IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NAMBUYE, GATEMBU & M'INOTI JJ.A.)

CIVIL APPEAL NO. 161 OF 2018

BETWEEN

EDWARD MBURU KARIUKI..APPELLANT

AND

SAMUEL KARISA CHARO NGUMA........................1ST RESPONDENT

JULIUS CHORO NGUMA.......................................2ND RESPONDENT

ERICK KAINGU CHARO..3RD RESPONDENT

DONALD CHARO NGUMA....................................4TH RESPONDENT

(Being an appeal from the ruling and order of the High

Court at Mombasa (Hon. M. Thande, J. dated 19th October

***2018 in* Mombasa Succession Cause No. 361 of 2011**

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JUDGMENT OF THE COURT

The appeal arises from the ruling of **Hon. M. Thande, J.** in Succession Cause No. 361 of 2011 delivered on 19th October 2018.

The background to the appeal is that a petition for grant of letters of administration intestate to the estate of **Charo Nguma Kalama** was filed in the trial court on 5th September, 2010 by **Donald Charo Nguma** (the 4th respondent) in his capacity as a son of the deceased, alleging *inter alia* that the deceased died at Mtwapa on 27th July, 2000. The list of beneficiaries enumerated in the supporting affidavit comprised of three widows, two daughters and six sons. The deceased's estate comprised only one asset namely **Title No. Kilifi/Mtwapa/558** (the suit property). Grant of Letters of Administration was issued on 21st September, 2012 and confirmed on 14th February, 2013 before expiry of six months. The justification was to raise fees for two grandchildren of the deceased namely, **Katana Karisa** and **Halima Charo Nguma**, who had received admission letters to secondary school and needed fees and shopping for that purpose.

On 10th July 2017, **Samuel Karisa Charo Nguma**, **Julius Charo Nguma** and **Erick Kaingu Charo**, the 1st, 2nd and 3rd respondents respectively, filed summons for revocation or annulment of grant primarily under **section 76(a), (b)** and **(c)** of **Laws of Succession Act.** They prayed for a fresh grant to be issued to them and for an injunction to stop the 4th respondent from selling or dealing with the suit property pending the hearing and determination of the summons. The summons was based on the grounds that both the temporary and confirmed grants were obtained on the basis of false allegations because the deceased did not die on 26th January, 2001 as alleged, but he disappeared in 1997 and was never heard of since; no proceedings for presumption of death of the deceased had been taken out; there was no death certificate for the deceased; not all beneficiaries of the deceased were disclosed; and that the 4th respondent had surreptitiously subdivided the suit property into plot numbers **4211, 4212, 4213, 4214, 4723 and 4724,** which he intended to dispose off to third parties.

The summons were heard *ex parte* on 19th July 2017 and an injunction was issued restraining the 4th respondent from selling, transferring or dealing with the suit property pending the hearing and determination of the summons. Upon service, the 4th respondent's advocates filed a notice of appearance, but did not attend court on 27th February 2018. The 1st, 2nd and 3rd respondents requested the court to determine the summons on the basis of their application.

By a ruling dated 6th April 2018, the court allowed the summons and annulled the grant issued to the 4th respondent. It also restored the status quo ante to the intent that the suit property would revert to the name of the deceased.

On 5th June 2018, **the appellant, Edward Mburu Kariuki**, claiming to be directly affected by the ruling applied to be joined in the proceedings and for an order to set aside, review or vary the order of 6th April 2018. He contended inter alia, that he was a bona fide purchaser for value of a portion of the suit property from the 4th respondent; that the order restoring the title of the suit property to the name of the deceased was issued without being prayed for; and that adverse orders were made against him without an opportunity to be heard. On his part, the 4th respondent applied on 18th June 2018 for stay of execution, review of the order 6th April 2018 and for an order of presumption of the death of the deceased. He pleaded that the orders of 6th April 2018 were made in error because the estate of the deceased had already been distributed to the beneficiaries and the remainder sold to third parties. He blamed his advocates for failure to apply for an order to presume the deceased dead and for failure to attend court for the hearing of the summons.

The two applications were consolidated and determined by a ruling dated 19th October 2018, the subject of this appeal. While appreciating that the appellant was not a party to the succession proceedings and was not heard, which he was entitled to under the rules of natural justice, the learned judge nevertheless held that there was no proof that the deceased was dead because the 4th respondent had neither applied nor obtained an order presuming his death. Accordingly, the court concluded on the authority of **Macfoy vs. United Africa Ltd [1961] 3 ALL ER 1165,** that the grant obtained by the 4th respondent on the basis of which he sold a portion of the suit property to the appellant was illegal, fraudulent, null and void. As regards the order reverting the suit property to the name of the deceased, the learned Judge found that it was a natural consequence of the annulment of the grant and an incident of the court's duty to protect the estate of the deceased. Lastly as regards the prayer for an order of presumption of the death of the deceased, the learned judge found that the 4th respondent had no discharged the burden on him. Accordingly, the learned judge dismissed the applications, provoking this appeal.

Although the appeal is based on 7 grounds, the appellant condensed the grounds into one in his written submission. He contends that the learned judge violated his right to property without according him an opportunity to be heard in breach of **Articles 40** and **50** of the **Constitution**. In support of the appeal, **Mr. Mogaka,** learned counsel for the appellant, faulted the learned Judge for the failure to appreciate that by the time the summons for annulment of the grant was lodged, heard, and determined, the suit property was non-existent, having long been subdivided, and one of the portions, **No. Kilifi/Mtwapa/4211** lawfully purchased and registered in the appellant's name. He added that the appellant was neither made a party to nor served with the application that gave rise to orders made on 6th April, 2018 that adversely affected his proprietary rights. Counsel further contended that that the learned Judge erred by failing to apply relevant and binding decisions of this Court on the principles of natural justice.

The appellant relied on **Articles 25, 49** and **50** of the Constitution and the decisions in **JMK vs. MWM & Another [2015] eKLR**, **Mbaki & Others vs. Macharia & Another [2005] eKLR**, **Tarak Khawaja & 5 Others vs. The Registrar of Societies & 9 Others [2017] eKLR** and **James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR.** He submitted a person who is likely to be adversely affected by a decision must be afforded an opportunity to be heard before the decision is made and it was no answer to say that the same decision would have been reached even after a hearing. Counsel further urged that a decision arrived at in violation of the rules of natural justice is null and void.

The 1st, 2nd and 3rd respondents opposed the appeal through their written submissions and urged us to uphold the decision of the learned judge. They maintained that the appellant had no right to be heard in the succession proceedings because he was not a beneficiary of the estate of the deceased. In their view, the appellant's remedy lay in a claim against the 4th respondent who purported to sell a property which he had obtained fraudulently. Lastly these respondents contended that the order for restoration of the *status quo ante* had already been effected and should not be interfered with.

The 1st, 2nd and 3rd respondents relied on **Nyaga Cottolengo Francis vs. Pius Mwaniki Karani [2017]eKLR; Matheka & Another vs. Matheka [2005] 1 KLR 455**, **Sophia Salim Gathiaka & Another vs. Mariam Mbuve Abdalla alias Mama Kanyanaya & 9 Others [2016]eKLR**; **Patricia Wanja Mundia vs. Jecinta Gathoni Karanja & Others [2017]eKLR**; and **Musa Nyaribari Gekone & Others vs. Peter Miyienda & Another [2015]eKLR** in support of the proposition that the court has very wide powers to revoke or annul a Grant, whether confirmed or not, and that a grant obtained on false claims is amenable to revocation. Those authorities were also relied upon to back the contention that transfer to a purchaser, of property forming part of the estate of a deceased, will be invalidated if it is shown to be either fraudulent or vitiated by other serious defects or irregularities and that the court should not protect a personal representative who undertakes unethical or illegal actions with regard to property of the estate of a deceased person to the prejudice of beneficiaries.

We have carefully considered this appeal. At the heart of the appeal is a challenge to exercise of discretion by the trial court when it declined to review or set aside its order. The principles upon which we should consider the matter have been crystallised by case law, for example in **United India Insurance Company Limited vs. East African Underwriters Kenya Ltd [1985] KLR 898** which we fully adopt. These are that we can only interfere with the exercise of that discretion if we are satisfied that the learned Judge misdirected herself in law, misapprehended the facts, took account of considerations which she should not have taken into account, failed to take into account a consideration of which she should have taken into account, or that her decision, albeit a discretionary one, is plainly wrong.

From the evidence on record, the learned judge concluded that the proceedings pursuant to which the 4th respondent obtained the grant of letters of representation and the confirmed grant **"were defective in substance."** The reasons the learned Judge gave were the 4th respondent's failure to comply with the prerequisite in **section 118A** of the **Evidence Act** which required him to first of all seek and obtain an order of presumption of death before applying for a grant, having averred in support of the application of grant that the deceased disappeared in 1997 and had never been seen or heard of by persons close to him. The fact that there was no evidence of death of the deceased at the time the grant was issued and confirmed is not contested, meaning that if the 4th respondent had made full and true disclosure, the grant could neither have been issued nor confirmed. In these circumstances, we cannot fault the learned Judge for holding that the proceedings were defective in substance and that the grants were null and void.

Rules 7(1)(b), (2), 10 and **26** of the **Probate and Administration Rules** required the 4th respondent to support his petition for grant of representation to the deceased's estate with an affidavit disclosing the **"date and place of death of the deceased, exhibit a certificate or a photocopy of a certificate of death of the deceased or such other written evidence of the death of the deceased as may be available"**. The 4th respondent did not comply simply because there was no evidence of death of the deceased.

The authorities relied upon by the appellant on the right to be heard and the rules of natural justice are a correct statement of the law. Yet on the peculiar facts of this appeal, neither the appellant, nor the 4th respondent is disputing that the 4th respondent obtained the grant of representation to the state of the deceased without evidence that the deceased was indeed dead. On that basis alone, the 4th respondent was not entitled to the grant which he used to purportedly sell part of the estate of the deceased to the appellant. Having obtained the grant through fraud and material non-disclosure, the fourth responded had no title to the suit property that he could validly pass on to the appellant. And it is not like the appellant has absolutely no remedy; we agree with the 1st, 2nd, and 3rd respondents that his proper remedy relies in a claim against the 4th respondent.

In light of the foregoing, we are satisfied that this appeal has no merit and is hereby dismissed. Each party to bear own costs. It is so ordered.

DATED and DELIVERED at NAIROBI this 5th day of March, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

<u>DEPUTY REGISTRAR</u>