



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CIVIL APPEAL NO. 53 OF 2015**

**BETWEEN**

**BENSON MANANI MAHINYE.....APPELLANT**

**VERSUS**

**WAIGANAGANA A. KENDI.....RESPONDENT**

*(An Appeal from the Ruling and or orders of the High Court of Kenya*

*at Kakamega, (A. C. Mrima, J.) dated 11<sup>th</sup> March, 2015*

**in**

**H.C. SUCCESSION CAUSE NO. 18 OF 2005)**

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**JUDGMENT OF THE COURT**

1. The main issue in this appeal is whether the High Court erred in ordering the cancellation of the appellant's title to land in spite of the provisions of section 93(1) of the Law of Succession Act.

**Background**

2. Rispa Ngaira Waiganagana (the deceased,) died intestate on 8<sup>th</sup> April 1987 in Kakamega. She was aged 45 years at the time of her death. She was the mother of Patrick Shimoli, Ronald Shaonyo, Julius Khamalishi Waiganagana, Ongaya Waiganagana, Zebby Mumelo and the respondent, Agnes W. Kedi. At the time of her death, she was the registered proprietor of a property known as Title Number Kakamega/Iguhu/931 (the property) measuring approximately 1.1 hectares.

3. Three of the children of the deceased, namely Patrick Shimoli, Ronald Shaonyo, and Ongaya Waiganagana predeceased her. They were however survived by their respective children.

4. In January 2005, the deceased's son, Julius Khamalishi Waiganagana (now deceased, and to whom we shall hereafter refer as "Julius") petitioned for Letters of Administration Intestate for the estate of the deceased. In that petition he described himself as the sole survivor of the deceased. The grant of Letters of Administration Intestate for the estate of the deceased was issued to Julius on 13<sup>th</sup> November 2007. In

February 2008, Julius applied for confirmation of the grant. In the application for confirmation of grant, he yet again described himself as the sole surviving child of the deceased and applied for the property to be distributed to him and him alone. During the hearing of the application for confirmation of grant before the High Court (F. A.Ochieng, J) the record of proceedings shows that Julius informed the court, ***“The deceased was my mother. My father died in 1971. I have no brothers or sisters. I am an only child.”***

5. A certificate of confirmation of grant identifying Julius as the sole heir of the deceased was issued by the High Court at Kakamega on 19<sup>th</sup> May 2008. In the same certificate, Julius was identified as the sole beneficiary of the property.

6. Meanwhile, and before the grant of letters of administration was issued to him on 13<sup>th</sup> November 2007, Julius had purported to enter into an agreement for sale dated 10<sup>th</sup> April 2005 under which he purported to sell a portion of the property to the appellant. Prior to confirmation of the grant, Julius entered into yet another agreement for sale dated 16<sup>th</sup> February 2009 with the appellant under which he purported to sell the remaining portion of the property to the appellant.

7. On 4<sup>th</sup> December 2008, the respondent, Waiganagana A. Kendi, a daughter of the deceased, presented an application dated 3<sup>rd</sup> December 2008 to the High Court at Kakamega seeking revocation or annulment of the grant of Letters of Administration issued to Julius on grounds that the same was obtained fraudulently by making of false statements or by concealment of material facts and that as one of the beneficiaries of the estate of the deceased, she was left out.

8. It is not clear from the record why the respondent does not appear to have pursued or prosecuted that application. However, by another application dated 9<sup>th</sup> July 2014 presented under certificate of urgency, on grounds that Julius had died in mysterious circumstances and that the appellant was in the process of disposing of the property, the respondent sought: an order to prohibit dealings in the property; cancellation of the certificate of confirmation of grant issued to Julius; cancellation of a transfer of the property by Julius to the appellant; and for an order for the property to revert to the estate of the deceased for the distribution to all the heirs of the deceased entitled to the property.

9. In her affidavit in support of that application, the respondent disclosed the children and grandchildren of the deceased and reiterated that Julius had applied and obtained the grant of Letters of Administration for the estate of the deceased without her knowledge and that of her siblings; that as she followed up the matter, her brother Julius committed suicide on 17<sup>th</sup> June 2014; that the appellant was planning to dispose of the property to frustrate her efforts to have the grant issued to Julius revoked; that her deceased brothers had left behind children who were living on the property and were at risk of being rendered landless; and that the appellant did not obtain a clean title to the property.

10. A certified copy of an extract of the proprietorship section of the title shows that Julius became registered as proprietor of the property on 17<sup>th</sup> December 2008 and a title deed issue to him on 18<sup>th</sup> December 2008. On 19<sup>th</sup> October 2011 the appellant became the registered proprietor of the property and a title deed was issued to him.

11. In his affidavit in reply, the appellant deposed that Julius approached him in 2005 intending to sell the property to him; that Julius assured him that he was the sole heir and beneficiary of the property and showed him copies of the documents he had filed in the succession cause in respect of the estate of the deceased; that upon satisfying himself of Julius' status, he entered into agreements for sale; that after obtaining confirmation of grant, Julius then transferred the property to him; that consent of the relevant land control board was duly obtained; that he took possession of the property in 2005 and was in exclusive possession since that time; that his title to the property was not impeachable by reason of section 93 of the Law of Succession Act; that the purported beneficiaries of the estate of the deceased mentioned by the respondent are fictitious and nonexistent.

12. When the respondent's application dated 9<sup>th</sup> July 2014 came up before the High Court on 6<sup>th</sup> October 2014 counsel for the parties recorded a consent order in the following terms:

*“BY CONSENT-*

- a. The Objector/Applicant be granted leave to file a supplementary Affidavit within 14 days.*
- b. The Respondent be granted leave to file a Further Affidavit as well, if need be, within 7 days.*
- c. Thereafter the parties to file written and exchange submissions within 30 days.*
- d. Mention to confirm compliance on 01/12/14.”*

13. It is instructive to note that the parties did not make any reference to the earlier application for revocation of grant by the respondent dated 3<sup>rd</sup> July 2008 when agreeing to have the application dated 9<sup>th</sup> July 2014 disposed of in that manner. We will revert to this matter later in this Judgment.

14. Pursuant to that consent, the parties filed further affidavits to buttress their respective cases and filed written submissions. After considering the application, the affidavits and the written submissions, the learned Judge delivered the impugned ruling on 11<sup>th</sup> March 2015 ordering that:

*“(a) The Certificate of Confirmation of a Grant dated 19/05/2008 to JULIUS KHAMALISHI WAIGANAGANA be and is hereby cancelled;*

*(b) The transfer made by JULIUS KHAMALISHI WAIGANAGANA to BENSON MANURI MULINYA and duly registered on 19/10/2011 pursuant to which a Title Deed was issued on 09/11/2011 be and is hereby equally cancelled.*

*(c) The Title Deed issued to BENSON MANUNI MULINYA on the property known as KAKAMEGA/IGUHU/931 to forthwith revert to RESPAH NGAIRA WAIGANAGANA.*

*(d) The Grant of Letters of Administration intestate issued to JULIUS KHAMALISHI WAIGANAGANA on 13/11/2007 shall be amended and the said JULIUS KHAMALISHI WAIGANAGANA substituted with AGNES KENDI WAIKANAKANA, ZEBBY MUMELO, MIKE WAIKANAKANA and ANDREW WIKANAKANA. An Amended Grant shall forthwith be issued accordingly*

*(e) Any of the Administrators and/or all of them shall file a Summons for Confirmation of the Grant within 21 days of the issuance of the Amended Grant and shall serve the same upon the Respondent herein and all the beneficiaries and heirs to the deceased as disclosed in paragraph 3 of the Supporting Affidavit of WAIGANAGANA AGNES KENDI sown on 09/07/2014 and evenly filed in Court.*

*(f) The Respondent and the said other beneficiaries or heirs shall file their responses within 21 days of service.*

*(g) The matter shall be fixed for directions within 90 day of this date.*

*(h) Costs of the application shall be borne by the Respondent herein.”*

15. Aggrieved by that decision, the appellant lodged the present appeal.

### **The appeal and submission by counsel**

16. At the hearing of the appeal, Mr. Akwala, learned counsel for the appellant, referred us to the

memorandum of appeal and submitted that the Judge erred in hearing the respondent's application dated 9<sup>th</sup> July 2014 despite the fact that Julius, who was the administrator of the estate of the deceased, had died and had not been substituted; that the Judge erred in revoking the grant and certificate of confirmation of grant in favour of Julius when the earlier application by the respondent dated 3<sup>rd</sup> July 2008 had not been heard and determined; that in view of section 93 of the Law of Succession Act, the Judge erred in cancelling the transfer in favour of the appellant, an innocent purchaser for value who had no knowledge of any anomalies in the title held by Julius; that in the circumstances the Judge was wrong to make the orders that he did as the only remedy that would have been available to the respondent would have been an award of damages as against the estate of the deceased.

17. Opposing the appeal, learned counsel for the respondent Mr. Mukavale defended the impugned ruling and submitted that the appellant did not, in the circumstances, have good title and the Judge was right to cancel it; that section 93 of the Law of Succession Act on which the appellant relied does not provide protection to a title that is the product of a grant of Letters of Administration obtained fraudulently through concealment of facts and which excluded the bona fide beneficiaries; that the appellant was aware that Julius was not the only heir of the deceased and is not an innocent purchaser as he purports; that the appellant purported to enter into an agreement for sale with Julius as the succession process was going on; and that the decision by the learned Judge cannot be vitiated on the basis that Julius was deceased at the time the application was heard and had not been substituted.

### **Analysis and determination**

18. We have considered the appeal and the submissions by learned counsel. The central question in this appeal is whether the learned Judge erred in ordering the cancellation of the appellant's title to the property in light of section 93(1) of the Law of Succession Act. In other words, did the order for cancellation of the appellant's title to the property violate that provision?

19. Based on our review of the material placed before the High Court, there can be no doubt that Julius obtained the grant of letters of administration of the estate of the deceased by fraud. He knowingly misrepresented to the court that he was the only survivor of the estate of the deceased. He concealed from the court that his sister, the respondent, also survived the deceased, as did Zebby Mumelo and the children of his deceased brothers. He did that in order to induce the court to issue him with the Grant of Letters of Administration of the estate of the deceased.

20. Julius repeated the intentional fraud when applying for confirmation of the grant. As already noted, he had no qualms when he told the court during the hearing of the application for confirmation of grant that, ***"I have no brothers or sisters. I am an only child."*** Quite clearly, therefore, Julius pursued a scheme to disinherit the respondent and his other siblings with the object of solely benefiting from the estate of the deceased.

21. The appellant however says that he should not be affected by the fraud perpetrated by Julius; that he is an innocent purchaser of the property for value without notice of any defect in the title Julius purportedly transferred to him. But is he? The learned Judge did not think so. The Judge said:

***"The [appellant] is a neighbour to the deceased's family. He indeed knows the family well. If it is true the Respondent was shown the documents in the cause as alleged he was properly put in the know and could easily detect from the said documents that the Petitioner had indicated that he was "the only surviving heir of the deceased." He equally would have noticed that the other heirs did not favour their consents thereto. He therefore had an opportunity to interrogate the issues given that he started dealing with the Petitioner long before the grant was issued and eventually confirmed. May be out of ignorance or otherwise, the Respondent chose to ignore to interrogate the issues."***

22. The finding that innocence in the appellant's case was wanting is in our view, well supported by the evidence before the court. By the time the appellant entered into an agreement to purchase a portion of the property with Julius on 10<sup>th</sup> April 2005, Julius did not have the capacity to do so. Indeed, even when

the second agreement for sale was entered into in February, 2009 between Julius and the appellant for the remainder of the property, Julius did not have a confirmed grant. Furthermore, it is patently clear from the contents of the replying affidavit sworn by the appellant on 6<sup>th</sup> October 2014 that he knew the family of the deceased well. It certainly does not come across from the evidence that the appellant was, as he would have the court believe, dealing with Julius at arm's length.

23. Could the appellant, in those circumstances, seek protection of his title under section 93(1) of the Law of Succession Act? We do not think so. Section 93 of the Law of Succession Act provides:

*“93. (1). Validity of transfer not affected by revocation of representation*

*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.”*

24. Commenting on that provision in the case of **Adrian Nyamu Kiugu vs. Elizabeth Karimi Kiugu and Anor [2014] eKLR** the High Court at Meru stated:

*“Whereas the above section states that a transfer by 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, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.”*

25. This Court took a similar approach in **Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and Another [2013] eKLR**.

26. And in **Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and another [2008] eKLR** where a purchaser claimed that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore not only protected under **S.93 (1)** of the Law of Succession Act (Cap 60) but also **section 143** of the Registered Land Act, this Court stated:

*“We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immoveable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”*

27. We have recently re-affirmed that position in **Musa Nyaribari Gekone and two others Vs. Peter Miyianda and another, Kisumu Civil Appeal No. 2 of 2014**.

28. The position taken by the learned Judge of the High Court in this case is therefore a correct interpretation and application section 93(1) of the Law of Succession Act. We have no basis for interfering with the Judge's decision in that regard.

29. That leaves the complaint that the application dated 9<sup>th</sup> July 2014 was heard before the earlier application by the respondent for revocation of grant dated 3<sup>rd</sup> December, 2008 was heard and before there was substitution of Julius, who was then deceased, as the administrator of the deceased.

30. In our view, the learned Judge correctly treated these complaints as an afterthought. As already mentioned, when the respondent's application dated 9<sup>th</sup> July 2014 came up for hearing before the High

Court on 6<sup>th</sup> October 2014, counsel for the parties recorded a consent order in terms of how the matter was to proceed. The respondent did not, at that opportune moment, raise a complaint on the competency of the application. In any case, the subsistence of the application dated 3<sup>rd</sup> December 2008 was not a bar to the court to entertain the subsequent application brought under certificate of urgency when the respondent apprehended that the property was at risk of being disposed of by the appellant. We also note that the court did, in the exercise of its powers, substitute Julius with the respondent, Zebby Mumelo, Mike Waikanakana and Andrew Wikanakana as the administrators of the estate of the deceased.

31. The upshot is that this appeal is devoid of any merit. It is dismissed with costs to the respondent.

Orders accordingly.

**Dated and Delivered at Kisumu this 2<sup>nd</sup> day of June, 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**