

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**FAMILY DIVISION**

**PROBATE AND ADMINISTRATION CAUSE NO.4 OF 2023**

**(FORMERLY KISUMU HC SUCCESSION NO. 430 OF 2012)**

**IN THE MATTER OF THE ESTATE OF THADEUS RAWIYO  
ODONGO (DECEASED)**

**ANDREA ONYANGO**

**RAWIYO.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**MARCELUS ODONGO**

**RAWIYO.....2<sup>ND</sup>**

**PETITIONER/RESPONDENT**

**VERSUS**

**FABIAN OWINO OWINO.....1<sup>ST</sup>**

**BENEFICIARY**

**CHRISTOPHER OMONDI ONYANGO.....2<sup>ND</sup>**

**BENEFICIARY**

**AND**

**BENARD ODUOR OCHIENG T/A**

**BENORTH AGENCIES.....1<sup>ST</sup> INTERESTED**

**PARTY**

**ROSE LOICE ONYANGO.....2<sup>ND</sup> INTERESTED**

**PARTY**

**MOSES OMONDI MENUANGO.....3<sup>RD</sup> INTERESTED**

**PARTY**

**CALL OF GOD**

**REVIVAL MINISTRY.....4<sup>TH</sup> INTERESTED PARTY**

**MESHACK OCHILO.....5<sup>TH</sup> INTERESTED PARTY**

**DOMINIC ODUOR OCHIENG.....6<sup>TH</sup> INTERESTED PARTY**

**GEORGE OTIENO OJODE.....7<sup>TH</sup> INTERESTED PARTY**

**CELLIO KHAVILITSI AYUGU.....8<sup>TH</sup> INTERESTED PARTY**

### **RULING**

1. The ruling relates to two applications dated 29/9/2025 (filed by 4<sup>th</sup> -8<sup>th</sup> Interested Parties) and 18/11/2025 (filed by 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties).
2. The application dated 29/9/2025 seeks principally two prayers namely that this court issue an order of stay of execution of the judgment and/or orders issued on 16/5/2025

and secondly, an order that the court review, vary and/or set aside the order for cancellation of title deeds issued to the Applicants with respect to parcel Numbers LR South Ugenya/Ambira/3971, 3973, 4081, 3978, 4049, 4131, 4197 and 4964. The application is supported by the grounds set out thereunder and by the affidavit sworn by Fredrick Otieno Owuor the Presiding Bishop of the 4<sup>th</sup> Interested Party. The Applicants' gravamen is inter alia; that the Petitioners/Respondents filed summons for revocation of grant dated 26/6/2019 as well as orders of cancellation of various title deeds issued to the beneficiaries and later transferred to third parties pursuant to the certificate of confirmation of grant; that this court delivered its judgment on 16/5/2025 where adverse orders were issued against the Applicants; that the Respondents failed to disclose to the court that there were other third parties who were likely to be affected by orders issued in respect of some of the disputed properties or seek to enjoin the interested parties to the suit; that the judgment of 16/5/2025 therefore condemned the interested parties unheard; that the sole intention of the Respondents was to steal a match on the

Applicants; that the titles issued to the Applicants are protected by the provisions of Section 93 of the Law of Succession Act; that the Respondents will not suffer any prejudice since the beneficiaries who sold their portions are deemed to have been entitled to do so upon distribution of the estate; that the Applicants had purchased parcel number South Ugenya/Ambira 3971 and is in occupation of the same since October 2017 and similarly the other interested parties over the other four parcels; that it is in the interest of justice that the order for cancellation of titles be allowed.

3. The Respondents opposed the application dated 29/9/2025 vide the affidavit of Marcelus Odongo Rawiyo, the 2<sup>nd</sup> Petitioner/Respondent sworn on 18/11/2025 wherein he averred inter alia; that the judgment of 16/5/2025 was lawfully delivered after full participation of all parties and thus the attempt to reopen the matter would lead to delay; that the deponent of the affidavit in support of the application does not have resolution or authorization to swear the affidavit on behalf of the church (4<sup>th</sup> Applicant); that the Applicant cannot claim ignorance since he admits to

have had prior knowledge of the case as early as 10<sup>th</sup> January 2016 and therefore the present application is an afterthought; that the Applicant is no longer the lawful owner of parcel 3971 since the same has already been cancelled by this court; that the Applicants build structures on the parcel of land in open contempt of court and that they acted recklessly with disregard for the ongoing dispute; that the succession cause was initiated on 27/6/2019 and that the Applicants were aware of the same; that the Applicants despite being aware of the dispute went ahead to buy the parcels and that there existed a caution registered on 22/10/2008 as well as litigation in Kisumu High Court vide Succession Cause No. 430/2012 and that the Applicants being prudent purchasers ought to have undertaken due diligence as the documents were in the public domain; that it was the duty of the beneficiaries and not the Respondents to notify or enjoin purchasers to the proceedings and hence the Applicants cannot shift the burden on the Respondents; that the Applicants and the beneficiaries had attempted to appeal the judgment but failed and therefore came back to this court to seek to reopen it and which is a misuse of the court

process and meant to circumvent justice and undermine the sanctity of the judgment; that the right to be heard must be exercised in the proper forum and that the Applicants have conceded that their claim is against beneficiaries and therefore they must wait until succession is concluded and then seek the remedy against the beneficiaries who sold the land to them before the relevant court; that the law does not protect titles tainted with fraud and hence to reinstate cancelled titles would be to revive illegality and perpetuate injustice; that the Applicants do not merit an order of stay of execution or an order for review or revision or the orders of this court vide the judgment of 16/5/2025; that the application should be dismissed with costs and that the Respondents' application dated 20/6/2025 be allowed as prayed.

4. The application dated 18/11/2025 seeks principally two orders namely an order of stay of execution of the orders of 16/5/2025 and an order to set aside the objection proceedings and ruling of 16/5/2025 and grant the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties unconditional leave to participate in the

hearing of the Summons for revocation of grant. The application is supported by the grounds set out thereunder and by the affidavit of Rose Loice Onyango, 2<sup>nd</sup> interested party sworn on even date. The Applicants' gravamen is inter alia; that the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are registered owners of land parcel South Ugenya/Ambira/3996 and 3941 which came up as a result of subdivision of South Ugenya/Ambira/15; that the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties bought the two parcels from one Christopher Omondi Onyango; that the two parcels were sold to them after the grant had been issued and confirmed procedurally in court; that the interests of the Applicants are protected under Section 93 of the Law of Succession Act; that the Respondents during the hearing of the objection confirmed that the beneficiaries had sold their shares and relocated elsewhere; that despite the Respondents being aware that the orders would affect the interested parties they deliberately failed to enjoin them into these proceedings; that it is the fault of the Respondents in failing to enjoin the Applicants which has necessitated the present application; that the interested parties stand condemned unheard; that

the rights of the interested parties are protected under Article 25, 40, 47 and 50 of the Constitution; that it is just and fair that the orders sought be granted.

5. The two applications were canvassed by way of written submissions. The learned counsel for the Petitioners/Respondents as well as counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties complied. There are no submissions by counsel for the 4<sup>th</sup> - 8<sup>th</sup> Respondents.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties submissions are dated 27/1/2026 and which raised two issues for determination namely whether the ruling of 16/5/2025 offended Article 25,40 and 50 of the Constitution by determining the interested parties' proprietary rights without affording them an opportunity to be heard and whether the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties are bona fide purchasers for the value without notice.
7. On the first issue of whether the ruling of 16/5/2025 offended Article 25,40 and 50 of the Constitution by determining the interested parties' proprietary rights without affording them

an opportunity to be heard, counsel submitted that the right to a fair hearing under Article 50(1) is the cornerstone of natural justice and founded on the fundamental principle that no person shall be condemned unheard. That this right is non derogable under Article 25(c) and is closely intertwined to the protection of property guaranteed under Article 40 of the Constitution.

Article 50 (1) provides that

***Fair hearing. 50. Every person has the right to have any dispute that can be resolved by the application for law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

That Kenyan courts have consistently upheld this principle in **Republic vs. The Honourable The Chief Justice of Kenya & Others Exparte Moiyo Mataiya Ole Keiwua, Nairobi HCMCA No. 1298 of 2004** where it was held that:

***“The right to be heard has two facets, intrinsic and instrumental. The intrinsic***

***value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all proceedings is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the***

***burden being upon those who affirm their existence.”***

Counsel placed reliance in **Honourable Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others SC Petition No. 7 of 2018**, in its ruling the Supreme Court expressed itself as follows:

***[87] ...In this regard, what then are the norms or components of a fair hearing? In the matter of Indru Ramchand Bharvani & Others v Union of India & Others, 1988, SCR Supl. (1) 544, 555, the Supreme Court of India found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing Bal Kissen Kenriwal v Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460). It is important to restate that a literal reading of the provisions of the Constitution of Kenya shows that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether***

**they arise in a judicial or an administrative context. Comparative experience shows that the European Court of Human Rights (European Court) has severally explained that: it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” See Steel and Morris -v- United Kingdom [2005] ECHR 103, paragraph 59).**

Further, counsel placed reliance in Re Estate of Mugo Kabire Kubu (deceased) [2025] KEHC 8601 (KLR) the court held as follows:

**“The Court has considered that every person has a right to a fair hearing in terms of Article 50 (1) of the Constitution, which provides as follows:**

**“Fair hearing .50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate,**

***another independent and impartial tribunal or body.***

***As persons registered as owners of the parcels of land claimed as part of the estate of the deceased, the Interested Party were entitled to be heard before a decision affecting their Article 40 right to property was made. As the decision affecting their title to the land was made without hearing them, they are entitled to be joined and pursue a redress in this matter where the decision was taken.”***

That in the instant case, the ruling of 16/5/2025 determined the fate of the Applicant's titles to South Ugenya/Ambira/3996 and 3941 without affording them an opportunity to be heard. They were condemned unheard. As registered proprietors of the said parcels, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were constitutionally entitled to be heard before any decision affecting their proprietary rights was made.

That the Applicants seek to demonstrate how they lawfully acquired title to the said parcels which arose from the sub

division of South Ugenya/Ambira/15 and to show that their titles are protected under Section 93 of the Law of Succession Act. the provisions protect purchasers who acquire property from personal representatives acting under grant, even where such grant is later revoked. That the Applicant are ready to demonstrate this through the confirmed grant, land Control Board consent, and title documents evidencing lawful purchase from a personal representative acting under a confirmed grant. That the Applicant will further demonstrate that through their annexed documents the confirmed grant (RLA -2) , the Land Control Board Consent, and title documents evidencing lawful purchase from a personal representative acting under a confirmed grant. That the Applicant will further demonstrate that through their annexed documents the confirmed grant (RLA -2) the Land Control Board Consent, and title deeds that they are purchasers who transacted with the personal representative (2<sup>nd</sup> Respondent) acting under a confirmed grant. Further, the Applicant will further demonstrate that through their annexed documents the confirmed grant (RLA -2), the

Land Board Consent, and title deeds that they are purchasers who transacted with the personal representative (2<sup>nd</sup> Respondent) acting under a confirmed grant.

That the ruling of 16/5/2025, which effectively invalidated these transfers, was made without considering this statutory protection and without hearing the registered proprietors and that denying the Applicants a hearing is to sanction a process in which a person's property is adjudicated upon in their absence, in direct violation of Articles 25 (c), 40 and 50 of the Constitution and the principles of natural justice.

8. On the issue of whether the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties are bona fide purchasers for value without notice, a bona fide purchaser was defined in the Black's law Dictionary, 8<sup>th</sup> Edition page 1291 as;

***“One who buys something for value without notice of another claim to the property and whether actual or constructive notice of any defect or informality claims or equities against the seller's title, one who***

***was in good faith paid valuable consideration for the property without notice of prior adverse claims.”***

Further, reliance was placed in the case of **Lawrence Mukiri v. Attorney General & 4 Others [2013] eKLR** where the court stated what amounts to bona fide purchaser for value, thus;

***“...a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:***

***a. He holds s certificate of title;***

***b. He purchased the property in good faith;***

***c. He had no knowledge of the fraud;***

***d. The vendors had apparent valid title;***

***e. He purchased without notice of any fraud;***

***f. He was not party to any fraud;***

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

That with regards to bona fide purchaser for value without notice, the principle of bonafide in the case of third parties dealing with property is equally applied by the courts in this county where circumstances permit and that whereas an intending purchaser of a property ordinarily is expected to carry out due diligence to verify the details and particulars of the property, it cannot be expected that the scope of such due diligence would extend beyond what the law provides as being sufficient e.g official searches and inspection of survey record unless there is on the face of it apparent need to carry out further investigation. Further, counsel submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties acquired Land parcel Number South Ugenya/Ambira/3996 and 3941 from a registered proprietor who derived title from a grant that had been issued and confirmed by the court. That the transactions were supported by Land Control Board consent and duly registered titles.

The Applicants, through the annexed supporting affidavit and documentary exhibits, have laid a clear documented foundation establishing their status as bona fide purchasers for value. That the title deeds annexed and marked RLA-1 demonstrate that the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are the registered absolute proprietors of LR No. South Ugenya/ Ambira/3996 and 3949, respectively.

That these registrations were the culmination of a transparent statutory process including an application for consent of the Ugunja Land Control Board and the subsequent issuance of title deeds on 23<sup>rd</sup> August 2019. That the certificate of official search dated 20/6/2017 also annexed, confirms that at the time of the transaction the registered proprietor was Christopher Omondi Onyango, the 2<sup>nd</sup> Respondent. That this chronological event demonstrates that the vendors held a registrable and demonstrable interest in the land at the material time, upon which the Interested parties were entitled to rely on. Further, counsel stated that the transactions are further anchored in the certificate of confirmation of grant annexed as RLA-2, issued by the High Court of Kisumu in

Succession Cause No. 430/2012 on 18/12/2025 and that confirmation legally empowered the administrators, including the 2<sup>nd</sup> Respondent, to distribute the estate assets, including Siaya/Ambira/15, from which the subject division arose. The interested parties therefore transacted the persons acting under the express authority of a confirmed grant issued by a court of competent jurisdiction. Further, it was stated that 2<sup>nd</sup> and 3<sup>rd</sup> interested parties carried out the requisite due diligence expected of any reasonable man and they further pray that the court finds for the for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties that they are bonafide purchaser for value without notice and therefore their titles are protected.

9. As regards on who is to bear the cost of this application, reliance was placed on Section 27 of the Civil Procedure Act Cap 21 Laws of Kenya which enacts that costs follow events.

10. Petitioners' /Respondents submissions ae dated 26/1/2026.

11. The learned counsel submitted that issues for determination are whether the application is procedurally competent or an abuse of process; whether the Interested parties meet the legal threshold for joinder and whether Section 93 of the Law of Succession Act protects the Applicants, whether Article 40 of the Constitution shields unlawfully acquired interests. Whether the Applicants discharged the duty of due diligence, whether the proper recourse lies against the Respondents or against the vendors and whether this court should reopen matters already conclusively determined.

12. On the first issue of finality of litigation and abuse of process, it was submitted that litigation must come to an end once a court determination has occurred and the doctrine of *functus officio* prohibits reopening matters once a court has rendered its final decision. Reliance was placed in the Court of Appeal case of **Telkom Kenya Limited v John Ochanda (Civil Appeal 60 of 2013) [2014] eKLR** which states that:

***Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.....proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available. ..We are fortified in this view by the fact that a perusal of the Respondents' application shows that what was sought went way beyond the exceptions to the application of the doctrine. There was neither slip in drawing the judgment nor an error in expressing the intentions of the court. Indeed, the grounds on which the application was premised, properly understood, betray the serious adjudicative exercise that the court was being called upon to perform.***

That the doctrine exists not as procedural convenience. That it is constitutional imperative to ensure finality in litigation and respect for judicial outcomes. That the present application seeks to re-open matters on merit before this court, without statutory basis, and runs squarely contrary to this binding authority.

13. As regards the threshold for joinder of Interested parties, reliance was placed in the case of **Francis Karioko Muruatetu & Another v Republic (2016) eKLR**, the Supreme Court held that an interested party must demonstrate a direct, proximate, and legally recognizable stake capable of assisting the Court in resolving the real issues in dispute and not introduction new issues. That from the foregoing legal provisions and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party; that one must move the court by way of a formal application. Enjoinment is not of right, but is at the discretion of the court; hence sufficient grounds must be laid

before the court, on the basis of the following elements; that the personal interest or stake that the party has in the matter must be set out in the application. that the interest must be clearly identified and approximate enough, to stand a part from anything that is merely peripheral. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. it must also be clearly outlined and not something remote. Lastly a party must in its application set out the case or submissions. It should also demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court. Therefore, in every case, whether some parties are enjoined as interested parties or not the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principle parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the court. one of the principles for admission of an interested party is that

such a party must demonstrate that he/she has a stake in the matter before the court. that stake cannot take the form of an altogether a new issue to be introduced before the court and that the interested party derive their claims from fresh issues, transactions grounded in a grand already declared defective. No legally enforceable interest can arise from a judicial nullity.

14. As regards Section 93 of the Law of Succession Act on not sanitizing invalid grants, it was submitted that the Applicant's reliance on Section 93 of the Law of Succession Act is legally untenable. That the statutory protection under the provision applies exclusively to transfers made by a person to whom representation has been granted. That in the present case, no lawful grant of representation had been issued to the vendors /beneficiaries at the time of the alleged transactions. That consequently, they lacked the legal capacity to alienate any interest in the estate, and any purported transfer is void ab initio.

15. Further, it was submitted that Section 93 cannot sanitize transactions conducted by persons acting without authority of a confirmed grant nor can it validate titles emanating from a legal nullity fraud. That the Applicant therefore cannot cloak an unlawful ultra vires transaction with statutory protection that was never intended to shield acts undertaken in absence of representation. That in the premise, the Applicant 's invocation of Section 93 must fail for want of legal foundation.

16. Counsel placed reliance in the case of **Mwai & Another v Mwai; Ndungu (Interested party) [2022] KEHC 9881 (KLR)** THE Court held that:

**Section 93 cannot validate transactions founded on an invalid grant. That the position is supported by the Court of Appeal in Musa Nyaribari Gekone** where the Court of Appeal upheld decisions of this court in the following terms'(and for the avoidance of doubt, I quote extensively from the said decision) Section 93 of the Law of Succession Act has been the subject of judicial interpretation in a number of cases. In a recent persuasive decision of

***Adrian Nyamu Kiugu v Elizabeth Karimi Kuugu and Ano. [2014] eKLR*** the High Court at Meru 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, and that it is 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 the objector herein. I therefore find and hold the sale to be invalid.

***Jecinta Wanja Kamau Vs Rosemary Wanjiru Wanyoike and Another [2013] eKLR*** where the Appellant therein unsuccessfully sought protection under Section 93, this Court sitting in Nyeri stated:

“Before the Appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In any case, and as provided by Section 82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magundu to sell the land before the confirmation of the grant. In **Jane Gachoki Gathecha Vs. Priscilla Nyawira Gitungu & 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 not only protected under Section 93 (1) of the law of Succession Act (Cap 60) but also Section 143 of the Registered land Act, this court sitting in Nyeri stated: “ *we think, with respect hat 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, the is a “transfer of any interest in immoveable 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.”* In **Re Estate of Christopher Jude Adela (deceased) [2009] Eklr, K.H. Rawal, J** (as she then was) had this to say in reference to Section 93 of the Law of Succession Act. The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of Section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected

even while undertaking unethical or illegal action prejudicing the interests and rights or right beneficiaries of the estate. In short, I do not agree that Section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.” Those decisions support the position take by the learned judge o the High Court in this matter when he stated that while under Section 93 o the Law of Succession Act, a revocation or variation of the grant does not invalidate a transfer by the personal representative, other considerations, such as the disposal of the property in contravention of the confirmed grant may invalidate the transfer. Having found as he did that the transfer of the property by the personal representative to himself, the 2<sup>nd</sup> Respondent and one Margaret Kerubo Orina was contrary to the provisions of the grant and having found evidence of fraud with regard to the representation in the application for grant and subsequent confirmation as the persons beneficially entitled to the deceased’s estate, the learned Judge

was correct to take a view that Section 93 of the Law of Succession Act did not afford the 3<sup>rd</sup> Appellant protection. There is therefore no merit in the complaint that the learned Judge erred in revoking, nullifying and cancelling the transfer and registration of the suit property in favour of the 3<sup>rd</sup> Appellant in contravention of Section 93 of the Law of Succession Act. Similarly, in *Re Estate of M'Marete* (2018) eKLR, the Court affirmed that a purchaser cannot obtain good title from an administrator acting without lawful authority.

*Equity does not cleanse illegality.*

17. Article 40 does not protect unlawfully acquired property. Article 40(6) of the Constitution expressly denies constitutional protection to unlawfully acquired property. In ***Dina Management Ltd v County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)*** the Supreme Court reiterated that courts must not constitutionalize illegality or preserve titles rooted in unlawful acquisition. The court in express terms stated that

Article 40 does not protect unlawfully acquired property, holding that the protection under article 40(6) of the Constitution cannot extend to land acquired unlawfully and unprocedurally. The court held that:

***Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the Appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above the Appellant could not benefit from the doctrine of bonafide purchaser.***

***We therefore agree with the appellate court that the Appellant's title is not protected under article 40 of the Constitution and the***

***land automatically vests to the 1st Respondent pursuant to article 62(2) of the Constitution. We hasten to add that, the suit property, by its very nature being a beach property was always bound to be attractive and lucrative. The Appellant ought to have been more cautious in undertaking its due diligence.***

Property rights cannot arise from fraud, irregularity, or legal nullity.

18. In **Dina Management Ltd** (supra), the Court set out the strict threshold for a bona fide purchaser, holding that:

***As held by the Court of Appeal in Munyu Maina v Hiram Gathitha Maina Civil Appeal No. 239 of 2009 [2013] eKLR,*** where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal

and free from any encumbrance including interest which would not be noted in the register. To establish whether the Appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter. Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed.

Also, that the legal standard, the Applicants' position is untenable. More critically, the primary duty of disclosure rested squarely upon the vendors, the 1<sup>st</sup> and 2<sup>nd</sup> Beneficiaries, who conducted the transaction with the Applicants. It was the Vendors who received the purchase money, held themselves out as having valid title, and bore the legal and ethical obligation to disclose all disputes, cautions, and encumbrances affecting the property. That any failure in candour or legality must therefore fall at their door, not the Respondent. Therefore, striking that the Applicants' application conveniently shields the

vendors while seeking to burden the Petitioners who never sold land and never received consideration. This court should not permit purchasers to shift commercial risk away from the sellers who profited and onto heirs who played no role in the transaction.

19. As regards the issue of if proper recourse lies against the vendors not the Respondent, it was submitted that the Applicant's recourse lies against the vendors (1<sup>st</sup> and 2<sup>nd</sup> beneficiaries) through refund, indemnity, contractual claims, or proceedings before the Environment and land Court and that a further reasonable course exists to await redistribution of the estate, confirm whether their purchased portions have been interfered with, and thereafter pursue remedies against the vendors, not innocent heirs and that the succession proceedings cannot be converted into an insurance policy for commercial purchasers.

20. As regards Res judicata and prohibition against Re-litigation, reliance was placed in **IEBC V Maina (2017) eKLR**, the Supreme Court reaffirmed that litigation must

come to an end and that courts must not revisit matters already determined. The court held that:

***Res judicata, a principle of law that seeks to ensure that there is conclusiveness in litigation is recognized in Section 7 of the Civil Procedure Act. The elements of res judicata are that: -***

- a) The former judgment or order must be final;***
- b) The judgment or order must be on merits;***
- c) It must have been rendered by a court having jurisdiction over the subject matter and the parties and***
- d) There must be between the first and the second action identity of parties, of subject matter and cause of action.***

It was further submitted that the judgment was final and determined on the merits. Both the late Hon. Justice Ogembo (deceased) and this court invited parties to state whether they wished to call additional witnesses or join other parties. That no such request was made. That the beneficiaries did not notify or involve the Interested Parties before judgement. That the interested parties only

surfaced after the matter had been fully heard and determined. That this raises a legitimate concern as to how they emerged in significant numbers post-judgment, and why they did not participate earlier despite the opportunity. Further, it was stated that the judgment was rendered by a court of competent jurisdiction over the parties and the subject matter. That there was identity of parties, identity of subject matter, and identity of cause of action. That reopening the case would therefore violate the doctrine of re judicata and that this application is a veiled attempt to reopen settled issues.

21. Learned counsel finally submitted that this application is procedurally defective, legally unsound, factually selective and an abuse of the Court's process as it seeks to re-open concluded matters, protect vendors who received purchase funds, and shift commercial risk onto innocent beneficiaries and that the rule of law, equity, and finality requires that it be dismissed. The counsel prayed further that summons dated 18<sup>th</sup> November 2025 be dismissed with costs and that the estate proceeds to lawful distribution without further obstruction.

22. I have considered the applications of the Interested Parties and the rival affidavits. It is not in dispute that the Objection that had been raised by the Petitioners herein against the two beneficiaries herein was determined vide this court's ruling dated 16/5/2025. It is also not in dispute that neither the Petitioners nor the said two beneficiaries invited the interested parties herein during the hearing of the objection which culminated in the aforesaid ruling. I find the issue for determination is whether the applications have merit.

23. The Interested Parties herein have contended that they are bona fide purchasers for value without notice and that they already have title deeds in their possession and further maintain that they ought to have been involved in the matter herein. The Petitioners maintain that it was the responsibility of the two beneficiaries herein to invite them and further that the interested parties should pursue the vendors over the portions of land that they had allegedly purchased. The interested parties therefore maintain that the ruling of 16/5/2025 offended Article 25,40 and 50 of the Constitution by determining the interested parties'

proprietary rights without affording them an opportunity to be heard, counsel submitted that the right to a fair hearing under Article 50(1) is the cornerstone of natural justice and founded on the fundamental principle that no person shall be condemned unheard. That this right is non derogable under Article 25(c) and is closely intertwined to the protection of property guaranteed under Article 40 of the Constitution.

Article 50 (1) provides that

***Fair hearing. 50. Every person has the right to have any dispute that can be resolved by the application for law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

It was further contended that Kenyan courts have consistently upheld this principle in **Republic vs. The Honourable The Chief Justice of Kenya & Others Exparte Moiyo Mataiya Ole Keiwua, Nairobi HCMCA No. 1298 of 2004** where it was held that:

***“The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all proceedings is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which***

***warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.”***

Further reliance was placed in **Honourable Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 30 others SC Petition No. 7 of 2018**, where in its ruling the Supreme Court expressed itself as follows:

***[87] ...In this regard, what then are the norms or components of a fair hearing? In the matter of Indru Ramchand Bharvani & Others v Union of India & Others, 1988, SCR Supl. (1) 544, 555, the Supreme Court of India found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing Bal Kissen Kenriwal v Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460). It is important to restate that a literal reading of the provisions of the Constitution of Kenya shows that the right to a fair hearing is broad***

**and the includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court of Human Rights (European Court) has severally explained that: it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” See Steel and Morris -v- United Kingdom [2005] ECHR 103, paragraph 59).**

Further reliance was placed in Re Estate of Mugo Kabire Kubu (deceased) [2025] KEHC 8601 (KLR) the court held as follows:

**“The Court has considered that every person has a right to a fair hearing in terms of Article 50 (1) of the Constitution, which provides as follows:**

**“Fair hearing .50. (1) Every person has the right to have any dispute that can be resolved**

***by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

***As persons registered as owners of the parcels of land claimed as part of the estate of the deceased, the Interested Party were entitled to be heard before a decision affecting their Article 40 right to property was made. As the decision affecting their title to the land was made without hearing them, they are entitled to be joined and pursue a redress in this matter where the decision was taken.”***

It was thus contended that the instant case, the ruling of 16/5/2025 determined the fate of the Applicant's titles to South Ugenya/Ambira/3996 and 3941 and others without affording them an opportunity to be heard and that they were condemned unheard yet as registered proprietors of the said parcels, they were constitutionally entitled to be heard before any decision affecting their proprietary rights was made. The Applicants now seek to demonstrate how

they lawfully acquired title to the said parcels which arose from the sub division of South Ugenya/Ambira/15 and to show that their titles are protected under Section 93 of the Law of Succession Act which protect purchasers who acquire property from personal representatives acting under grant, even where such grant is later revoked. The Applicant have also maintained that they are ready to demonstrate this through such documents as the confirmed grant, land Control Board consent, and title documents evidencing lawful purchase from a personal representative acting under a confirmed grant, the Land Control Board Consent, and title documents evidencing lawful purchase from a personal representative acting under a confirmed grant. Indeed, the ruling of 16/5/2025 invalidated the titles without hearing these registered proprietors.

24. On the other hand, the Petitioners contend that Section 93 cannot sanitize transactions conducted by persons acting without authority of a confirmed grant nor can it validate titles emanating from a legal nullity fraud. That the

Applicants therefore cannot cloak an unlawful ultra vires transaction with statutory protection that was never intended to shield acts undertaken in absence of representation. That in the premise, the Applicants' invocation of Section 93 must fail for want of legal foundation. Reliance was placed reliance in the case of **Mwai & Another v Mwai; Ndungu (Interested party) [2022] KEHC 9881 (KLR)** the Court held that:

**Section 93 cannot validate transactions founded on an invalid grant. That the position is supported by the Court of Appeal in *Musa Nyaribari Gekone* where the Court of Appeal upheld decisions of this court in the following terms'**(and for the avoidance of doubt, I quote extensively from the said decision) *Section 93 of the Law of Succession Act has been the subject of judicial interpretation in a number of cases. In a recent persuasive decision of **Adrian Nyamu Kiugu v Elizabeth Karimi Kuugu and Ano. [2014] eKLR** the High Court at Meru 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, and that it is 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 Petitioners have taken great exception at the conduct of the interested parties who now feign ignorance of this matter yet they come from the neighborhood of the Petitioners and beneficiaries and that it is not possible that they did not know about these proceedings. Indeed, several courts have ruled differently regarding the application of section 93 of the Law of Succession Act. In **Jecinta Wanja Kamau Vs Rosemary Wanjiru Wanyoike and Another [2013] eKLR** where the Appellant therein unsuccessfully sought

protection under Section 93, the Court sitting in Nyeri stated: “Before the Appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In any case, and as provided by Section 82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magundu to sell the land before the confirmation of the grant. In **Jane Gachoki Gathecha Vs. Priscilla Nyawira Gitungu & 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 not only protected under Section 93 (1) of the law of Succession Act (Cap 60) but also Section 143 of the Registered land Act, this court sitting in Nyeri stated: “ *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 immoveable 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.”* Again in **Re Estate of Christopher Jude Adela (deceased) [2009] Eklr, K.H. Rawal, J** (as she then was) had this to say in reference to Section 93 of the Law of Succession Act. The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of Section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation

while a personal representative will be protected even while undertaking unethical or illegal action prejudicing the interests and rights or right beneficiaries of the estate. In short, I do not agree that Section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.” Those decisions support the position taken by the learned judge of the High Court in this matter when he stated that while under Section 93 of the Law of Succession Act, a revocation or variation of the grant does not invalidate a transfer by the personal representative, other considerations, such as the disposal of the property in contravention of the confirmed grant may invalidate the transfer. Having found as he did that the transfer of the property by the personal representative to himself, the 2<sup>nd</sup> Respondent and one Margaret Kerubo Orina was contrary to the provisions of the grant and having found evidence of fraud with regard to the representation in the application for grant and subsequent confirmation as the persons beneficially

entitled to the deceased's estate, the learned Judge was correct to take a view that Section 93 of the Law of Succession Act did not afford the 3<sup>rd</sup> Appellant protection. There is therefore no merit in the complaint that the learned Judge erred in revoking, nullifying and cancelling the transfer and registration of the suit property in favour of the 3<sup>rd</sup> Appellant in contravention of Section 93 of the Law of Succession Act. Similarly, in *Re Estate of M'Marete* (2018) eKLR, the Court affirmed that a purchaser cannot obtain good title from an administrator acting without lawful authority.

25. Even though the Petitioners have vociferously contested the interested parties' applications, one thing stands out namely that the said interested parties were not invited to participate in the objection proceedings that involved the Petitioners herein and the two beneficiaries herein. The two sides appear to trade on a blame game as to who was to rope in the interested parties. I find that it is a cardinal principle of natural justice that a person should not be condemned unheard. Even though the Petitioners herein

appear to create the impression that the interested parties were in league with the two beneficiaries and that they hatched a stratagem not to come in early in the proceedings, I must dismiss the same and find that the interested parties are entitled to be given a forum to ventilate their claims if any. The interested parties should not be faulted for not participating in the matter as they were not served with any notices or pleadings to attend court over the same. Again, the Petitioners' contention that the interested parties are their neighbours and were deemed to have been aware of this matter must be rejected outrightly as the interested parties could have felt that it was a family matter between the Petitioners and beneficiaries which was none of their business unless they were duly served with court documents requiring their participation. I find that there will be no prejudice suffered by the Petitioners if the applications are allowed since they are yet to file fresh summons for confirmation of grant in which the issue of distribution will be addressed.

26. As the orders sought are discretionary in nature, this court will be guided by the decision of **Shah Vs Mbogo & Another [1967] EA 116** where the court held that the discretionary power to set aside *ex parte* orders has been held to be intended to avoid injustice and hardship resulting from an accident, inadvertent or excusable mistake or error but is not designed to assist a person who has deliberately sought to obstruct or delay the course of justice whether by evasion or otherwise. I find that it will be unfair for this court to turn its back to the Applicants who have demonstrated that they have an interest in the dispute before this court. In the case of **Branco Arabe Espanol Vs Bank of Uganda [1999] 2 EA 22** the court held that the main purpose of litigation is the hearing and determination of disputes which should be fostered rather than hindered. Again, under Article 50(1) of the Constitution, every person has a right to be heard and that the fundamental duty of the court is to ensure that parties who are seeking justice be accorded such opportunity to be heard.

27. In the final analysis and taking all the circumstances into account, I find that it would be quite unfair to deny the

Applicants the opportunity to ventilate their case so as to ensure that substantive justice is achieved by ensuring a level playing field is availed to all the parties to ventilate their rival claims on merit.

28. It is noted that setting aside the entire objection proceedings might create a set back and delay in the matter. Since the Petitioners and beneficiaries had litigated between themselves without the participation of the interested parties herein, it is appropriate to retain the proceedings aforesaid and then reopen both the Petitioners case as well as that of the Beneficiaries to enable the interested parties, once they have duly filed their documents, to cross-examine the witnesses and thereafter the interested parties will present their witnesses who will be cross-examined by the adverse parties and thereafter the court will proceed to make a determination thereon.

29. In view of the foregoing observations, it is my finding that the Applicants' applications dated 29/9/2025 and 18/11/2025 have merit and are allowed in the following terms:

- i) The Petitioners and Beneficiaries cases which proceeded on 23/1/2025 are hereby reopened.
- ii) An order of stay of cancellation of titles which emanated from sub division of LR No.South Ugenya/Ambira/15 into South Ugenya/Ambira/3941, 3996, 3971, 3973, 4081, 3978, 4049, 4131, 4197 and 4964 is hereby issued and shall be in force pending determination of the interested parties' claims.
- iii) The interested parties are hereby directed to file and serve documents and witness statements or seek to rely on their affidavits in support of the present applications within fourteen (14) days from the date hereof with corresponding leave to the Petitioners and Beneficiaries to file documents if need be within seven (7) days upon service.
- iv) The Petitioners' application dated 20/6/2025 shall await the determination of the Interested Parties' claims.

- v) The matter to be mentioned on 7/5/2026 for further directions.
- vi) Each party to bear their own costs.

**Dated and delivered at Siaya this 16<sup>th</sup> day of April 2026.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

**Onyango Jonyo.....for Petitioners/Respondents.**

**M/s Raburu for Omondi.....for 1<sup>st</sup> and 2<sup>nd</sup>  
Beneficiaries**

**M/s Raburu for Onyango.....for 2<sup>nd</sup> & 3<sup>rd</sup> Interested  
Parties.**

**N/A Ooro E.....for 4<sup>th</sup> - 8<sup>th</sup> Interested Parties.**

**Maurine.....Court Assistant.**