



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA, & KIAGE, J.J.A.)

CIVIL APPEAL NO. 94 OF 2014

BETWEEN

PURITY NDIRANGU.....APPELLANT

VERSUS

ANTHONY KARANJA.....1STRESPONDENT

DORIS M. WANJIRU KINUTHIA.....2ND RESPONDENT

AMOS KINUTHIA GITAU.....3RD RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya Nairobi (Kimaru, J.)

dated 20th June 2013

in

Succession Cause No. 1574 of 1994)

JUDGMENT OF THE COURT

1. On 25th January, 2005 the High Court (***Koome, J.***) (as she then was), revoked the grant of letters of administration intestate and all the consequential transactions effected pursuant to the grant. The grant had been issued to ***Purity Mugure Ndirangu*** (the appellant herein) and ***Charles Mukiri***. The grant was in respect of the estate of ***Evanson Mburu Muiru***, (herein after referred to as the deceased). The court then issued a new grant to ***Anthony Karanja*** (1st appellant) and ***Purity Mugure Ndirangu***. The court further directed the two administrators to file an application for confirmation of the grant.

2. The reason for the revocation of the initial grant was that there had been material concealment and misrepresentation when the grant was issued and confirmed. The administrators failed to disclose that ***Anthony Karanja*** was a son of the deceased and was therefore entitled to a portion of the deceased's estate as a beneficiary.

3. Before the revocation of the initial grant the appellant had sold a parcel of land known as ***LR. No. Dagoretti/Uthiru/733*** (the suit land) to the 2nd and 3rd respondents at a consideration of Kshs. 1,300,000/-. The appellant used part of the sale proceeds to purchase a six acre parcel of land at ***Mweiga*** within ***Nyeri*** County which is registered as ***LR. No. Nyeri/Gatarakwa/686***.

4. The respondents, having purchased the suit land, subdivided it and sold some of the subdivisions to third parties who have since acquired title deeds for the same.

5. On 28th March, 2012 the interested parties filed an application seeking a review of the orders made by ***Koome, J.*** on 25th January, 2005 with a view to having them set aside in their entirety. In their affidavit in support of the application the 2nd and 3rd respondents stated that in the sale of the suit land the appellant had represented herself as the *bona fide* administrator of the deceased's estate; that they had already subdivided the suit land and sold portions thereof to third parties who have since erected permanent homes; that the order issued on 25th

January, 2005 was therefore very prejudicial to them and to the innocent third parties as it had the effect of revoking all the transactions relating to the suit land.

6. The respondents further stated that they had approached the appellant with a view to resolving the matter amicably but she was not cooperative. In their view, the appellant was intent on enriching herself unjustly to the detriment of the respondents and innocent third parties by benefitting twice from a state of affairs that she had brought herself.

7. In his ruling that allowed the 2nd and 3rd respondents' application, **Kimaru, J.** recognized the agreement that was entered into between the appellant and 2nd and 3rd respondent on 27th January, 1999. The court noted that the 1st respondent had reached an agreement with the 2nd and 3rd respondent as to how the remaining part of the suit land was to be distributed so that the 1st respondent gets a share of the same. The court further held that the appellant could not benefit from the suit land as she had already sold it and used part of the sale proceeds to purchase land elsewhere.

8. Being aggrieved by the aforesaid ruling, the appellant preferred an appeal to this Court. The appellant faulted the learned judge for recognizing the agreement that was entered into between the appellant and the 2nd and 3rd respondents in 1999; for stating that there was no confirmed grant when the appellant sold the suit land; for holding that the appellant had no capacity to sell the suit land; for finding that the appellant used proceeds from the sale of the suit land to acquire another property in Mweiga within Nyeri County; for holding that the appellant stood to benefit twice unless the orders sought by the 2nd and 3rd respondent were granted; and for endorsing the arrangement between the 1st respondent and the 2nd and 3rd respondents regarding distribution of the remainder of the suit land.

9. **Mr. Ombwayo**, learned counsel for the appellant, made brief submissions in support of the appeal. Counsel faulted the learned judge for setting aside the earlier ruling by Koome, J. and granting orders that had not been sought by the respondents. Counsel submitted that the 2nd and 3rd respondents had not shown that there was any error on the face of the record to warrant a review. He also pointed out that the grant was confirmed on 17th November, 1998, long before the appellant sold the suit land in 1999. He urged the Court to allow the appeal.

10. **Mr. Kitheka** appeared for the 1st respondent and **Mr. Muchai** for the 2nd and 3rd respondents. Mr. Kitheka submitted that by the time the initial grant was being revoked the suit land had been sold, subdivided and title deeds issued. However, following revocation of the initial grant the appellant did not refund the money that she had received from the 2nd and 3rd respondents but was still intending to get a share of the suit land from the respondents. Counsel therefore supported the decision by Kimaru, J., stating that it will be unjust for the appellant to benefit twice at the expense of the respondents.

11. Mr. Kitheka further submitted that the sale of the suit land was not illegal, the initial grant of representation having been confirmed long before sale agreement was entered into. But even if there was any defect in the said transaction, the provisions of **section 93** of the **Law of Succession Act**

justified the transaction, counsel urged. The section states as hereunder:

“93(1). A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

12. Consequently, Mr. Kitheka submitted, the sale of the suit land by the appellants was lawful; that the suit land had been subdivided by the 2nd and 3rd respondent and the subdivisions sold to third parties except a portion that was ceded to the 1st respondent, to which he has a title deed. There is therefore nothing available for distribution and it would be an academic exercise to allow the appeal, counsel concluded.

13. **Mr. Muchai**, learned counsel for the 2nd and 3rd respondents, supported Mr. Kitheka's submissions. Counsel pointed out that the error of law that was alluded to in the application for review was that the court overlooked the provisions of section 93 of the Law of Succession Act by which the 2nd and 3rd respondents became bona fide purchasers of the suit property.

14. Lastly, Mr. Muchai submitted that the appellant was not entitled to any share of the suit land as she had already sold it and purchased six acres at Mweiga.

15. We have considered the record of appeal and submissions by counsel. Looking at the impugned ruling and the grounds of appeal the main issues for our determination are:-

(i) Whether the review of the Koome, J's ruling was warranted.

(ii) Whether the trial court was right in holding that the appellant had no interest in the suit land.

(iii) Whether the trial court was right in recognizing the sale agreement of the suit land by the appellant to the 2nd and 3rd respondents.

16. In her ruling, Koome, J. held, inter alia:

“I hereby revoke the grant that was issued on 14th

October, 1994 to Purity Mugure Ndirangu and Charles Mukiri and confirmed on 17th November, 1998 and all the consequential transactions effected pursuant to the said grant.”

As at the date of the aforesaid ruling the suit property had lawfully been sold to the 2nd and 3rd respondents, who had also subdivided the same and obtained title deeds to the subdivisions. It is not clear whether the learned judge’s attention was drawn to that fact. Whether or not there was material non-disclosure and misrepresentation when the grant was issued and confirmed, the provisions of section 93 of the Law of Succession Act validated the transaction that had been entered into between the appellant and the 2nd and 3rd respondents.

17. Section 93 of the Law of Succession Act protects a bona fide purchaser of any property from a person who has obtained a grant of representation, even if that grant is subsequently revoked or varied. See this Court’s decision in **JACINTA WANJA KAMAU V. ROSEMARY WANJIRU WANYOIKE & ANOTHER, 2013 eKLR**.

18. It was not disputed that the 2nd and 3rd respondents were bona fide purchasers for value of the suit property. The appellant did not dispute receipt of Kshs.1,300,000/- from the 2nd and 3rd respondents, being sale proceeds in respect of the suit property. She did not also dispute the fact that she used part of that money to purchase six acres at Mweiga, which land was registered in her name on 23rd March, 2000.

19. In the circumstances, the 2nd and 3rd respondents were justified in seeking a review of the orders made on 25th January, 2005 to protect their interests in the suit property, which they had lawfully acquired. This finding disposes of the first and third issues.

20. Turning to the second issue, the learned judge did not err in finding that the appellant had no interest in the suit land, having lawfully sold the same to the 2nd and 3rd respondents and used part of the sale proceeds to purchase a six acre parcel of land at Mweiga. The learned judge stated:

“This court agrees with the interested parties that it would be unconscionable for this court to permit the respondent to benefit twice from a situation that she herself brought about. In this case the respondent sold the suit parcel of land to the interested parties despite the fact that she did not have capacity to do so. She was paid the purchase consideration in full. She used part of it to purchase another parcel in Nyeri County. She now wants the interested parties to again surrender to her part of the parcel of land that she had sold to them. That cannot be. It would be inequitable for this court to allow the respondent to benefit from an illegality that she herself perpetrated.”

21. It is trite law that a court cannot allow a person to benefit from his own wrong doing; equity detests unjust enrichment. See **CHASE**

INTERNATIONAL INVESTMENT CORPORATION AND ANOTHER V. LAXMAN KESHRA AND OTHERS 1978 KLR 143. The learned judge cannot be faulted for making the impugned orders in the review application.

22. All in all, we find no merit in this appeal and dismiss it in its entirety. The appellant shall bear the costs of the appeal.

Dated and Delivered At Nairobi This 10th Day of May, 2019.

P.N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR