



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 353 OF 2004**

**IN THE MATTER OF THE ESTATE OF M' IMARIA MARIMBA ALIAS MARIA MARIMBA  
(DECEASED)**

**JULIA NCULUBI IMARIA.....1<sup>ST</sup> APPLICANT**

**GRACE KANINI IMARIA.....2<sup>ND</sup> APPLICANT**

**MARY AKUI IMARIA.....3<sup>RD</sup> APPLICANT**

**ESTHER KAINDA IMARIA.....4<sup>TH</sup> APPLICANT**

**-Versus-**

**JOYCE KANGAI MURUNGI (The window & legal administrator of the estate of**

**JACKSON MURUNGI M' IMARIA.....RESPONDENT**

**MOSES MUTUMA KITHURE & 8 OTHERS.....INTRESTED PARTIES**

**JUDGMENT**

[1] This Succession Cause has a rather sad history; close family members amongst have engaged in endless disagreements amongst themselves and with third parties on this estate. Be that as it may, revocation of grant of the Grant issued to the deceased Petitioner Jackson Murungi M' Imaria on 19<sup>th</sup> June 2006 was sought in the application dated 10<sup>th</sup> November 2014. The reason cited was that, the grant had subsequently become useless and inoperative by reason of the Petitioner's death. On 19th November 2015, the said Application was allowed with the consent of parties. It was further agreed that Letters of Administration of the Estate be issued to Joyce Kangai Murunggi. The parties further agreed that the Application to join the Interested Parties dated 23<sup>rd</sup> November 2015 be allowed and that as a consequence of the above orders the only outstanding issue is distribution of the estate. The parties also agreed that the proceedings on distribution be canvassed by way of *viva voce* evidence.

**Evidence**

[2] OW1 was Mary Akui Imaria. It was her evidence that the deceased was her father and that they were chased away from the estate property by their brother from their father's estate. Now she lives in a rented premises at Kiego market which was not very far from her father's estate. She said that she had 5 siblings namely; Jackson Murungi, Eunice Mwakaithuma, Grace Kanini M' Imaria, Mary Akui M'Imaria and Esther Kinda M' Imaria. It was her further evidence that their mother, Julia Nculubi Imaria is now deceased, and her body was still lying at the mortuary because the Respondent had blocked her burial on her husband's land original number 510. She told the court that their mother never remarried after the death of the deceased. It was her evidence that Jackson was dead but his family was living on the deead's land and that Eunice and Grace were also deceased. She further testified that Jackson had filed this succession cause alone without involving the other siblings and that further she did not agree to their land being sold to any of the purchasers herein. She further contended that they should be provided for in their father's estate and that the estate should be shared equally among all the five children of the deceased.

[3] OW2 was Esther Kahinda. She stated in court that the deceased was her father and that her mother Julia Nculubi is also deceased. It was her further evidence that their deceased father had left behind L.R No. 510 and that after his death, their mother was left on the land but they were later chased away by their brother. It was her further evidence that when their mother died, they tried to bury her on their land but they were told that the land had been sold; they were arrested and taken to Maua police station. She continued to testify that Grace Kanini was their sister who had been buried in his in-laws land; and that all of her sisters had been disinherited from their father's estate. Her sisters Grace Kanini and Eunice Mwawetume had left behind children who should be provided for. She stated that the deceased did not sell land in

his lifetime and that the estate should be distributed equally among all the 5 children of the deceased.

[4] RW1 Joyce Kangui adopted her witness statement dated 9<sup>th</sup> February 2016 as her evidence in chief. She testified that she was married by one Jackson Murungi Imaria (deceased) in 1973 and that her husband was a son of M' Imaria Marimba and Julia Nculubi and that they resided in land parcel No. Nyambene/Antubetwe-Njoune 510 with her family until the year 2014 when her husband filed this succession cause and was vested with the estate of the deceased on 18<sup>th</sup> January 2005. The land was subsequently subdivided into 3 portions which went to Jackson Murungi Imaria, Julius Kabiringu Nchebere and John Gitonga Murungi. It was her further evidence that her husband divided his portion and started selling portions and shared proceeds with his sisters (the 2<sup>nd</sup> to 4<sup>th</sup> Applicants). According to her, this was the reason why they never raised any objection to the sale when her husband was alive. It was her further evidence that prior to the demise of her husband, he had sold several portions which were included in the Confirmed Grant. She was also allocated a portion totaling 0.72 acres for herself and some other four portions cumulatively totaling to 0.80 acres of which she was to hold in trust for the minors. It was her further testimony that she was later on served with court documents whereby she was accused of subdividing and selling land belonging to Imaria Marimba which was not the case as all along this process was facilitated by the court. She therefore urged the court to dismiss the Applicant's case and their proposed mode of distribution and give the interested parties their legal entitlements.

[5] The Interested Parties case was as follows; John Mutua M' Ekotha testified as IP1. He stated that he had bought land from Jackson Murungi who had sold to him 10 points which was excised from 3058 and that he had bought another 10 points from his window (the Respondent herein) to enable her file the instant succession cause. He further testified that his wife (Jackson) filed succession cause at Maua and transferred the land to him and that he was currently using the land and that no one else was on the land. He further testified that the Protestors had never asked him to leave the land and urged the court to protect his acquisition.

[6] The parties thereafter agreed by consent that all affidavits and statements filed by the Interested Parties be admitted in evidence. After close of the respective parties' case, the court directed the parties to file submissions. As at the time of writing this judgment, none of the parties had filed submissions. I will nonetheless determine the case on merit.

## **ANALYSIS AND DETERMINATION**

[7] I have set out the evidence in ex tenso; not for lack of better analytical skill or style but so as not to miss the subtleties, power and grace of evidence adduced. I have carefully considered the evidence as well as the proposed mode of distribution by both the Applicants/objectors and the Respondent herein. There is no dispute that the 1<sup>st</sup> Applicant Julia Nculubi Imaria (now deceased) was the deceased's wife, whilst the 2<sup>nd</sup> to 4<sup>th</sup> Applicants are the children of the deceased couple. OW1 and 2 Mary Akui Imaria and Esther Kahinda gave clear, consistent and cogent evidence that they were chased away by their brother (the Respondent's husband) from their father's estate. They further testified that Jackson filed the instant succession cause alone and that he had excluded their mother and all the sisters. Their evidence on these particular respects was unshaken even under intense cross examination.

[8] The Respondent on the other hand contended inter alia that they resided in parcel land No. Nyambene/Antubetwe-Njuone 510, until the year 2014 when her deceased husband filed the instant succession cause, whereupon he was vested with the estate of the deceased, She explained that the land was subsequently subdivided into 3 portions which went to Jackson Murungi Imaria, Julius Kabiringu Nchebere and John Gitonga Murungi and that her husband had subdivided his portion. She also told the court that her husband started selling the said portions of land and shared the proceeds with the Applicants. Although, the Respondent contended that her deceased husband sold the lands in question and shared the proceeds with the Applicants, there is absolutely no shred of evidence to support that claim. Her claim that the reason they did not raise objections earlier or during her husband's lifetime was neither here nor there. These were mere allegations without proof. In cross examination she admitted that there were no single sale agreements that her husband's sisters witnessed or signed.

[9] The Respondent stated in cross examination as follows;

***“He had transferred to some purchasers himself before he died (i.e. my husband.....).***

Weigh this on what the evidence by IP1 John Mutua that he had bought from the deceased 10 points *and another 10 points from the Respondent to facilitate filing of succession cause.*

### **Defence of innocent purchaser**

[10] The Interested Parties had on diverse dates bought various parcels of land from the original Petitioner Jackson Murungi M' Imaria (deceased) and from the Respondent herein. Their main line of defence is that they were purchasers for value without notice and urged the court to protect their interest. I am alive to the provisions of Section 93 of the Law of Succession Act which provide thus;

#### ***93. Validity of transfer not affected by revocation of representation***

***(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.***

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

[11] Section 93 of the Law of Succession Act has been a subject of Judicial interpretation in a number of cases. In ***Jane Gachola Gathetha vs Priscilla Nyamira Gitungu and another (2006)*** eKLR the Court of Appeal in Nyeri stated thus;-

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

[12] *In Re-Estate of Christopher Aide Adela (Deceased) (2009)*. eKLR Rawal J stated as follows:

*“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.”*

[13] In this case the Applicants contended that the original Petitioner (Jackson) had excluded them and their mother from these proceedings and this contention remained uncontroverted throughout the hearing. A careful perusal of the original Grant dated 27<sup>th</sup> June 2006, issued to the original Petitioner Jackson Murungi Imaria shows that the Applicants have not been provided for and this renders support to their assertions that they were not involved in these proceedings and that they were not consulted. Therefore, the grant was obtained in contravention of the law. Thus, any transaction based on such grant would be irredeemably vitiated by irregularity. I dare to venture that the claw back on property rights in article 40(6) of the Constitution may be invoked in such case. The purchaser of such property may not claim to keep the property so acquired. A person who obtains a grant of representation upon concealment of material facts or with the aim of disinheriting others acquires no legitimacy as an administrator or transferor of land. This position is informed by the Constitution as right of inheritance is a right and is protected. See the wide powers given to court in law to protect and preserve estate property. Therefore, subsequent subdivision and transfers of land parcel no. Nyambene/Antubetwe Njuone/510 to the Interested Parties was tainted with illegalities and irregularities; the said transfers are therefore null and void abinitio. Accordingly, I order that all subdivisions of the original Title to Land Parcel NO. 510/Nyambene/Antubetwe and all subsequent titles thereto shall be cancelled and ownership of the original suit land to revert to the names of the deceased in the original title, i.e. being Land Parcel No.510/Nyambene/Antubetwe/Njoune. The Interested Parties are not left without a remedy; they have a claim (if any) against the person who sold them the land. The remedy does not lie in this succession cause. It is so ordered.

#### **Distribution**

[14] With regard to distribution I have carefully considered the proposed mode of distribution by both the Respondent and the Applicants/objectors. The Respondent proposes to give the 3<sup>rd</sup> and 4<sup>th</sup> Applicants 0.20 acres only she further seems to suggest that they are married. There was evidence on record that the 2<sup>nd</sup> Applicant was now deceased and that she had left behind children. No provision was however made for her dependants.

[15] The Applicants/objectors on the other hand have proposed to distribute Land Parcel No. 510/Nyambene/Antubetwe/Njoune which is the only property forming the estate of the deceased equally to all the children and where the deceased children are themselves deceased, then to the dependants of such children as follows;

- a) Family of Jackson Murungi Imaria.....0.876 Acres
- b) Family of Eunice Mukwetuma M’Imaria.....0.876 Acres
- c). Grace Kanini M’Imaria.....0.876 Acres
- d). MaryAkui Imaria.....0.876 Acres
- e). Esther Kainda Imaria.....0.876 Acres

[16] The Applicants/objectors have proposed to distribute the estate of the deceased equally to all the children of the deceased and where such children are deceased to their dependants. The Applicants/objectors have even provided for the family of the Respondent despite what she and the original Petitioner have taken them through including disinheriting some of the beneficiaries. Taking into totality all the circumstances in this cause, I find their proposed mode of distribution to be fair, equitable and reasonable and accordingly I adopt it as order of the court. The estate of the deceased shall therefore be distribute equally to all the children and where the deceased children are themselves deceased, then to the dependants of such children as follows;

#### **Land Parcel No. 510/Nyambene/Antubetwe/Njoune**

- a) Family of Jackson Murungi Imaria.....0.876 Acres
- b) Family of Eunice Mukwetuma M’ Imari .....0.876 Acres

c). Grace Kanini M' Imaria.....0.876 Acres

d). MaryAkui Imaria.....0.876 Acres

e). Esther Kainda Imaria.....0.876 Acres

[17] This being a succession matter there will be no order as to costs.

**Dated and Signed at Meru this 1<sup>st</sup> November, 2018**

.....

**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Meru this 5<sup>th</sup> day of November 2018**

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**A. MABEYA**

**JUDGE**