Mitay Saikwa and Vomorono Ltd being fully aware of the nature of proceedings herein, in which the former was actively participating, and in which clear and unequivocal orders were issued on 22nd August 2013 and extended by Court from time to time restrained him and persons on his behalf from alienating, Transferring property, indeed transferred the suit property by an instrument of Transfer dated 31st December 2013 which was in utter disregard and blatant contempt of the Court order of 22nd August 2013.

The Court issued an order on 9th April 2014 barring Vomorono Ltd from interfering with or alienating, selling, transferring, charging, developing the suit property or dealing with the suit property pending the delivery of the Ruling referred to in paragraph 2 hereabove of the order.

Another order issued by the Trial Court on 9th May 2014, was to the effect that the sale of the suit property during pendency of the 2 applications be and is hereby nullified. The Executor and the other parties agree on distribution of L.R.No 209/8558, in default the Court shall grant orders on distribution.

ORAL

SUBMISSIONS

Mr Isindu submitted on behalf of his client Moses Saikwa that in 2015, Vomorono Ltd were aware of Court orders of 9th May 2014 and moved the Court appropriately by way of application of 11th May 2015 for review.

On 27th May 2015, all parties appeared before the Trial Court and the interested party applied and was granted the order that status quo be maintained. In the intervening period the Executor and interested party filed ELC Misc 132 of 2015 and ELC 183 of 2015 and sought orders and these are attached to Pages 46 & 47 of the Applicant's bundle.

On 21st July 2015, Counsel for the interested party and for the Executor filed Consent order before ELC Court without knowledge or consents of all parties and compromised the suit. All these orders were registered with Lands Office.

The pain the beneficiary Moses Saikwa has is that both interested party and Executor who were represented by highly competent lawyers abused the Court process which is below the moral and professional probity of Counsel in the matter.

The Applicant moved the ELC Court and filed application to set aside the consent of 20th July 2015 dated 30th September 2015 and on 23rd June, 2017, Hon. L.J Gitumbi had no difficulty setting aside the orders fraudulently obtained.

The actions of Vomorono Ltd, its Directors and John Mitay Saikwa were in blatant disregard and utter contempt of the Court, its process and orders which actions should be deprecated and appropriately punished by the Court to restore respect, authority, dignity and sanctity of the Court, its processes, records and orders.

Mr Langat for the interested party submitted that they filed the application of 11th May 2015 with annexed affidavit sworn by Silas Kibet Simatwo and was to have the interested party joined to these proceedings. The Court granted the order and the interested party joined the proceedings 7 months later on 18th December 2015.

All this time, the interested party was not party to the Succession Proceedings and was not bound by Court orders of this Court then.

They relied on the case of SHIMMERS PLAZA LTD vs NATIONAL BANK OF KENYA (2015) eKLR in establishing standard of proof in contempt proceedings that it shall be proved beyond any shadow of doubt that the person complained of contempt of Court acted with full knowledge of the Court orders. The interested party was not served with Court orders issued on 22nd August 2013 and the one of 9th May 2014.

Secondly, the interested party filed a matter in ELC court under Order 31 CPR 2010 so as to protect the title document of the suit property as required under Section 13 of Land Registration Act. This is because the last page of the Title was plucked out and did not show details of transfer and ownership. This was crucial as the suit property was charged by Habib Bank. According to the Affidavit sworn by Ms Grace Mbogo of Habib Bank on 22nd October 2013 the bank conducted periodical searches and did not find the title. The interested party could not wait for unscrupulous persons to fraudulently transfer the suit property.

Counsel also intimated that at the time of the sale of suit property, they were not the advocates on record but Chege & Company Advocates.

They were guided by the grant confirmed on 6th November 1989 which was rectified on 4th August 2011 which confirmed that the Executor /Vendor was Executor of the deceased's estate under the Will.

On 29th August 2012, the entry made on the Provisional Title document was/is as follows;

The grant of Probate of the estate of Andrew Saikwa and John Mutai Saikwa as personal representative.

Therefore by virtue of the fact that the interested party conducted due diligence and it included official search and Entry number 8 is as shown in the application filed on 11th May 2015 and this confirms that the interested party did not have any knowledge of defective title. The interested party was guided by Confirmed grant and Entry 8 on the title document.

Counsel raised objection to contempt of Court proceedings as the Application was filed beyond/after the statutory period of 6 months.

The Court orders were made on 9th May 2014 and are almost 3 years to date when Mr. Isindu filed the application for contempt of Court.

The case of OCHINO & ANOTHER vs OKOMBO & \$ OTHERS [1989] KLR C.A. sets conditions to be met in a case of contempt of Court as follows;

- 1) *The person must abstain from doing a certain act*
- 2) *The Court order ought to be served with a Penal Notice*
- 3) *The Court order shall be clear and unambiguous*
- 4) *The fact of service of the Court order must be proved beyond reasonable doubt*
- 5) *The Contemnor ought to have actual personal knowledge of the Court order*
- 6) *The timelines for filing application for contempt of Court and when the Court order in issue was made should be 6 months.*

In the instant case; the application for contempt of Court does not contain list of Directors of Vomorono Ltd alleged to be in contempt. The Applicant named the Company but not the Directors of the Company. The Applicant sought to punish the parties' advocates for contempt of Court but there is no specific prayer to punish lawyers in the application.

Mr Langat relied on the case of SAM NYAMWEYA & 3 OTHERS vs KENYA PREMIER LEAGUE & 2 OTHERS 2015 eKLR which sets out the proper procedure for contempt proceedings. The order(s) complained of is/are not supported by averments by the Process Server to demonstrate that the order(s) was/were served to the interested party. Correspondence without Affidavit of Service is not mandated by law. The application for contempt is brought improperly before the Court.

He reiterated Vomorono Ltd was an innocent purchaser for value and was not part of these proceedings. The annulment arose due to numerous fraudulent activities orchestrated by beneficiaries of the estate of Andrew Saikwa (deceased).

Mr Mutai for the Executor submitted that at the heart of this matter, are responsibilities of an Executor under Section 79 81 & 82 (b) (ii) of Law of Succession Act Cap 160. The Executor had/has powers grounded in the Will of the deceased of 11th July 1974. Section 93 of Law of Succession Act provides that the validity of the transaction is not affected by revocation of grant. The issue at hand was said to be that the Executor entered into a sale transaction of suit property L.R.No 209/8558 on 3rd December 2013-31st December 2013 contrary to Court orders. It is necessary to show that there were Court order(s) in place at the time and were made personally known to the Executor and that despite the said knowledge he acted in a contemptuous manner by going on with the sale when he should have stopped.

The Court order of 22nd August 2013 was issued *ex parte* and was to last upto 3rd September 2013. The Applicant has not annexed any document that shows that the orders were subsequently extended and on each extension the Court order was extracted and served and made known to the Executor and in December 2013 the Executor signed an agreement of sale after being made aware that such acts were contrary to Court orders. The Executor did not act in contempt of the Court order of 9th May 2014. The filing of ELC183 of 2015 was not contemptuous of the Court. There is an Affidavit of Service of 6th October 2017 as all parties were served.

Mr Isindu replied to submissions made as follows; the application for contempt of Court proceedings is to punish the Executor and Interested party to purge the contempt. They disobeyed various Court orders regarding the suit property and part of the deceased's estate. The Executor participated in all proceedings in the current Succession Cause and knew and was aware of the Court orders. There was no legal basis to serve the orders to him.

In fact in the Sale Agreement Clause 4:2 it is expressly stated that the Sale is subject to conclusion of Succession Cause 599 of 1986 by necessary implication the Interested party was informed of existence of this case and the case was central to sale of the property.

During the pendency of the Court orders from Family Court, the interested party and Executor moved to Environment & Land Court, Division of High Court and filed ELC132 of 2015 & ELC 183 of 2015 whose orders effectively cancelled the Court order of 9th May 2014. These are issues of subverting the Court process and the interested party and Executor have run from 1 Court to another.

FINDINGS & DETERMINATION

1) APPLICATION FOR REVIEW/SET ASIDE COURT ORDERS OF 9TH MAY 2014

The right of review is provided by 80 of the Civil Procedure Act which states that:

Any person who considers himself aggrieved-

- a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
- b) By a decree or order from which no appeal is allowed by this Act,*

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 of the Civil Procedure Rules, 2010 stipulates circumstances under which one may apply for review:

- a) On discovery of a new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.*
- b) On account of some mistake or error apparent on the face of the record.*
- c) For any other sufficient reason.*
- d) The application for review ought to be filed without unreasonable delay.*

The following cases outline principles considered in grant of review;

KITHOI vs KIOKO (1982) KLR 177 C.A. PG181- the application for review must strictly prove grounds for review.

FRANCIS ORIGO & ANOR vs JACOB KUMALI MUNGALLA [2000] eKLR- review may be sought from a different Court from the one that granted the order; if not in the same Court or for other legal basis.

MWIHOKO HOUSING CO LTD EQUITY BUILDING SOCIETY [2007]2KLR 171.- where the Court made wrong decision on an incorrect exposition of the law and reached erroneous conclusion of law is not ground for review but appeal.

The interested party's claim is that it was not a party to these proceedings that culminated to Court orders of 9th May 2014. These orders are prejudicial to their interests in the suit property as Purchaser of the said property. At the time these orders issued, they were not parties to the proceedings and therefore were not accorded a hearing. This claim does fit the first criterion and does not amount to discovery of new and important matter of evidence. Discovery means to invent or find something not known before. The Applicant did not show they discovered these proceedings. The interested party entered sale of suit property L. R. No 209/8558 Agreement which in Clause 4 made these proceedings condition precedent to completion of the sale.

With regard to the 2nd criterion, there is no allegation made of mistake or error apparent on the orders of 22nd August 2013, 9th April 2014, 9th May 2014 & 27th May 2015 by the Court which is self-evident. Therefore the other consideration is whether a review is applicable for any other sufficient reason.

The Court is moved by parties who file pleadings on the dispute to be determined and after hearing and determination, the Court renders verdict.

In the instant case;

Esther Saikwa T/A Talai Holdings on 24th June 2013 filed under certificate of urgency Petition seeking conservatory orders and temporary injunction against the Executor who intended to proceed with sale of suit property L. R. No 209/8558 during Court vacation. The Court granted orders on 22nd August 2013 restraining Respondents & Interested party (Executor) from intended sale until *interpartes* hearing on 3rd September 2013.

Esther Saikwa T/A Talai Holdings on 4th April 2014 filed under Certificate of urgency application seeking to restrain interested party (executor) Vomorono Ltd (intended Purchasers) and their agents or servants from dealing in any manner with suit property L. R. No 209/8558. These orders were granted on 9th April 2014 pending Ruling of the Court on applications filed on 12th July 2012 and 7th December 2012. The Orders had/have a Penal Notice attached.

On 9th May 2014, Hon. Justice W. Musyoka rendered Ruling on the application filed on 12th July 2012 by Esther Saikwa for orders that cancellation of transfer of L.R No 209/8558 be nullified and application filed by Moses Saikwa of 7th December 2012 seeking to protect the deceased's property from being disposed by John & Esther Saikwa. Esther Saikwa to furnish accounts of total income generated and deposit the same in a joint bank account and a restriction be placed on the title of the suit property until final hearing.

The Trial Court nullified any sale that occurred during the pendency of the 2 applications for Ruling. The title of the suit property was to revert to Executor and the beneficiaries were to distribute the suit property within 45 days.

On 23rd January 2015, Amos Potendo Saikwa applied to be joined to these proceedings as beneficiary as his mother Drusilla Cheruto Saikwa was daughter of the deceased. On 27th May 2015 the application was granted and status quo on the suit property was to be maintained until hearing and determination of the instant application filed on 11th May 2015 for review of orders of 9th May 2014.

I have outlined details of applications that culminated to the orders sought for review. A cursory glance of these events confirm that there was imminent danger of sale of the suit property L. R. No 209/8558 an asset comprising of the deceased's estate without all beneficiaries consensus and consents and the Court's green light by first Esther Saikwa and later John Saikwa. Despite various Court orders, the sale took place while the Sale Agreement acknowledged there were pending proceedings over the suit property. The sale commenced 3rd December 2013 without awaiting the outcome of the pending Ruling which was finally delivered on 9th May 2014. Now that the import of the Ruling was nullifying any sale that occurred during pendency of the said Ruling; the interested party sought to be joined to the proceedings and applied for review of the orders.

Cumulatively, these facts do not disclose sufficient reason to review the Court orders that were the outcome of facts as presented to the Trial Court then to adjudicate the dispute.

Despite various applications by beneficiaries to halt impending sale until the Ruling, the Executor pursued negotiating and facilitating purchase of the suit property without disclosure to beneficiaries and obtain their consents, to interested party as to the status/progress of ongoing Succession proceedings with regard to the suit property L. R. No 209/8558 and to the Court on intention to sell, ongoing negotiations etc. The Executor pursued the sale in total disregard of Court orders. These circumstances do not amount to sufficient reason to warrant a review. All parties ought to have waited for the Ruling of the Court before any sale of the suit property. To do so would amount to this Court condoning such blatant disregard for Court orders and sanitize the Executor's misconduct. The application for review is denied/not granted. The interested party's recourse for redress is from the Executor or to lodge an appeal.

2) APPLICATION FOR CONTEMPT OF COURT FILED ON 3RD MAY 2016.

Section 4(1) of the Contempt of Court Act, 2016 defines contempt as:

“civil contempt as willful disobedience of any judgment, decree, direction, order or other process of a court or willful breach of an undertaking given by a court.

To prove contempt, it must be proved that; the contemnor was aware of the court order or rule which was violated, that the contemnor was able to comply with the order and that the contemnor failed to do so.”

In the case of SAM NYAMWEYA & OTHERS –V- KENYA PREMIER LEAGUE LTD AND OTHERS [2015] EKLK Lord Justice Clerk stated that:-

“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

From the above definitions of contempt of Court the issues for determination are;

- a) Were these orders issued on 22nd August 2013, 9th April 2014, 9th May 2014 & 27th May 2015 valid orders of the Court?
- b) Were these orders served upon contemnors and were they aware of the said orders?
- c) Is the Executor John Saikwa and/or interested party Vomorono Ltd guilty of contempt of the above stated orders?
- d) What are the requisite orders?

From the Court record, the pleadings and able submissions by Counsel for all parties it is not disputed that the impugned orders are valid Court orders in Succession Proceedings pertaining to suit property L. R. No 209/8558 which is part of the deceased's estate.

With regard to the 2nd issue, is whether the said Court orders were served to the Contemnors?

The Court of Appeal in SHIMMERS PLAZA LTD vs NBK(2015) Hon. Mwera Karanja, Mwilu JJA adopted the decision of High Court and approved growing jurisprudence that reiterated that knowledge of a Court order suffices to prove service and dispenses personal service for purposes of contempt proceedings in BASIL CRITICOS vs A.G. & 8 OTHERS (2012) e KLR where Hon. Justice Lenaola then stated;

The law has changed as it stands today, knowledge supersedes personal service.....,

In the case of TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS. CABINET SECRETARY FOR DEVOLUTION AND PLANNING & 3 OTHERS [2017] EKLK provides:

“...There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard which in civil contempt cases the burden of proof is higher than a balance of probabilities required in civil cases and provides that:

- i. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*
- ii. the defendant had knowledge of or proper notice of the terms of the order;*
- iii. the defendant has acted in breach of the terms of the order; and*
- iv. the defendant's conduct was deliberate...”*

In the instant case, the interested party was not party to the Succession Cause 599 of 1986 until they filed application of 11th May 2015 which was partly heard by the Trial Court and they were enjoined to these proceedings on 18th December 2015.

They knew of the Succession proceedings in Family Court as the same was/is acknowledged in the Sale Agreement for the suit property of 3rd December 2013 where at paragraph 4:2 the conclusion of the pending proceedings in Nairobi Succession Cause 599 of 1986; in the matter of Estate of Andrew Kisa Saikwa (deceased) would the 10% of the purchase price be paid.

As to specific Court orders; there is no evidence that the interested party was served with Court order of 22nd August 2013, 9th April 2014, and 27th May 2015.

However, it was intimated by Mr Mtai for Executor that the Letter from the Mr Isindu dated 22nd April 2015, for the Beneficiary Moses Saikwa informed Vomorono Ltd of the existing Court order of 9th May 2014.

The interested party posits that at the time of receipt of the letter dated 22nd April 2015, it was a year later from when the order was granted, they were not parties to these proceedings and were not granted opportunity to be heard. Finally, by this time the sale took place on 3rd December 2013. Clearly, they had not been served properly and on time to ensure compliance.

The totality of the evidence on record is that the interested party was not served with the Court orders to ensure compliance. Although they knew of existing Succession proceedings, they did not know of its intricate details.

With regard to the Executor, John Saikwa, He always party to these proceedings. He is eldest son of Andrew Saikwa(deceased), appointed one of the Executors of his father's Will of 11th July 1974. He obtained grant and was confirmed on 30th June 1987 and rectified on 4th August 2011 appointing him sole Executor. He is also one of the beneficiaries of the estate of the deceased. He was privy to and had knowledge of these proceedings right from the start to date. Infact the applications that culminated to non- compliance directly concern and involve him as Executor. In the proceedings that gave rise to orders of 22nd August 2013, he was one of the parties as interested party.

The application of 24th March 2014 that gave rise to Court order of 9th April 2014, the Executor was an interested party.

The applications of 12th July 2012 by Esther Saikwa and the application of 7th December 2012 by Moses Saikwa were filed against Esther and John Saikwa. They were parties to the proceedings and were to comply with specific unambiguous order that Esther accounts to Court and any sale or transfer of suit property was nullified and distribution undertaken within 45 days.

The application that culminated with court order of 27th May 2015 filed by beneficiary Amos Potendo Saikwa was to maintain *status quo ante* of the suit property until determination of the application for review filed by interested party of 11th May 2015. Although the Executor is not named as party to this application, the order shows he was represented by Counsel.

So as per the above cited cases on actual knowledge *vis a vis* personal service of the Court orders, the Executor had/has personal knowledge of these proceedings and particularly the Court orders as a party to the Succession Proceedings. The Executor participated in all proceedings and therefore the issue of personal service is not relevant or practical in the present circumstances.

c) Is the Executor John Saikwa and/or interested party Vomorono Ltd guilty of contempt of the above stated orders?

In Re Bramblevale (1970) 1 Ch. 128 Lord Denning, affirmed this position when he stated as follows:

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt.”

The burden of proof is that the Contempt of Court is proved beyond reasonable doubt that the Executor and interested party willfully disobeyed Court orders cited above and instead proceeded with the sale of the suit property despite nullification of sale and maintenance of status quo.

What constitutes Contempt of Court in the instant case is as follows;

EXECUTOR

The suit property L. R. No 209/8558 is part of the estate of Andrew Saikwa (deceased) and subject of Succession Proceedings in the instant Court file.

According to 1 of the beneficiaries , Moses Saikwa, John Saikwa is Executor of this estate and contrary to powers of the Executor as donated by law, the Will of the deceased and grant without consultation involvement and consents of all beneficiaries to the sale of the suit property and existing valid Court orders that stopped any sale or transfer of the suit property, the Executor single handedly without disclosure entered into agreement for sale with 3rd Party/interested party of the suit property. In the process the Executor and interested parties deprived other beneficiaries their rights over the suit property.

John Mtay Saikwa fully aware of the Court orders of 22nd August 2013 as participant in these proceedings, negotiated and signed the Agreement for sale with the interested party to the exclusion of beneficiaries, yet the suit property is family property and has been subject to longstanding disputes among beneficiaries.

The Agreement acknowledged the existence of the Nairobi Succession Cause 599 of 1986 as condition precedent to the conclusion of the sale and payment of the Purchase price.

The Court orders of 9th April 2014 and 9th May 2014 which nullified any sale of the suit property were duly registered against the suit property's title document at Land' s Office on 1st July 2014 and later served upon Vomorono Ltd.(This Court found no evidence of such service from the court record.)

While the Court orders of 27th May 2014 of maintaining the *status quo* over the suit property and pending for hearing their application of 11th May, 2015, Vomorono Ltd and John Saikwa filed ELC CT Misc App 183 of 2015 and recorded Consent on 20th July 2015, without disclosing to the Court ongoing Succession proceedings in the Family Court over the same suit property. The Consent order had the effect of reviewing and vacating the Court orders of 9th May 2014 and 27th May 2015. On 30th July 2015, they registered the Consent order against the title document in Lands Office. Yet the application to set aside these orders was pending for hearing in the Family Court.

Were the contempt proceedings legally and lawfully instituted?

The application for contempt of Court was filed on 3rd May 2015 whilst the last of the Court orders disobeyed was on 27th May 2015.

The Contempt of Court Act 2016 prescribes at Section 34 that ;

No court shall initiate any proceedings for contempt of court either on its own motion or otherwise after the expiry of a period of 6 months from the date on which contempt of Court is alleged to have been committed.

Therefore, although the conduct complained of amounts to contempt of the Trial Court's orders cited above, there is limitation of action, the proceedings ought to commence before 6 months are over. The Applicant discharged their legal duty to prove beyond reasonable doubt the contempt by the executor.

On the other hand, the Executor failed to carry out his statutory mandate as Executor of the deceased's estate as provided in Section 79 82 & 83 and more particularly Section 82 (b) of Law of Succession Act Cap 160 which provides;

82.(b). to sell or otherwise turn to account, so far as seems necessary and 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;

Although the Executor derived his mandate from the will and grant and confirmed grant of Probate, he did not demonstrate the necessity and desirability of the sale in distributing the estate.

In *RE ESTATE OF DAVID KYULI KAINDI (DECEASED), SUCCESSION CAUSE NO. 3403 OF 2005*, it was pointed out that:

“[18] The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.”

[19] The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependents, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.”

The Executor is party to all proceedings with regard to the deceased's estate. He is privy to all cases that interrogate the administration of the estate for the benefit of beneficiaries in the deceased's estate. In the instant case admittedly, there has been as gleaned from the Court record long standing disputes over the distribution of assets that comprise the deceased's estate; the suit property.

The Executor is central to all unfolding activities with regard to the estate in the Family, Courts, Lands Registry. He was involved in all proceedings that gave rise to the above cited orders, yet he failed to engage, consult and amicably agree on sale of the suit property with beneficiaries. He did not inform them of the negotiations so as to allow the beneficiaries participate in negotiations to protect their beneficial interest in the suit property. Moses Saikwa deposed in the affidavit filed on 27th May 2015, that the Sale transaction between the Executor and interested party was tainted with fraud and illegality; whereas the Sale Agreement acknowledged that conclusion of proceedings in Nairobi Succession Cause 599 of 1986 as condition to payment of the purchase price and transfer; in breach of the said condition in the Sale Agreement and despite the Court order of 9th May 2014 nullifying any sale and mandating distribution of the suit property to beneficiaries, the sale was completed and transfer done vide institution of proceedings in Environment and Land Court for issuance of provisional title document vide a Consent.

The beneficiaries complained of non-disclosure, transparency and accountability in the Sale of the suit property, the sale of the suit property was not agreed by all beneficiaries and from the Agreement for Sale and Transfer the figures of Purchase Price differ. The disparity Ksh 300,000,000/- in one document and Ksh 200,000,000/- is unexplained.

It is also alleged by beneficiaries that during the pendency of Court orders, there was under valuation of the suit property, payment of monies to 3rd parties other than lawful beneficiaries and in 2014 the interested party attempted to take possession of the property after an illegal eviction process that led to wanton destruction of permanent houses and other developments on the suit property. The beneficiaries lost beneficial interest in the suit property and were not paid the proceeds for their share of the suit property.

The Executor failed to disclose to the Trial Court ongoing negotiations with interested party over the sale of suit property so as to move the Court to grant relevant orders and safeguard each party's beneficial or proprietary right to the suit -property. Instead he participated in Court proceedings and orders were issued that bound him and his agents or servants not to dispose the suit property pending Ruling delivered on 9th May 2014 which nullified any/every sale of the said property during pendency of the Ruling and ordered distribution of the estate.

The Executor participated in ELC Court proceedings in ELC Misc 183 of 2015 with interested party and entered into Consent settling the application filed 6th July 2017 that the Chief land Registrar and/or Registrar to cancel Entry 12 from Land Register in respect of land Reference number 209/8558.I.R.no 2822 owned by Vomorono Limited.

Later when Moses Saikwa was enjoined to the proceedings he disclosed these Succession proceedings and subsisting Court orders.

Hon. L J Gitumbi stated in Ruling of 23rd June 2017 and sought all proceedings now be heard in the Family Court as follows;

“Neither Vomorono Ltd nor John Saikwa notified [ELC] this court of the existence of High Court Succession Cause 599 of 1986 and the subsisting orders issued by Hon. Justice W. Musyoka. This Court adopted the impugned consent order without knowledge of the 2 Court orders issued by the Trial Court in High Court Succession Cause 599 of 1986”

I need not say more on the matter in ELC as the ELC Trial Court’s observations are apt. Again, the Executor in concert with the interested party colluded and sought in another Court orders that directly and adversely impacted on current valid orders issued by Hon J. Musyoka in this matter.

The Executor and Vomorono Ltd expedited matters regarding the sale and the Executor deliberately concealed full material facts from Courts, Beneficiaries and now Lands Office. The Executor facilitated issuance of new title document to the suit property in Entry 9 on 8th August 2013 and removal of Entry 12 of Court order of 9th May 2014 in these proceedings to nullify all sale /transfer transaction with regard to the suit property yet The Executor & Vomorono Ltd did not disclose to Registrar Lands Office that there was a valid regular and lawful order in Succession Cause 599 of 1986 in place that was not set aside.

There must be full and frank disclosure to the court of all material facts known to an applicant. In *Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others [1995] eKLR*, the Court of Appeal approved and applied the case of *Brink’s-MAT Ltd vs Elcombe (1988) 3 All ER 188* where the Court set out the principles as follows:

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:

- (i) The duty of the applicant is to make a full and fair disclosure of the material facts.*
- (ii) The Material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.*
- (iii) The applicant must make proper enquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.”*

In a nutshell, the Executor conducted sale of the suit property contrary to Court orders and failed to explain the necessity and desirability in selling the suit property in execution of his duty without consulting and obtaining consents from the beneficiaries. The Executor being involved in all proceedings and activities engaged in material non- disclosure to beneficiaries , Courts and Lands Office with a view to conceal disobedience of Court orders and deprive beneficiaries their interest in the suit property. Such conduct amounts to contempt of Court orders. It also amounts to derogating from statutory duty as Executor. This an old matter, oscillated in Court on applications by each beneficiary against each other with flurry of applications determined by the Trial Court and hence after close to 40 years the distribution of the estate is not complete.

Although the Executor’s conduct confirms civil contempt by wilful disobedience of Court orders, the application is time barred. From the above circumstances, the Executor is no longer able and willing to distribute the estate as per court order of 9th May 2014 and safeguard the beneficial interest of all beneficiaries. This Court own its own motion invokes Section 76 (d) (ii) and (e) of Law of Succession Act Cap 160 and revokes grant of Probate with Will annexed of 30th June 1987 and rectified on 4th August 2011.

INTERESTED PARTY-VOMORONO LIMITED

With regard to interested party Vomorono Ltd, they were not party to the instant proceedings at the time the cited Court orders were issued. However, from the Agreement of Sale of 3rd December 2013 they knew of the proceedings in Succession P.A 599 of 1986. In the Sale Agreement it was agreed that upon conclusion of the instant case 10% of the sale price would be paid. The balance would paid upon transfer of suit property and 90 days from the said date. Alas, the sale was completed before these proceedings closed with satisfactory and agreed distribution of suit property L.R.209/8558.

On the issue of Contempt of Court and in line with legal provisions and case-law, Vomorono Ltd is mentioned in the above cited Court orders issued with regard to the suit property, but they were not parties to proceedings until they were served with Court orders of 9th May 2014 in 2015 and thus filed the present application of 11th May 2015 to be joined as party to proceedings and to set aside orders nullifying Purchase of the suit property.

There is no evidence on record clearly confirming Vomorono’s actual knowledge of valid, clear unambiguous orders curtailing sale transfer or disposal of the suit property until distribution of the estate. The evidence that Vomorono Ltd was duly served with the order save the letter of 22nd April 2015 by the Applicant is borne out by the Court record.

The issue of personal service on the Company and individual Directors was not complied with. The Sale Agreement was signed on 3rd December 2013, the Court order nullifying sale was on 9th May 2014 but the said order was served on them in 2015. They sought to be joined to these proceedings and were granted orders on 18th of December, 2015.

Vomorono Ltd knew of the Succession Proceedings but dealt with Executor who did not divulge the ongoing issues with regard to the suit property *viv a vis* beneficiaries and contentious issue with beneficiaries over the suit property. In fact the 3rd Party submitted that in the process of due diligence, they could not access and peruse the Court file as it was pending for Ruling.

Vomorono Ltd conducted due diligence and obtained Will of Andrew Saikwa(deceased) grant of 30th June 1987 and rectified on 4th August 2011. There was/is confirmed grant issued on 16th November 1989.They conducted official search at Lands Registry and confirmed that the Executor was personal representative of the estate. The Charging Bank Habib Bank, also conducted due diligence and was satisfied with the official documents presented and granted the Loan on the basis of the Charge over the suit property and had the same as security.

From the circumstances, Vomorono Ltd stated that contrary to fraud and illegal claims levelled against them by beneficiaries, the sale transaction was/is above board and followed due process. They purchased the suit property on Willing Buyer Willing Seller basis. Clearly they were not party to and/or aware of the internal strife between beneficiaries over the suit property until they were served Court order a year later. They claimed to be *bonafide* purchaser for value without notice of defective 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] ECLR 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.*

The conditions above are met by Vomorono in light of due diligence conducted.

This Court would stop here but in light of ELC Court order the matters are resolved in Family Division of the High Court I shall proceed on.

The Court notes that the Purchaser of the suit property, as set out in paragraph 3 of the Notice of Motion Application dated 11th May 2015, that the Purchaser conducted the relevant due diligence on the aforementioned property. It is further set out in the abovementioned application, that the due diligence was conducted by both advocates to the conveyance transaction. Upon satisfaction of the status of the property, the Purchaser obtained a Charge Facility towards raising funds to purchase the subject property. The Court further notes that the Purchaser upon being satisfied with the status of the property, was able to Charge the same with the "Chargor Bank" which conducted its own independent due diligence and was equally satisfied. Upon completing all other requirements of the conveyance, the Purchaser disbursed funds to the Seller's Advocates, M/s S.M Chege and Co. Advocates, whom they believed to be acting for the family of the deceased through the Executor.

The sale was executed by the Executor who had capacity to contract but held himself out as having authority from beneficiaries to sell the suit property which formed a binding contract. The lack of authority could not have been disclosed by due diligence as the documents confirming him as personal representative of the estate were genuine, illegal and proper and were not challenged. The said sale agreement is now the subject of acute attacks. It is manifest that in Common Law, a party who contracts with another party and holds himself out as having legal capacity to contract on the basis of ostensible authority, the Purchaser is entitled reasonably to rely on the Executor's authority to transact the sale.

In fact, on the basis of the Sale Agreement and Due Diligence process the 4th Party the Financier Bank, relied on the same Executor's ostensible authority to sell and executed official documents of the Charge on the suit property as security.

Unfortunately, although questions arose as to the authenticity of the documents presented by the Executor and his execution of the Agreement for Sale, this is not a matter under inquiry in this Court except to the extent of beneficial interests in the suit property. It is sufficient for this Court to find that in spite of the Executor actual lack of authority to contract, The Purchaser was/is perfectly entitled to rely on representations made by the Seller especially if even after due diligence, the Executor's lack of authority to contract was not/ could not be detected.

Although it is pleaded by the Beneficiaries that they did not give authorization to the Sale of the Property, it was not within the scope of the Purchaser to determine the same. The Purchaser operated on the understanding that the Executor was fulfilling his duties in accordance with the Law of Succession and any Court orders issued. The fact that the Executor failed to fulfill his duties accordingly does not disqualify the Due diligence undertaken by the Purchaser toward the transaction.

The Beneficiaries to the estate now request the Court to nullify the Sale of the Subject Property on the basis of the Executor's conduct that has deprived them of beneficial interest in the suit property.

The Court from its assessment of the pleaded events, is of the view that the Purchaser herein would be deemed to be a "Bona Fide

Purchaser". 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.

Secondly, although the Executor flouted and disobeyed Court orders a valid contract of sale exists, the contract is not vitiated by illegality, fraud or mistake. Thirdly, on 24th October 2014 all beneficiaries represented by Counsel and 3rd Party filed Consent essentially agreeing to the Sale of suit property.

Furthermore, as the Sale Agreement forms a Commercial Agreement and the Executor of the Estate, the Agreement cannot be nullified on the basis that the Beneficiaries' were not appropriately consulted. The Agreement between the Parties is binding on the basis that the Purchaser, through their due diligence, was able to establish that the Executor was duly appointed and mandated to fulfill the various affairs of the Estate. The fact that the Executor did not comply with the procedural mechanisms within the estate to facilitate the transaction, can only be considered when assessing his conduct and viability as an Executor. However, the same can have no consequence on the Agreement of which was duly executed and fulfilled. It is for this particular reason and circumstance for which the Bona Fide Purchaser Doctrine is adequately suited.

The Executor had capacity to enter into contract and fulfilled essentials of a valid contract of sale of land. The contract of sale which is ironclad (not *void ab initio*) gave Vomorono Ltd proprietary interest over the suit property. However, the same transaction denied, withdrew the beneficiaries of the estate's beneficial interest over the suit property. Although the Executor had capacity to contract he lacked the requisite authority to transact on behalf of the beneficiaries. He did not disclose or involve them in his mission to sell all their interest to Vomorono Ltd.

The Executor's conduct is not condoned or excused but the sale Agreement's validity is protected and intact in the absence of fraud /illegality proved on the part of interested party by Section 93 of Law of Succession Act. There shall remain a valid and binding contract of sale of land if and when the sale is completed with consultation of ALL beneficiaries or their representatives; material disclosure of purchase price, funds remitted to whom, how and when and reinstatement of each beneficiary's interest on the suit property satisfied by sale proceeds upon relinquishing their stake. This is in line with the parties/advocates consent of 24th October 2014 that detailed the process of sale of suit property L.R No. 209/8558, receipt of that purchase price and the beneficiaries' beneficial interest determined by the proceeds of sale in lieu of their share in the suit property.

DISPOSITION

1. The application of 11th May 2015 for review is dismissed as it did not meet criteria set out in Section 80 CPA and Oder 45 CPR 2010
2. The Application of 3rd May 2016 for contempt of Court is dismissed as it was time-barred filed 1 year after contempt of Court while the limitation is 6 months under the Contempt of Court Act, 2016.
3. By this Court's own motion under Section 76 of Law of Succession Act Cap 160, grant of probate is revoked removing John Saikwa as Executor of deceased's estate.
4. Fresh/New grant shall be issued in the name of Moses Kiplangat Saikwa as Executor of the deceased's estate.
5. In consultation with ALL beneficiaries, the new Executor to discuss and agree on the way forward in compliance of Court orders and completion of the sale of the suit property.
6. John Saikwa to deposit in Court with Deputy Registrar within 21 days funds payments received with regard to sale of the suit property L.R.209/8558.
7. The new Executor Moses Saikwa to pursue and obtain records to confirm 1 single genuine and valid title of the suit property and obtain details of the sale of land.
8. John Saikwa to file accounts on the running the estate of the deceased w.e.f. appointment to withdrawal as Executor to date
9. All monies regarding the sale proceeds and purchase price balance be deposited in Court by any/all withholding party/representative within 21 days.
10. Matter be mentioned within 30 days (5th July, 2018) for compliance, progress and status of this matter.

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH OF JUNE, 2018

M.W.MUIGAI

JUDGE OF FAMILY DIVISION OF HIGH COURT

IN THE PRESENCE OF:

Lagat & Peter Langat for Interested Party

Other parties are absent