Kamundia & 6 others v Maingi & 3 others (Civil Appeal 201 of 2019) [2022] KECA 753 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 753 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 201 OF 2019

HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA

JUNE 24, 2022

BETWEEN

SIMON KAMUNDIA .... 1ST APPELLANT

MWORIA C. KIRERA .... 2ND APPELLANT

DORCAS MUTHONI KUMENYA .... 3RD APPELLANT

PETER KIRIMI MUTHINI .... 4TH APPELLANT

LUCY KINYA MATHEW .... 5TH APPELLANT

NAOMI KANINI KIRERA .... 6TH APPELLANT

CAROLINE GATWRIRI MWIRIGI .... 7TH APPELLANT

AND

TABITHA GATIRIA MAINGI .... 1ST RESPONDENT

PHILLIS KARUGU MWORIA (DECEASED) -SUBSTITUTED BY PATRICK MURIUNGI MWORIA .... 2ND RESPONDENT

TOM MUTUMA CHABARI .... 3RD RESPONDENT

MICHAEL MURERWA .... 4TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Meru (F. Gikonyo, J.) dated 30th January, 2019 in Succession Cause No. 432 of 2010)

JUDGMENT

1. The appeal arises from the judgment and decree of the High Court of Kenya at Meru (F. Gikonyo, J.) delivered on 30th January, 2019 in Meru Succession Cause No. 432 of 2010. By the said judgment the trial court after careful consideration of the pleadings, evidence and submissions revoked the grant that

had been issued to the 1st appellant on 28th February, 2012 and issued a fresh grant to Tabitha Gatiria Maingi and Phillis Karugu, the 1st and 2nd respondents respectively. The learned judge identified the beneficiaries to the estate as; Tabitha Gatiria Maingi, – the widow; Tom Mutuma – son, Phillis Karugu – sister, James Mutegi – nephew and Michael Murwerwa – nephew. The trial court further directed that the estate being parcel **No. NKUENE/MITINGUU/KITHINO/3** measuring 24 acres "the suit property" be shared equally amongst the aforesaid beneficiaries.

2. Being aggrieved by the judgment and decree, the appellants have appealed to this Court for an alternative if not a different finding in their favour. The background to this appeal is that Chabari M'Rimunya (the deceased) died intestate on 1st July, 1998. The 1st appellant, petitioned the High Court for grant of letters of administration of the deceased's estate citing himself as the son of the deceased alongside James Mutegi Murungi. The 2nd to 7th appellants were listed as the purchasers of the suit property. The Grant was issued to the 1st appellant on 16th February, 2011 and subsequently confirmed on 28th February, 2011. After learning of the confirmed grant, the respondents filed summons for the revocation of the grant on 2nd October, 2012. It was premised on the grounds that the grant was obtained fraudulently by making of a false statement, untrue allegations of facts and concealment of material information. It was supported by the affidavit of the 1st respondent. In the affidavit, she deposed that she was the widow and the only surviving spouse of the deceased, and that the 1st appellant is the son to the Phillis Karugu Mworia (deceased) the 2nd respondent and thus was not a beneficiary of the estate of Chabari M'Rimunya. That the chief of Kirendene location had denied ever issuing any letter to the 1st appellant for purposes of succession proceedings and that the only beneficiaries of the estate of the deceased were the respondents.

3. The summons was opposed by the 1st appellant through the replying affidavits of James Mutegi Murungi dated 6th October, 2012 and that of the 1st appellant of the same date. The duo deposed that the 1st respondent was not a widow of the deceased as she was married to one, Muturi Wachokomba who was the father of the 3rd respondent. That on 28th June, 1998, the deceased called the sub-area administrator and his relatives and stated how the suit property should be shared. That on 12th January, 2009, he relinquished his entire interest in the suit property to the 1st appellant as he was financially endowed.

4. The 2nd to 7th appellants filed replying affidavits sworn on 28th January, 2013 in which they deposed that they had each bought their respective parcels of land from the 1st appellant thus they were protected by Section 93 of the *Law of Succession Act*. The 1st respondent filed a further affidavit dated 6th February, 2013 in which she deposed that the agreements between the 2nd to 7th appellants and the 1st appellant were made between 10th January 2010 and 7th September, 2012 and that by dint of **Section 6(1) (a)** of the ***Land Control Act***, the said agreements were null and void on account of failure to obtain the consent of the Land Control Board of the area within six (6) months after the making of the agreements. Further, that they were not protected by Section 93 of the Succession Act as none of them had procured and or obtained a transfer of any interest in the suit property. That the 2nd to 7th appellants' remedy lay in damages for breach of agreement by the 1st appellant.

5. In her testimony, the 1st respondent stated that she was the only wife to the deceased and they had a son, one **Tom Mutuma Chabari**, the 3rd respondent. That the 2nd respondent was the sister to the deceased who is the mother of the 1st appellant and that, the deceased had two sisters and two brothers. That the suit property never belonged to Mutegi who had claimed ownership and who had then sold it to the 1st appellant. That though it had been indicated in the agreements that the suit property had been sold to the 2nd to 7th appellants, none of them was in physical occupation as she lived on the suit property with the 2nd respondent and her children as well as the 3rd respondent. That the allegations

that she had been married to Muturi Wachokomba was not true as the person was unknown to her. That she had been married under the Ameru Customary Law and the 2nd respondent had participated in the payment of her dowry.

6. The 2nd respondent testified that she was the sister to the deceased. That the allegation in the application for grant of letters of administration that the 1st appellant was the son to the deceased was not true as his father was one, M'Mworia M'Murithu, her husband. That her husband and father to the 1st appellant had his own land known as Abogota/Nkachie/370.

7. She confirmed that indeed the deceased had married the 1st respondent in accordance with the Ameru Customary Law and had one son and that her deceased brother had indicated during his lifetime that the suit property be left to the 1st respondent for her to share it out.

8. The 4th respondent also testified to the effect that the deceased was his nephew who had a wife, the 1st respondent and one child, the 3rd respondent.

9. The appellants did not testify but opted to file written submissions. The trial court framed two issues for determination which were, the validity of sale of the deceased's estate to the 2nd to 7th appellants and whether or not to revoke the grant issued and confirmed to the 1st appellant. On the first issue, the trial court found that the 2nd to 7th appellants had bought the properties before confirmation of the grant, thus the transactions were unlawful, null and void as they violated Section 82 (b) of the *Law of Succession Act*. On the second issue, the trial court found that at the institution of the summons for grant of letters of administration, the 1st appellant had informed the court that he and James Mutegi Murungi were the only two sons of the deceased which was not true and that the grant was indeed obtained through concealment of material facts and fraud. As a consequence, the trial court revoked the grant.

10 Aggrieved by the decision, the appellants successfully sought and obtained leave to appeal to this Court. The appellants have raised five grounds of appeal which are; that the trial court erred in law and in fact in failing: to allow the appellants to testify in the primary cause yet the respondents testified and their evidence was therefore not considered; in condemning the appellants unheard contrary to the rules of natural justice; in invalidating the sale of portions of the suit property to the appellants without hearing them; ordering distribution of the subject parcel of land to strangers; misinterpreting Section 93 of the *Law of Succession Act* and invalidating the sale to innocent purchasers for value without addressing their fate yet they had paid consideration for the same.

11. Parties filed written submissions and when the matter came up for plenary hearing before us on 11th April, 2022, Mr. Mbaabu, learned counsel appeared for the appellants whereas Mr. Riungu, learned counsel appeared for the respondents. They all opted to fully rely on their filed written submissions and did not wish to highlight.

12. The appellants submitted that they were not allowed to testify despite the fact that they had filed affidavits. They were not therefore accorded opportunity to give oral evidence like the respondents in order to ventilate their positions and challenge the evidence of the respondents. While citing **Article 60(1)** of *the Constitution* and the case of ***Kenya Trypanosomiasis Research Institute Vs. Anthony Kabimba Gizinjilu [2019] eKLR***, the appellants contended that failure to be accorded an opportunity to testify, the rules of natural justice were thereby breached and they were accordingly condemned unheard. The appellants further submitted that based on Section 93 of The *Law of Succession Act*, the interests of the 2nd to 7th appellants were protected and the trial court fell into error when it invalidated the same. The appellants finally submitted that from their witnesses, affidavits that were on record, the respondents were strangers to the deceased's estate, as the deceased

did not marry and therefore did not have off springs. It was in error for the trial court to distribute the estate to strangers. They thus prayed that the appeal be allowed.

13. The respondents on the other hand submitted that the 2nd to 7th appellants were not parties in the primary cause, thus they had no *locus standi* to lodge an appeal before this Court. Further, that the 1st appellant was found to have obtained the grant of letters of administration through fraudulent means. That during the hearing of the suit before the trial court, all parties were represented by counsel and the issue as to failure to accord or deny one a hearing was never raised by the appellants. That documents and affidavits filed by the appellants were considered by the trial court and were in fact referred to in the judgment. That the trial court distributed the estate to the rightful persons as per the law and its interpretation of Section 93 of the Succession Act was proper. There was already breach of Section 82(ii) of the *Law of Succession Act* thus the 2nd to 7th appellants could not be said to be *bona fide* purchasers protected under Section 93 of the Act. They prayed that the appeal be dismissed.

14. We have perused the pleadings before the trial court, proceedings and the judgment therefrom, the grounds of appeal and the rival submissions filed. As a first appellate court, we have a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing our own conclusion from that analysis. However, we have to bear in mind the fact that we did not have the opportunity to see and hear the witnesses first hand. This duty is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: ***'..... re-evaluate, reassess and re-analyse the extracts of the record and draw its own conclusions.'*** This was buttressed by this Court in the case of ***Peter M. Kariuki Vs. Attorney General [2014] eKLR*** where it was held that:

> "We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence See *Ansazi Gambo Tinga & Another Vs. Nicholas Patrice Tabuche* [2019] eKLR. (Emphasis supplied).

15. In our view the main issues for determination are whether: the respondent made a case before the trial court for the revocation of the grant issued to the 1st appellant; the 2nd to 7th appellants were entitled to a share of the estate and finally, whether the trial court ought to have distributed the estate after revoking the said grant.

16. It is clear that the summons for revocation of grant before the trial court were premised on the fact that the grant was obtained fraudulently and by concealment of material fact, that the letter by the area chief was forged and that the 1st appellant misrepresented to the court that he was the sole son of the deceased and thus disinheriting the respondents some of whom were the surviving widow and son of the deceased.

17. The grounds upon which a grant of representation may be revoked are provided for under section 76 (a)-(e) of the *Law of Succession Act*. From the face of the application it is apparent that the application was premised on the grounds that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently.

18. It is trite, that it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the grounds stated in section 76 (a) – (e) of the

Law of Succession Act. However, the court is bestowed with the powers to revoke the grant on its own motion so long as there is evidence of any of the stated grounds. The above provision was construed by this Court in the case of ***Matheka & Another Vs. Matheka [2005] 2 KLR 455*** where the court laid down the following guiding principles.

> "i. A grant may be revoked either by application by an interested party or by the court on its own motion.
>
> ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate." (Emphasis supplied)

19. These grounds ought to be proved with evidence as the power to revoke a grant is a discretionary one that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously. See ***Albert Imbuga Kisigwa Vs. Recho Kavai Kisigwa,*** *Succession Cause No.158 of 2000 (UR).*

20. There must be evidence of wrong doing for the court to invoke Section 76 to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.

21. The deceased herein died on 1st July 1998 and as such and pursuant to Section 2 of the *Law of Succession Act*, his estate was subject to the said Act. Under the said Act, and as a general rule of procedure, a petition for letters of administration intestate is commenced by filing of a petition. Section 51(2) of the *Law of Succession Act* provides that the petitioner is supposed to include information as to; -

> in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then.
>
> (Emphasis supplied).

22. From our perusal of the record, we discern that the appellant only listed himself and James Mutegi Murungi as the beneficiaries despite the fact that the deceased had a sister who was his mother and was alive, a wife who was known to the 1st appellant and a son all of whom lived in the suit property that the 1st appellant sought to inherit as a sole beneficiary to the exclusion of the said beneficiaries.

23. Rule 26(1) of the *Probate and Administration Rules 1980* further requires that letters of administration should not be granted to any petitioner without notice to every other person entitled in the same degree as or in priority to the petitioner. Sub-rule 2 provides that an application for a grant where the petitioner is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent, by all persons so entitled in equality or priority, be supported by an affidavit of the petitioner and such other evidence as the court may require. It is this provision which the 1st respondent seems to have invoked while seeking revocation of the grant by averring that despite her being the wife to the deceased and thus by extension being the person in law that was entitled to apply for the grant of letters of administration, the 1st appellant did not even include her in his papers filed in court.

24. There was an averment to the effect that the letter from the chief of Kirendene location issued to the 1st appellant for purposes of Succession proceedings was a forgery. It is trite law that where fraud is alleged, it must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. The onus to prove fraud is on the party who alleges it. The standard of proof required is higher than in ordinary civil matters (balance of probabilities) but it ought not to be one beyond a reasonable doubt as in criminal cases. See *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) Vs. Stephen Njoroge Macharia* (supra) and Central Bank of Kenya Ltd Vs. Trust Bank Ltd & 4 Others [1996] eKLR.

25. In the instant case, this allegation was not controverted at all by the appellants. Accordingly, the assertion and the particulars thereof remained unchallenged and therefore proved.

26. By dint of Section 51(2) of the *Law of Succession Act*, a petitioner is supposed to include in the petition information already set out elsewhere in this judgment. As we have already noted, the letter from the Chief if annexed to the petition would indicate the deceased's dependants, who would then be included in the petition as beneficiaries. However, from the record, the 1st appellant seems to have obtained a letter that indicated himself and James Mutegi Murungi as the sole beneficiaries of the estate of the deceased which was not true. From the record there is no indication that the deceased had left behind a widow, children and any siblings to the deceased who were either alive or not. This information was only brought to the attention of the trial court at the time the application for revocation of the grant was filed, heard and determined. It therefore means that the 1st appellant did make material non-disclosure which upon discovery made the trial court to revoke the grant and rightly so in our view.

27. Of great interest to us is the fact that the 1st appellant well aware that the 2nd respondent is his biological mother and the sister to the deceased found no reason to include her in the petition as a beneficiary. It is also evident that the 1st appellant is the son of Mworia M'murithu if the evidence of his own mother is anything to go by. She asserted while testifying that the deceased was not the father to the deceased. We are in agreement with the trial court that this was a trustworthy witness and her evidence was rightly relied on to revoke the grant. In our view therefore the trial court did not err and indeed applied the facts and the law in revoking the grant.

28. The issue of the suit property being sold in contravention of **Section 82** of **the *Law of Succession Act*** was raised by the 1st respondent while making the application for revocation of the grant.

29. Section 82 of the *Law of Succession Act* provide as follows:

> "82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-
>
> to enforce, by suit or otherwise, all causes of action which, by virtue ofany law, survive the deceased or arising out of his death for his personal representative;
>
> to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:
>
> Provided that—
>
> ii. no immovable property shall be sold before confirmation of the grant..." (Emphasis supplied).

30. The agreements of sale were executed long before confirmation of the grant which was on 28th February 2012. We take cognizance of the fact that the appellants had knowledge of the fact that the suit property remained registered in the name of the deceased. There is nothing on record that shows any due

diligence that was conducted by the 2nd to 7th appellants by either conducting a search to establish whether the suit property belonged to the 1st appellant or not. We are in agreement with the finding of this court in the case of *In Re Estate of Jamin Inyanda Kadambi (Deceased)*[2021] eKLR where it was stated that;

> "A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(b)(ii) of the *Law of Succession Act*. Clearly, the sale transaction that was carried out by the administrators was contrary to sections 45 and 82(b) (ii) of the *Law of Succession Act*, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.*(Emphasis supplied).*

31. From the above, it is clear that the agreements between the 1st appellant and 2nd to 7th appellants were made before the confirmation of grant and therefore cannot stand the protection of the law. The appellants sought protection in Section 93 of the *Law of Succession Act*, which provides *inter alia:*

> (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."

32. However, it should be noted that this particular section does not protect illegal sale as the one in this case. When the petition was filed the 2nd to 7th appellants were stated as beneficiaries and not purchasers who needed protection of the law under that section. There was therefore concealment of material facts from the time the petition was filed. In ***Re Estate of Moses Wachira Kimotho (Deceased) Succession Cause 122 of 2002*** ***[2009] eKLR,*** this Court made pronouncements on the importance of disclosing all material facts before a court of law while seeking a grant of letters of administration and confirmation thereof. It observed;

> "I am certain that had the Applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the Respondent been forthright and candid and included the Applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The Respondent knew of the Applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant."

33. We agree with the above reasoning and find it applicable in the circumstances of this case. This vitiates the appellants' plea and we uphold the finding of the trial court on the same. It should also be noted that the said appellants did not obtain the necessary consent of the local land control board as required by law for that kind of transaction, nor has the transfers been effected to them. This may suggest that they were aware that the transaction was not above board.

34. In our view, a bona fide purchaser is one who purchases something for value without notice of another's claim to the same or without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title. In the Ugandan case of *Katende Vs. Haridar & Company* Limited [2008] 2 E.A.173* which was cited by this Court in the case of *[Weston Gitonga & 10 Others Vs. Peter Rugu Gikanga & Another]* [2017] eKLRit was held: -

> For the purposes of this appeal, it suffices to describe a **bona fide** purchaser as 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 that:
>
> a. he holds a certificate of title;
>
> b. he purchased the property in good faith;
>
> c. he had no knowledge of the fraud;
>
> d. he purchased for valuable consideration;
>
> e. the vendors had apparent valid title;
>
> f. he purchased without notice of any fraud;
>
> g. he was not party to any fraud.

35. From the record before us, none of the above were proved by the 2nd to the 7th appellants that would warrant this Court to tilt the judgment of the trial court. We therefore find just like the trial court that the 2nd to 7th appellants were not *bona fide* purchasers for value without notice and the alleged transactions were meant to defeat the interest of the rightful beneficiaries.

36. The appellant raised a ground to the effect that the trial court erred in law and exceeded its mandate by redistributing the estate to foreigners. However, as we have already opined, the trial court did not err in revoking the grant. It follows therefore that any subsequent distribution of the estate was legal and well founded. Section 66 of the *[Law of Succession Act]*, provides as follows; –

> "When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference–
>
> a. Surviving spouse or spouses, with or without association of other beneficiaries;
>
> b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided in Part V;
>
> c. The Public Trustee; and
>
> d. Creditors."

37. Having found that the appellants were not the rightful persons to apply for the grant of letters of administration of the deceased, we hold that the court was right in proceeding to distribute the estate to the respondents as indeed from the evidence, they were the rightful persons entitled to the estate. The foreigners from the record are indeed the appellants and not the respondents.

38. The record shows that during the hearing of the dispute in the trial court, all the parties were represented by counsel. They all had filed affidavits and subsequently written submissions. The appellants never raised the issue of not being heard on their affidavits. In its judgment the trial court made extensive reference to the affidavits. In our view therefore the complaint that they were not accorded a hearing or a fair hearing is but a red herring.

39. Having considered all the above and rendered ourselves as such, it is our considered view that the appeal herein is unmerited. The same is dismissed with costs notwithstanding the fact that it is a succession cause involving some family members. This is due to the conduct and character of the appellants who were hell bent on disinheriting the respondents at whatever cost.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HANNAH OKWENGU

....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

....

JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR