



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT SUCCESSION CAUSE NO. 55 OF 2016

(FORMERLY MERU SUCCESSION CAUSE NO. 101 OF 2010)

**IN THE MATTER OF THE ESTATE OF JOSIA MANTU ALIAS MANTU MUGWIKA
(DECEASED)**

CHARITY MUKWANYAGA MUKUNGI.....1ST APPLICANT

ERNEST KABURU.....2ND APPLICANT

AND

ESTHER CIANJOKA M'MANTU.....PETITIONER

JUDGMENT

1. This cause relates to the estate of the late **JOSIAH MANTU ALIAS MANTU MUGWIKA (dcd)** who died on 23rd June, 1999 domiciled at Chogoria sub location. At the time of his demise he had one property registered in his name namely L.R. No **MWIMBI/CHOGORIA/386**. The petition for a grant of letters of administration was presented to the PM's court at Chuka by Esther Cianjoka M'Mantu (now dcd) who then was the surviving widow. The lower court issued a grant vide Chuka PM's Court Succession Cause NO.101 of 2010 on 2nd August, 2010 and appointed the said widow as the administratrix of the estate of the late **Josiah Mantu alias Mantu Mugika** thereafter she moved the said court to have the grant confirmed before the expiry of the statutory period, a prayer that was granted with the issuance of certificate of confirmation on 1st September, 2010.

2. The record from the lower court indicate that on 14th March, 2011 **WALLACE NKONGE MANTU** (now deceased) moved the high court in Meru for revocation of the grant issued to Esther Cianjoka M'Mantu. Before the file was moved to the High Court in Meru for hearing and determination of the summons for revocation of grant dated 10th March, 2011, the administratrix moved and subdivided the estate creating parcels No. **MWIMBI/CHOGORIA/5088, 5089 and 5090**. She transferred parcel No.5088 to one **NICHOLAS KITHUCI NYAGA** and retained the two parcels in her name.

3. Wallace Nkonge Martin (now dcd) together with Charity Mukwanyaga Mukungi and Ernest Kaburu on 19th June, 2013 moved the High Court in Meru vide an application dated 18th June, 2013 seeking conservatory order to restrain Esther Cianjoka M'Mantu (the respondent) from interfering with the 3 parcels of land (No's **MWIMBI/CHOGORIA/5088, 5089 and 5090**) pending the determination of summons for revocation of grant dated 10th March, 2011. The High Court in Meru vide a ruling dated 20th June, 2013, found merit in the application and issued an order to conserve the said properties and restrained the respondent from dealing or changing the status of the said assets pending the determination

of the summons for revocation of grant. It does appear from the record that by this time unknown to the court, the respondent (Esther Cianjoka M'Mantu) had by then sold parcel No. Mwimbi/Chogoria/5089 to one Isaac Kiogora Marete (the caveator herein) vide a agreement dated 26th November, 2012. Nonetheless, the court in Meru later heard the summons for revocation of grant and revoked the grant nullifying or cancelling the **MWIMBI/CHOGORIA/5089 and 5090** directing that the original title **Mwimbi/Chogoria/386** do revert to the name of the deceased in this cause. It is important to note that parcel No. Mwimbi/Chogoria/5088 was omitted from the order cancelling the resultant titles after subdivisions of parcel of the original estate. I will come back to that issue later in this judgment. The High Court ruling dated 24.9.2014 appointed the following as administratrix and administrator respectively

(i) Esther Cianjoka M'Mantu (widow to the deceased)

(ii) Charity Mukwanyaga Mukungi (daughter to the deceased) &

(iii) Ernest Kaburu (son to the deceased – who substituted Wallace Nkonge M'Mantu who passed on 21st July, 2013).

4. On 11th December, 2014, Charity Mukwanyaga Mukungi and Ernest Kaburu took out summons for confirmation of the grant and made the following proposal on how the estate should be distributed.

(i) Esther Cianjoka M'Mantu to have life interest on 2 acres of land out of Mwimbi/Chogoria/386.

(ii) Ernest Kaburu and Charity Mukwanyaga to have 0.5 acres which they proposed to dispose in order to recover costs arising from this succession cause.

5. The proposal did not go down well with Esther Cianjoka M'Mantu and Isaac Kiogora Marete (caveator) who filed two separate protests. The caveator protested that he had purchased Mwimbi/Chogoria/5089 and in fact had a title over the same while Esther Cianjoka M'Mantu protested deposing that Charity Mukwanyaga Mukungi was married and that Ernest Kaburu had benefitted from 7 acres of land given to him as a gift by the deceased prior to his demise. This protest is now before this court for determination on the basis of written submissions which were the directions issued by my predecessor in these proceedings. It is also important to note that while the protests herein were pending for determination, the 1st petitioner, Esther Cianjoka M'Mantu unfortunately passed on on 1st June, 2016 which made remaining petition to revise their earlier proposal on how the estate should be distributed. With the demise of the said administrator, the remaining petitioners have suggested that the estate should be disposed and Kshs.1,300,000/= be deposited with the firm of Jesse Kariuki (the petitioner's counsel) to cover his legal fees and disbursements while the remainder be distributed equally between the families of the beneficiaries.

6. In their written submissions made via Jesse Kariuki & Co. Adv the remaining administratrix and administrator respectively have submitted that owing to the fact that Esther Cianjoka M'Mantu had no child of her own, the distribution should be done in favour of the surviving children and their families. They have suggested that Kshs.1,300,000/= should be set aside to cover for legal fees and that because the 2 acres is too small to be subdivided among all the beneficiaries the same should be sold and proceeds shared out equally among the children/ and/ or the families who are beneficiaries to the estate herein.

7. They have faulted the caveator's claim contending that the decision by **Hon J. A. Makau** nullified all the titles that had been issued on the basis of the grant nullified by the same court. The petitioner's contention is that the caveator should lay claim on the estate of the late Esther Cianjoka in order to be refunded any monies paid to her. They have further faulted the caveator from trying to seek an appeal in this court from the back door against the decision of the court sitting in Meru which had cancelled the title **Mwimbi/Chogoria/5089**. It is their contention that that title (**Mwimbi/Chogoria/5089** does not now exist. They have cited a decision in this court in the matter of the estate of the late **Mukinda Airanya alias M'Mukindia Mairanyi (dcd) (Chuka HCC Succ No.699/15)** in their contention that purchasers of assets of a deceased person prior to the confirmation of a grant are unprotected.

8. The caveator/protestor in his written submissions made via Lucy Kaaria, Matumbi & Co. Advocates, has contended that the 1st petitioner, Esther Cianjoka M'Mantu (dcd) had legal capacity to transact and dispose parcel No. Mwimbi/Chogoria/5089 to the caveator because at the time of sale, she had been issued with a certificate of confirmation of grant. The protestor has submitted that the administratrix acted within the law and that the caveator acquired good title. He has denied that by purchasing the asset forming the estate, he was intermeddling with the estate.

9. The protestor has further contended that he is protected under S. 93(2) of the L.S.A and that nullification of the grant did not alter his interest as protected by law. To this end, he has cited the decisions in the following cases

(i) William Onkobo Matundura & Anor – vs - Julius Moracha Matundura & Anor [2014]eKLR

(ii) Evangeline Kagumo Ndubi –vs- Cyprian Kithara Ndubi [2012] eKLR

The protestor has submitted that the deceased had already gifted his children with land parcels and that the estate was left for the benefit of the widow Esther Cianjoka M'Mantu (now dcd). He has faulted the petitioner's intention to dispose off the estate contending that they are only interested to share the proceeds from the sale against the interest of an innocent purchaser for value. The caveator have further argued that even if he was to sue for breach of contract, he would still sue the same petitioners herein and the court will have to make a finding on whether or not the widow was entitled to a share of the estate and in his view, the widow was indeed entitled to a share to cover for her daily subsistence.

10. This court has given a brief background of this cause and how the parties mentioned above have proceeded from the inception of the cause to the present dispute. I have perused through the proceedings and considered both the petitioner's case, their supporting affidavits, witness statements, all annexures, the submissions and authorities cited. I have also considered the protestor's position, his affidavit of protest, and the authorities cited by the caveator in this cause. The issue for determination is basically whether or not the caveator's (purchaser's) interests were extinguished by the revocation of grant and the subsequent orders vide the ruling dated 24th September, 2014 or whether the interests being purchaser's interest were protected by section 93 of the Law of Succession Act.

11. It is not in dispute that the late Esther Cianjoka M'Mantu (who was the 1st petitioner) had a grant in respect to the estate of her late husband (deceased herein) issued to her on 2nd August, 2010 and confirmed on 1st September, 2010 before the expiry of the statutory period of six months. The court had a discretion pursuant to the provisions of section 71 (3) of the L.S.A to do so upon the application made by the applicant (dated 30th August, 2010.) Upon the confirmation of grant, the provisions of section 79 of the L.S.A came into operation and the provisions of that section provides as follows:

“the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.” (emphasis added).

I have perused at the certificate of confirmation issued on 1st September, 2010 and the only limitation contained was that 1 acre out of the property (Mwimbi/Chogoria/386) forming the estate was to go to one Nicholas Kithuci Nyaga. The rest was to vest in the petitioner (Esther Cianjoka M'Mantu). The petitioner from the record appears to have subdivided the estate (Mwimbi/Chogoria/386 into 3 portions giving rise to Mwimbi/Chogoria/5088, 5089 and 5090 and transferred parcel No. 5088 to Nicholas Kithuci Nyaga. She later sold and transferred parcel NO. Mwimbi/Chogoria/5089 to the caveator herein. The question as to whether or not she had power or authority to dispose of the parcel to the caveator herein is clearly captures by the provisions of section 82(b) which granted her power to sell the property upon confirmation of the grant. This court therefore finds that the protestor's transaction with the 1st petitioner that saw him acquire Mwimbi/Chogoria/5089 was to that extent legal and no evidence has been laid

before me that suggest that the subsequent registration of the caveator as the owner of Mwimbi/Chogoria/5089 was tainted with any irregularity.

12. I have noted from the ruling delivered in Meru High Court in this cause that the nullification of the titles only affected parcels numbers **Mwimbi/Chogoria/5089 and 5090** and this, in my view could have been informed by the fact that parcel No. **Mwimbi/Chogoria/5088** had changed hands at the time. The applicants in their summons for revocation of grant dated 10th March, 2011 and further summons for conservatory orders dated 18th June, 2013 did not mention that there was an interested party claiming purchaser's interest. The caveator was therefore not served. I do find that his assertions that he was in the dark in so far as the above cited applications are concerned well founded. He should and ought to have been served because the prayers sought in the two applications affected him.

13. It is also clear from the ruling of this court then sitting at Meru that the grant, upon which the 1st petitioner acted on in disposing of parcel No. Mwimbi/Chogoria/5089 was revoked and the said title alongside title No. Mwimbi/Chogoria/5090 were both cancelled by that court. The petitioners herein hold that the protestor herein is seeking to appeal against that order or revocation and cancellation of the title while the protestor insists that the law protected or shielded him against those orders.

14. In order to address the above issue it is important to look at the provision of section 93 (1) of L.S. A. which provides as follows;

“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.”

The above provisions in my view protects a purchaser for value of any property forming the estate where a grant is subsequently revoked or annulled by an order of the court. I have read the cited authorities by both the petitioners and the protestor and all the authorities seem to agree in respect of purchaser's interests. In the authority cited by the petitioner that is the decision in case of the matter of the estate of the late **Mukinda Airanya alias M'Mukindia Mairanyi**, the court, found that section 93 protected the purchase of part of the estate by Teresa Kathure because she purchased her interests on 8th August, 2012 after the grant had been confirmed on (14th February, 2012.) In the other 2 cases cited by the protestor/caveator the courts came to the same conclusion. In the case of **Wiliam Onkoba Matundura & Anor – vs- Julius Moracha Matundura & Anor [2014] eKLR**, the court cited a decision by **Makhandia J** (as he then was) in the **Kisii High Court Succession Cause No.219 of 2010 Liewa Jagalo & Anor –vs- Rose Achieng** where the said judge made the following observations.

“Finally, under section 93 of the L.S.A, the interested parties are expressly shielded. Their interest in their respective parcels of land aforesaid cannot be challenged or impugned even if the grant is revoked. The validity of their transfer cannot be affected by revocation of grant. The interested parties bought for value from the petitioner their respective portions of land. That purchase and subsequent transfer to them of the suit premises is protected expressly by section 93 of the Law of Succession Act.”

15. It is clear from the provisions of section 93 as it is illustrated by the above authorities that the protestor's interest on **Mwimbi/Chogoria/5089** is indeed shielded by the notwithstanding the orders issued by the court to revoke and cancel the resultant titles including **Mwimbi/Chogoria/5089**. It is instructive to note that the same court's cancellation order appears and did not affect parcel No. **Mwimbi/Chogoria/5088** and for the same reason in my view. The section protects an innocent purchaser for value but certainly the protection does not extend to fraudulent transactions and I have not found any element of fraud in the transaction between the caveator herein and the 1st petitioner. The petitioners herein have submitted that the protestor was aware that there was an application pending for revocation of grant when he purchased the property in question but the provisions of sections 93 (2) of L.S.A. appears to suggest that a transfer of land to a purchaser for value shall not be invalidated only by reason that the

purchaser had notice of a dispute or liability to the estate. That being the position in law, I find that the petitioner's attempt to lock out the protestor from the distribution of the estate herein is wanting. They have suggested that the caveator can make a follow up and sue the estate of the late Esther Cianjoka M'Mantu but at the same time stated that the said Esther Cianjoka M'Mantu did not have a child of her own and by extension that they were the next of kin to the late Esther Cianjoka M'Mantu. So if they are suggesting that the caveator should sue them later after distribution of the estate, then I find their suggestion mischievous and sure attempt to have their cake and eat it at the same time which I find unnecessary for the ends of justice.

In view of the foregoing this court finds it just and fair to let the caveator retain the portion he purchased from the late Esther Cianjoka M'Mantu which means the parcel known as Mwimbi/Chogoria/5089 shall revert back to him. The remaining portion of the estate shall be shared equally among the following beneficiaries

(i) Charity Mukwanyaga

(ii) Samuel Mugambi

(iii) Ernest Kaburu

(iv) Ann Karimi

(v) Ruth Gatune

(vi) Verstane Bearman Mbaya

(vii) (The widow (if any) and children (if any) to the late, Wallace Nkonge Mantu because no evidence was adduced to show that Wallace Nkonge had any children or wife..

The petitioners had applied for an order that they be allowed to dispose of the property and share the proceeds after meeting their financial obligations. I am however not persuaded that it is necessary for this court to direct parties how best to utilize rights that vests in them. It really is an issue to be determined by the beneficiaries herein. There shall be no order as to costs so each party shall pay own costs.

Dated at Chuka this 11th day of May, 2017

R.K. LIMO,

JUDGE.

11.5.2017

Coram

Before

Hon. R. K. Limo – J

C/A - Muriithi

Applicant

Respondent

Kaaria for caveator

Muriithi h/b for Jesse

Court

Judgment dated, signed and delivered in the presence of Kaaria for caveator and Muriithi h/b for Jesse Kariuki for petitioner.

R. K. LIMO,

JUDGE.