



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 91 OF 2016**

**BETWEEN**

**WEVARSITY SACCO SOCIETY LIMITED.....APPELLANT**

**AND**

**MOSES MUSA LUMITI ABURA.....1<sup>ST</sup> RESPONDENT**

**DORCAS ASINYILWA BARASA.....2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA UNION OF SAVINGS & CREDIT**

**CO-OPERATIVES LIMITED (KUSCCO)...INTERESTED PARTY**

*(An appeal from the Judgment of the High Court of Kenya*

*at Kakamega (Sitati, J.), dated 21<sup>st</sup> September, 2016*

**In**

**Succession Cause No. 990 of 2011)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. **Wilson Abura Liluma** (the deceased), died on 9<sup>th</sup> June, 2008. **Moses Musa Lumiti Abura**, his son, the 1<sup>st</sup> respondent, petitioned the High Court for grant of letters of Administration intestate. The grant was given to him on 22<sup>nd</sup> May, 2012.

2. Subsequently, the 1<sup>st</sup> respondent applied for confirmation of the grant. In the affidavit in support of the application, the 1<sup>st</sup> respondent stated that the deceased was survived by himself, **Samson Liluma Abura**, **Agnes Norah Andaye**, **Dorcias Asinyilwa Barasa** and **Jones Tellah Nyikuli**. The identification of shares of the persons beneficially entitled to the deceased's estate was said to have been ascertained and determined as follows:

<b><u>Beneficiary</u></b>	<b><u>Asset</u></b>	<b><u>Share</u></b>
Moses (Musa) Lumiti Abura	Isukha/Shirere/41	1.55 Ha
Samson Liluma Abura	“ “	1.55 Ha
Agnes Norah Andaye	“ “	1.55 Ha

<b>Dorcas Asinyila Barasa</b>	“ “	<b>0.09 Ha</b>
<b>Jones Tella Nyikuli</b>	“ “	<b>0.75 Ha</b>
<b>Banda</b>	“ “	<b>0.05 Ha</b>
<b>Moses Lumiti Abura</b>	<b>Isukha/Shirere/593</b>	<b>Whole</b>

3. All the beneficiaries agreed to the aforesaid mode of distribution of the deceased's estate, and thereafter the court confirmed the grant and the deceased's estate was distributed as shown above.

4. On 13<sup>th</sup> November, 2014 **Samson Liluma Abura**, one of the beneficiaries of the deceased's estate, step brother of the 1<sup>st</sup> respondent, entered into a sale agreement with the appellant herein for his 1.55 hectares, which had been registered as **Isuka/Shirere/6130**. The purchase price was Kshs.17,000,000/=.

5. The vendor and the purchaser sought and obtained consent of the area Land Control Board, and on 25<sup>th</sup> February, 2015, the appellant was issued with a title deed for the aforesaid parcel of land. Thereafter the appellant subdivided its land into 28 plots and sold 24 of them to its members and the 4 remaining plots were reserved for an office block. The appellant had charged the entire parcel of land, **Isuka/Shirere/6130** to the Interested Party, to secure a sum of Kshs.15,000,000/= advanced to it.

6. When the appellant started developing its property, the 2<sup>nd</sup> respondent, a sister of the 1<sup>st</sup> respondent, moved to court on 15<sup>th</sup> May, 2015 and filed an application for revocation of the grant that had been issued to the 1<sup>st</sup> respondent. She also sought restoration of the original title, **Isukha/Shirere/41**, by cancellation of the titles to the five resultant subdivisions, that is **Isukha/Shirere/6127, 6128, 6129, 6130 and 6131**.

7. The 2<sup>nd</sup> respondent stated that the grant was obtained secretly without her consent, participation or knowledge; that the 1<sup>st</sup> respondent concealed the fact that she was entitled to an equal share of the estate; and that the 1<sup>st</sup> respondent had left out another property of the deceased's estate.

8. The 1<sup>st</sup> respondent did not file any response to the summons for revocation of the grant. The appellant, through **Victor Kiplagat Kiptanui**, its Chief Executive Officer, filed a replying affidavit. He explained that the appellant was not a party to the succession cause; that court records showed that the 2<sup>nd</sup> respondent consented to the confirmation of the grant and was granted 0.09 Ha of **Isukha/Shirere/41**; that the appellant entered into a sale agreement with the 1<sup>st</sup> respondent after he had obtained a title deed for his parcel of land; and that the appellant had transparently and lawfully purchased and subdivided land parcel No. **Isukha/Shirere/6130** as earlier stated. The other parties adduced oral evidence and thereafter filed their respective submissions.

9. In her decision, Sitati, J. held that the 2<sup>nd</sup> respondent neither signed the consent to making the application for the grant nor the consent to distribution of the estate; that her signature had been forged; that she did not participate in the succession proceedings; that the appellant purchased the suit land before succession was completed; and that **Samson Liluma Abura** intermeddled with the deceased's property by selling part of it to the appellant.

10. Consequently, the learned judge granted the 2<sup>nd</sup> respondent's prayer for revocation of the grant and declared as null and void all the transactions made pursuant to the revoked grant.

11. Being aggrieved by that decision, the appellant preferred an appeal to this Court. In its memorandum of appeal, the appellant argued, *inter alia*, that by revoking, nullifying and cancelling the transfer and registration of the suit property in its favour, the learned judge contravened **section 93** of the Law of Succession Act; and that by setting aside the consent on distribution of the deceased's estate the learned judge violated the provisions of **sections 51 and 76** of the Law of Succession Act as read with **rules 26 and 40(8)** of the Probate and Administration Rules.

12. The appellant further faulted the learned judge for holding that it had purchased the suit property before completion of the succession process; for holding that the grant was obtained secretly without the 2<sup>nd</sup> respondent's consent or participation in the succession process, whereas the respondents appeared before Nyikuli O. J. Advocate & Commissioner for Oaths (who was also their advocate in the High Court matter as well as in this appeal) when they swore the affidavit in support of summons for confirmation of the grant.

13. When the appeal came up for hearing, Mr. Abok, learned counsel for the appellant, relied on his written submissions, which he briefly highlighted. Regarding the first ground of appeal, that is, by nullifying the transfer of the suit property the learned judge contravened the provisions of **section 93** of the Law of Succession Act, the appellant's counsel submitted that the appellant purchased the suit property from **Samson Liluma Abura**, a person to whom a grant of representation had been issued and confirmed and therefore the title deed was valid and indefeasible.

14. The section states as follows:

**“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.**

**(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.”**

15. Regarding the manner in which the grant was obtained, the appellant’s counsel submitted that the 2<sup>nd</sup> respondent did not prove any of the factors set out under **section 76** of the **Law of Succession Act** which have to be demonstrated before revocation or annulment of a grant can be ordered.

16. Further, the 2<sup>nd</sup> respondent’s advocate, before whom the beneficiaries (including the 2<sup>nd</sup> respondent) signed the affidavit in support of the summons for confirmation of the grant, neither testified nor swore any affidavit to deny that, as a Commissioner for Oaths, he had witnessed the signing of the said affidavit by the 2<sup>nd</sup> respondent.

17. Miss Nyambura, learned counsel for the Interested Party, supported the appeal. She reiterated that the sale of the suit property and the subsequent registration of the charge was done long before the application for revocation of the grant was made.

18. The 1<sup>st</sup> respondent, who was unrepresented, opposed the appeal. He said that regarding the sub-division and distribution of the estates their step brother, **Samson Abura**, had not followed what the beneficiaries had agreed at their home. The 1<sup>st</sup> respondent equally denied having signed the consent regarding distribution of the deceased’s estate.

19. Mr. Nyikuli, learned counsel for the 2<sup>nd</sup> respondent, relied on his written submissions. He argued that **section 93** of the Law of Succession Act does not prohibit the exercise of the court’s discretion to invalidate a fraudulent transaction. In his view, the 2<sup>nd</sup> respondent had proved that the grant was obtained without her knowledge and that she had not executed any consent in respect of distribution of the estate.

20. In support of his submissions, the 2<sup>nd</sup> respondent cited, *inter alia*, this Court’s decision in **Musa Nyaribari Gekone & 2 Others v Peter Miyianda & Another [2015] eKLR**, where the Court took the position that notwithstanding the provisions of **section 93** of the Law of Succession Act, if it is proved that the transfer of the property in question was as a result of a fraudulent grant, the grant and the transfer can be invalidated.

21. We have carefully considered the record of appeal as well as the submissions on record. There are two broad issues for determination in this appeal. The first one is whether the learned judge of the High Court was right to hold that the 1<sup>st</sup> respondent obtained the grant secretly and/or fraudulently; and through concealment of the fact that the 2<sup>nd</sup> respondent was entitled to an equal share of the deceased’s estate. The second issue is whether, under **section 93** of the Law of Succession Act the title in favour of the appellant could be annulled.

22. In considering the first issue, it is imperative that we turn to the 2<sup>nd</sup> respondent’s affidavit in support of the summons for revocation of the grant. The 2<sup>nd</sup> respondent stated that “the grant herein was obtained secretly without my knowledge and confirmed in my absence.” Then she went on to state that the petitioner did not disclose to the court that she was entitled to an equal share of land parcel number **Isukha/Shirere/41**.

23. In the petition for letters of administration filed on 22<sup>nd</sup>, December 2011, the petitioner listed all the children of the deceased, including the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent then signed Form 38, that is, consent to making of a grant of administration intestate to a person of equal or lesser priority, in this case her brother, **Moses Lumiti Abura**. The affidavit shows that the 2<sup>nd</sup> respondent signed it in the presence of **Asichiri George Aburili**, an advocate and Commissioner of Oaths, who was not called as a witness.

24. Long after issuance of the grant of letters of administration, in their application for confirmation of the grant, the beneficiaries filed an affidavit in which they consented to the mode of distribution and the share of the deceased’s estate which each of them was to get. The affidavit shows that the 2<sup>nd</sup> respondent was to get 0.09 hectares while the 1<sup>st</sup> respondent was to get 1.55 hectares.

25. The affidavit was signed by the beneficiaries in the presence of Nyikuli O. J; Advocate and Commissioner of Oaths; who in a rather surprising turn of events, was the same advocate instructed by the 2<sup>nd</sup> respondent to file the summons for revocation of grant on grounds, *inter alia*, that the grant was obtained secretly and in a fraudulent manner.

26. The 1<sup>st</sup> respondent did not file any replying affidavit to the application. It may therefore be assumed that he did not contest the fact that he signed the affidavit of consent to the mode of distribution of the deceased’s estate before Mr. Nyikuli.

27. When this Court asked Mr. Nyikuli whether indeed the two respondents executed the said affidavit in his presence, the advocate was non-committal; he simply said, “I do not want to commit myself as to whether I commissioned the affidavit or not.”

28. On the other hand, the 1<sup>st</sup> respondent’s main argument during the hearing of the appeal was that the subdivision of the land was not according to what the family of the deceased had agreed.

29. In the aforesaid circumstances, we are not satisfied that the 2<sup>nd</sup> respondent discharged her burden of proof that the grant of representation was fraudulently obtained. It was not enough to simply deny that she was not aware of the fact that her brother had applied for letters of administration; and that she had not signed the affidavit of consent to the mode of distribution of the deceased’s estate. There were two affidavits on record which showed the contrary. The 2<sup>nd</sup> respondent’s advocate, being the same one before whom the 2<sup>nd</sup> respondent signed the affidavit of consent, ought to have shed light on the issue but chose not to. We even do not think that it was ethically right for him to

represent the 2<sup>nd</sup> respondent in the matter. His representation and submissions negated his client's case.

30. We now turn to the issue of validity of transfers under section 93 of the Law of Succession Act upon revocation of a grant. **Section 93(1)** preserves a transfer of any immovable or movable property made to a purchaser by a person to whom representation has been granted in the event of subsequent revocation or variation of the grant.

31. Upon finding that the 2<sup>nd</sup> respondent had not signed the consent to the application for the grant and that she had been kept in the dark about the succession proceedings, the learned judge revoked the grant and went on to state that "all transactions made pursuant to the revoked grant cannot stand." The learned judge did not address her mind to the provisions of **section 93(1)** at all.

32. The appellant had filed a lengthy affidavit that explained in great details how it had acquired the suit property. It is worth reiterating that at the time of entering into the sale agreement, the original parcel of land known as **Isukha/Shirere/41** had been subdivided as shown in the certificate of confirmation of the grant and **Samson Liluma Abura** had already been registered as the absolute proprietor of the suit land, that is, **Isukha/Shirere/6130**.

33. It was factually inaccurate for the learned judge to hold that the appellant bought the suit land before the succession process was completed. There was no iota of any fraud on the part of the appellant in the process of acquisition of the suit land. The appellant exercised due diligence by conducting appropriate search at the Lands Registry and the court registry, which showed that **Samson Liluma Abura** was the true owner and registered proprietor of the suit land.

34. Having held that the 2<sup>nd</sup> respondent did not prove that the legal representative of the deceased's estate had acquired the suit property unlawfully or fraudulently, and having established that the appellant had lawfully purchased the suit property from **Samson Liluma**, we find that the appellant had acquired a valid title to the suit land. The transfer of Samson's interest in the suit land was unassailable; even by virtue of the provisions of **section 93(1)** of the Law of Succession Act, the learned judge having erred in revoking the grant.

35. In view of the foregoing, we hereby allow this appeal, and set aside the High Court judgment dated 21<sup>st</sup> September, 2016. The respondents shall bear the costs of this appeal.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of September, 2017.**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**