



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 321 OF 2003

IN THE MATTER OF THE ESTATE OF WILSON MUTYAUUVYU NDUNDA

BETTY MUINDI WILSON

STANLEY KASYOKA..... ADMINISTRATORS/RESPONDENTS

VERSUS

MATHEW NDUNDA WILSONINTERESTED PARTY

AND

STEPHEN M. MBITHI

GEORGE MATENJWA GACHAU

TAFUTA DEVELOPMENT CO. LTD OBJECTORS/APPLICANTS

AND

PAUL KIMOTHU NJOKI AND 17 OTHERS..... PROPOSED INTERESTED PARTIES

RULING

INTRODUCTION

1. There is pending hearing before the Court an application by Summons for Revocation of Grant dated 5th October 2015, where the objectors have sought both final and interlocutory reliefs, principally as follows:

1. That pending the hearing and determination of the application, an interim order do issue restraining the administrator/respondents either by themselves or jointly with others, their agents or other persons acting on their behalf or through them from any sale, transfer, charge or any other or further dealings or interference with the plots named therein “being part of plots comprising 40 acres of the resultant subdivision of Plot NO. Donyo Sabuk/ Koma Rock Block 1/ 202 sold by the deceased to the objector/applicants being plots nos. Donyo Sabuk/ KomaRock Block 1/7328 – 7772 and from taking possession, occupation or undertaking developments thereon;

2. That the amended Certificate of Confirmation of Grant issued to Betty Muindi Wilson and

Stanley Kasyoka on 19/11/2013 be revoked and afresh Certificate of Confirmation of Grant be issued to them, naming and listing the objectors/applicants as the rightful beneficiaries entitled to transfer of the aforesaid plots;

3. That any sale, disposal or transfer to any person or persons by the administrators/respondents of any of the above plots be revoked and all the plots be reverted and transferred with vacant possession to the objectors/applicants being the beneficial owners as purchasers thereof from the deceased; and

4. That the Court do issue such other or further orders as necessary for the preservation of the estate and the interests of the objectors/applicants.

[2] The Summons for Revocation of Grant is based upon an alleged sale by the deceased to the objectors of portions of the estate as follows: –

“The grant was obtained by means of an untrue allegation of facts essential in point of law to justify the grant in that-

i. The administrators did not disclose to the court, and knowingly concealed from the court the fact that the deceased had sold to the objectors/applicants, for the total purchase price of Ksh.2.1 million, 40 acres out of the original plot No. Donyo Sabuk/Koma Rock Block 1/7328 – 772 (inclusive of the above stated plots listed in the amended certificate of confirmation of grant) which plots beneficially belong to the applicants and should accordingly be transferred to the applicants as the rightful beneficiaries. The deceased on subdivision the original title was left with only plot No. Donyo Sabuk/ Koma Rock Block 1/ 7789.

ii. The administrators/respondents have wantonly and wrongfully been selling and transferring the said plots sold by the deceased as aforesaid and intend to continue to do so without the knowledge and consent of the applicants, and have made arrangements to distribute other plots amongst themselves and their siblings....”

[3] The application is opposed by the Administrators of the Estate who by a replying affidavit sworn by one of the administrators Stanley Kasyoka Wilson on 2nd December 2015 set out their case at paragraph 5 thereof as follows:

“a) Vide a sale agreement dated 15th July 1995, the deceased sold 25 acres piece of land to the objectors herein both trading as Tafuta Developments. The 25 acres were to be excised from the title NO. Donyo/Sabuk Koma Rock Block 1/202.

b) The total consideration of the sale agreement was Ksh.1,250,000/ (Read Kenya Shillings one million Two Hundred and fifty Thousand Only)”

c) At the time of signing the contract the objectors herein paid Ksh.90,000 (Read Kenya Shillings Ninety Thousand Only) and there was a special condition in the sale agreement that the remaining balance was to be paid not later than 30th September 1995. Annexed and Marked SK2 is a true copy of the said Agreement.

d) The late Mr. Wilson Mutyaavyu Ndunda had an intention of using the money out of the said sale of 25 acres to pay for the purchased (sic) of the tractor Registration No. KAG659E vide a higher (sic) purchase Kenya, Tanzania and Uganda Leasing Company Limited (K.T.U.). The objectors failed to adhere to the terms of the agreement causing the deceased to ran into arrears of instalment payment towards the tractor, the objectors herein (Tafuta Development) in fact wrote two letters dated 6/5/1998 and 13/5/1998 to K.T.U. Leasing Co. Limited acknowledging that they owed the deceased a sum of Ksh.600,000 and Ksh.400,000 (Read Kenya Shillings Six Hundred Thousand and Kenya Shillings Four Hundred Thousand) giving an undertaking that they will pay the required instalments on behalf of the deceased. Annexed and marked SK3 a, b are true copies

of the letters.

e) The objectors did not pay the instalments despite the demand letters from the deceased and finally the tractor was repossessed. Annexed and marked SK 4 a, b, c, d are true copies of the demand letter from the deceased to the objectors, and copies of the demand letters to the deceased demanding for the balance and a copy of the proclamation notice on the deceased properties.

f) The objectors failure to clear the balance of the purchase price left the deceased frustrated with a lot of debt where other than the tractor being repossessed his other properties were attached hence did not sign an transfer in favour of the objectors.”

[4] In a Supplementary Affidavit sworn by the 1st Objector on 18th January 2016, the objectors reiterated their contention “that the deceased with full knowledge of the respondents [administrators] sold to the objectors a total of 40 acres out of his plot No. Donyo Sabuk/ Koma Rock Block 1/202 and paid the full purchase price and the deceased excised them as Plot Nos. Donyo Sabuk/ Koma Rock 1/7328-7772, the deceased retaining for himself Plot No. Donyo Sabuk/ Koma Rock Block 1 /7789.”

[5] The Interested Party opposed the Objectors’ Summons for Revocation of Grant and raised a Preliminary Objection dated 25th February 2016 that the Objector’s claims was time-barred under sections 4(1) and 7 of the Limitation of Actions Act.

[6] By a Notice of Motion application dated 8th March 2016, the administrators sought that pending hearing and determination of the Summons for revocation dated 5th October 2015 the Court do issue a temporary injunction order restraining the Objectors together with their agents, servants or workmen from trespassing, selling, wasting disposing off, selling or interfering or in any manner whatsoever dealing with the deceased estate the subject matter of this suit.

[7] In a ruling dated 28th April 2016, the Court declined the Motion as the persons allegedly trespassing on the suit lands had not been joined as parties, significantly, as follows:

[6] However, it is a cardinal principle of law that an order may not be made against a person who is not a party to the suit without having been heard. The Administrators accept that the strangers on the suit parcels of land claimed to have bought the land from the objectors. To the extent that these may be bona fide purchasers for value without notice who have already acquired legal or beneficial interest in the parcel of land, they must be heard by the court before an adverse order is made against them as sought by the Administrators. The strangers on the ground cannot, as purchasers, be taken to be agents or servants of the objectors who may be bound by an order of court so worded. They are independent persons who ought to be joined as necessary parties and heard, if they so wish, before an order is made against them.”

TWO APPLICATIONS FOR JOINDER OF INTERESTED PARTIES AND IN OPPOSITION THERETO

[8] The Interested Parties who claim to have purchased parcels of land from the administrators and thereafter obtained title deeds thereto, have filed an application by Summons dated 11th December 2015 seeking to be joined in the proceedings as interested parties and that the applicants be granted leave to respond to the Summons for Revocation of Grant dated 5th October 2015.

[9] The grounds of the summons for joinder of the proposed interested parties are that they are *bona fide* purchasers for value and registered proprietors of named parcels of land part of the suit property whose title can only be challenged in accordance with the provisions of section 26 (1) of the Land Registration Act, 2012 and that as such registered proprietors their presence in the matter is necessary to enable the

court effectually and completely adjudicate upon and settle all questions involved in the Cause. The interested Parties also accused the objectors of non-disclosure of the proposed interested parties' interest of which they were well aware, and asserted their right to a fair hearing under Article 50 of the Constitution.

[10] The Objectors' opposition to the Interested Parties' application for joinder is primarily procedural that *"by virtue of Rule 60 of the Probate and Administration Rules the intended interested parties do not as a matter of fact and law need any leave of court to enjoin the proceedings and file any affidavit, their only licence to come to court as interested parties being entry of appearance in the cause. Thus there is no lawful or just cause for not complying with the Rule and failing to grounds of objections or replying affidavit to the application dated 1/2/2016 as they do not need leave of court to do so."*

[11] Substantively, the Objectors opposed the joinder of the interested parties through a counter-application by way of Summons dated 1st February 2016 seeking Orders that -

"1. This application be certified urgent and a direction be given that the application be heard and determined in priority to and before the application dated 11/12/2015 filed by the 18 interested parties, in light of prayer no. 2 below.

*2. The Summons dated 11/12/2015 by the 18 Interested Parties be struck out or dismissed with costs, **AND** the Title Deeds for the subject Plot Nos. Donyo Sabuk/ Koma Rock Block 1/7459, 7721, 7460, 7599, 7723, 7635, 7725, 7580, 7638, 7591, 7590, 7592, 7589, 7565, 7570, 7573, 7569, 7566, 7597, 7456, 7596, 7595, 7610, 7605 & 7623 be forthwith nullified, revoked and cancelled.*

3. The costs of this application be provided for."

[12] The grounds of the application dated 1st February 2016 were set out in the Summons as follows:

a. The application dated 11/12/2015 is incompetent and bad in law in so far it violates Rule 60 of the Probate and administration Rules as the mandatory Entry of Appearance has not been entered, without which the applicants have neither the right of audience before this court nor capacity to file any application before the court.

b. The subject Title Deeds afore stated and as per annexure PK 2 were transferred, registered and issued in blatant violation of preservatory orders issued on 17/8/2015 restraining the administrators from any interference, transfer or further dealings pertaining to the grant. Accordingly, the administrators had no lawful authority or power to effect the transfer thereof to the interested parties or act under the grant during the life of the order.

c. The Title Deeds were acquired through fraud or misrepresentation that the transfers were valid and lawful when that was not so as the administrators had by the order of 17/8/2015 been barred from any interference or transfer of the estate assets and from further dealings pertaining to the grant and could not lawfully effect any transfers thereof.

d. The Title Deeds were acquired illegally, procedurally or through a corrupt scheme intended to defeat the Objectors' interests thereto and the court's preservatory orders against any dealings with the estate assets and are thus invalid and illegal.

e. Holders of titles acquired through fraud or misrepresentation or acquired illegally, unprocedurally or through a corrupt scheme hold no valid titles and are not entitled to protection of the court.

f. The transfer of the subject titles to the interested parties have not been demonstrated to be valid as the transfers and titles are not supported by any valid documentation as no evidence of relevant material (eg) sale agreements and relevant and mandatory Land Control Board Consents has been placed before the Court to demonstrate the Titles were valid and procedurally transferred to the

interested parties.

g. The interested parties are not the subject of any orders to be issued under the Summons for Revocation of Grant dated 5th October 2015 and their interests can only be litigated against the administrators separately without involvement of the objectors.

h. The subject title deeds are not validly, illegally, procedurally and lawfully acquired and were acquired through fraud and misrepresentation and should be nullified, revoked and cancelled by this court, being transferred under a suspended grant which is a matter within the jurisdiction of this court seized of matters undertaken under a grant issued by the Court.

[13] The Court directed that the Objectors' application dated 1st February 2016 seeking the dismissal of the Interested Parties' application for joinder be heard as a response thereto, and parties agreed to file submissions thereon, and ruling was reserved.

[14] Counsel for the Parties - M/S Robson Harris & Co. Advocates for Proposed Interested Parties, M/S Mwanja Mbithi & Co. Advocates for the Objectors, and M/S P. Sang & Co. Advocates for the Administrators - filed written Submissions dated 3rd May 2016, 6th May 2016 and 16th May 2016, respectively.

Issues for determination

[15] Having considered the pleadings, affidavits and submissions of the parties and the proposed interested parties, I consider that the issue for determination in the applications the subject of this ruling may be condensed into two broad issues, namely:

a. Whether the proposed interested parties' application for joinder dated 11th December 2015 is competent; and

b. Whether the Objectors' Summons dated 1st February 2016 for nullification and cancellation of Interested Parties' titles to the suit parcels of land upon transfer by the Administrators may be granted at this stage by reason of breach of court order.

DETERMINATION

[16] At the outset, it may be observed that the dispute between the parties involved in this suit depends on the determination of two alternate questions, namely: whether the objectors had a beneficial interest, and to what extent, in the estate of the deceased, in which case such property would not be part of the deceased's free property capable of disposal by administrators; and two, whether in any event the sale of the parcels of land to the Interested Parties was transacted in breach of a restraining order of the Court, and therefore null and void. If however, the sale transactions by the administrators were valid, there will be a further question even if the Amended Confirmed Grant herein is revoked or varied, whether the sale is vitiated at all in view of section 93 of the Law of Succession Act, which provides as follows:

"93. Validity of transfer not affected by revocation of representation

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

(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.

See the Court of Appeal decision in *Musa Nyaribari Gekone & 2 others v Peter Miyianda & another* [2015] eKLR..

[17] In all the above situations it cannot be denied that the proposed Interested Parties have an interest in the suit: if the suit parcels of land are not part of the deceased's free property and therefore not available to the administrators of the estate or if the administrators had no valid authority to sell in views of a restraining order, the proposed interested parties will lose their right to the property to which they are registered proprietors upon their respective transfers upon purchase. In these circumstances, it cannot be said, as urged by the Objectors, that the dispute can be resolved as between the administrators and the objectors. At the very least, if the administrators authority to sell is shown not to have been enjoined by restraining orders of the Court, then the proposed interested parties are entitled to be heard on any question of validity of transfers of the parcels to them. The proposed interested parties are also entitled to be heard on the ingredient of complicity in any fraud or misrepresentation for purposes of the test for revocation of title in section 26 (1) (a) of the Land Registration Act.

[18] Under section 26 of the Land Registration Act, a registered proprietor's title can only be defeated in accordance with the Act. Section of 26 (1) of the Act provides as follows:

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that

the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

[19] Even if it is conceded that the right to property under Article 40 of the Constitution does not in terms of sub-article (6) protect **“any Property that has been found to have been unlawfully acquired”**, I would agree that the Interested Parties have a right to demonstrate to the Court, as the finder of that fact, that the property was not obtained by fraud or misrepresentation. To deny them such opportunity would be to violate their right to fair hearing under Article 50 (1) of the Constitution, which entrenches the right to be heard as follows:

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

[20] The **finding** that property is not protected by Article 40 of the Constitution must be a conclusion of fact (and law) upon hearing of the parties involved who wish to be heard on the matter.

General principles for joinder of parties

[21] It well settled that an applicant for joinder as a party to a suit need only demonstrate sufficient interest in the suit which justifies his being heard before an adjudication in the matter, and such interest need not be one that must succeed at the trial. The matter of joinder of parties is governed by recent authority of the Court of Appeal at Malindi in *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR where in considering an application for joinder in a regular civil suit it was held as follows:

*“From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in **Order I rule 10 (2)** bearing in mind the unique circumstances of each case with regard to the necessity of*

the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

[22] This Court considered an application for joinder in a constitutional application in **Benjamin K. Kipkulei v County Government of Mombasa & Another** [2015] eKLR and held as follows:

- 19.....*The test for joinder of a party as an interested party is not that the applicant must show a stake or interest that must prevail in the suit, as that is not possible before the full hearing of the matter; the applicant should demonstrate a legal interest that calls for hearing before a decision on the dispute before the court is adjudicated. In common judicial parlance, I would say that the applicant ought to show on ‘an arguable case’ basis that he has an interest recognized in the law and capable of protection. As a registered proprietor of the suit property upon public auction which is subject of challenge in these proceedings, the proposed party has an identifiable stake and legal interest in the property the subject of, and therefore an interest in, the proceedings before the Court.*
- 20.*In keeping with Article 159 of the Constitution of Kenya 2010, for the promotion of substantial justice without undue regard to technicalities of procedure, I would find that to require the proposed interested party to wait for the determination of the petition between the petitioner and the respondent to find out whether it shall, if the petition is defeated, keep the suit property or sue the respondent for damages if the petition is successful, is breach of the substantial justice principle as the entire dispute between the parties could be heard and determined as one whole after hearing all the parties.”*

Interested Parties under the Law of Succession

[23] With respect to succession proceedings, the need to give a hearing a person who has an interest in the suit is recognised, for instance, under section 76 of the Law of Succession Act, which gives locus to “any interested party” to move the court for revocation or annulment of grant. Similarly, Rule 60 of the Probate and Administration Rules provides as follows:

“Every interested person (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the Registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the applicant may with leave of the court file an affidavit in reply.”

[24] It is clear that the proposed that interested parties were less than scrupulous in their observance of the rules of court applicable to the matter. For that default, the proposed interested parties or their legal advisors may be mulcted in costs, but would their failure to follow the correct procedure by entering appearance and filing replying affidavits to the objectors’ application for revocation of grant entitle the court to make orders that would adversely affect them without hearing them, despite their well-expressed intention so to be heard through the very application, albeit incompetent, for joinder as interested parties?

[25] Default in compliance with rules of procedure may be excuse in the interest of justice in accordance with Article 159 of the Constitution. In the majority decision of **the Court of Appeal (Ouko, JA with whom J. Mohamed, JA agreed) in Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 6 others** [2013] eKLR, it was held that –

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its

*highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. **Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.***”

[26] In his dissenting judgment (relied on by the Objectors) and in declining to apply the Article 159 principle to salvage the appellant in the **Salat** appeal, supra, Kiage, JA was apparently influenced by what appeared to be impunity in a deliberate failure on the part of the appellant to follow the rules of which he was aware saying:

“One gets the distinct impression from the record that the appellant, though aware of his default has resorted not only to diversionary blame, but a veritable taunt at the applicants “Mta-do.”

*I am not in the least persuaded that **Article 159 of the Constitution** and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”*

[27] Article 159 (2) (d) and (e) of the Constitution enjoins that the Court -

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

....

*(d) **justice** shall be administered without undue regard to procedural technicalities; and*

*(e) the **purpose and principles** of this Constitution shall be protected and promoted.*

Needless to say, Rule 60 of the Probate and Administration Rules is a rule of procedure, while the right to protection of property and to fair hearing for adjudication of disputes are substantive justice rights part of the Bill of Rights the promotion of which is, under Article 10 thereof, one of the principles of governance under the Constitution. I think that the interest of justice in this case require that the interested parties as registered proprietors of the suit parcels of land be heard before a determination as to the validity of the transfers of the title to the property to them.

[28] The Interested Parties’ substantive right to be heard is recognised both under the Constitution and the Rule 60 of the Probate and Administration Rules. The Interested Parties clearly sought to exercise their undoubted right to be heard and their only default is in the rules of court applied, and not in failure to pursue their right. With respect, I do not agree that a party who, as here, has a **clear** interest in a suit may be refused a right to hearing merely because he adopts a faulty procedure in seeking to be joined and to be heard in the suit as an interested party. That would be to give “**undue regard to procedural technicalities**” and unconstitutionally elevate technicalities of procedure to trump substantive justice rights to property and fair hearing under the Bill of Rights which, in accordance with Article 19 (3) (c) of the Constitution, “*are subject only to the limitations contemplated in this Constitution.*”

[29] Although no time limit is prescribed in Rule 60 of the Probate and Administration Rules, I consider that the same should coincide with the period of 14 days prescribed for a regular civil process to file an appearance and thereafter within a similar period file a replying affidavit. In any case, Rule 67 of the Probate and Administration Rules provides for enlargement of time by the Court on application or own motion as follows:

67. Enlargement of time

Where any period is fixed or granted by these Rules or by an order of the court for the doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.

[30] Accordingly, while the Court will award costs of the proposed interested parties' application to be joined as interested parties to the Objectors, it will uphold the interested parties' right to be heard by allowing them within 14 days to enter appearance and file replying affidavits to the Objectors' Summons for Revocation of Amended Confirmed Grant dated 5th October 2015.

Whether Objectors' application of 1st February 2016 may be granted at this stage

[31] It would be wholly artificial to hold that a person who has filed an affidavit in a suit on a previous application setting out his case in the matter, which is diametrically opposed to the position taken by another party in a subsequent application filed in reply to that said person's case has not controverted the latter party's case merely because he has not filed a 'replying affidavit' to the later application. In common judicial parlance, the issues must be deemed to be joined on the respective contentions taken by the parties in their respective applications and supporting affidavits. The proposed interested parties' case that they are *bona fide* purchasers without notice and registered proprietor of the suit parcels of land, which is the primary contention in their application for joinder dated 11th December, 2015 is a complete answer to the Objectors' application dated 1st February 2016 for nullification and cancellation of titles held by the Interested parties.

[32] On its merits, while the application makes assertion that the "" no attempt was made by the Objectors to prove the illegality, fraud and breach of the court order as alleged. While the Certificates of Title attached to the Proposed Interested Parties application for joinder show that the registration and issue of titles happened between 31st August 2015 and 9th November 2015, there was no evidence as to when the transfers of title were made, the documents lodged for registration so as to demonstrate that the administrators dealt with the parcels of land contrary to the order of the court, which was issued on 17th August 2015 and subsequently extended from time to time.

[33] Neither was there evidence adduced as to the service of the Order granted *in the absence of the parties* upon the application by Notice of Motion dated 17th August 2015 by the Interested Party against the respondent Administrators. The said application sought principal orders as follows:

“2. That pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to issue an Order of Injunction restraining the respondents alone or jointly with others, his agents or anybody acting through them from interfering or making any further dealings pertaining to the Grant herein.

3. That the Respondents herein be ordered to provide an Account for the Estate of the Late Wilson Mutyaavyu Ndunda.

4. That the court directs that the properties that the administrators have sold without consent of other beneficiaries be deemed as their portions out of the deceased estate.”

[34] Upon reading the said application, the Court (C. Kariuki, J.) made an order *in chambers in the absence of both applicants and the respondents* that –

“Court:-

I have perused the application dated 17/8/015 and the supporting affidavit. I grant Prayer 2 for 14 days. The application be served for direction on 26/8/015.”

[35] However, there was no evidence that the said Order was lodged against the titles at the Lands Registry so as to provide constructive notice on the Proposed Interested Parties and all who dealt with the parcels of land.

Proof of illegality and fraud

[36] It is trite that allegations of illegality and fraud attract a higher standard of proof above the regular civil standard of balance of probabilities. The Objectors have not adduced evidence to the required standard that the transfer of titles to the proposed interested parties was illegal, fraudulent and in breach of a restraining court order.

[37] Indeed, even on a balance of probabilities, the objectors’ application fails because, from the evidence of Certificates of Titles issued on 31st August 2015 it is probable that the transactions leading to the transfer and registration of the titles had taken place well in advance of the registration on 31st August 2015 and not inconceivably before the restraining order of 17th August 2015 was made. Prayer 4 of the said application of 17th August 2015 is telling that the Administrators had already sold some of the properties hence the prayer that such plots be deemed to have been taken from their respective portions of inheritance.

[38] At paragraphs 4 and 5 of the supporting affidavit of Mathew Ndunda Wilson, the Interested Party herein, sworn on 17th August 2015 in support of his Notice of Motion of 17th August 2015, it conceded that the administrators had already sold some of the properties of the Estate subject of the suit as follows:

“4. That on the 19th November 2013, an Amended Certificate of Confirmation of Grant was issued to the Respondents. A copy of the same attached herewith marked MNW 3.

5. That all the Respondents [the Administrators] have gone ahead to sale (sic) and transfer several parcels of Land contrary to what was earlier on agreed by all the beneficiaries without their consent and used all the benefits for their personal use. Attached herewith are copies of the Search Certificates that have so far already been transferred to third parties marked MNW4 a-n.”

[39] There is nothing to show that the plots complained of by the Interested Party as having already been sold without consent of other beneficiaries and therefore to be deemed as having been taken from the administrators’ inheritance share were not those purchased by the proposed Interested Parties, the dealings wherewith precedes the Court order of 17th August 2015. Indeed, from the Certificates of Search attached as Exhibit MNW4 a-n in the supporting affidavit to the Notice of Motion of 17th August 2015, it is clear that some of the plots whose titles are sought to be nullified and cancelled, that is to say, plots nos. Donyo Sabuk/ Koma Rock Block 1/7599, 7456, 7460, 7580, 7635, 7723, 7725, 7459, and 7721 were registered and titles issued in the names of the proposed Interested Parties long before the court Order of 17th August 2015, with some as far back as 1st October 2014.

[40] The Objectors improperly attempted, contrary to the provisions of sections 107 and 108 of the Evidence Act, to shift the burden of proof to the proposed interested parties by deponing in the supporting affidavit of Stephen M. Mbithi of 1st February 2016 that –

“5. That accordingly the application should be struck out with costs and the subject title deeds nullified, revoked or cancelled on the grounds that :-

(h) *The 18 interested parties' title deeds have not been demonstrated on the evidence tendered that they were validly and procedurally issued in that:-*

(i) *The Court orders of **17/8/2015** were in force when the titles were transferred and issued and so they were invalidly issued in violation of a court order.*

(ii) *Relevant sale agreements, applications for and mandatory consent of Land Control Board are non-existent and Court can only find that the transfer were invalid and effected by administrators whose authority under the Grant had been suspended by a court order.*

iii. *There is no evidence confirming that Objectors were aware of the Interested Parties' interests."*

[41] The burden of proof in the objectors' application for nullification, revocation and cancellation of titles on the grounds of alleged illegality, fraud and breach of court orders remained in accordance with section 108 of the Evidence Act with the Objectors as the proponents of the illegality, fraud and breach of court order. It was not discharged. Accordingly, I would find, and so hold, that the later limb of prayer 2 of the Objectors' Summons dated 1st February 2016 is without merit.

Other relevant considerations

[42] The Objectors relied on a content on that the suit property was or was not "free property" of the deceased as defined in section 3 of the Law of Succession Act so as to form part of his estate for inheritance by the administrators and disposal to the Interested parties, citing **Geoffrey Ndungu Kinuthia and Another v. Mary Njoki Karanja**, Court of Appeal at Nairobi Civil appeal No. 270 of 1997. However, that is a matter for determination at the trial of the Summons for Revocation of Amended Confirmed Grant dated 5th October 2015.

[43] At such hearing the Court is at liberty to call for *viva voce* hearing where the situations demands it as provided for under Rule 41 (1), (2) and (3) of the Probate and Administration Rules in the case of hearing of application for confirmation of grant as follows:

"41. Hearing of application for confirmation

*1. At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed **and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative"***

[44] In the circumstances of this case, the dispute may be resolved only by a determination of the question whether the Objectors have an interest, and if so to what extent, in the suit property. I would agree, as held by Nyamweya, J. in **Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v. Caroline Wangui Kiguru**, Nairobi ELC suit NO. 351 of 2013, [2013] eKLR, that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the Constitution and the High Court as the Succession Court under section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction.

[45] However, without deciding, it would appear that the Environment and Land Court is more suited of the two courts for the hearing and determination of the question of **beneficial ownership** of the suit property asserted by the Objectors and denied by the administrators, and which really turns on construction of contracts of sale of land alleged by the parties. The determination of the interested parties' right to property is simply a matter of application of succession and land law, and it depends on the finding of the court on the question of beneficial ownership of the suit property.

[46] But that is not say, as urged by the Objectors, that the interested parties need not be heard in the ownership dispute between the administrators and the objectors: should the Court hold that the suit land is

estate property, the administrators would be entitled to sell to the proposed interested parties, and that would be the end of the dispute. Should the Court, however, find that the asset was not part of the deceased's free property, the question of cancellation of the interested parties' titles would arise. As persons holding the title to the land with the protection of section 26 of the Land Registration Act and who stand to lose it upon adverse adjudication of the issue of the asset being part of the deceased, the Interested Parties must be heard on the question of their involvement in a fraudulent transaction or whether *the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme* to justify the revocation of their title.

[47] Therefore, for purposes - in the words of Order 10 (2) of the Civil Procedure Rules ***“in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit”*** - the proposed Interested Parties ought to be heard and the permissive provisions of the said Order 10 (2) of the Civil Procedure Rules in cases of a civil suit before the Environment and Land Court or Rule 60 of the of Probate and Administration Rules (P & A) Rules in the Succession Court come into aid.

[48] The Court of Appeal has in ***Dr. Leonard Kimeu Mwanthi v Rukaria M'twerandu M'iriungi [2013] eKLR*** deprecated the mixture of pure succession questions and ownership disputes in applications before the Succession Court and has advised that separate civil causes be filed as follows:

*“The litigation in this matter has seen parties litigate for the same subject matter both under the **Civil Procedure** and the **Law of Succession**. We must state this is a procedure that causes confusion as there is a clear justification and sound reasoning why Legislature separated both regimes. This case is a clear demonstration that when both regimes of law are applied interchangeably, a simple matter for example of Succession of a deceased estate becomes protracted and parties keep hovering from the civil court to the succession cause.*

*The **Law of Succession Act** was envisaged as a complete regime of law complete with its own procedure for purposes of administering the estate of a deceased person and the distribution of the estate to the beneficiaries. If there is any claim of civil nature against a deceased's estate, a claimant is supposed to file a civil suit against the administrators of the deceased's estate. Involvement of claimants of civil obligations or others in matters of the administration of a deceased estate causes delays and difficulties in resolving them within the regime of the law of succession.”*

[49] Indeed, even the Law of Succession Act contemplates the hearing before a civil court of beneficial ownership disputes in accordance with Rule 41 (3) of the P & A Rules as follows:

“(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of [section 82](#) of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to [section 71\(2\)](#) of the Act, proceed to confirm the grant.”

[50] However, the determination of the Summons for Revocation of the Amended Confirmed Grant is not before me and I cannot, therefore, in this ruling, make a decision whether the dispute as to the beneficial ownership of the Objectors in the property listed in the Amended Confirmed Grant are part of the deceased's estate or not should be heard by this Succession Court or the civil court (now the Environment and Land Court). What is before me is merely the application for joinder of the Interested Parties and the application for nullification and cancellation of titles to the suit parcels of land for the determination of which it is not necessary to rule on the proper place of suing.

Nullification, revocation and cancellation of Titles

[51] To be sure the nullification of titles sought by the Objectors in their application of 1st February 2016

is primarily consequential relief that may be granted upon hearing and determination of summons for revocation herein. Undoubtedly, the Court has power upon hearing and determination an illegality has been committed to make consequential orders to rectify the situation as happened in where the Court of Appeal found in *Esther Njoki Rurigi v. Patrick Gathenya* [2005] eKLR (Githinji, Waki, JJA & Deverell, Ag. JA) that an amendment to a land Registry Index Map (RIM) was illegal and, therefore, cancelled the same as follows:

***“We have made a finding that the amendment of the RIM resulting in the exchange of the two parcels was illegal and a nullity. That being the case the appellant was entitled to the reliefs Nos. 1 and 3 of the Originating Summons. The appellant also claimed damages for trespass. This is not, however, a suitable case for the award for damages because it is the illegal action of the Land Registrar which has largely contributed to the problem. Similarly, this is not a suitable case for the award of the costs of the suit to the appellant because if it was not for the illegal action of the Land Registrar this suit, perhaps, would not have been filed. Lastly, this is a suitable case for making a consequential order concerning the illegal amendment of the respective Registry Index Maps to obviate unnecessary disputes and litigation.*”**

We are not without sympathy for the respondent for the situation he is enmeshed in. However, equity follows the law and we have to apply the law as it is without any adulteration.

For the reasons that we have given above, we allow the appeal with no order as to costs. The judgment of the superior court given on 25th February, 2000 dismissing the appellant’s suit with costs is set aside. In substitution, judgment is entered for the appellant in terms of prayers No. 1 and 3 of the Originating Summons dated 3rd February, 1999 with no order as to costs in the superior court.

Consequently, the illegal amendments of the R.I.M. for parcel Nos. Kiambaa/Kanunga/449“A” and 499“B” pursuant to the letter of the District Land Registrar, Kiambu dated 15th April, 1982 and the Director of Survey’s letter dated 19th April, 1982 are cancelled. The respondent do give vacant possession of the suit land to the appellant within 6 (six) months from the date hereof and in default eviction order do issue. Those are the orders of the Court.”

[52] If the objection is that the administrators could not dispose what was not free property of the deceased, the Court has no basis to grant the Summons for nullification of the titles of the Proposed Interested Parties without having heard the main Summons for Revocation the Amended Grant by which the Objectors seek a determination that the suit property is not part of the estate of the deceased, the hearing wherefor must be had with participation of the Interested Parties as registered properties whose titles may only be defeated upon being shown, pursuant to section 26 (1) of the Land Registration Act 2012, to have been obtained by fraud or misrepresentation (including as to existence or otherwise of a restraining order of the Court) to which they were parties or otherwise that *the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

ORDERS

[53] Accordingly, for the reasons set out above, the Interested Parties application for joinder by Summons dated 11th December 2015 is struck out as incompetent and costs thereof shall be paid by the proposed interested parties to the Objectors.

[54] The Objectors’ application by Summons dated 1st February 2016 is dismissed with costs to the Administrators and the proposed Interested Parties.

[55] The proposed interested parties are at liberty to enter appearance and file replying affidavits to the Objectors’ Summons for Revocation of the Amended Confirmed Grant dated 5th October 2015 as necessary pursuant to Rule 60 of the Probate and Administration Rules within 14 days.

[56] In the interest of justice, the interim orders of the Court are extended in order to maintain the status quo pending the hearing and determination of the application for revocation of the Confirmed Grant herein, or until further orders of the Court.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 15th DAY OF February 2017.

O. NYAMWEYA

JUDGE

APPEARANCES:

M/S P Sang & Co. Advocates for the Administrators.

M/S Ng'etich and Associates, Advocates for the Interested Party.

M/S Mwanja Mbithi & Co. Advocates for the Objectors.

M/S Robson Harris & Co. Advocates for the Proposed Interested Parties.