



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. 830 OF 2008**  
**IN THE MATTER OF THE ESTATE OF NGUNZA MUA NGEI**  
**JOHNSON MUINDE NGUNZA**  
**BENSON KATEETI NGUNZA.....ADMINISTRATORS/RESPONDENTS**  
**VERSUS**  
**MICHAEL GITAU KIARIE & 12 OTHERS.....OBJECTORS**  
**RULING**

**INTRODUCTION**

[1] Before the Court is an application for confirmation of Grant dated 12<sup>th</sup> January 2015 supported by the affidavit of Johnson Muinde Ngunza, the first petitioner/administrator deponing that “the identification and shares of persons beneficially entitled to the estate have been ascertained and determined as per the schedule hereto marked JMN1 to which the beneficiaries have consented.”

[2] By a **Protest to Confirmation of Grant dated 8<sup>th</sup> May 2015**, the Objectors protest that they had completely been excluded from the distribution schedule and assert that they are beneficiaries of the Estate by virtue of sale by the petitioners of several portions of land from the deceased’s parcel of land known as Mavoko Town Block 3/2097.

**THE LAW**

***Procedure and powers of court in proceedings for confirmation of grant***

[3] The procedure and powers of the court in exercise of its jurisdiction of the court on an application for confirmation of Grant are set out in Rule 41 of the Probate and Administration Rules (P&A Rules) 1980. **The Court is obliged to consider the application, the Grant, affidavits and protests and to hear the applicant, the protester and any interested party in person or by Counsel.**

[4] Rule 41 of P&A Rules is in terms 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.**

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

(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.

(4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

(5) Where the court in exercise of its power under [section 71 \(2\)\(a\)](#) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.

(6) Where the court, in exercise of its power under [section 71\(2\)\(b\)](#) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.

(7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given.

(8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced.

(9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.”

### **Pleadings, Affidavits and Submissions**

[5] The Administrators have in affidavits previously filed in court in support of an earlier application for confirmation of Grant accepted and named some of the Objectors as being beneficially entitled to the suit parcel of land.

[6] The dispute in the matter started with an application dated 27<sup>th</sup> July 2011 for Revocation of Grant issued by the Court to the two petitioners on 3<sup>rd</sup> February 2011. The grounds for the application were that the petitioners who had sold some portions to the objectors had not joined them as beneficiaries even though they had constructed permanent buildings on the land upon purchase of the portions of land. The

application for revocation of grant appear to have been settled by an order of the Court (Dulu, J.) made with consent of the parties on 20<sup>th</sup> June 2012 that-

- “1. The petitioners have seven (7) days to file documents recognizing the objectors as purchasers, and purchasers who have not finalised payments to do so.*
- 2. Thereafter the Deputy Registrar to fix mention date for directions.”*

[7] The Petitioners then filed a Summons for confirmation of Grant dated 2<sup>nd</sup> November 2012 supported by an affidavit of Johnson Muinde Ngunza sworn on 2<sup>nd</sup> November 2012 in which the first petitioner at paragraphs 7 and 8 thereof identified some 15 persons as beneficially entitled as purchasers and attaching copies of sale agreements to parcel of land herein and confirmed as follows:

*“7. That the **identification and share of all persons beneficially entitled to the estate have been ascertained and determined as per the schedule attached hereto marked annexure JN1.***

*8. That the aforesaid persons **though not named survivors of the deceased are entitled through purchase which fact is well within the information and with the consent of the deceased beneficiary** attached hereto is **a bundle of sale agreements** marked JM2.”*  
*(sic)*

[8] In a replying Affidavit sworn by Francis Muhia Kimani on behalf of the Objectors sworn on 11<sup>th</sup> December 2012 objected that confirmation of Grant as proposed in the Schedule of distribution in the application would create disputes because two beneficiaries had not been included in the Schedule and the total acreage shown on the Schedule exceeded the size of the disputed parcel of land, as follows:

*“5. That the said application filed on 2/11/2012 has left two beneficiaries namely Edward Mutisya Musyoki and Nyakwirigiria who have bought one acre each and paid in full.*

*6. That the acres as stated in the list of beneficiaries are more than on the ground as it states 44 while on the ground is 40 acres.”*

It was not clear whether the two persons missing on the schedule of beneficiaries were the persons that the Court in its order of 20<sup>th</sup> June 2012 above directed that *“purchasers who have not finalised payments to do so.”*

[9] In further reply, another Objector, Michael Gitau made a Further Affidavit sworn on 7<sup>th</sup> June 2013 deponed that the entire parcel of land Mavoko Town Block 3/2097 had been wholly sold out by the petitioners and they had instructed a surveyor to subdivide the land, as follows:

*“2. That the deceased land known as Mavoko Town Block 3/2097 was completely sold by Petitioners herein and the same subdivided accordingly. (See the attached list of buyers marked MG1).*

*3. That the surveyor was instructed by the Petitioners herein to subdivide the same to the purchasers accordingly. (See the attached map marked MG2).”*

[10] The second Petitioner, Benson Kateeti Ngunza, made an affidavit entitled Further Affidavit in Support sworn on 10<sup>th</sup> June 2013 in response to the further affidavit of Michael Gitau aforesaid, and disputed the subdivision shown in the Further Affidavit of Michael Gitau is correct subdivision on the ground and proposed a fresh distribution of the suit parcel of land to the two houses of the deceased in equal shares with each house thereafter making provision for the persons who bought a share from their share, as follows:

*“3. That indeed we instructed a surveyor to subdivide the parcel of land [but] the objectors herein have been contracting other surveyors without our knowledge and what is provided herein does not capture the correct subdivisions involving all parties.*

*4. That indeed what is annexed herein is not what is sought to be divided at the ground.*

*5. That I aver that indeed the estate of the estate of the deceased Ngunza Mua comprised of two houses namely:-*

*1) Ndila Ngunza’s house and*

*2) Agnes Mutilu Ngunza’s house*

*And we beneficiaries of both families have agreed to share the parcel no. Mavoko Town Block 3/2097 in equal shares of each house 20 acres.*

*6. That thereafter each house or its representative shall proceed and transmit the properties to any purchasers/creditors who have bought a parcel from their share.*

*7. The scheme of distribution filed by the respondent is totally unacceptable to us and we opine that instead that the grant be confirmed in terms proposed in the amended schedule.”*

**[11]** Without any formal withdrawal being filed, the petitioners filed another application for confirmation of Grant dated the 12<sup>th</sup> January 2015, the Objectors’ Protest to which is the subject of this ruling.

### **The new application**

**[12]** The Summons for Confirmation of Grant dated 8<sup>th</sup> May 2015 seeks to have the disputed parcel of land distributed to the two houses of the wives of deceased, in the same manner as set out in the Schedule attached in the Further Affidavit in Support sworn by the 2<sup>nd</sup> Petitioner on 10<sup>th</sup> June 2013, aforesaid. The Objectors filed a Protest on the said ground on non-recognition of their beneficial interest as purchasers of portions of the estate’s asset, land parcel Mavoko Town Block 3/ 2097 and their exclusion on the distribution schedule.

**[13]** With consent of Counsel for the parties, the Court (Thuranira Jaden, J.) on 11<sup>th</sup> May 2015 directed that the Protest be canvassed by way of affidavits and submissions and fixed the matter for mention on 6<sup>th</sup> October 2015, when this Court took over the matter and reserved judgment. Counsel for the Parties – M/S D.M Mutinda & C0. Advocates for Objectors and M/S Muema & Associates, Advocates for the Petitioners – filed written submissions dated 30<sup>th</sup> June 2015 and 2<sup>nd</sup> October 2015, respectively.

### **Respective Cases for the Parties.**

**[14]** The Court has considered the pleadings, affidavits and the written submissions filed in this matter. The Petitioners submitted that the sale of land subject of the application took place before the Grant to the Petitioners was confirmed to the administrators amounting to intermeddling, a nullity and a criminal offence, as follows:

*“The objectors allegedly bought the parcels of land on diverse dates from 4<sup>th</sup> October 2007 and the deceased died on 31<sup>st</sup> May 2007, a grant of representation was made to the petitioners on the 3/02/2011. The law on intermeddling is set out section 45(2) as follows:- “Except so far as expressly authorised by this Act, or by any other written law or by a grant of representation under this Act, no person shall for any purposes take possession or dispose of or otherwise intermeddle with any free property of a deceased person.” The petitioners or any other beneficiaries had no authority to the [sell] to the*

objectors [and they] cannot be said to have acquired any interest over the property.

*The law is well set out in section 82(b) (ii) which states “personal representatives shall subject only to any limitation imposed by their grant, have the following powers to sell or otherwise turn to account all or any part of the estate vested in them, as they think best provided that no immovable property shall be sold before confirmation of grant.”*

*Similarly the sales hereto amount to criminal activity and cannot be upheld the property has to devolve to the rightful beneficiaries and then thereafter may enter into proper sales agreement and transfers the respective portions to the purchasers in accordance with the law **Succession Cause No. 1974 of 2008 in the matter of the Estate of Veronica Njoki Wakagoto (Deceased) (2013) eKLR.**”*

**[15]** For the Objectors, reliance is placed recognition of purchaser’s interest in the law of succession and on the principles of Equity as follows:

*“From the foregoing, it is crystal clear that the failure by the petitioners to recognize the Objector in the present application for confirmation of grant dated 12<sup>th</sup> February 2015 is outrageous, prejudicial, done in bad faith and is purely to deny the Objectors the property [they] rightfully bought from the petitioners.*

*[F]rom the Further Supporting Affidavit of the 2<sup>nd</sup> Petitioner sworn on 10<sup>th</sup> June 2013, in paragraph 3 he depones that indeed they had contracted a surveyor to subdivide the land for the objectors. This admission to contracting a surveyor to sub divided the parcel clearly shows that the petitioners had indeed sold the land to the objectors and therefore the only noble, equitable and just thing is to include the Objectors in their Schedule of Distribution and let them have what they bought [from] the petitioners.*

*[T]he Law of Succession Act recognizes the purchaser’s rights and in support of these submissions the said (sic) the Law of Succession defines a “Purchaser”. Purchaser according to the Act means a purchaser for money or money worth.*

*The objectors submit that if the grant is confirmed objectors have no chance to prove what they are seeking from the deceased estate as they would already have been omitted. The Objectors need not to be petitioners to make their claim but their claim is purely for their interests as purchasers to be recognized.*

*[T]his Honourable Court should exercise its jurisdiction as a court of equity and must at all times uphold principles of equity and justice. I therefore urge that the Objectors application be allowed and the Objectors to be included in the distribution schedule as they fall in the category of beneficiaries as purchasers.”*

### **Other considerations**

**[16]** There was a proposal made by the Counsel for Objectors on 1<sup>st</sup> October 2013 for a court visit to assist the Court in reaching a decision in the matter.

### **ISSUE FOR DETERMINATION**

**[17]** The issue for determination in this application for confirmation is whether the court will order that the objectors who allege to be purchasers of portions of the deceased estate from the petitioner/administrators be recognised by confirmation of the Grant as beneficiaries of the estate for purpose of distribution of the Estate.

### **DETERMINATION**

[18] As observed by the Court of Appeal at Nairobi in *Esther Njoki Rurigi v. Patrick Gathenya* [2005] eKLR (Githinji, Waki, JJA & Deverell, Ag. JA), in paraphrase, not without sympathy for the Objectors for the situation they are enmeshed in –

***“However, equity follows the law and we have to apply the law as it is without any adulteration.”***

[19] In accordance with section 82 of the Law of Succession Act, from the powers of personal representatives is excepted the power to sell immovable property by a Proviso, as follows:

***“Provided that –***

***(ii) no immovable property shall be sold before confirmation of the grant.***

An administrator, as in this case, who has not had his Grant of Letters of Administration confirmed is not authorised to dispose of land as immovable property. The Court cannot, therefore, order that the suit parcels of land be distributed to the Objectors in these proceedings for confirmation of grant.

[20] In this matter, there may not be a dispute that the objectors are purchasers; only whether they are purchasers of an interest in a valid transaction in accordance with the Law of Succession Act. While the Law of Succession Act protects purchasers of interest from administrators even after revocation of the Grant under section 93 of the Act, the purported sale by an administrator before confirmation of the Grant is expressly prohibited under the Proviso to section 82 of the Act as shown above.

[21] As the sale of land was not by the deceased the purchasers did not obtain a purchaser’s interest capable of being recognised as a creditor to the Estate as permitted under section 66 of the Law of Succession Act. The sales having been made in contravention of section 82 of the Act with regard to immovable property they are not protected under section 93 thereof should the grant subsequently be varied or revoked.

[22] I respectfully agree with Musyoka, J. in *In the Matter of the estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR that a purported sale of immovable property belonging to a deceased by any person, including the personal representative, without authority of a Confirmed Grant is illegal, invalid and criminal, as follows:

*“In this matter the respondent sold property belonging to a dead person without authority as letters of administration had not yet been made to him. The fact of having petitioned for the letters did not clothe him with any authority. He and Felix Kinuthia intermeddled with the estate, and they no doubt committed an offence under section 45(2) (a) of the Act. It is unfortunate that the prosecutorial authorities do not focus on offences of this kind as prosecutions are hardly ever mounted over them. This explains why property of dead persons is routinely intermeddled with.*

*As the respondent had no authority to sell the property in question, Felix Kinuthia acquired no interest in it at all as the seller had no title to it whatsoever. A buyer, such as Felix Kinuthia, is not in the same footing with a creditor, for the interest he alleges to have acquired in the estate was not acquired from the deceased during his lifetime or from a person authorized to sell the property. It should be noted that even where a grant of representation has been obtained, the grant-holder has no power to sell any immovable asset before confirmation of the grant. This is the law under section 82(b) (ii), which states –*

***‘Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers ... to sell or otherwise turn to account ... all or any part of the assets vested in them, as they think best:***

***provided that – no immovable property shall be sold before confirmation of the grant ...’***

*The sale to Felix Kinuthia of immovable property was done in contravention of the law. It amounted to criminal activity. Such transaction cannot be valid, and should not be upheld by the law.”*

[23] It is with sympathy to the Objectors that I have to uphold the law and declare that the objectors having allegedly purchased their respective portions of land that they claim in the Estate land from the petitioners/administrators before confirmation of the Grant did not acquire a valid interest capable of protection under the Law of Succession Act, and that the petitioners/administrators may have committed the offence of intermeddling under section 45 (2) (a) of the Act, an issue for the determination of a criminal court.

### **CONCLUSION**

[24] The Objectors may have bought portions of the Deceased’s Estate from the petitioners/administrators but they did not acquire a valid purchaser’s interest in accordance with the Law of Succession Act that may be recognized as beneficiaries to the Estate for purposes of distribution as prayed by the Objectors. Accordingly, their Protest to the application for confirmation of Grant is without merit.

[25] Noting the facts of the case as set out in the various affidavits filed in this Petition, and the Objectors’ request to have the Court visit the site, and in consideration of the imperative of Article 159 of the Constitution to do substantial justice and to promote alternative forms of dispute resolution, I respectfully suggest that the matter may be resolved by the parties by agreement as to the persons who purchased portions of the suit land, to what extent and in what shares. Thereafter the distribution of the estate subject of the dispute asset may be settled. In the interest of understanding the parties’ respective cases, the court may visit the *locus in quo*.

### **ORDERS**

[26] For the reasons set out above, the Objectors’ **Protest to Confirmation of Grant dated 8<sup>th</sup> May 2015** is dismissed.

[27] Each party will bear its own costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 15<sup>th</sup> DAY OF February 2017.**

**P. NYAMWEYA**

**JUDGE**

### **APPEARANCES:**

M/S Muema & Associates, Advocates for the Administrators.

M/S D. M. Mutinda & Co. Advocates for the Objectors.