

**IN THE COURT OF APPEAL  
AT NYERI  
(CORAM: NYAMWEYA, KIMARU & MUCHELULE JJ.A.)**

**CIVIL APPEAL NO. 228 OF 2018**

**BETWEEN**  
**GICUKU NYAGA.....APPELLANT**  
**AND**  
**PHYLLIS GRACE KARIMI ..... 1<sup>ST</sup>**  
**RESPONDENT NICASIO NJERU NJAGI.....2<sup>ND</sup>**  
**RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Embu (Muchemi J.) dated 19<sup>th</sup> June, 2018,*

*in*

***Succession Cause No. 77 of  
2002 As consolidated with  
Succession Cause No. 284 of 2007)***

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**\*\*\*\*\* JUDGMENT OF THE COURT \*\*\*\*\***

1. The dispute before the High Court was in relation to the estate of **Johana Nyaga** (deceased) who died on 16<sup>th</sup> September, 2000. He died intestate. His widow, **Alice Wangiri Nyaga**, petitioned the court for a grant of letters of administration intestate in **Succession Cause No. 77 of 2002**, and named the deceased beneficiaries as herself, **Mary Gicuku Nyaga** (daughter), **Bedan Njagi Nyaga** (son), **Peter Njue Nyaga** (son), and **Annette Muthanje Kathuri**.
2. The deceased's estate comprised of land parcels numbers

**Ngandori/Kirigi/3338,**

**Gaturi/Weru/3499,**

**Gaturi/Weru/3498,**

**Gaturi/Weru/3503,**

**Gaturi/Weru/3504,**                    **Gaturi/Weru/3505,**                    and  
**Gaturi/Weru/3508.**

3. The petitioner died on 7<sup>th</sup> September, 2004, before the grant issued to her could be confirmed. The deceased's children made a new application for confirmation of the grant dated 12<sup>th</sup> April, 2005, and the same was confirmed on 12<sup>th</sup> May, 2005. This grant was later revoked on 23<sup>rd</sup> February 2006 upon application by the 1<sup>st</sup> respondent and a new one confirmed on 2<sup>nd</sup> February, 2007. This confirmed grant was similarly revoked by consent of the parties on 5<sup>th</sup> March 2008.
4. The deceased's daughter, **Mary Gicuku Nyaga**, who is the appellant herein, filed another petition, **Succession Cause No. 284 of 2007**, on 6<sup>th</sup> September, 2007, in relation to the estate of the same deceased, **Johana Nyaga**, and was issued with letters of administration intestate on 28<sup>th</sup> July, 2011. The two succession causes were consolidated and the appellant subsequently applied filed a summons for confirmation of grant dated 6<sup>th</sup> August 2013 in **Succession Cause No. 77 of 2002**.
5. The 1<sup>st</sup> respondent filed an affidavit of protest in **Succession Cause No. 77 of 2002**. It was her case that on 17<sup>th</sup> May

2004, she entered into a sale agreement with the deceased's widow, **Alice Wangiri Nyaga**, for the sale of two and three quarters

acres ( $2\frac{3}{4}$  acres) of land parcel Number Gaturi/Weru/3508. That on 17<sup>th</sup> October, 2007, the deceased's son, Bedan Njagi, sold to her an extra quarter acre of parcel number Gaturi/Weru/3508. She stated that on 16<sup>th</sup> September 2004, **Bedan Njagi** and his brother **Peter Njue Nyaga**, jointly sold to her another quarter acre out of land parcel Gaturi/Weru/3508. She averred that on 17<sup>th</sup> August 2004, and on 28<sup>th</sup> June 2004, she purchased land parcels numbers Gaturi/Weru/3501 and 3505 respectively, from the deceased's widow, **Alice Wangiri Nyaga**. The deceased's widow further sold to her parcels Gaturi/Weru/3498 and 3499. The 1<sup>st</sup> respondent annexed the respective sale agreements in the above-named transactions. She explained that she paid **Alice Wangiri Nyaga's** medical bills and covered her funeral expenses amounting to Kshs. 69,750. She asserted that she fenced off the purchased plots and has been utilizing them since their respective purchases.

6. The 2<sup>nd</sup> respondent, **Nicasio Njeru Nyaga**, also filed an affidavit of protest dated 26<sup>th</sup> June, 2014 in **Succession Cause No. 77 of 2002**, against the application for confirmation of grant filed by the appellant, **Gicuku Nyaga**. The 2<sup>nd</sup> respondent deponed that on 25<sup>th</sup> June 2003, he

entered into a sale agreement with the deceased's widow,  
**Alice Wangiri Nyaga**, for sale of land

parcels number Gaturi/Weru/3503 and 3504. He stated that the sale was completed and acknowledged by **Alice Wanguru Nyaga**, in her application dated 12<sup>th</sup> January, 2005 for confirmation of the grant that had been issued to her, with respect to the estate of the deceased. He stressed that the deceased's widow died before the said grant was confirmed.

7. The application for confirmation of the grant, together with the protests were disposed of by way of written submissions. **Muchemi J.**, in a judgment delivered on 19<sup>th</sup> June, 2018, ruled in favour of the respondents. The learned Judge held that the respondents adduced sufficient evidence to prove that they had purchased the respective parcels of land belonging to the estate of the deceased from the beneficiaries, and were therefore beneficial owners of the same.
8. Aggrieved by this decision, the appellant filed the instant appeal where she faulted the learned Judge for finding in favour of the respondents, contending that the respondents ought to have pursued their claims, if any, in a civil suit. The appellant was aggrieved by the learned Judge's decision, and asserted that the purported sale agreements were null

and void as no consents from the Land Control Board were procured. The appellant opined that the vendors in respect of the purported sale

agreements had no capacity to sell the parcels of land. She faulted the learned Judge for distributing parcel number Gaturi/Weru/3505 to the 2<sup>nd</sup> respondent, despite the fact that he did not avail any sale agreement to that effect.

9. The appellant took issue with the fact that the learned Judge applied the provisions of **Section 93** of the **Law of Succession Act**, yet no transfers with respect to the parcels of land claimed by the respondents had been effected by the administrators of the estate. The appellant was aggrieved that the learned Judge distributed majority of the deceased's estate to third parties, leaving out the rightful beneficiaries. She was of the view that the decision of the learned Judge was against the weight of the evidence on record.
10. The appeal was canvassed by way of written submissions. It was the appellant's submission that the deceased's widow and sons had no capacity to sell the parcels of land before confirmation of the grant was issued to them. She urged that **Section 82(b)(ii)** of the **Law of Succession Act** forbade the sale of a deceased's immovable assets prior to confirmation of grant. She opined that the respondents' recourse lay in seeking a refund of the alleged purchase

price paid to the vendors, or wait until the beneficiaries received their respective shares of the

estate of the deceased before laying claim. She submitted that the respondents were not entitled to a share of the deceased's estate as they were not beneficiaries.

11. The appellant further submitted that the learned Judge erroneously awarded parcels Gaturi/Weru/3503, 3504, and 3505 to the 2<sup>nd</sup> respondent, on the basis of a revoked grant, and that **Section 93** of the **Law of Succession Act** was not applicable as the parcels of land were yet to be transferred to the respondents. She was of the view that the alleged sale agreements were invalid as no Land Control Board consents was procured by the parties to validate the sale. She invited us to allow the appeal as prayed.
12. The 1<sup>st</sup> respondent, on her part, submitted that the deceased's widow included her as a beneficiary of the estate of the deceased in **Succession Cause No. 77 of 2002**, acknowledging her rights as a creditor or purchaser. That upon the death of the widow, the appellant was named as the administrator of the estate of the deceased, and that she too acknowledged her beneficial interest in the estate of the deceased in her affidavit dated 27<sup>th</sup> October, 2004. The 1<sup>st</sup> respondent submitted that she produced the relevant sale agreements, which were not disputed by any

of the beneficiaries, and that she paid the purchase considerations in full.

13. She urged that **W. Karanja J.** (as she then was), in a ruling dated 18<sup>th</sup> February, 2010, held that the 1<sup>st</sup> respondent was not a stranger to the estate of the deceased as alleged by the appellant, but was rather a beneficial owner on account of having purchased the respective parcels of land from the beneficiaries. She reiterated that the vendors had the duty to procure the consents from the Land Control Board, and as such, they should not be allowed to benefit from their own wrong doing. It was her submission that their conduct of receiving the purchase price estopped them from claiming that they had no capacity to sell the suit parcels of land. She urged that the appellant was aware that she took possession of the parcels of land in 2004 and had extensively developed the same. She was of the view that the appellant seeking to deny her what was rightfully hers while unjustly enriching herself.

14. This being a first appeal, our duty was well stated in **Selle and Another v. Associated Motor Boat Co. Ltd [1968] E.A. 123,**

where the court observed as follows:

***“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are***

***well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact, if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mhamed Sholan, (1955) E.A.C.A. 270)".***

15. In the present appeal, three issues came to the fore for determination by the Court. The first issue is whether the respondents purchased the suit properties when the administrator at the time had authority to sell the same to them. The second issue for determination is whether the beneficiaries of the estate of the deceased were entitled to inherit the suit properties as a whole or part of the suit properties. Finally, the third issue for determination, is what orders are to issue in respect of this appeal together with the attendant costs.

16. In the present appeal, the following facts are not in dispute:  
It is not disputed that the deceased was survived by his

widow

**Alice Wangiri Nyaga** and her children Mary Gicuku Nyaga  
the

appellant (daughter), Bedan Njagi Nyaga (Son), Peter Njue Nyaga (Son) and Annete Muthanje Kathuri (daughter). All the children of the deceased duly signed the consent authorizing the widow to petition to Court for a grant of letters of administration of the estate of the deceased. It is also not disputed that the deceased's estate comprised of the parcels of land numbers **Ngandori/Kirigi/3338, Gaturi/Weru/3498, Gaturi/Weru/3499, Gaturi/Weru/3503, Gaturi/Weru/3504, Gaturi/Weru/3505, and Gaturi/Weru/3508.**

17. It is noteworthy that in the petition for the grant, the widow listed the 1st respondent **Phillis Grace Karimi** as a creditor to the estate of the deceased having already purchased the following parcels of land i.e Gaturi/Weru/3498.3499 and 3508. All these parcels of land measured 2 3/4 acres.
18. The deceased's widow, **Alice Wangiri Nyaga** petitioned the Court in **Embu Succession Cause No. 77 of 2002**. She was issued with a grant of letters of administration intestate as the administrator in respect of the estate of the deceased. Before the grant could be confirmed, the deceased's widow died on 7<sup>th</sup> September, 2004.
19. Upon the death of the widow, three of the children of the

deceased namely, **Bedan Njagi, Gicuku Njagi** and **Peter Njue**

were issued with a grant of letters of administration intestate. The grant was confirmed on 12<sup>th</sup> May, 2005 and the estate of the deceased was distributed in accordance with scheduled provided therein which excluded the 1<sup>st</sup> respondent but introduced the 2<sup>nd</sup> respondent **Nicasio Njeru Njagi** as beneficiary of parcels No. Gaturi/Weru/3503, 3504 and 3505. It was apparent from his affidavit of protest that the 2<sup>nd</sup> respondent purchased these parcels of land from the widow of deceased on 25<sup>th</sup> June 2003.

20. The appellant lodged another succession cause in respect of the estate of the deceased being **Succession Cause No. 284 of 2007** in which she identified herself and two grandchildren of the deceased namely **Fundi Rui Wessey** and **Everline Muthoni** as the sole beneficiaries of her deceased father's estate.

21. The two petitions were consolidated. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed affidavits of protest to the summons for confirmation of grant which had earlier been issued in **Succession Cause No. 77 of 2002**. When the trial court heard the protest it found in favour of the respondents provoking the present appeal.

22. During the plenary of the hearing of the appeal, it was

argued on behalf for the appellant that the respondents  
could not have

legally purchased the properties from the estate of the deceased since at the time the alleged sale took place, no letters of administrations had been granted. On their part, the respondents argued that they had legally purchased the suit properties from the beneficiaries of the estate of the deceased and therefore their ownership of the suit properties could not be impeached. They further added that all beneficiaries of the estate of the deceased acknowledged the sale.

23. We have re-evaluated the evidence adduced by the parties before the trial court and the submissions made before this Court. It was clear to us that indeed the widow of the deceased had initially acknowledged the 1<sup>st</sup> respondent in the distribution of some of the suit parcels of land namely: Gaturi/Weru/3498,3499 and 3508. The 1<sup>st</sup> respondent in turn brought evidence of the sale agreements she entered into with the widow of the deceased on various dates in 2004, and one which she entered with another beneficiary (Bedan Njagi ) on 17<sup>th</sup> October 2007. Likewise, the respondent averred that he entered into an agreement with the widow of deceased for sale of some of the parcels of land on 25<sup>th</sup> June 2003.

24. It is notable in this respect that the widow of the deceased,  
**Alice Wangiri Nyaga**, was issued with a grant of letters  
of

administration intestate on 20<sup>th</sup> February 2002, and by the time of her death on 7<sup>th</sup> September 2004 the said grant had not been confirmed. Another grant was then issued to the appellant, Bedan Njagi and Peter Njue, which was confirmed on 12<sup>th</sup> May 2005, but set aside on 23<sup>rd</sup> February 2006 upon an application by the 1<sup>st</sup> respondent dated 5 July 2005. Another grant issued to the three administrators was confirmed on 2<sup>nd</sup> February 2007, and later revoked by consent on 5<sup>th</sup> March 2008. From the record, the next legal action that was taken appears to have been the grant of letters of administration intestate issued to the appellant in **Succession Cause No. 284 of 2007** on 28<sup>th</sup> July, 2011, which were the subject of the summons for confirmation of grant dated 6<sup>th</sup> August 2013.

25. Consequently, all but one of the subject sale agreements were entered into between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the widow of the deceased before the first confirmation of the grant on 12<sup>th</sup> May 2005. Under section **82(b)(ii) of the Law of Succession Act**, the personal representative of the estate of the deceased cannot sell any immovable property of the estate before the grant has been confirmed. When Alice Wangiri Nyaga, the deceased's widow, purported to sell

portions of the deceased's estate to the 1st respondent, she did not have a confirmed

grant. In the same manner, the widow purported to sell portions to the 2nd respondent. The widow did not have a confirmed grant at the time. These transactions were not only illegal but were also criminal under section 45 of the Act. They amounted to intermeddling, and could not form the basis of the respondent's claim to the estate of the deceased. The respondents were not creditors of the estate of the deceased as there was no evidence that they bought any portions of his parcels of land while he was still alive.

26. We therefore disagree with the findings reached by the trial court to the effect that all the beneficiaries were aware that the properties that comprised the estate of the deceased had been sold to the respondents, and that the respondents acquired legal interest in the said properties as creditors. It is also notable that **W. Karanja J.** (as she then was) did observe in the ruling delivered on 18<sup>th</sup> February, 2010 in **Succession Cause No. 77 of 2002** that the beneficiaries had no legal authority to sell the deceased's land to the 1<sup>st</sup> respondent, even though they were aware of her possession of the parcels of land.

27. The only sale that occurred during the subsistence of a confirmed grant was the one resulting from the sale

agreement dated 17<sup>th</sup> October 2007 for the sale of a quarter  
( $\frac{1}{4}$ ) of an acre

of Land Parcel Number. Gaturi/Weru/3508 entered into between the 1<sup>st</sup> respondent and Bedan Njagi Ngari Ngano, who was at the time one of the administrators of the deceased's estate. We are of the view that the 1<sup>st</sup> respondent can in the circumstances benefit from the protections afforded by both **section 82(b)(ii) and section 93 of the Law of Succession Act**, and has a valid and legal interest and title with respect to Section 93 provides as follows:

***“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.”***

28. In answer to the second issue for determination we therefore hold that the proper and legal beneficiaries of the estate of the deceased are entitled to the remainder of the estate of the deceased, and the titles issued to the respondents for all parcels of land belonging to the deceased except for a

quarter ( $\frac{1}{4}$ ) of an acre of Land Parcel Number.

Gaturi/Weru/3508 sold on 17<sup>th</sup>

October 2007 to the 1<sup>st</sup> respondent are accordingly liable for revocation.

29. In the premises therefore, this appeal substantially succeeds save for the finding we have made with respect to the sale of a quarter ( $\frac{1}{4}$ ) of an acre of Land Parcel Number. Gaturi/Weru/3508 on 17<sup>th</sup> October 2007 to the 1<sup>st</sup> respondent. We hereby set aside the judgment delivered by the High Court at Embu (***Muchemi J.***) on 19<sup>th</sup> June 2018 in **Succession Cause No. 77 of 2002 as consolidated with Succession Cause No. 284 of 2007** in its entirety, and grant the following orders in its stead:

**1. The appellant shall file and serve all proper and legal beneficiaries with a new affidavit and schedule of distribution of the estate of the deceased within 45 days of the date of this judgment, taking into account the findings made herein and particularly as regards the 1<sup>st</sup> respondent's interest in and title to a quarter ( $\frac{1}{4}$ ) of an acre of Land Parcel Number. Gaturi/Weru/3508 which was sold to the 1<sup>st</sup> respondent on 17<sup>th</sup> October 2007 by Bedan Njagi Ngari Ngano.**

**2. Any and all titles to the remaining parcels of land  
forming part of the estate of the deceased which  
were**

issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents after the death of the deceased are hereby revoked.

3. Given the circumstances giving rise to the appeal, each party shall bear their own costs of the appeal and of the suit in the High Court.

30. Orders accordingly.

Dated and delivered at Nyeri this 24<sup>th</sup> day of October, 2025.

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**L. KIMARU**

.....  
**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

*I certify that this  
is a true copy of the  
original Signed*  
**DEPUTY REGISTRAR**