



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 166 OF 1997

IN THE MATTER OF THE ESTATE OF DIONYSIUS MUTURUCHIU (DECEASED)

JASPER M'ARIMBA NGUTARI PETITIONER

VERSUS

MERCY NYAWIRA KINYUA PROTESTOR

VICTOR MUTURI GITONGA..... INTERESTED PARTY

J U D G M E N T

1. **DIONYSIUS MUTURUCHIU (“the deceased”)** died on 14th November 1993. On 18th June 1997, **JASPER M'ARIMBA NGUTARI (the petitioner)** petitioned for letters of administration intestate and listed **L.R. NO. KIUNGOINE/236** as the only asset of the estate.
2. On 20th March 1998, the grant of letters of administration intestate were issued to the petitioner which were subsequently confirmed on 8th January, 1999. At confirmation, 3 acres were distributed to **Gideon Gitonga Nkabu (the interested party)** while the rest of the estate land went to the petitioner.
3. However, on his own motion the, Deputy Registrar, Hon. Oundu revoked the grant vide a ruling made on 23rd July, 1999 and reverted back the suit property to the name of the deceased. This was however, quashed by Tuiyot J. in 2001.
4. On 30th December 1999, **Kathure M'Turuchiu Choreira** lodged a protest against the confirmation of grant. Later in 2007, Mercy Nyawira Kinyua (the objector) took over from her as the objector.
5. On 22nd June, 2017, the objector filed an application for the revocation of the grant while **Victor Muturi Gitonga** was substituted as the interested party in the stead of his father Gideon Gitonga Nkabu on 4th July, 2018. The objector's application was heard by way of viva voce evidence whereby three (3) witnesses testified.
6. The Objector, **Mary Nyawira Kinyua** was born in 1982. She told the court that the deceased was her father and that she was only 13 years at the time of his demise. She was later informed of the filing of the petition after she became of age.
7. She testified that neither the petitioner nor the interested party was related to the deceased. That although her mother had separated with the deceased, the deceased continued to take care of her as she stayed with her grandmother (the deceased's mother) in Nkubu.
8. She further told the court that the deceased was an advocate by profession. That he had represented the petitioner in a murder case for which the petitioner paid the deceased by transferring to the deceased **ABOGETA/L-KIUNGONE/236** which was registered in the name of the deceased on 24th April, 1989.
9. In cross-examination, she confirmed that she had filed for the Succession of the deceased's estate at Nairobi in 2017 but had not included the property in this matter due to the objection proceedings pending herein. She confirmed that she had not seen any receipt to show that the deceased was paid any legal fees nor was she aware of any case by the petitioner claiming that his father had defrauded him of his land. She also did not know how the interested party got the property.
10. Since the petitioner and the interested party failed to file their affidavit evidence or witness statement, as ordered by the court, on which they were to be cross-examined on, it meant that they did not have evidence to offer at the hearing. On his part therefore, the interested party relied on an affidavit his father had sworn on 19th December, 2007.
11. His testimony was that he was an innocent purchaser for value without notice and was protected under *section 93 of the Law of*

Succession Act. That he had purchased **ABOGETA/L-KIUNGONE/236** from the petitioner as the personal representative of the deceased at two different times. That the said **ABOGETA/L-KIUNGONE/236** was no longer in existence what was in existence and in his own name were **ABOGETA/LOWER-KIUNGONE/874 &875**, respectively. That his family had been in exclusive occupation thereof since 2000. That he had tried to have discussions with the objector since she filed the present application but they had not settled the matter.

12. Although the court directed the parties to file their respective submissions, as at the time of writing the judgment, none of the parties had filed any. Having considered the affidavits on record and the evidence submitted, the issues for determination are; ***whether the grant issued to the petitioner should be revoked, and if so what orders should be made regarding the estate of the deceased.***

13. From the evidence on record, it was quite clear that the petitioner was not in any way related to the deceased. He was not a relative of the deceased or a creditor of the estate for that matter. He did not qualify under the provisions of the law to petition for letters of administration for the estate of the deceased.

14. The petitioner's case seemed to be that the deceased had represented him in a criminal case. That he was unable to pay the deceased his legal fees but instead intended to pay him with only one acre from the estate land. That however, the deceased defrauded him by registering himself as owner of the whole property.

15. Several matters remained unexplained by the petitioner. He did not tell the court when was the criminal case was concluded. Neither did he produce the agreement in respect of which the deceased was to receive only one acre from **ABOGETA/L-KIUNGONE/236** and not the whole of it as his fees? The deceased was registered as owner of **ABOGETA/L-KIUNGONE/236** on 24th April, 1989 yet the petitioner did nothing to claim his "defrauded land" from the deceased during his lifetime. He waited until the deceased passed on for him to lodge a claim by way of the petitioner herein.

16. The original file in this matter disappeared shortly after the grant was confirmed on 5th June, 1998. A skeleton file was opened shortly thereafter. For that reason, neither the original petition was on record nor, the letter of introduction by the chief were on record at the time of trial.

17. The documents that accompanied the petition indicate that the deceased died on 3rd April, 1995 while the Certificate of grant issued on 5th June, 1998 indicate that he died on 14th November, 1994. A copy of the death certificate annexed to an application by the original objector dated 30th December, 1999 show that the deceased died on 14th November, 1994. The petitioner petitioned for letters of administration of his estate sometimes in April, 1997. The documents petitioning do not disclose the capacity in which the petitioner was petitioning.

18. The grant was confirmed on 8th January, 1999 by the Deputy Registrar. The Deputy Registrar was to later on discover that there was fraud which had been perpetrated in the matter and he suo motto revoked that grant on 23rd July, 1999. Curiously, instead of the petitioner coming to court to set aside that order of revocation, he took out a completely separate Judicial Review proceedings to have that order quashed. This is to be discerned from the affidavit of the interested party.

19. From the foregoing, it is clear that the petitioner waited until the deceased died then he decided to raise a none existent claim against the deceased, that he had fraudulently transferred to himself a whole six acres in **ABOGETA/L-KIUNGONE/236** instead of one acre. This is contained in a copy of letter dated 31st December, 1998 from the Chief of Nkuene Location addressed to whom it may concern. The petitioner did not bother to cite any of the relatives of the deceased if at all he had any claim against the deceased's estate. There is no evidence that he ever filed any law suit either against the deceased or his estate before stealthily petitioning for letters of administration for his estate.

20. One other issue, it is doubtful whether the Deputy Registrar had any jurisdiction to issue and confirm the grant as it happened in this case. In the High Court, the issuance of and confirmation of a grant is not an administrative act which the Deputy Registrar can undertake. It is an exercise of judicial authority which is the preserve only of the Judge.

21. To my mind, the objector has proved that the grant in this matter was obtained fraudulently by the petitioner. **Section 76 of the Act** is clear that a grant obtained in circumstances such as in this case is a proper grant for revocation. The grant is hereby revoked.

22. The next issue is the position of the interested party. He claimed to be an innocent purchaser for value without notice. That he had purchased **ABOGETA/L-KIUNGONE/236** in two phases. That he was now the registered owner of the entire property now registered as **Abogeta/L-Kiungone/874 and 875**. That he was the one in exclusive occupation and should be protected by virtue of the provisions of **section 93 of the Act**.

24. I have perused the entire record and the following is what comes out. The interested party never produced any of the sale agreements allegedly have executed with the petitioner. He never disclosed in any of the affidavits he filed the date when the sale agreements, if any, were entered. He never disclosed for how much the property was allegedly sold to him; whether the agreed sum, if any, was paid to the petitioner and if so, when?

25. With all these flows, can the interested party be taken to have been an innocent purchaser for value without notice? How innocent was he? For what value did he acquire **ABOGETA/L-KIUNGONE/236** for? Didn't he have notice of the fact that the petitioner was on a fraudulent scheme?

26. Earlier in this Judgment, I indicated the speed at which the petitioner moved with to 'inherit' **ABOGETA/L-KIUNGONE/236** from the deceased. The record shows that, as early as January, 1999, barely two years into the petitioner's grand fraud to acquire **ABOGETA/L-KIUNGONE/236**, the interested party was by the side of the petitioner. In the Certificate of confirmation issued on 8th January, 1999, 3

acres in **ABOGETA/L-KIUNGONE/236** was shared to the interested party. For all purposes and intents, he presented himself to court as a beneficiary in the estate of the deceased! The question the court asks itself, which the interested party did not answer is, on what basis was he inheriting a share in the estate of the deceased?

27. On 11th January, 1999, barely three days after the confirmation of grant in which the interested party was a party, both the interested party and the petitioner presented themselves before the Registrar of Lands, Meru and had the entire **ABOGETA/L-KIUNGONE/236** registered in their names in the shares of 3 acres for the interested party and the petitioner the balance.

28. To my mind, the interested party was not as innocent as he wanted the court to believe. To the contrary, he was either a willing conduit for the petitioner's fraud or an accomplice all together in the grand scheme to defraud the real beneficiaries of the estate of the deceased of the estate.

29. To this end, the interested party cannot seek to hide behind **section 93 of the Act**. In the case of **Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu & Another [2008] eKLR**, the Court of Appeal held:-

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

30. In the same manner, the petitioner had no interest in the estate property. He passed none to the interested party and the interested party acquired none.

31. In view of the foregoing, I find that the application by the objector is meritorious and I allow the same. The grant issued to the petitioner on 5th June, 1998 is hereby revoked. The entries made on **ABOGETA/L-KIUNGONE/236** subsequent to the filing of this Succession Cause be and are hereby cancelled and **ABOGETA/L-KIUNGONE/236** is hereby ordered to revert back to the name of the deceased.

32. Since the objector indicated that she had since lodged an appropriate Succession Cause at Nairobi in respect of the estate of the deceased, I will not make any further orders as she can now include the property herein in those proceedings and inherit the property accordingly.

33. I will award the costs of these proceedings to the objector against both the petitioner and the interested party.

SIGNED at Meru Me: -

A. MABEYA

JUDGE

DATED and DELIVERED this 6th day of December, 2018.

F. GIKONYO

JUDGE