



**Bisem v Sang & 2 others (Sued as the Executors of the will of Joseph Arap Leting (Deceased))  
(Civil Appeal 46 of 2019) [2023] KECA 340 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 340 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 46 OF 2019  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
MARCH 17, 2023**

**BETWEEN**

**DAVID KIPKOSGEI BISEM ..... APPELLANT**

**AND**

**JEROTICH TABARNO SANG ..... 1<sup>ST</sup> RESPONDENT**

**MAUREEN CHEPTOO LETING ..... 2<sup>ND</sup> RESPONDENT**

**ANTHONY KIPROP LETING ..... 3<sup>RD</sup> RESPONDENT**

**SUED AS THE EXECUTORS OF THE WILL OF JOSEPH ARAP LETING  
(DECEASED)**

*(Being an appeal from the decision of the High Court of Kenya at Eldoret (H.A.  
Omondi J) dated 10th January, 2019 in Succession Cause No. 120 of 2010)*

**JUDGMENT**

**JUDGMENT OF MUMBI NGUGI JA**

1. The present appeal relates, albeit obliquely, to the distribution of the estate of Josiah Kibisem Sang (Deceased) who died in 1986. The 1<sup>st</sup> respondent Jerotich Tabarno Sang (hereafter Jerotich) who, from the information placed before the Court at the hearing of the appeal, is now also deceased, obtained letters of administration intestate to the estate of Josiah Kibisem Sang in Eldoret SRM SUCC. Cause No. 39 of 1986 on February 25, 1987. The letters of administration intestate were confirmed on 28<sup>th</sup> December 1988 and the deceased's estate was distributed.
2. Pursuant to the said confirmation, land title number Nandi/Lessos/317 was subdivided into title numbers Nandi/Lessos 554, 236, 564 and 555. Nandi/Lessos/ 555 and 564 were transferred to and registered in the name of Joseph Arap Leting (deceased), (hereafter 'Arap Leting') represented in this appeal by the 2<sup>nd</sup> respondents, the administrators of his estate.



3. On July 21, 2008, pursuant to an application filed in 2004 by the appellant, a son of the deceased and step-son of the 1<sup>st</sup> respondent, the letters of administration issued to the 1<sup>st</sup> respondent in 1986 were revoked by the High Court sitting in Eldoret. The revocation was on the basis that the Magistrate's Court, which had issued the letters of administration and confirmed the grant, lacked the jurisdiction to deal with the estate of the deceased. Further, the court found that there was material non-disclosure and the grant was obtained fraudulently. The record indicates that at the time of the revocation, however, the estate of the deceased had been distributed. The titles resulting from the subdivision of Nandi/Lessos/317 had been issued, and two of them transferred to Arap Leting.
4. By an application before the High Court dated 2<sup>nd</sup> February 2009, the appellant moved the High Court seeking revocation and annulment of the title documents relating to the said land parcels. He further sought orders that pending the hearing and determination of his application, an order do issue to restrain the Nandi District Land Registrar from effecting any transaction in the said land parcels. He further sought orders that Jerotich and Arap Leting, the registered owners of the subject titles, be ordered to deposit the said titles in court, and that the court makes a fair order for the mode of distribution to cater for all the dependants of the late Josiah Kibisem Sang.
5. The application was opposed. In a replying affidavit sworn on 9<sup>th</sup> February 2009, Jerotich averred, on the basis of information from her Counsel, that a purchaser for value without notice was protected under section 28 of the Registered *Land Act* (now repealed). Further, that parcel numbers Nandi/Lessos/555 and 564 had been sold to Leting by Hosea Kipchumba Sang, a brother of the appellant, and she had signed the transfers to Arap Leting in her capacity as the administrator of the estate of Josiah Kibisem Sang.
6. Jerotich described the application by the appellant as mischievous on the grounds that parcel number Nandi/Lessos 554 was still available and registered in her name. Further, that Nandi/Lessos/236 does not exist as part of it was sold to two people and new title numbers had resulted therefrom, being 751, 752 & 753. It was also her contention that the deceased owned parcel No. Nandi/Songoliet/181 which the appellant registered in his name on February 23, 2000 pursuant to a grant that he had obtained, illegally in Succession Cause No.2334 of 1997, the file in respect of which could not be traced in the registry.
7. Jerotich confirmed in her replying affidavit that she had obtained a grant in Eldoret Senior Resident Magistrate's Court Succession Cause No. 39 of 1986 on February 25, 1987, and that the grant had been confirmed on December 28, 1988. The appellant had, however, made an application for revocation of the said grant, which was allowed on July 21, 2008.
8. Jerotich averred that in his application for revocation, the appellant did not disclose that he had obtained a parallel grant in Succession Cause No.2334 of 1997, nor had he made such disclosure to date. She accused the appellant of being on a spree of selling off the deceased's land. He had obtained the death certificate in respect of the deceased from her, claiming that he wanted to process tea payment from the factory, yet all along he intended to apply for a rival grant without her knowledge.
9. It was Jerotich's further averment that the deceased had other properties namely Nandi/Lessos/235 and 237 which are still intact; that all the properties of the deceased had been distributed in accordance with his will, and the beneficiaries had since sold their respective portions.
10. Upon hearing the application, the court (Omondi J, as she then was) dismissed it as being devoid of merit in the ruling dated January 10, 2019.



11. Dissatisfied with the decision, the appellant filed the present appeal in which he raised ten (10) grounds of appeal in the memorandum of appeal dated 13<sup>th</sup> March, 2019. He argues in the first four grounds that the court erred in dismissing his application and finding it devoid of merit; in holding that he was indulging in a circus that should come to an end; and in terming his application a wild goose chase. In his fifth ground, the appellant contends that the trial court erred in holding that Arap Leting (deceased) was a purchaser of land from the estate of the deceased, and that the letters of administration issued to the 1<sup>st</sup> respondent could validly and competently be used to effect a valid transfer of land.
12. It is the appellant's contention in his sixth ground that the court erred in holding that the transfer of land to Arap Leting (deceased) was protected and could not be challenged and or annulled or cancelled. He further contends that the trial court erred in law and fact in failing to hold that there was no valid grant issued to the 1<sup>st</sup> respondent; in failing to hold that Arap Leting (deceased) never legally and validly acquired an interest in the estate of Josiah Kibisem Sang (deceased); and finally, that the decision of the court was as a whole legally unsound and untenable and ought to be set aside.
13. The appellant filed submissions dated June 8, 2022 which were highlighted by his Counsel, Mr. Momanyi. The appellant contends that there existed a High Court in Eldoret at the time the 1<sup>st</sup> respondent filed the succession cause and that the Judge who revoked the grant to the 1<sup>st</sup> respondent was right when he held that the subordinate court lacked jurisdiction to handle the succession cause.
14. The appellant contends further that his name was omitted from the list of the beneficiaries of the deceased's estate, and his name ought to have been included regardless of whether or not he was to receive a share of the estate.
15. The appellant faults the dealings between Arap Leting and Hosea Kipchumba Sang which he terms intermeddling in the estate of the deceased. It is his case that the 1<sup>st</sup> respondent did not tender any evidence of the alleged will demonstrating the distribution of the estate by the deceased.
16. Regarding the contention by the respondents that the dealings with the estate of the deceased were protected by section 93 of the [Law of Succession Act](#), the appellant submits that the section only applies where the beneficiary did not purchase land from the holder of the grant of letters of administration. He contends that the respondents could not use the said section to sanitize the illegality between Hosea Kipchumba Sang and Arap Leting.
17. Learned counsel for the appellant, contended that the appellant's application seeking cancellation of the title deeds that were obtained by Arap Leting was valid as the subordinate court that had issued the grant to Jerotich lacked both territorial and pecuniary jurisdiction to deal with the succession matter. It was his further submission that the confirmed grant violated the provisions of section 71 of the [Law of Succession Act](#) as there was no distribution of the estate of the deceased, and the administrator could not therefore transmit the property to either herself or to Arap Leting. Counsel further submitted that Arap Leting did not purchase any land from the deceased or his beneficiaries, and what is on record is a pledge for the deceased property as a security for repayment of the loan owed by the deceased's son. Accordingly, it cannot be protected by section 93 of the [Law of Succession Act](#).
18. The respondents-the administrators of the estate of Arap Leting- opposed the appeal and filed submissions dated June 2, 2022 which were highlighted at the plenary hearing by learned counsel, Mr. Orina. The respondents argue that though it is contended that the court which issued the grant lacked jurisdiction to do so, the ruling delivered by Ibrahim J (as he then was) is clear in its scope and only revoked the grant for having been obtained fraudulently and for material non-disclosure. The respondents submit that the non-disclosure was not perpetrated by Arap Leting and its adverse



effects, if any, do not operate to vitiate an interest already transferred to a third party purchaser prior to revocation of the said grant.

19. The respondents further contend that the appellant has not tendered any explanation as to where he was for a period of over 6 years from when the suit parcels were transferred to Arap Leting only to file the application in 2004.
20. The respondents submit that the appellant deliberately failed to disclose to the trial court the fact that he had filed parallel proceedings relating to his father's estate and as a beneficiary of a different house. He further did not challenge the fact that certain bequests made to him had already been confirmed, and that he had dealt with them to his own benefit.
21. The respondents submit that the superior court was right to hold that Arap Leting was a beneficiary of the estate by virtue of being a third-party purchaser for value. Further, that his interest was acknowledged by the administrator of the estate who proceeded to transfer a portion of the suit property to him.
22. The respondents further submit that this Court should note that the beneficiaries of the estate of the deceased are many and extended, yet none of them, apart from the appellant, is dissatisfied with the manner in which the estate was distributed. Their submission is that the High Court was right in finding that the appellant is on a fishing expedition on matters that are not his concern.
23. In his submissions at the plenary hearing, learned counsel, Mr. Orina, submitted that the respondents, having been issued with a title pursuant to a grant that had not been invalidated at the time of transfer, fall within the protection of section 93 of the Law of Succession Act. He observed that it is not in dispute that Arap Leting had dealings with the beneficiaries of the estate and that the Jerotich acknowledged that a loan was issued to a beneficiary and upon the beneficiary failing to repay that loan, a further agreement was done acknowledging the debt. Pursuant to that acknowledgement, as set off, a portion of the estate that was due to that particular beneficiary was made to the benefit of Arap Leting. According to counsel, the agreement acknowledging the debt clearly stated that a portion of land would be given to offset the debt, and nowhere had the respondents perceived themselves as beneficiaries of the deceased's estate.
24. Having considered the appellant's appeal, his submissions in support thereof and the submissions in response, it is my view that the sole issue for determination is whether the High Court was correct in finding that the appellant's application was devoid of merit, the transfer of the land parcels in contention being valid and indefeasible under both section 93 of the Law of Succession Act and section 26 of the Land Registration Act 2012.
25. In considering this issue, I note that it is undisputed that Jerotich Tarbano Sang, (deceased) one of the three widows of Josiah Kibisem Sang and a step-mother of the appellant, had obtained letters of administration to the estate of the deceased in 1987. The record indicates that the grant was confirmed on December 28, 1988, though the certificate of confirmation was issued in 1998.
26. The record further indicates that the properties in contention, Nandi/Lessos/555 and 564, were transferred to Arap Leting in 1997. The evidence before the High Court indicates that Jerotich transferred them to Arap Leting in her capacity as the administrator of the estate of the deceased to offset a debt owed by Hosea Kipchumba Sang, a son of the deceased and a brother of the appellant.
27. I note further that the evidence on record is that there were other properties of the deceased which Jerotich avers, and the appellant does not dispute, were dealt with by the other houses of the deceased, and none of the other beneficiaries has joined the appellant in challenging the grant to Jerotich. Among these properties is Nandi/Songoliet/181 which, according to Jerotich in her replying affidavit, the



appellant had registered in his name on 23<sup>rd</sup> February 2000 pursuant to a grant that he had obtained, illegally, in Succession Cause No.2334 of 1997. The facts of the case before the trial court lend greater credence to the averments of Jerotich, particularly in view of the fact that it was only in 2004 that the appellant applied for revocation of the grant to Jerotich.

28. All that notwithstanding, the present appeal stands or falls on the provisions of section 93(1) of the Law of Succession Act, which provides that:

1. All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.
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.

(Emphasis added).

29. Section 93(1) of the Act is intended to protect the interests of purchasers. In order for the section to apply, the interest in the immovable property must have accrued to the person seeking to rely on its provisions, and the purchaser must have proof of purchase of the interest in the immovable property. It may be argued, in light of the wording of section 93(2), that the section does not protect a purchaser who had notice that a grant was obtained through fraud, but no such argument has been made in this case.

30. From the documents presented before the trial court and the averments of the parties, there is no dispute that Jerotich had letters of administration issued to her in 1987, and confirmed in 1988. There is evidence that Arap Leting entered into an agreement for sale of the subject properties with Hosea Kipchumba Sang, a beneficiary of the estate of Kibisem Arap Sang who was entitled to the properties. A transfer was duly signed by Jerotich in her capacity as the administrator of the estate of Kibisem Arap Sang. The transfer was registered, and titles to the properties issued in favour of Arap Leting. By the time the appellant made an application for revocation of the grant in 2004 and the orders for revocation were issued in 2008, the interest of Arap Leting in the property had crystallised, and was protected by the provisions of section 93.

31. It is my view, therefore, that the trial court properly found that the appellant's application was devoid of merit. I would accordingly dismiss the appeal with costs to the respondents.

#### **JUDGMENT OF KIAGE, JA**

1. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, J.A. I entirely agree with it and have nothing useful to add.
2. As Tuiyott, J.A is in agreement, the appeal shall be disposed of as proposed by Mumbi Ngugi, J.A.

#### **JUDGMENT OF TUIYOT, JA**

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF MARCH, 2023**

**MUMBI NGUGI**



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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

