



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 26 OF 1988**

**IN THE MATTER OF THE ESTATE OF THOMAS MBUI NJENGE alias THOMAS NCHENGE (DECEASED)**

SUSAN GACHERI ..... APPLICANT

-VS-

DAVID MBUKO T. MBUI ..... PETITIONER

-AND-

JENNIFER KIBITI ..... 1<sup>ST</sup> INTERESTED PARTY

JOSEPH MBOROKI ..... 2<sup>ND</sup> INTERESTED PARTY

JEDIEL MURERWA ..... 3<sup>RD</sup> INTERESTED PARTY

FLORENCE MUKIRI ..... 4<sup>TH</sup> INTERESTED PARTY

CHARLES MUTWIRI ..... 5<sup>TH</sup> INTERESTED PARTY

SILAS MWITI ..... 6<sup>TH</sup> INTERESTED PARTY

PETERSON GACHIUGU ..... 7<sup>TH</sup> INTERESTED PARTY

AND

STANLEY M'MURITHI M'RICHUI ..... OBJECTOR

**JUDGMENT**

1. **Thomas Mbui Njenge alias Thomas Nchenge (“the deceased”)** died in or about 1964. The Chief of Ntima Location issued a letter of introduction on 30<sup>th</sup> December, 1987 whereby he introduced Nanice **Kanario (widow)**, **David Mbuko (“the petitioner”)** and **Washington Gitobu** as the survivors of the deceased. He also specified the property known as **Ntima/Ntakira/524** as the only asset of the estate of the deceased.
2. On 10<sup>th</sup> February, 1988, the petitioner petitioned for Grant of Letters of Administration intestate. The record shows that the said letters were issued to him on various dates and subsequently confirmed on 10<sup>th</sup> March, 1992.
3. By Summons filed on 14<sup>th</sup> February 2008, **Washington Gitobu**, who was the original applicant sought that the grant issued on 16/6/88/, 18/11/88 and/or 15/12/88 and subsequently confirmed on 10/3/1992 be revoked and/or annulled.
4. The grounds upon which the revocation was sought were that; the grant was obtained fraudulently by the making of a false statement; there was concealment of material facts; the proceedings to the making of the grant were defective in substance; that the petitioner had distributed **L.R. No. Ngusishi Settlement Scheme 332** which was not part of the estate; the petitioner never obtained his consent before confirmation and that the petitioner was in the process of selling parts of the estate property with a view to disinherit the applicant.
5. In the affidavit in support, the applicant stated that the deceased’s estate comprised of **L.R No. Ntima/Ntakira/524**, where he and the

petitioner were born and brought up and lived up-to the time of making the application. That when the petitioner instituted these proceedings, a stranger by the name of Stanley M'Murithi M'Irichiu lodged an objection which he all along thought was ongoing. That the petitioner threatened to evict him in the 2005, as a result of which he filed a **Land Disputes Tribunal Case No. 12 of 2005** which proceeded to appeal at Embu and was then the subject of **Meru High Court Miscellaneous application No. 113 of 2007**. That it was during those proceedings that he learnt that the succession cause was concluded without his knowledge or consent and the petitioner distributed the entire estate to himself.

6. The petitioner opposed the application vide his replying affidavit sworn on 23<sup>rd</sup> July, 2008. He deposed that when the deceased died he gave the applicant five acres at **Ngusishi/Settlement Scheme/332** and the petitioner 3 acres in **Ntima/Ntakira/524** which he added to 1.97 acres he had purchased from **Stanley M'Murithi**. That after filing the succession matter, it was referred to arbitration whereby an award was made in his favour in terms of the deceased's decision aforesaid.

7. He further deposed that after confirmation, he had subdivided the property and sold five portions without any challenge by the applicant. That the applicant had not challenged the succession earlier because he knew that his father had given him the Ngusishi property which the petitioner had just realized that the applicant had sold to one **Salome Muko**.

8. During the pendency of this Cause, the original applicant (**Washington Gitobu M'Mbui**) passed on whereby he was substituted by his daughter (**Susan Gacheri**), the current applicant. Subsequently, the 1<sup>st</sup> to 7<sup>th</sup> interested parties were also enjoined in these proceedings on the basis that they had bought portions of the estate property from the petitioner. The court directed that the matter be determined by way of *viva voce* evidence.

9. **OW1** was **Susan Gacheri**. It was her evidence that she was a daughter to the original applicant while the petitioner was her uncle. That she was therefore a granddaughter to the deceased. That her late father had objected to the grant because the petitioner had not distributed to him any share in the estate property, **Ntima/Ntakira/542** which, although initially registered in the name of the deceased was subsequently registered in the name of the petitioner.

10. She testified that the deceased died before she was born and that he did not have any other land save for **Ntima/Ntakira/524**. According to her, parcel No. **Timau/Ngusishi/332** was not part of the deceased's estate. That it belonged to the Settlement Fund Trustees. That she had lived on **Ntima/Ntakira/524** which they were using with the petitioner. Each had his own portion but the petitioner had since evicted her, subdivided the same and sold portions thereof despite there being an inhibition registered on 29<sup>th</sup> July 2008. She urged that the property be divided equally between the estate of her late father and the petitioner.

11. **OW2 Gibert Mwenda M'Chebere** was stood down before he could testify and was never recalled when the matter resumed. **OW3 Vincent Munene** told the court that the late **Washington Gatobu** was his grandfather whereas the late **Charles Mutwiri** was his father. His claim was on his share which his father should have got from the deceased.

12. **OW3 Alice Kararu Kirima** testified that she was the wife of Washington Mbui with whom she got two children namely, Charles Mutwiri and Susan Gacheri. It was her evidence that she was married to the deceased's home in 1974 but separated with her husband in 1977. It was her evidence that the deceased's family only had one piece of land being **L.R No. Ntima/Ntakira/524**. that she and her husband acquired some property in Ngushisi through balloting but they later found that there was no actual land on the ground.

13. **OW4 Elizabeth Mukami** told the court that she was the wife to the petitioner and had lived on the suit property for 43 years. She was married in 1973 and that the family had only one parcel of land namely **Ntima/Ntakira/524**. She further testified that Washington continued to live on that property until his demise and that he did not have any other property. That the said property should have been divided between the two sons of the deceased, the petitioner and the late Washington Gitobu.

14. **PW1 was David Mbuko**, the petitioner. He told the court that the deceased had two properties namely; **Ntima/Ntakira/524** and **Timau/Ngusishi/332**. That he had purchased **Ntima/Ntakira/524** for KShs.300/- in 1957 from **Stanley M'Murithi M'Richui** but because he was young without an identification card, he had it registered in the deceased's name. That he initially paid Kshs 270/= and the balance in 1988 which had risen to KShs.900/-. That **Stanley M'Murithi M'Richui** had tried to block this succession cause because of the balance of the purchase price but withdrew the same on being paid.

15. It was his testimony that after the chief gave them a letter of introduction to commence this succession cause, he asked them to go to the District Officer's office so that they could sort out the issue of succession there. That he went there accompanied by his brother. That they then entered into consent whereby **Ntima/Ntakira/524** was shared to him while **Timau/Ngusishi/332** was to go to Washington. That this was in accordance with the deceased's wishes. That the consent was recorded in court and the grant confirmed.

16. **PW2 Simon Kibiti** told the court that sometimes in 1978, his father told him that he had been paid some balance of money for some land that he had sold. He neither knew which land his father had sold to the petitioner nor the amount paid at the time.

17. **PW3 Charles Kiome** told the court that he had purchased firewood from **Washington Gatobu** after the latter's house had been eaten by ants. That the clan had told **Washington** to go live in Timau and leave the petitioner behind in **Ntima/Ntakira/524**.

18. **PW4 Ntarangwi M'Mukiri** told the court that he witnessed the petitioner give the balance of the purchase price for the land. However, he could not recall the person to whom the money was paid nor in respect of which land.

19. On their part, the interested parties filed replying affidavits on 25<sup>th</sup> November 2013, in response to the application for revocation of grant. They contended that they had, on diverse dates between the year 2005 and 2008, bought parcels of land from the petitioner who was the registered owner and had carried out developments therein.

20. It was submitted for the applicant that she had made a case for the revocation of the grant. That it was not clear when the grant was issued to the petitioner. That the application for confirmation was not accompanied by a consent from the other beneficiaries.

21. That in both affidavits in support of the petition and the one for confirmation of grant, the petitioner had indicated that the deceased's estate only comprised of **Ntima/Ntakira/524**. That none of the elders present when the deceased allegedly divided his properties to his two sons was called to testify nor was there an explanation for their being not called. That it had been proved that a total of 7 interested parties had filed affidavits claiming to have bought land from the petitioner thereby establishing the applicant's contention that the petitioner was in the process of disposing of parts of the property to disinherit the applicant.

22. Mr. Mwarania therefore concluded that the grant be revoked and a joint one be issued. That the property be distributed equally between the applicant and the petitioner by ordering the rectification of the register in respect of L.R No. Ntima/Ntakira/2793, 2794, 2795, 2796, 2797, 2801 and 2802 by deleting the name of the petitioner and replacement thereof with the name of the applicant.

23. On the other hand, it was submitted for the petitioner that there was no evidence that the petition was filled secretly. That the applicant was aware of the proceedings in court and had participated in the arbitration proceedings before the elders. Ms. Kiome further submitted that it was clear that the applicant had been given **Timau/Ngusishi Settlement Scheme/332** measuring 5 acres and that it was the wish of the deceased to give the Ntakira property to the petitioner.

24. For the interested parties, Mrs. Ntarangwi submitted that the acquisition of parcels of land from the original **L.R No. Ntima/Ntakira/524** by the interested parties was lawful. That they should be protected under the Law of Succession Act as the petitioner had already obtained confirmed letters of administration. That since the 6<sup>th</sup> and 7<sup>th</sup> interested parties had bought land parcel numbers Ntima/Ntakira/2792 and 2798 and they had followed the necessary procedures of acquiring their respective titles, their titles should not be cancelled.

25. With regard to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties, it was submitted that they may not have carried out searches at the lands office to know the status of the various parcels of land at the time of purchase, but the petitioner had title deeds which he had acquired after confirmation of grant in this succession cause. Consequently, it was urged that on the authority of **Janet Wanjiku Waweru v. Teresia Njeri Kimani [2015] eKLR, Justus Karigicha Kathambi Nyeri CA No. 61 of 2014 (UR) and Nyaga Cottolengo Francis v. Pius Mwaniki Karani [2017] eKLR**, the grant should not be revoked and the interests of the interested parties should not be affected.

26. After a careful consideration of the affidavits on record, the testimony of witnesses and the submissions of learned counsel, the issues for determination are, ***did the applicant have notice of these proceedings, should the grant be revoked and if so, how should the estate be distributed.***

27. Under **Rule 26 of the Probate and Administration Rules**, it is mandatory that notice be given to all those equally entitled to representation before any grant can be issued. Such notice is evidenced by the filing of the duly signed **Forms 38 and 39** which constitute consents to presentation of the petition and consent to distribution. Although the applicant contended that he had no notice of these proceedings, he admitted in his supporting affidavit that he was aware of the objection that had been lodged by **Stanley M'Murithi M'Richui** only that he was unaware when it was withdrawn and the grant confirmed.

28. From that affidavit therefore, it is safe to conclude that the applicant may have been aware of the existence of these proceedings. The only dispute is whether he knew how it was being prosecuted or whether he was involved in its active prosecution. What is clear is that, when the application for confirmation was being made, his consent does not seem to have been sought and obtained.

29. The next issue is whether the grant should be revoked. The applicant contended that the grant was obtained fraudulently by the making of a false statement; that there was concealment of material facts to the case; that the proceedings were defective in substance; that a strange property was distributed and that his consent was not obtained for the distribution of the estate. This is what he set out to prove.

30. The jurisdiction of this court to revoke a grant is set out in **section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya**. In the case cited by Mrs. Ntarangwi of **Nyaga Cottolengo Francis v. Pius Mwaniki Karani (supra)**, the Court of Appeal held:-

***“That provision has been construed by this Court in the Matheka Case (supra) which laid out the guiding principles as follows:-***

***‘1. A grant may be revoked either by application by an interested party or on the court’s own motion.***

***“2. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts in essential in point of law or the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.***

***3. The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be acquired ....” (Emphasis added).***

31. I have already set out the grounds on which the applicant challenged the grant. All that is required of an applicant is to prove any of the grounds set out in **section 76 of the Act** in order to succeed.

32. The Original record shows that there were four entries and/orders made by the deputy registrar on 16<sup>th</sup> June, 1988. Firstly, the deputy registrar noted the Certificate of the Principal Registrar that no grant had been received presumably for the estate of the deceased, Secondly,

he noted the filing of the application for temporary letters of administration, Thirdly, he issued the temporary letters of administration and finally, he noted the filing of the objection on 26<sup>th</sup> May, 1988.

33. On 18<sup>th</sup> November, 1988, the deputy registrar noted the withdrawal of the objection and consequently issued a grant to **David Mbuko T. Mbui**, the petitioner.

34. The above two instances show that the grant was issued twice by the Deputy Registrar. Under the **Act**, the issuance of a grant is not an administrative act. It is a judicial act. Where a succession cause has been instituted in the High Court, the grant is to be issued by a Judge and not the deputy registrar. In the present case, not only was the grant wrongly issued by the deputy registrar, but it was issued.

35. As if the foregoing was not enough, on 11<sup>th</sup> August, 1988, the deputy registrar recorded that the parties had not agreed on distribution of the estate. He referred the issue of distribution to the District Officer, Imenti North for arbitration. On that date, the only person who is recorded to have been present in court was the petitioner. None of the beneficiaries was present. The question arises, on what authority did the deputy registrar refer the issue of distribution to the District Officer? On record was an application dated 13/07/88 by the petitioner against one Stanley M'Murithi M'Richui. There is nothing under the Act to show that the deputy registrar had the jurisdiction to hear that application. In any event, he could not consider it ex-parte in the absence of the other party or evidence of service.

36. There is the issue of what constitutes the estate of the deceased. In the chief's letter of introduction and **Form P&A 5**, it was clearly indicated that the estate of the deceased constituted of **Ntima/Ntakira/524** only. After the deputy registrar had referred the matter to the District Officer, Imenti North for arbitration, another property came into the picture in those proceedings. This was **Timau/Ngusishi/332. PExh2** was a document that was produced by the petitioner entitled "**APPLICATION FOR JUDGMENT BY CONSENT**". It was the purported result of that arbitration. It is in that document that for the very first time, the property known as **Timau/Ngusishi/332** was alluded to.

37. Several issues arise regarding the said arbitration and **PExh2**. As at the 11<sup>th</sup> August, 1988 when the deputy registrar was referring the matter to arbitration, the only pending dispute was the objection by **Stanley M'Murithi M'Richui** to the issuance of the grant to the petitioner. There was an application dated 13/7/1988 by the petitioner filed on 2/8/1988 against the said **Stanley M'Murithi M'Richui** for the objection to be heard by the court or to be referred to arbitration. The deputy registrar directed that the arbitration be undertaken within 90 days then set the matter for mention on 10<sup>th</sup> November, 1988. The matter was not mentioned on 10/11/88 but was mentioned on 18/11/88 when the objection was withdrawn and the deputy registrar proceeded to issue the grant to the petitioner.

38. From the foregoing, **Washington Gatobu** was nowhere in the picture to have been referred to as one of the adverse parties in the arbitration. Even as at that time, no application for confirmation had been lodged. In any event, both **PExh2** and the handwritten copy thereof that is on record are categorical that the arbitration was pursuant to an order made on 11<sup>th</sup> August, 1989 by Justice Samuel Oguk. There is no such order on record by Oguk J or any order made on 11<sup>th</sup> August, 1989. Accordingly, the document produced as **PExh 2** is of no use and as it has no basis both in law and fact. To the extent that it was acted on, all that arose out of it has no legal backing and must fall by the wayside.

39. The record shows that, the "Award" was lodged in court and read by the deputy registrar on 13/9/1991. Later on, Porter J seeing the "Award" on 10<sup>th</sup> March, 1992 confirmed the grant thereby confirming what was contained in **PExh2**. To the extent that the confirmation was based on **PExh 2** the same cannot stand.

40. In this court's estimation, it was not established that the applicant participated in the alleged "arbitral proceedings". There were no minutes produced to show when and where the alleged proceedings took place, those present in those proceedings and their capacity. **PExh2** does not show where and when the proceedings took place or whether the applicant was in attendance. All it shows is that, page 2 thereof is signed by amongst others **Washington Gatobu**. The District Officer Imenti North, before whom the proceedings were supposed to be undertaken has not signed it. Further, none of the participants (elders) in that arbitration was called to testify or any reason advanced for their failure to attend. In any event, I will have something to say about the mark appearing as the signature of the applicant later on in this judgment.

41. In this regard, it cannot be said that the applicant ever participated in the arbitral proceedings that culminated in the "Award" that led to the confirmation of the grant. In this regard, I am satisfied that the applicant had been able to prove that the grant was obtained fraudulently by the making of a false statement; the proceedings to obtain the grant and confirmation thereof were defective in substance; that there was concealment of material facts to this case. The grant cannot therefore stand.

42. The next issue is how the estate should be distributed. To answer this issue, the court must rule on the position of the property known as **Timau/Ngusishi/332**. It was the applicant's testimony and those of her witnesses that **Ntima/Ntakira/524** was the only asset of the deceased. However, it was the petitioner and his witnesses' evidence that the deceased had bequeathed to **Washington Gatobu, Timau/Ngusishi/332** during his lifetime while he gave the petitioner **Ntima/Ntakira/524**.

43. Firstly, as already found, the first time **Timau/Ngusishi/332** came to the picture in these proceedings is in the baseless arbitral proceedings that were stage managed by the petitioner to achieve his desired end. I have already found that the said arbitration had no basis either in law or fact.

44. Secondly, there was no satisfactory evidence to show that **Timau/Ngusishi/332** ever belonged to the deceased. The petitioner alleged that the deceased divided his properties between him and **Washington Gatobu** in the presence of some elders. None of those elders was called to testify on that aspect. The testimony of the petitioner was that someone by the name of **Corporal Muketha** balloted **Timau/Ngusishi/332** for and on behalf of **Koome Toma** whom the petitioner alleged to be **Washington Gatobu**.

45. On this aspect, it should be recalled that the alleged **Corporal Muketha** was neither called to testify nor the failure to call him explained. Further, this **Corporal Muketha** was allegedly balloting for **Koome Toma** in the 1980's, over 25 years after the demise of the deceased. A look at **PEXh.5**, which is a copy of the green card for **Timau/Ngusishi/332**, shows that the register was opened in 1985, 20 years after the demise of the deceased. It was in the name of the Settlement Land Trustees. The name of the deceased never featured anywhere. **PEXh.8** which the petitioner relied on as the basis of the deceased's ownership of **Timau/Ngusishi/332** does not support that fact.

46. I saw the witnesses testify. The petitioner came out as a pathological liar. A schemer of the highest order. One who had meticulously planned all these years to disinherit his only brother of the only property that belonged to their late father. I accepted the testimony of **OW4 Alice Karau Kirima**, the estranged wife of **Washington Gatobu**. She was honest that the land which **Washington Gatobu** balloted for at Ngusishi was found to be missing on the ground.

47. Because the petitioner set out to lie in order to disinherit his brother, he could not remember what he was telling the court over time. When the objector, **Stanley M'Murithi M'Richui** lodged his objection, his contention was that *"The deceased had agreed with me to put 0.21 points together with his land NO. NTIMA/NTAKIRA/524 during land demarcation"*. Clearly his claim was for 0.21 (acres or ha) in **Ntima/Ntakira/524** according to the document he filed in court on 4/5/1988.

48. In response to that objection, the petition explained how the objector was not related at all to the deceased in anyway whatsoever. He did not indicate that he had purchased any land from the objector.

49. Later, in his Replying Affidavit sworn on 23<sup>rd</sup> July, 2008 in opposition to the Summons for revocation, the petitioner stated that he bought 1.97 acres from the same objector, **Stanley M'Murithi**, which was added to 3 acres of the deceased to form **Ntima/Ntakira/524**.

50. At the trial, the petitioner narrated how he had in 1957 sold chicken while in Kiambu and purchased 5 acres of land from **Stanley M'Murithi**. That a portion thereof of 0.26 acres was excised for a road and that the deceased contributed a portion of 0.23 acres to make 4.74 acres that is **Ntima/Ntakira/524**. He swore that he purchased the said property for KShs.300/= of which he paid only 270/=. That it is the balance thereof that provoked the objection by **Stanley M'Murithi M'Richui** in this matter in 1988 when the petition was filed. That it is after the petitioner had paid the balance in November, 1988, then amounting to KShs.900/-, that **Stanley M'Murithi M'Richui** agreed to withdraw the objection.

51. Apart from that testimony expressly contradicting the petitioner's previous affidavits, it does not agree at all with the claim by **Stanley M'Murithi M'Richui** in his objection that was filed against the petition herein. To my mind, the petitioner is a person who cannot be believed. I did not believe either him or any of his witnesses who appeared to have been conditioned on what they were to tell the court.

52. As regards the documents produced by the petitioner, the signatures alleged to belong to **Washington Gatobu** differed. While the signature in **PEXh.2** and **PEXh.3** are similar, the signature in the letter dated 16<sup>th</sup> May, 1982 (**PEXh.4**) alleged to be that of **Washington Gatobu** completely differed from the one in **PEXh 2** and **PEXh 3**. That difference was never explained. Those signatures also completely differed with the signature appearing in **Washington Gatobu's** own affidavit in support of the Summons for revocation that is the subject of this judgment.

53. In view of the foregoing, I make a finding that at no time did the property known as **Timau/Ngusishi/332** belong to the deceased. That the deceased did not bequeath **Washington Gatobu, Timau/Ngusishi/332** as alleged by the petitioner. I also make a finding that the entire of **Ntima/Ntakira/524** belonged to the deceased and was the only property forming the estate of the deceased. Accordingly, under **section 38 of the Act**, that property was distributable equally to the two surviving children of the deceased, the petitioner and **Washington Gatobu**.

54. As regards the final issue, there was evidence that after the grant was confirmed, the petitioner subdivided the property and sold seven portions thereof to the interested parties. It was not disputed that the 5<sup>th</sup> and 6<sup>th</sup> interested parties followed all due diligence and properly purchased their portions, being **Ntima/Ntakira/2798** and **2792**, respectively. That they had undertaken the said purchases before the inhibitions were put and that they had undertaken massive developments on their subject portions. They produced evidence in support of the foregoing. It was submitted that their portions be spared the orders of this court.

55. That was not the case for the rest of the interested parties. It was established that they never bothered to carry-out any search as at the Lands office. That they entered into the transactions when there was already an inhibition against their respective portions. These were in respect of **Ntima/Ntakira/2802, 2793, 2794** and **2795**. Portion Nos. **Ntima/Ntakira/2796, 2797** and **2801** were also said to be still in the name of the petitioner.

56. **Section 93 of the Act** protects transactions undertaken by personal representatives. However, where such transactions are carried out in a fraudulent manner, they cannot be protected. In **Re-Estate of Christopher Aide Adela (Deceased) (2009) eKLR** the court observed:-

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

57. In Monica Adhiambo v Maurice Odera Koko [2016] eKLR the court held:-

*“With that said, the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the Law of Succession Act. The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property”*

58. In the present case, the petitioner acted in the most fraudulent manner against his brother. There was an inhibition against the portions purchased by some of the interested parties. Had they bothered to carry out a search, they would have realized that the portions were not available for sale or the titles were not clean. The petitioner having titles to the portions *per se* was not reason enough for the said interested parties to purchase the said portions. They assisted the petitioner in furthering his fraud against the other beneficiary of the estate. They have a cause of action against the petitioner for the monies paid.

59. Accordingly, the court is in agreement with **Mr. Mwarania’s** proposal on the orders to be made. That **Ntima/Ntakira/524** (or the subdivisions therefrom) is to be distributed equally between the petitioner and **Susan Gacheri**. That in order for this 30 year old matter to be brought to an end in this court, the orders should be such as not to make the parties return to this court again. Judgment is therefore entered as follows:-

- a) The grant issued to the petitioner and confirmed on 10<sup>th</sup> March, 1992 is hereby revoked.
- b) A fresh grant is hereby issued to the petitioner jointly with **Susan Gacheri**.
- c) The register in respect of **L.R No. Ntima/Ntakira/2793, 2794, 2795, 2796, 2797, 2801 and 2802** be and is hereby rectified by deleting the name of the petitioner and replacing the same with the name of the **Susan Gacheri**.
- d) The petitioner is directed to surrender to the Deputy Registrar forthwith all original titles for **L.R No. Ntima/Ntakira/2793, 2794, 2795, 2796, 2797, 2801 and 2802** for onward transmission to the Lands office, Meru for destruction.
- e) The petitioner, his family members, servants, agents, assigns or their tenants and the interested parties are further directed to forthwith quit and vacate from the aforesaid parcels of land within 30 days from the date of this judgment.
- f) Although this is a family matter, the petitioner must be told and in no uncertain terms be made aware that fraud and calculated wrongs do not pay. In this regard, he has to bear the pain of the costs of these proceedings.

It is so decreed.

**DATED and DELIVERED at Meru this 18<sup>th</sup> day of October, 2018.**

**A. MABEYA**

**JUDGE**