



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 367 of 2006**  
**IN THE MATTER OF THE ESTATE OF SALIM ISLAM SAADAN (Deceased)**  
**ABDULHAKIM SALIM**  
**ATIE SALIM**  
**KHAIRU MOHAMED .....APPLICANT**  
**VERSUS**  
**SHUMI ALI MUSTAFA .....RESPONDENT**  
**RULING**

1. Before this Court is Summons dated 21.4.15 seeking orders that:-
  - a. That the Respondent be compelled to give a proper account of the properties of the Estate.
  - b. That the sale of the property known as Lamu/Block I/582 to Husuni Alawi Husuni Mohamed be revoked.
  - c. That the Court do issue further orders as it deems fit.

**The Applicant's Case**

2. The Application is supported by the grounds on the face of it as well as the Supporting Affidavit of Atie Salim one of the Applicants, sworn on 23.4.15. It is the contention of the Applicants that the Grant of Probate issued to the Respondent was revoked by an order of this Court dated 16.7.14; that the Respondent was further ordered to provide accounts of the dealings of the estate up to the date of the revocation of the Grant; that on 16.7.15 the Respondent filed in Court a document purporting to be accounts which were a replica of the Respondent's testimony before Court which the Court had rejected.
3. The Applicants additionally claim that the Respondent has failed to account for monies received for the estate; that the Respondent charged a property of the estate known as Title No. Lamu/Block I/582 to secure a loan of Kshs. 3,000,000/=; that the Respondent subsequently sold and transferred the same on 7.6.12 to Husuni Alawi Husuni Mohamed, the Interested Party herein, without informing the other beneficiaries and notwithstanding that a caution had been registered against the title and the matter herein was pending judgement; that the said property was sold for Kshs. 8,000,000/= which sum was not accounted for; that the said property was allegedly given to Ali Salim Islam, Badru Salim Islam, Swaleh Salim Islam, Abdulaziz Salim Islam, Shumi Ali

Mutsfa, Fatuma Awadh Omar, and Mariam Salim Islam yet the same was sold by the Respondent without informing the beneficiaries; that the said sale was fraudulent and has occasioned grave injustice to the minor beneficiaries.

4. In a Supplementary Affidavit, the Applicants claim that the Interested Party had approached them to purchase the said property but that they informed him that the matter was still pending in court and that it was unsafe for him to purchase the same; that the transfer was contrary to the Grant which has now been revoked did not grant any property to the Respondent but to Ali Salim Islam, Badru Salim Islam, Swaleh Salim Islam, Abdulaziz Salim Islam, Shumi Ali Mutsfa, Fatuma Awadh Omar, and Mariam Salim Islam; that that there was a caution by Awadh Salim Islam registered against the property on 27.2.12 which was removed without notice to the cautioner; that the transfer of the said property by the Respondent to herself, charging the same to Kenya Commercial Bank and transferring the same to the Interested Party was fraudulent; that the Interested Party was well aware of the dispute herein.

#### The Interested Party's Case

5. The Interested Party Husuni Alawi Husuni Mohamed, raised a Preliminary Objection as follows:
  - a. This Honourable Court has no jurisdiction under Section 76 and 83 of the Law of Succession Act Chapter 160 of the Laws of Kenya to revoke the sale of Lamu/Block I/582 to the Interested Party;
  - b. The Summons is incompetent in so far as prayer 2 thereof is concerned as the same violates rule 49 of the Probate and Administration Rules;
  - c. Prayer 2 is overtaken by events as no objection and or protest was made before the grant of letters of administration and or confirmation of the grant.
  - d. The Summons is oblivious of the provisions of Section 92, 93 and 94 of the Law of Succession Act Chapter 160 of the Laws of Kenya.
  - e. The Interested Party has not been properly made a party to the proceedings herein.
6. In his Replying Affidavit sworn on 7.10.15 the Interested Party further deponed that on 27.12.11, he saw and advert in the Daily Nation newspaper placed by Garam Investments for the sale by public auction of the property herein; that the sale did not take place on the scheduled date as the same was cancelled; that upon inquiry, the branch manager, Kenya Commercial Bank Limited, the Chargee directed him to the Respondent who agreed to sell the said property to him; that he then purchased the said property for Kshs. 8,000,000/= through the bank's lawyers; that at the time of the sale, the Respondent had a confirmed Grant; that he lawfully purchased the property as an innocent purchase without notice of any dispute or encumbrance in respect of the same. He urged the Court to dismiss the Summons with costs.

#### The Respondent's Case

7. In her Replying Affidavit sworn on 26.10.15, the Respondent depones that the items appearing in the accounts refer to the same estate, same properties and the same beneficiaries and therefore repetition thereof was inevitable; that save for Lamu/Block 582, no material change had occurred to necessitate a change in account status; that the Court did not make a finding that the accounts given by her were wrong.
8. The respondent further claims that the valuation had been done and she annexed the Report. She however claims that not all the properties were valued as the same were in the possession of the Applicants and other beneficiaries who refused to co-operate; that she is willing to offset the value of the property sold to the Interested Party with other properties of the estate; that there would be no justice in revoking the said sale as the Interested Party was an innocent purchaser without knowledge of internal dealings of the estate. She prayed that the Summons be dismissed with costs.

#### Determination

9. I have considered the Summons, the Affidavits on record and the rival submissions made by Counsel for the parties. I will first deal with the Preliminary Objection. The Interested Party made no submissions on the Preliminary Objection nor indeed on his Replying Affidavit opposing the Summons. Ms. Wasi holding brief for Ms. Bakari for the Interested Party at the hearing simply told the Court that the Interested Party wishes to rely on the Preliminary Objection and the Replying Affidavit filed in Court.
10. The Interested Party claims that that this Honourable Court has no jurisdiction under Section 76 and 83 of the Law of Succession Act Chapter 160 of the Laws of Kenya to revoke the sale of Lamu/Block I/582 to the Interested Party. Though the heading of the Summons refers to Section 76 and 83(h) of the Law of Succession Act, this Court is aware of the provisions of **Article 159 (2) (d)** of the **Constitution** of Kenya 2010 which behove courts to ensure that

**“Justice shall be administered without undue regard to procedural technicalities.”**

The spirit of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties. The erroneous reference of provisions of law in the heading of the Summons is a mere technicality and does not in any way oust the jurisdiction of the Court.

11. On the claim that the Summons is incompetent in so far as prayer 2 thereof is concerned as the same violates rule 49 of the Probate and Administration Rules, it is not clear to the Court how the prayer offends the said rule. As stated earlier, Interested Party chose not to make any submissions on the Preliminary Objection. When things are left unclear by a party, they affect the prospects of their claim. The Court cannot draw conclusions in an unclear claim when as in this case the Respondent has failed to argue the claim and clarify the same.
12. As regards the remaining limbs of the Preliminary Objection, it is clear that evidence must be adduced to support the same. It is trite law that a preliminary objection should be based on pure points of law. Law JA in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** rendered himself thus:

***“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

In view of the fact that the said limbs in the Preliminary Objection raise questions of fact and law in regard to which both the Applicants and Interested Party are in disagreement, and evidence must be called, the Preliminary Objection must fail.

13. Back to the Summons, the issues for determination are:

- a. Whether the Respondent should be compelled to give a proper account of the properties of the estate.
- b. Whether the sale of the property known as Lamu/Block I/582 to Husuni Alawi Husuni Mohamed should be revoked.

14. The Respondent was prior to the Revocation of the Grant of Probate by the Court on 16.7.14 the representative of the Estate. The Court ordered the Respondent to give an account under Section 83(h) of the Law of Succession Act of her dealings with and distribution of the estate up to the date of the account. The Applicants argue that the document filed by the Respondent on 16.2.15 is a replica of her testimony which had been rejected by the Court. I have read the Ruling by the Court and I do not see where the Court rejected the said account. The Respondent in her Replying Affidavit annexed a valuation report of the estate and states that some of the properties have not

been valued due to lack of co-operation by the Applicants and other beneficiaries. I have perused the valuation report and find that indeed there are several properties forming part of the estate to which the valuers were denied access by Awadh Salim. On the other hand the valuation report refers to other properties which formed part of the estate of the deceased and which were not released for inclusion in the state of the deceased. I have noted further that the valuation report is dated 1.10.15 yet the report in respect of Title Number Lamu/Block I/582 indicates that the registered owner thereof is the deceased herein. This cannot be accurate as it is not disputed that the said property was transferred to the Interested Party in 2012. Section 83(h) of the Law of Succession Act provides

***“Personal representatives shall have the following duties—***

***(h) To produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account”***

This Court finds that the Respondent is yet to comply with the order of the Court made on 16.7.14 to give a full and accurate account of all dealings in the estate up to the date of the account

15. I now turn to the issue of whether the sale of the property known as Lamu/Block I/582 to Husuni Alawi Husuni Mohamed should be revoked. It is not disputed that the said sale took place in 2012, long before the Grant issued to the Respondent was revoked. Indeed the Interested Party states in his Replying Affidavit that the Respondent at the time of the sale, the Respondent had a confirmed Grant. The question to consider is whether the sale was valid. Section 93(1) of the Law of Succession Act provides:

***“(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.”***

16. The High Court at Meru in a recent persuasive decision of **Adrian Nyamu Kiugu vs. Elizabeth Karimi Kiugu and Anor [2014] eKLR** the stated:

***“Whereas the above section states that a transfer by 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, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.”***

17. Section 93(1) protects transfers made to a purchaser by a person to whom representation has been granted. This section however does not protect and validate transfers by a person by whom representation was obtained fraudulently. The Respondent herein obtained the Grant fraudulently leading to the revocation of the same by this Court. Consequently the protection in Section 93(1) is not available to the Respondent and the Interested Party.

18. The Interested Party claims that he was a bon fide purchaser for value without notice. Given that he was of his own admission privy to the confirmed Grant, the Court can safely conclude that he was aware that the Respondent and other female children of the deceased were entitled to only ? of the estate. The Applicants also averred that the Interested Party had approached them to purchase the said property but they informed him that the matter of the estate was in Court and that it would

be unsafe to purchase the property before conclusion of the matter. He nevertheless proceeded to purchase the said property. He now seeks the protection of the same.

19. Section 93 of the Law of Succession Act has been the subject of judicial interpretation in a number of cases. In **Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and another [2008] eKLR** where a purchaser claimed that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore protected under **S.93 (1)** of the Law of Succession Act (Cap 60) Court of Appeal sitting in Nyeri stated thus:

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

20. The Respondent was not the sole beneficiary of the property and therefore had no property to transfer to the Interested Party. It is evident to me that the Interested Party purchased the property with his eyes open. He was not a *bona fide* purchaser for value without notice as he would want this Court to believe. He was fully aware of the circumstances surrounding the property. The sale and transfer of Lamu/Block I/582 by the Respondent to the Interested Party is therefore *void ab initio* and the property is traceable.

21. The Respondent has made what in my view is a preposterous offer to offset the value of the property with another property of the estate. This is a person who held the property of her father's estate as Executor. In spite of the trust that comes with a grant of representation, the Respondent went ahead and took a loan on the security of Title No. Lamu/Block I/582 for her own benefit and not for the benefit of the estate. She then defaulted in the repayment of the loan thus jeopardizing the estate. She later caused the caution registered against the title to be removed without notice to the cautioner. Thereafter she caused the property to be registered in her name and transferred the same to the Interested Party having pocketed Kshs. 8,000,000/= being the purchase price paid. This Court takes the view that such offer only serves to make a bad situation worse. The Respondent seeks to compound her devious scheming against the other beneficiaries of the estate of the deceased by making the estate pay for her deceit and fraud. This Court cannot allow this to happen.

22. In the result, I find that the Summons herein has merit and is allowed. I hereby order that:

- a. The Respondent do produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account within 60 days of the date hereof.
- b. The transfer of the property known as Lamu/Block I/582 to Husuni Alawi Husuni Mohamed be and is hereby revoked. The property is hereby restored to the estate of the deceased.
- c. The Respondent shall bear the cost of this Application.

**DATED, SIGNED and DELIVERED in MOMBASA this 8<sup>th</sup> day of February 2016.**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**