



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.62 OF 2009

IN THE MATTER OF THE ESTATE OF:

TERESA NYANCHERO MATUNDURA DECEASED

AND

IN THE MATTER OF: LR NO. KISII MUNICIPALITY/BLOCK II/66 $\frac{1}{3}$ SHARE

AND

**IN THE MATTER OF: PARTIAL REVOCATION OF GRANT, CANCELLATION OF TITLE
AND RECTIFICATION OF THE REGISTER**

AND

IN THE MATTER OF: LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA

BETWEEN

WILLIAM ONKOBA MATUNDURA 1ST APPLICANT

SARAH MORAA MORACHA 2ND APPLICANT

VERSUS

JULIUS MORACHA MATUNDURA 1ST RESPONDENT

ANNA ONDIEKI 2ND RESPONDENT

RULING

1. The applicants herein William Onkoba Matundura and Sarah Moraa Moracha filed a summons for partial revocation of grant, cancellation of title and rectification of register under **Rules 47, 59, 63, 73 and 76** of the **Probate and Administration Rules, Section 55** of the **Law of Succession Act** and **Section 65, 66, 67, 106 and 107** of the **Land Registration Act 2012** for orders:-

1. ***THAT*** the instant application be certified as urgent and the same be heard on priority basis.

2. ***THAT*** pending the hearing and determination of this application, the Honourable Court be pleased to grant an Order of Inhibition, inhibiting the Transfer, Charge, encumbrances and/or any

other dealings whatsoever, in respect of LR. NO.KISII MUNICIPALITY/BLOCK II/66 $\frac{1}{3}$ share forming part of the estate of the deceased and preserve the same.

3. THAT *pending the hearing and determination of this Application, this Honourable Court be pleased to issue an Order of Injunction restraining the Respondents by their Agents, servants and/or employees from trespassing, interfering with the applicants and any other person under their authority's quiet possession of LR NO. KISII MUNICIPALITY/BLOCK II/66 $\frac{1}{3}$ Share.*

4. THAT *this Honourable Court be pleased to revoke and/or annul the Grant of Letters of Administration issued to the 1st Respondent herein on the 17th December 2012.*

5. THAT *this honourable court be pleased to grant an Order directing the Rectification of the Register in respect of LR NO. KISII MUNICIPALITY/BLOCK II/66 $\frac{1}{3}$ Share by deleting the name of ANNA ONDIEKI and restoring the names of SARAH MORAA MORACHA, as the legally registered owner, to hold in Trust for the sons and Grandsons.*

6. THAT *this Honourable Court be pleased to make such other and/or further orders as may be just and expedient in the circumstances.*

7. THAT *costs of this application be paid out of the Estate of the Deceased.*

2. The above application was supported by 14 grounds set out on its face and by the affidavit of the 2nd applicant Sarah Moraa Moracha averring that she has been a wife to the 1st Respondent for 30 years and blessed with 6 issues in the marriage 4 of whom are alive, that as a family they have been solely depending on the income from the suit land for their upkeep and school fees. She further avers that on 17th December 2012 the court issued a certificate of confirmation of grant to the 1st Respondent in respect of the suit land to hold in trust for his sons and grandsons, that upon issuance of the confirmation the 1st Respondent went underground and without consent of the family, disposed off and transferred the suit land he held in trust for the family to the 2nd respondent.

3. She further avers that the 2nd respondent has now started threatening her with eviction of all the tenants from the suit land on the basis that she has acquired title; that her children and herself have no other means of income should the tenants be evicted; that the 1st respondent has failed to discharge his obligations as ordered thus it would be in the interests of justice that the Grant issued in favour of 1st Respondent be revoked and re-confirmed to her because the family and herself stand to suffer substantial loss and damage as the proceeds from the aforesaid disposition of property has not been invested anywhere for the benefit of the family.

4. Finally the deponent says that the confirmation of grant issued in favour of 1st Respondent did not authorize or mandate him to appropriate and alienate the estate of the deceased but to hold it in trust for the family and thus the sale, transfer and registration of the suit land in favour of Anna Ondieki ought to be recalled, rescinded and/or nullified.

5. On the 12th day of June 2013 I granted interim orders in terms of prayers 1, 2 and 3 and set the application for inter partes hearing on 24th June, 2013.

6. The respondents on their part have each filed their respective replying Affidavits dated 24th July 2013 through the firm of Oguttu Mboya & Co. Advocates. The 1st respondent acknowledges the fact that confirmation of grant was issued in favour of the 1st applicant and himself on 17th December 2012, that pursuant to confirmation of grant the 1st applicant and himself embarked on causing various assets of deceased to be alienated in line with the scheme of distribution after which he became the registered proprietor of the $\frac{1}{3}$ portion of the suit land.

7. He further avers that he sought and obtained permission and consent of his sons after which he sold and transferred the suit land to the 2nd respondent. He acknowledges that the 2nd applicant was his wife, but not a beneficiary of the estate of the deceased and since the 2nd applicant was not a survivor of the deceased, same cannot purport to enter into succession proceedings concerning the estate of the deceased.

8. He further avers that the 1st applicant was allocated his lawful and due share of the estate of the deceased which was transferred and registered in his name thus he cannot be a supervisor of the 1st respondent's affairs and the instant application is therefore misconceived and calculated to defeat the due process of the court contrary to the provisions of **Section 93** of the **Law of Succession Act Chapter 160 Laws of Kenya**.

9. The 2nd respondent on her part avers that on or about 31st January 2013 the 1st respondent and herself entered into a Land Sale agreement in respect of the suit land at an agreed consideration of Kshs.2,000,000/=. That upon entering into the land sale agreement with the 1st respondent, the 1st respondent took appropriate and suitable measures to have the portion of the suit land transferred and registered in his name and he subsequently executed the necessary transfer instrument whereby the suit land was transferred and registered in her name.

10. She further states that she is now the lawful and bona fide proprietor of the suit land and is obliged to issue relevant termination notices to the tenants who have been in possession of the suit land. That since her purchase of the suit land does not touch on a portion of the estate of deceased it cannot form a basis of the summons for the revocation of the grant.

11. The 2nd Respondent also avers that since she was not a beneficiary of the estate of the deceased her interests over and in respect of the suit land cannot be addressed vide the instant proceedings in which the applicants lack *locus standi*. She contends that since the $\frac{1}{3}$ portion of the suit land has been lawfully and legally transferred to her by the lawful administrator of the estate of the deceased, these proceedings are banned/or prohibited by dint of the provisions of **Section 93** of the **Law of Succession Act, Chapter 160, Laws of Kenya**. The said section reads:-

“93 (1) 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.

(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.”

12. The respondents also filed a statement of grounds of opposition opposing the applicants' application the same being that:-

1. The instant summons for Revocation of grant Application is pre-mature, misconceived and otherwise bad in law.

2. The Applicants herein are not seized of the requisite Locus-standi, to commence, originate and/or maintain the instant Application, whatsoever and/or howsoever.

3. The Honourable Court is devoid of jurisdiction to grant the Orders sought vide the instant summons for Revocation Application.

4. The instant Application is barred and/or prohibited by dint of section 93 of the Law of Succession Act Chapter 160, Laws of Kenya.

5. *The 2nd Applicant herein is a stranger to the instant proceedings and has never been enjoined as a party, whatsoever. Consequently, same cannot appropriate and/or benefit from any orders sought herein.*

6. *Besides, the 2nd Respondent has also not been enjoined in the proceedings and hence no adverse orders or at all, can issue and/or be obtained against same. Consequently, the instant proceedings are legally untenable.*

7. *The instant proceedings have been mounted and/or commenced in vacuum.*

8. *The Applicants herein are non-suited.*

9. *The instant Application constitutes and/or otherwise amounts to an abuse of the due process of Court.*

10. *The instant Application is otherwise devoid of merits, whatsoever*

13. The 1st respondent's son Smart Ngare Moracha also swore a further affidavit dated 26th June 2013 in which he avers in paragraph 4 thereof that he has never signed any consent to transfer any property to Mrs. Anne Ondieki (the 2nd respondent) as alleged and the signature thereon was a forgery; that the suit land is held in trust by the 1st respondent but he has forged consents to transfer the land; that one Onsongo Matundura Moracha is his younger brother aged 10 years and not competent enough to sign any consent and that he has made a report at the Kisii Police station OB No.16/26/6/13 for the offence of forgery against the respondents herein.

14. When the matter came before me on 9th December 2013, Mr. Aoga for the applicants submitted that the court was misled into confirming the grant because the purported consent was given by the 1st respondent's son one who is aged 10 years, and who cannot, in law, give consent. He thus urged the court to find that the purported consent is a forgery as per OB 16/6/26/6/13 at Kisii police station.

15. He further submitted that the objection filed before court was never brought to the attention of the court before confirmation. That the 1st born son of 1st applicant Smart Ngare Moracha has sworn an affidavit showing he never gave any consent and that even though the 1st respondent has referred to the 2nd applicant as his estranged wife and therefore not entitled to a share, he wondered why the 1st respondent could seek consent from the 2nd applicant's sons.

16. Counsel further submitted that the suit land falls within controlled transaction which requires both parties to seek consent before transfer thus suit land could only be transferred if there was no objection. In addition he submitted that the documents of transfer are incomplete as they show no reference number. In conclusion, counsel urged the court to grant the order as prayed as it was misled into confirming the grant.

17. Mr. Oguttu for the respondents opposed the application and reiterated the averments in both the grounds of opposition and the respondents' replying affidavits. He submitted that the 1st grant was issued in the joint names of 1st applicant and 1st respondent and the confirmation of the grant was done pursuant to a scheme of distribution filed by the 2 administrators that is the 1st applicant and 1st respondent on 13th December 2012 and adopted by the court on 17th December 2013 in the presence of counsel and parties and if there was any fraud the same should have been brought to the attention of the court by the 1st applicant. Thus the 1st applicant cannot now say that there was misrepresentation. Counsel asked the court to find and to hold that such conduct on the part of 1st applicant amounts to abuse of office.

18. He further submitted that the consent of the sons of 1st respondent were not filed to facilitate confirmation of the grant as they could not partake of the inheritance of their grandmother during the life

of their father thus they were not beneficiaries. Hence the consent referred to by counsel for the 1st applicant was a consent to land registry after confirmation of grant to facilitate transfer of suit land.

19. He further submitted that administration of the deceased's estate has now been concluded, and consequently, there is no more estate of deceased to be dealt with vide the instant succession cause, and the 1st applicant having partaken of his shares of the deceased estate cannot now supervise over or decide how the 1st respondent should deal with his share of the deceased's estate and court should not assist him in this regard.

20. Counsel further submitted that the 2nd applicant was never a party to the succession proceedings and having not been a party she cannot walk into the proceedings without seeking leave to be joined.

21. Regarding the objection proceedings, counsel submitted that these were clearly on record when the parties entered into and agreed on the schedule of distribution, and that this being the case, the objection was superceded by the confirmation orders. Reliance was placed in **Section 68 of Cap 160** which provides:-

“68 (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow.

(2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross application within a specified period.”

22. Further, he submitted that the 2nd respondent was not a party to the succession proceedings nor was she a beneficiary of the estate and thus she was only a purchaser for value and she can thus not be brought into these proceedings without leave and an order of the court. In addition, he submitted that by virtue of being a purchaser for value the 2nd respondent was secured by the provisions of **Section 93 of Cap 160** (supra) so that even a subsequent revocation of grant cannot invalidate the transfer.

23. Counsel referred the court to **Kisii High Court Succession Cause No.219 of 2010 – Liewa Jagalo & another –vs- Rose Achieng** (unreported) where Makhandia J (as he then was) stated the following concerning the provisions of **Section 93 of Cap 160**:-

“Finally, under Section 93 of the Law of Succession Act, 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 Successions.”

24. The court was also referred to **Kisii High Court Succession Cause No.35 of 2012 – Peter Miyianda & another –vs- Musa Nyaribari Gekone & 2 others** (unreported) in which the court also held that **Section 93 of the Law of Succession Act** shields an innocent purchaser for value of a deceased's estate whether such purchase was before or after commencement of the Act. In **Re Estate of Gitau (deceased) [2002] 2 KLR 430**, the Court (Khamoni J) held, *inter alia*, that once the administrators of a deceased's estate have completed their work and where part of the estate has been sold to a purchaser for value, the court becomes *functus officio* so that if the parties have any issues arising out of the succession those issues must be ventilated elsewhere.

25. In the **Gitau case**, the objector filed summons for the revocation of grant of letters of administration on grounds of fraud and concealment of material facts under **Section 76 of the Law of Succession Act**. Unfortunately for the objector, the supporting affidavit to the objection did not support the summons. At holding number (1) thereof the learned judge made the following pertinent point:-

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant which, as in this case has nothing wrong.”

26. Mr. Aoga in reply submitted that the objection to grant by 2nd applicant was a proper objection raised by 2nd applicant as wife of the deceased, and that Smart Ngare has sworn an affidavit on 26th June 2015 at paragraph 4 to the effect that he did not sign any consent for the purpose of transferring suit property to 2nd respondent which position remains unchallenged. Counsel still maintains, on behalf of the applicants that the transfer by 1st respondent to 2nd respondent was done fraudulently without knowledge of 1st respondent and her sons and the participation of 2nd applicant in proceedings was immaterial as she can still challenge the proceedings touching on deceased estate. He urged the court to allow the application.

27. After evaluating the above rival submissions by both counsel appearing, **Section 76 of the Succession Act Cap 160** comes to mind. **Section 76** is on **Revocation or Annulment** of grant. It stipulates thus:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-

a) that the proceedings to obtain the grant were defective in substance;

b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either:-

i) to apply for confirmation of the grant within one year from the date thereof or such longer period as the court has ordered or allowed; or

ii) to proceed diligently with the administration of the estate; or

iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e) that the grant has become useless and inoperative through subsequent circumstances.

28. It is an undisputed fact that a confirmation of grant was issued to both the 1st applicant and the 1st respondent by this court on 17th December 2012. Under that certificate of confirmation of grant the 1st Respondent herein Julius Moracha Matundura was given $\frac{1}{3}$ of LR No. Kisii Town/Block II/66 to hold in trust for his sons and grandsons.

29. A trust is defined by Black’s Law Dictionary, 8th Edition as:-

“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title, a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary).”

30. One of the fundamental principles of a trust is that the trustee owes the beneficiary a fiduciary duty not to waste the property but in fact to manage it to fruitfully for the benefit of the beneficiary see **P.W.G. -vs- S.M.K. & 2 others [2012] e KLR.**

31. In the instant case, **Section 76** of the **Law of Succession Act** must of necessity be read together with **Section 93** of the **Act**; because it appears from the affidavit sworn by Sarah Moraa Moracha that her main contention in this case is not the grant per se, but is the distribution of the deceased's estate, part of which has now devolved to the 2nd Respondent after purchase from the 1st Respondent. So, the question that must be answered at this stage is whether the applicants have demonstrated to this court that the orders sought in respect of LR Kisii Municipality/Block II/66 ought to be granted.

32. From the pleadings on record, I do not find, as alleged by the applicants that the conduct of the proceedings in this case were conducted in secrecy or that the respondents and in particular the 1st respondent concealed any material particulars, which if they had been revealed, would have made this court not to confirm the grant on 17th December 2013.

33. In any event, the court record shows that all the way from 26th October 2013 to 17th December 2013 all parties were properly and adequately represented and on 2nd November 2013, the parties, through their respective counsel recorded a consent order appointing the 1st applicant and the 1st respondent co-administrators of the deceased's estate. On the 17th December 2013, the grant was confirmed by consent of the parties in terms of the Schedule of Distribution dated 13th December 2013 and filed in court on the same day. The certificate of confirmation reflects the details set out in that Schedule of Distribution dated 13th December 2013.

34. So while **Section 76** of the **Law of Succession Act** is open to any party to apply for revocation of grant, it is noteworthy that in the instant case, the administrator had completed their work and the only complaint by the applicants is with regard to distribution of the estate touching on the $\frac{1}{3}$ share in LR Kisii Municipality/Block II/66 bequeathed to the 1st respondent to hold in trust for his sons and grandsons. The same does not say that the 1st respondent was to hold the same in trust for the 2nd applicant, and others.

35. In any event, the consent to the distribution recorded in court on 17th December 2013 was filed with the full knowledge that there were objection proceedings pending. The objector, Sarah Moraa Moracha, the 2nd applicant in the instant application was represented by the same firm of advocates, namely, G.M. Nyambati & Co. Advocates. It cannot therefore be said that the existence of the said objection was not brought to the attention of the court. It was the duty of counsel for the 2nd applicant to bring up that issue, and having failed to do so, the objection was compromised by the agreed schedule of distribution dated 13th December 2013 and the subsequent adoption of the same by the court on 17th December 2013.

36. So, what is the fate of the title of the 2nd respondent? I would reiterate what Makhandia J said in the **Liewa Jagalo Case** (above) that the said title is shielded and protected by the provisions of **Section 93** of the **Law of Succession Act** and cannot therefore be impugned under this succession cause. The 2nd applicant should mount that fight before another court and/or forum. Perhaps if the instant application had been brought by the son(s) and/or grandson(s) of the 1st respondent, the determination of the application would have been premised on other factors.

37. In the premises and for the reasons above stated, the summons dated 6th June 2013 seeking partial revocation of grant, cancellation of title and rectification of register is hereby dismissed. Costs of the summons to the Respondents.

38. Orders accordingly.

Dated, signed and delivered at Kisii this 6th day of March, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. G.M. Nyambati (present) for 1st and 2nd Applicants

Mr. Okemwa h/b for Oguttu-Mboya for 1st and 2nd Respondents

Mr. Bibu - Court Clerk