



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 2 OF 2014

BETWEEN

- 1. MUSA NYARIBARI GEKONE**
- 2. YUNES KERUBO GEKONE APPELLANTS**
- 3. LAMMY NJUGUNA MATHERU**

VERSUS

- 1. PETER MIYIENDA**
- 2. JANE BOSIBORI NYAMBEGERA..... RESPONDENTS**

(Appeal from the ruling and Order of Hon. Justice E.. M. Muriithi, J.) dated and delivered at Kisii on the 5th day of August, 2013

in

HCC SUCCESSION CAUSE NO. 35 OF 2012)

JUDGMENT OF THE COURT

1. In a ruling delivered in High Court Succession Cause No. 35 of 2012 on 5th August 2013, the High Court at Kisii (Edward M. Muriithi, J.) revoked the grant of letters of administration issued by the court on 19th April 2013 in favour of the 1st appellant, Musa Nyaribari Gekone, with respect to the estate of Charles Obwagi Gekone, deceased. By the same ruling, the court rescinded the transfer of the property known as title number Kitutu/Daraja Mbili/2178 in favour of the 3rd appellant, Lammy Njuguna Matheru, and ordered that the property should revert to, and be registered in the name of the deceased.

Aggrieved, the appellants have appealed to this court against that ruling in its entirety.

Background

2. The deceased died on 30th March 1998. At the time of his death he was aged 45 years. He did not

leave behind a widow or children. He died a bachelor. 14 years after his death, his brother, Musa Nyaribari Gekone, the 1st appellant, petitioned the High Court for letters of administration intestate with respect to the estate of the deceased. In that petition, the 1st appellant indicated that his mother, Yunes Kerubo Gekone, the 2nd appellant, and Margaret Kerubo Orina, a sister in law, survived the deceased. In the inventory of the assets and liabilities of the deceased, the 1st appellant indicated that the deceased was the owner of title number Kitutu/Daraja Mbili/2178 (the property) with an estimated value of Kshs. 500,000.00. Under liabilities, the petitioner indicated that there were none.

3. Based on that petition, a Grant of Letters of Administration was issued to him by the court on 5th June 2012. On 6th December 2012, the petitioner applied for confirmation of the Grant. The High Court confirmed the Grant on 19th April 2013 under which the petitioner was to be registered as owner of the property “*to hold in trust for the family.*” The beneficiaries of the estate were named as the 2nd appellant who is the deceased’s mother, Yunes Kerubo, the 1st appellant and Margaret Kerubo Orina.
4. Things moved rapidly after that. The beneficiaries of the estate entered into a sale agreement dated 13th May 2013 with respect to the estate property, under which they agreed to sell the same to the 3rd appellant for Kshs. 2,500,000.00. The property was then promptly transferred to the 3rd appellant on 16th May 2013 who became the registered proprietor.
5. Without further ado, the 3rd appellant as the new registered owner of the property instructed his advocates to demand, which the advocates did by letter dated 21st May 2013, that the 1st respondent should “*forthwith desist from trespassing and/or interfering with the*” property failing which legal proceedings would be instituted.
6. On 27th May 2013, the 1st respondent, Peter Miyienda, claiming to have purchased the property from the deceased and also claiming to have been in possession of the property since 1997 moved the High Court to revoke the Grant of Letters of administration in favour of the 1st appellant on the basis of which the property was transferred to the 3rd appellant. He also sought an order for rescission of that transfer and for an order for rectification of the register to restore the name of the deceased as the legally registered owner.
7. After hearing the parties, the High Court concluded that the 1st appellant obtained the letters of administration in respect of the estate of the deceased by concealing material facts namely; that he withheld from the court the fact that the 1st respondent had an interest over the property. The learned judge expressed himself as follows:

“Accordingly, I revoke the grant of letters of Administration made to the petitioner on the 5/6/2012 and confirmed on 19/4/2013 on the grounds of non-disclosure of the 1st Applicant’s interest as a purchaser for value of the suit property and therefore the untruthful allegation that all persons beneficially entitled to the estate had been ascertained and determined as the 1st and 2nd Respondents only”.

8. The learned judge also found that the transfer of the property from the 1st appellant to himself jointly with the 2nd appellant and Margaret Kerubo Orina was contrary to the provision of the confirmed Grant to hold the property in trust for the family. The judge further found that the 1st appellant fraudulently represented to the court when applying for the grant of letters of administration that himself, the deceased’s mother and Margaret Kerubo Orina:

“Were the only persons beneficially entitled to deceased’s estate when the Petitioner and the 2nd respondent [deceased’ mother] were aware of the sale agreement of 21/12/1997 and of

the 1st applicant's occupation of the suit property..."

9. The appellants have challenged the decision of the High Court arguing that the learned judge fell into error in revoking the grant of letters of administration and in rescinding the transfer of the property in favour of the 3rd appellant. They contend that the judge was wrong to treat the 1st respondent as a person beneficially interested in the estate of the deceased; that the finding by the judge that the grant was obtained by fraud or by concealment of material facts and non disclosure of interest was wrong as the 1st respondent was not a lawful heir and that the judge erred in nullifying the transfer of the property in favour of the 3rd appellant.

Submissions by counsel

10. At the hearing of the appeal, Mr. J. M. Oguttu learned counsel for the appellants, submitted that the learned judge of the High Court was wrong to hold that the 1st respondent was beneficially interested in the estate of the deceased by virtue of being a purchaser; that the judge paid undue regard to section 76 of the Law of Succession Act; that 1st respondent is not a 'kindred' of the deceased under section 39 of the Law of Succession Act a person "*beneficially entitled to the estate*" under rule 40(4) of the Probate and Administration Rules to whom the estate of the deceased could devolve.

11. According to Mr. Oguttu, the sale agreement on the basis of which the court considered the 1st respondent to be a person interested in the estate could not sustain that position because: Firstly, it was void under the Land Control Act as consent under that Act was not obtained; secondly, no claim could be founded on the sale agreement on account of section 4(2) of the Limitation of Actions Act that places a 12 year time limit within which to make a claim; that the sale agreement having been entered into on 21st December 1997, 12 years had lapsed by the time the application for Grant of Letters of Administration was made in 2013; thirdly, the sale agreement was a forgery as it is clear the national identity card for the deceased's mother is incorrect.

12. Mr. Oguttu further submitted that the finding by the judge that the Grant of Letters of Administration in favour of the 1st appellant was obtained by fraud was not well founded; that no particulars of fraud were either pleaded or proved to the required standard; that upon confirmation of the Grant of Letters of Administration in favour of the 1st appellant, he transferred the property to all three heirs including himself who in turn sold and transferred the same to the 3rd appellant who acquired an indefeasible title; that under section 93 of the Law of Succession Act the validity of the transfer of the property in favour of the 3rd appellant could not be affected by the revocation of the Grant of Letters of Administration.

13. Opposing the appeal, learned counsel for the 1st respondent Mr. G. M. Nyambati, submitted that in making the application for Grant of Letters of Administration with respect to the estate of the deceased, the 1st appellant failed to make material disclosure to the court; that the 1st respondent was a creditor of the estate entitled to the property having purchased it from the deceased and having been in occupation since 1997.

14. Mr. Nyambati refuted claims that the sale agreement could not be a basis for the 1st respondent to claim to be beneficially interested in the estate, saying that the deceased died 3 months after entering into the sale agreement; that the 6 months period within which consent under the Land Control Board would have been required to be obtained had not lapsed by the time the deceased died; that the land is in any case within the municipality; that it is clear based on the letter of demand by the 3rd appellant that he was aware that the 1st respondent was in possession of the property; that the contention that the sale agreement is a forgery is baseless.

15. According to Mr. Nyambati, the contention that particulars of fraud were neither pleaded nor proved has no basis; that even though the claim was not instituted by way of plaint, the

particulars were provided.

Analysis and Determination

16. We have considered the appeal and the submissions by learned counsel. The issues that arise for our determination in this appeal are:

1. *Whether the High Court was right to hold that the 1st respondent is a beneficiary interested in the estate of the deceased.*
2. *Whether the High Court was right to hold that the Grant of Letters of Administration of the estate of the deceased was obtained by concealment of material facts.*
3. *Whether, by reason of section 93 of the Law of Succession Act the title in favour of the 3rd appellant could be revoked.*

17. On the question whether the 1st respondent was beneficially interested in the estate of the deceased and whether he had the legal standing to apply for revocation of the grant of the letters of administration, the learned judge held that under section 76 of the Law of Succession Act the court is empowered to revoke or annul a grant “on the application of any interested party or of its own motion” and that the expression “any interested party” is wide enough to cover a person who claims to have purchased an asset of the estate.”

18. The relevant part of section 76 of the Law of Succession Act provides:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion

(a)...

(b) That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d)...

(e)...

19. The expression “any interested party” as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of sections 66 and 39 of the Law of Succession Act. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an ‘interested party’ for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the Law of Succession Act. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the Law of Succession Act when he held that the 1st respondent has the locus standi to present the application for revocation of the grant. We agree

- with the learned Judge that the 1st respondent's interest as a purchaser of the property of the deceased qualifies him as an 'interested party' with standing to challenge the grant.
20. We turn now to the question whether the learned judge was right to hold that the grant of letters of administration was obtained "*by concealment from the court something material to the case*" within the meaning of **Section 76(b)** of the Law of Succession Act.
21. It is not in dispute that the deceased died on 30th March 1998; that he was survived by his mother, the second appellant and his brother the first appellant; that the first appellant petitioned for letters of administration in respect of intestate estate of the deceased on 30th January 2012; that in that petition he indicated that the property, with an estimated value of Kshs. 500,000.00, constituted the only asset of the deceased at the date of his death; and that the estate had no liabilities; that grant of letters of administration was issued to the 1st appellant on 5th June 2012 and confirmed by the court on 19th April 2013; that under the confirmed grant: the heirs of the estate were identified as the deceased's mother, the 2nd appellant, the deceased's brother the 1st appellant and the deceased's sister in law Margaret Kerubo Orina; that the property was to be registered in the name of the 1st appellant to hold in trust for the family.
22. It is also not in dispute that upon confirmation of the grant, the property was transmitted to and registered in the name of the 1st appellant; that on 10th May 2013, the property was then transferred into the names of the 1st and 2nd appellants together with Margaret Kerubo Orina who on 13th May 2013 entered into an agreement for sale with the 3rd appellant under which they agreed to sell the property to the 3rd appellant for a consideration of Kshs. 2,500,000.00; that a transfer in favour of the 3rd appellant was registered on 16th May 2013 and a title deed issued to the 3rd appellant on the same date; that by a letter dated 21st May 2013, the 3rd appellant, through his advocates Ms. Oguttu-Mboya & Co. Advocates, demanded that the 1st respondent do "*forthwith desist from trespassing*" upon the property.
23. The facts, as established by the Judge, were that the 1st respondent did enter into a sale agreement with the deceased on 21st December 1997 which was witnessed by the deceased's mother; that the 1st respondent has been in possession of the property operating a timber business; that the balance of the purchase price for the property was paid to the deceased's mother, the 2nd appellant; and that the grant and confirmation of the letters of administration was obtained by concealment of the 1st respondent's interest in the property and by an untrue allegation that all persons beneficially entitled to the estate had been ascertained and determined.
24. Based on our evaluation of the material presented by the parties before the High Court, we are satisfied that those findings were well founded. Just over three months prior to his death, the deceased entered into an agreement for sale of land dated 21st December, 1997 with the 1st respondent under which the deceased agreed to sell the property and the 1st respondent agreed to purchase the same for Kshs. 330,000.00; the 1st respondent took possession of the property on the basis of that agreement; at the time the deceased died there was a balance on the purchase price of Kshs. 60,000.00; that balance was paid by the 1st respondent paid to the deceased's mother, the 2nd appellant, who received it on 4th June 1998.
25. The 3rd appellant was himself not a stranger to the 1st respondent and had his sight on the property for sometime prior to entering into an agreement to purchase the property from the 1st and 2nd appellants and Margaret Kerubo Orina on 13th May 2013 as already mentioned. Prior to that, on 20th September 2010, he had entered into an agreement for sale with the 1st respondent under which he agreed to purchase the same property from the 1st respondent for a consideration of Kshs. 1,800,000.00. In his words, that agreement "*collapsed, when it transpired that the*

applicant [the 1st respondent] was not the owner...”

26. Based on that evidence, we think the learned judge was right to hold as he did that the 1st appellant should have disclosed, when applying for the grant of letters of administration or when seeking its confirmation, that the 1st respondent had an interest in the property. At the very least, the 1st respondent should have been considered a creditor of the estate, having paid part of the purchase price with respect to the property to the deceased and the balance of the purchase price to the deceased's mother subsequent upon the death of the deceased.
27. There are then the questions raised by counsel for the applicants that firstly, the sale agreement dated 21st December 1997 was a forgery; that the Limitation of Actions Act barred a claim under it; and that by dint of the provisions of the Land Control Act, the transaction is void for want of consent.
28. Mr. Oguttu submitted that the claim by 1st respondent for revocation of the grant of letters of administration in favour of the 1st appellant was, for all intents and purposes, a claim for specific performance to enforce the agreement for sale dated 31st December 1997. Therefore, argued Mr. Oguttu, that agreement for sale was null and void on account of the absence of Land Control Board Consent and secondly, by reason of the Limitation of Actions Act.
29. On his part, Mr. Nyambati submitted that there is no evidence of forgery as alleged by the appellants; that the suit property is within a municipality and is therefore outside the ambit of Land Control Act and the question of the Limitation of Actions Act does not apply.
30. We begin with the question of consent under the Land Control Act. In their grounds of appeal, the appellants argue that the learned judge erred by holding that the 1st respondent became a beneficiary of the estate of the deceased based on a sale agreement that was void by reason of section 6 of the Land Control Act.
31. After exhaustively reviewing the background to the Land Control Act and previous judicial pronouncements, this Court has in the recent decision in **David Sironga Ole Tukai vs. Francis Arap Muge & 2 others [2014] eKLR** reaffirmed that under section 6 of that Act, without consent of the relevant land control board, a transaction involving agricultural land is void for all purposes.
32. The learned judge of the High Court concluded that there was no evidence presented to demonstrate that the transaction between the deceased and the 1st respondent was a controlled dealing requiring consent under the Land Control Act. The learned judge stated:
- “In alleging that the 1st applicant’s purchase agreement with the deceased was subject to the provisions of the Land Control Act Cap 302, the Respondents did not prove this to the case [sic] and were not able to show that the transfer to the 3rd Respondent itself had the consent of the Land Control Board. In these circumstances, I am unable to hold that the 1st Applicant’s alleged agreement with the deceased was subject to a consent under the Land Control Act, Cap 302”.*
33. Part of the material that the 1st respondent placed before the High Court in support of the application for revocation of the grant of letters of administration included business permits issued by the Municipal Council of Kisii for the conduct of the 1st respondent's timber business on the property. That lends credence to the submission by learned counsel for the 1st respondent that the property is situated within the then municipality of Kisii. There is no doubt that the object of the Land Control Act is to control transactions in agricultural land. Under section 2 of the Land Control Act, land that is within a municipality or a township is excluded from the definition of agricultural land. The conclusion reached by the learned judge of the High Court that no

evidence was produced to show that the 1st respondent's purchase agreement with the deceased was subject to the provisions of the Land Control Act cannot therefore be faulted.

34. The contention that the 1st respondent's purchase agreement with the deceased was a forgery is not in our view supported by evidence. In his replying affidavit sworn on 31st May 2013, the first appellant deposed that *"the purported sale agreement, which is being relied upon by the applicant is a forgery, including the inclusion of an erroneous identity card number, purported to belong to the 2nd respondent, which is not true."* The 2nd respondent referred to therein is the mother of the deceased, who after the death of the deceased is shown to have received the balance of the purchase price under the same agreement, as deposed by the 1st respondent in his further affidavit sworn in the High Court on 6th June 2013.

35. There is then the complaint that the 1st respondent's proceedings before the High Court though instituted as summons for revocation of grant, were for all purposes proceedings for specific performance of the agreement for sale dated 31st December 1997 to recover land and that under section 12 of the Limitation of Actions Act, that claim is statute barred.

Section 7 of that Act is to the effect that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued.

36. This complaint is not part of the grounds set out in the appellants' memorandum of appeal and was not a matter that was subjected to determination in the impugned ruling. Be that as it may, we are not persuaded that the summons for revocation of grant and rectification of register presented by the 1st respondent is an *"action to recover land"* for purposes of section 7 of the Limitation of Actions Act.

37. The last issue that we need to consider is whether, by reason of section 93 of the Law of Succession Act the title in favour of the 3rd appellant could be revoked. The appellants' complaint in this regard is that the learned judge erred in revoking, nullifying and cancelling the transfer and registration of the property in favour of the 3rd appellant *"contrary to section 93 of the Law of Succession Act"*

38. After setting out the provisions of section 93 of the Law of Succession Act, the learned judge stated that the object of that provision *"is to protect dealings with the legal representative of the deceased who must have as personal representatives assumed deceased's authority to deal with the estate of the deceased."* The judge then considered the report of the Commission on the Law of Succession, 1968; and held that under section 55(1) of the Law of Succession Act, if the disposal of immovable property is done in contravention of the confirmed grant, the same would be an invalid exercise of the powers of the legal representative and may be invalidated under section 45 of the Act. The Judge then found that:

"In transferring the suit property to himself, the 2nd respondent and one Margaret Kerubo Orina, the 1st respondent acted contrary to the provisions of the confirmed grant that he held the suit property upon trust for the family. This initial transfer being invalid, the subsequent transfer by the three to the 3rd respondent is also invalid."

39. Section 93 of the Law of Succession Act has been the subject of judicial interpretation in a number of cases. In a recent persuasive decision of **Adrian Nyamu Kiuguvs. 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. “

40. In Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and Another [2013] eKLR where the appellant therein unsuccessfully sought protection under section 93, this Court sitting in Nyeri stated:

“Before the appellant could seek protection as a purchaser under *Section 93 of the Act* she had first to prove that she is a purchaser. In this case, there was no *prima facie* evidence that she was a purchaser. In any case, and as provided by *Section 82 (b) (II) of the Act*, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the grant.”

41. 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 sitting in Nyeri stated this:

”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.”

42. In Re Estate of Christopher Jude Adela (Deceased) [2009] eKLR, K.H. Rawal, J (as she then was) had this to say in reference to Section 93 of the Law of Succession Act;

“The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of *section 23 of the RTA (Cap 281)* or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a *Carte blanche* of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal action prejudicing the interests and rights or right beneficiaries of the estate.

In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”

43. Those decisions support the position taken by the learned judge of the High Court in this matter when he stated that while under Section 93 of the Law of Succession Act a revocation or variation of the grant does not invalidate a transfer by the personal representative, other considerations, such as the disposal of the property in contravention of the confirmed grant may invalidate the transfer. Having found as he did that the transfer of the property by the personal representative to himself, the 2nd respondent and one Margaret Kerubo Orina was contrary to the provisions of the

grant and having found evidence of fraud with regard to the representation in the application for grant and subsequent confirmation as to the persons beneficially entitled to the deceased's estate, the learned Judge was correct to take the view that section 93 of the Law of Succession Act did not afford the 3rd appellant protection. There is therefore no merit in the complaint that the learned Judge erred in revoking, nullifying and cancelling the transfer and registration of the suit property in favour of the 3rd appellant in contravention of section 93 of the Law of Succession Act.

44. The result of the foregoing is that the appeal fails. It is dismissed with costs to the 1st respondent.

Dated and delivered at Kisumu

This 19th day of June, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR