IN THE COURT OF APPEAL AT

KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 65 OF 2011

BETWEEN

PETER OMBUI NYANGOTO …..... APPELLANT

AND

ELIZABETH MATUNDURA

WILLIAM ONKOBA MATUNDURA …..... RESPONDENT

(An Appeal from a ruling of the High Court of Kenya at Kisii (Musinga, J.)

dated 27th July, 2010

in

SUCCESSION CAUSE NO. 62 OF 2009)

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JUDGMENT OF THE COURT

Facts giving rise to this appeal are, as can be deciphered from the record before us, straight forward and simple. In summary, T***eresa Nyanchero Matundura*** *(deceased)* was the mother of ***Elizabeth Matundura*** *and* ***William Onkoba Matundura***, the first and second respondents in this appeal who were the first and second applicants in the High Court of Kenya at Kisii - ***Succession Cause No. 62 of 2009*** filed in the Matter of the Estate of Teresa Nyanchero Matundura *(deceased)* and in the Matter of ***L.R. NO. KISII TOWN/BLOCK 11/66, 68*** and ***NYANCHWA BLOCK 1/9520*** in which they had

applied for Revocation of grant, Rectification of the Register and Nullification of Title. She was also the mother of ***Julius Moracha Matundura*** and ***Daniel Abuta Matundura*** the first and second petitioners in that case. The record shows that she was also the mother of ***David Kabasho Matundura*** and ***Annah Matundura***. She was the registered proprietor of 1/3 shares in Land Parcel Nos. ***L.R. No. KISII TOWN/BLOCK 11/66*** and proprietor of ***L.R. NO. KISII TOWN/BLOCK 11/68*** and ***NYANCHWA BLOCK 1/9520.*** She died on 16th June, 2001. At the time of her death, all the properties herein were still in her name. Although there is no clear evidence that land parcel ***NYANCHWA/BLOCK 1/9520*** was in her name, nonetheless, she mentioned it in her purported will as one of her properties and there was no proof to the contrary. Before she died she made what was referred to as a will or wish on 22nd October, 1996, in which she stated as follows:-

"DISTRIBUTION OF MY PROPERTIES AMONGST MY SONS

I have a total of 3 (three) plots of which one is a partnership.

1. *DAVID K. MATUNDURA my first son will take Nyanchwa Block 1/9520 (residential). This plot will be inherited by him and his sons and even great grandsons.*

2. *WILLIAM O. MATUNDURA my second son will take ½ (half) of Block 11/68 Section 21. This plot will be inherited by him and his sons and great grandsons.*

3. *JULIUS M. MATUNDURA my third son will take 1/3*

   (one third) share of Block 11/66 Section 19. This plot will be inherited by him and his sons and great grandsons

4. *DANIEL ABUTA MATUNDURA my fourth and last son will take ½ (half) of Block 11/68 Section 21 to share with William*

   O. Matundura. This plot will be inherited by him and his sons and great grandsons.

   This has been written by me the final person in the distribution of my properties P.O. Box 2213, Kisii.

5. *The plot at home – Kienyakwara from the hilltop upto the end will be divided in four equal portions as they may agree whether to divide across or otherwise but each son must get an equal share with the other .*

This is how the distribution will be made amongst my sons, and this decision will not be altered by anybody.

It is my own words and decision.

1. THERESA NYANCHERO MATUNDURA

ID/NO. [particulars withheld]

She died as we have stated on 16th June, 2001. That was about five years after the ***"will."***

It is not in doubt that she did not in that *"will or written wish"* direct that the sons take over the properties before her death, nor was it intended that the succession procedures as are laid down in the ***Law of Succession Act Chapter 160*** then in force be discarded or short circuited even if the sons were to proceed by way of implementing that *"will."* In our understanding, they had to proceed and make necessary petitions for Letters of Administration with written will annexed pursuant to ***Form 79***, and obtain the necessary court orders thereafter before they or any of them could proceed to deal with their mother's properties. Equally, in case they felt they would not proceed by way of a *"will*," they still had to apply for letters of administration intestate and later have the grant of such Letters of Administration intestate confirmed before they could deal or in any way dispose of the property. These requirements in our mind, obtain even in cases where all beneficiaries have consented to honour the will or to have the property in case the deceased died intestate, divided amicably.

However in this case, Daniel Abuta Matundura who is now deceased, had the entire land parcel ***Kisii Mun/Block 11/68*** transferred into his name on 7th November, 2007 and thereafter as per abstract of title for that land, commonly referred to as Green Card, had it on the 30th day of November, 2007, transferred to the appellant in this appeal ***Peter Ombui Nyangoto***. This was before anybody applied for letters of administration to the estate of Teresa, the deceased who was the original owner of the property. Nay it was before any such grant if obtained, had been confirmed. That transfer of the property from the name

of Teresa the deceased to Daniel Abuta Matundura (now also deceased) and to the appellant was done pursuant to ***Sale of Land Agreement*** dated 28th September, 2006, which was apparently supplemented by another ***Sale of Land Agreement*** dated 3rd October, 2007. The sale agreements show that the subject property was sold for Kenya shillings six million. The second respondent William Onkoba Matundura who was to share this property with Daniel said he never gave Daniel consent to deal with the same property before proper procedures under the ***Succession Act*** *(supra)* were honoured. Julius Moracha Matundura who was

one of the beneficiaries in the *"will of Teresa"* said in his affidavit that pursuant to the expression of wish by the deceased, every beneficiary of the deceased took charge of his/her gift inter vivos and that he took possession of ***L.R. No KISII TOWN/BLOCK 11/66*** wherein the deceased held 1/3 share and that he demised and/or rented his share to his sister Annah Nyaboke Matundura who is paying him rent for the same shop. That was in justifying the action of Daniel in selling ***L.R. No. KISII TOWN/BLOCK 11/68*** to the appellant. The appellant said the second respondent William also received half of the amount of Kshs 6,000,000/= the price paid for the property and was thus party to the deal he was later complaining about. Whatever took place, and whoever was a party to it or not a party, all the above took place before any application was made for Letters of Administration in respect of the estate of the deceased Teresa who was the registered owner of the suit property.

Later, the first respondent Julius and the second respondent Daniel *(deceased)* in the *High Court Succession Cause No. 62 of 2009*, applied for and obtained Letters of Administration intestate issued to them on 23rd April, 2009. This was long after the subject property had been transferred to Daniel who also had sold and transferred it to the appellant. The second respondent in this appeal was not amused. He moved to the court by way of summons for revocation of Grant and rectification of Register we have referred to above. He sought several orders, five of which are relevant to this judgment. These were prayers 3,4,5,6 and 7 in the application which were:-

> *"3. That this Court be pleased to make a declaration that the Sale and Transfer of L.R. No. KISII TOWN/BLOCK 11/68 without confirmation of Grant of the letters of Administration from the names of the Late Teresa Nyanchero Matundura is null and void.*
>
> 4. *That this Honourable Court be pleased to rescind, recall, vary and/or null (sic), the transfer and Registration of LR. NO. KISII TOWN/BLOC 11/68, in the names of PETER OMBUI NYANGOTO in lieu and/or in place of the deceased.*
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> 5. *That this Honourable Court be pleased to grant an Order directing Rectification of the Register in respect of LR. NO.*
>
> *KISII TOWN/BLOCK 11/68 by deleting the name of PETER OMBUI NYANGOTO and restoring the names of the Deceased herein, as the legally Registered owner, in respect of the subject land pending the Confirmation of the Grant for equal distribution of the Estate.*
>
> 6. *That this Honourable Court be pleased to revoke and/or annul the Grant of Letters of Administration issued to the Petitioners herein on the 23rd April, 2009.*
>
> 7. *That this Honourable Court be pleased to make such other and/or further Orders as may be just and expedient in the circumstances."*

Several reasons were advanced in support of that application, and these were on the main that the deceased Teresa was the registered 1/3 owner of land parcel ***NOS. KISII TOWN/BLOCK 11/66*** and Sole owner of ***11/68*** together with ***NYANCHWA BLOCK 1/9520*** and held the same till her death; that the land parcel ***KISII TOWN/BLOCK 11/68*** was to be shared by the applicant and deceased Daniel but the same was transferred into the name of Daniel and then sold to the appellant before the Letters of Administration obtained on 23rd April, 2009 had been confirmed,; that this was irregular, illegal and void as Daniel *(now deceased)* who was the second Petitioner in the application for Letters of Administration, had no authority and/or mandate to appropriate and/or alienate the estate of the deceased prior to the confirmation of the

Grant; that as a result of the action of Daniel, the applicants namely William and Elizabeth had suffered loss of their share of inheritance. As we have stated above, Julius responded to that application vide his replying affidavit sworn on 18th June, 2010, in which he said in summary that prior to the deceased's death on 16th June, 2001, she had made a will in which she distributed her properties to the surviving beneficiaries in the presence of two elders; that pursuant to the expression of her wish in that document, every beneficiary of the deceased took charge of his/her gift inter vivos, and he (Julius) also took the 1/3 share willed to him and rented it to their sister Annah Nyaboke Matundura. Likewise Daniel *(deceased)* also took his share and transferred it to his name and later transferred it to the appellant so that the property ***L.R. No. KISII TOWN/ BLOCK 11/68*** was not subject of the application for Letters of Administration as it had been alienated before the application for Letters of Administration could be made, on the basis that it had been distributed by the deceased in her will or expression of her wish, and thus to him this suit property ***KISII MUNICIPAL COUNCIL/BLOCK 11/68*** was not subject of their Petition for Letters of Administration. He thus insisted in that affidavit that that property having been alienated before the Succession Cause was filed, it could not be the subject of the Succession proceedings and could only be

pursued in a different platform but not in the Succession proceedings in the High Court. He also alleged bad faith on behalf of the second respondent. The appellant in this appeal Peter Ombui Nyangoto also opposed that application in an affidavit in reply sworn by him on 8th June, 2010 in which he stated inter alia that he was a total stranger to the succession cause and his name had been mysteriously included in the Succession Cause in which he was not originally a party. He maintained that he was a purchaser for value of the suit land ***LR. NO. KISII TOWN/BLOCK 11/68*** which did not form part of the Estate of Teresa as in any case the Succession Cause was in respect of Land Parcel ***NO. KISII TOWN/BLOC 11/66*** in which he had no interest. He stated further that Land Parcel No. ***KISII TOWN/BLOCK 11/68*** was transferred to him under circumstances of which the second respondent was fully aware; that in any case at one time the lease in respect of which Teresa had been registered as the owner had expired and on its being renewed the land was directly transferred to Daniel who transferred it to him; and the second respondent William was at all times aware of those circumstances and was party to all that went on as he had received Ksh.3,000,000/= out of the purchase price.

That application was placed before *Musinga J. (as he then was)* who, after full consideration allowed it in terms of prayers 3,4,5 and 6 we have cited herein above. As pertains to the appeal before us which is mainly on Land Parcel ***L.R. NO. KISII TOWN/BLOCK 11/68***, the learned Judge stated as follows in allowing the application:-

"Although it was contended that L.R. No. Kisii Town/Block 11/68 and Nyanchwa Block 1/9520 formed part of the deceased's estate, the two properties were not included in form P&A 5. However, from the extract of the register annexed to the applicant's affidavit there is evidence that the deceased was the owner of parcel No. 68 above. It was sold by Daniel Matundura and transferred to Peter Ombui Nyangoto on 30th November, 2007 before letters of administration of the deceased's estate were applied for. That amounted to intermeddling with the deceased's estate. Daniel Matundura purported to have been an appointed Attorney of the deceased but that was not so. Both the vendor and the purchaser knew that the property belonged to the deceased herein. It matters not that part of the purchase price was paid to the 2nd applicant. As long as the sale was done contrary to the provisions of the law of Succession Act, it was illegal and the same cannot stand. The 2nd applicant and any other person who unlawfully took any money from Peter Ombui Nyangoto in the purported sale of that property are liable to refund the same to the purported purchaser.

Consequently, I grant prayers 3,4,5 and 6 of the applicant's application."

appeal namely:-

"1. That the learned Judge of the High Court erred in law and in fact in making a decision on property which did not form part of the Succession Cause he was dealing with.

2. That the learned Judge of the High Court in law (sic) and in fact in ordering the

cancellation of the title held by the Appellant when there was no legal basis for doing so.

3. That the learned Judge of the High Court failed in and in fact to consider the provisions of Section 93 of the Succession Act.

In supporting the appeal, Mr. Masese, the learned counsel for the appellant, contended that the appellant was improperly dragged into Succession matter that was filed in the High Court and in which the appellant was originally not a party rightly, as though the deceased died in the year 2001, he purchased the property and was registered owner of the same property on 30th November, 2007, before the Succession Cause was filed, which Succession Cause when filed was only in respect of one property which was not the subject property. In his view, the appellant was not a party to the Succession Cause. In any case, he maintained that as the lease in respect of the subject property had expired and was renewed in the name of Daniel, Daniel rightly transferred it to the appellant. In any event he continued, Teresa had already distributed her property. He thus urged us to find that the learned Judge erred in cancelling the appellant's title as he contended that in any case revocation did not mean cancellation of the title that had already been issued.

In response, Mr. Nyambati, the learned counsel for the respondents, submitted that the learned Judge was right as the subject property was registered in the name of the deceased and should not have been sold before the Grant was applied for, made and confirmed. According to him, Daniel and the appellant proceeded without the consent of the second respondent who was also a beneficiary as there was nothing to prove the allegations that the second respondent was paid any part of the proceeds of sale as alleged by the appellant. In his view, the provisions of ***Section 93*** of the ***Succession Act*** cannot assist the appellant in this matter.

Although the *Succession Cause No. 62 of 2009* which was filed by Julius and Daniel as Petitioners for Letters of Administration in the matter of the estate of Teresa Nyanchero Matundura, was filed only in respect of Land Parcel ***KISII MUNICIPALITY BLOCK 11/66,*** and did not mention ***L.R. KISII MUNICIPALITY BLOCK 11/68***, and that was the property in respect of which the two obtained Letters of Administration that was sought to be revoked, in the application for revocation in respect of which the learned Judge of the High Court delivered the ruling appealed from, all immovable properties that were in the name of the deceased before her demise were made subject of the complaint and the learned Judge dealt with all of them. Whereas no appeal was filed against that decision in respect of the other two properties, the appellant, who was only offended by the decision as concerns ***KISII MUNICIPALITY/BLOCK 11/68,*** filed the appeal only in respect of that piece of land and therefore this appeal is only in respect of that land parcel. That is confirmed by the facts on this appeal as only the two respondents are named and those affected by the decision as concerns ***KISII MUNICIPALITY/BLOCK 11/66*** *and* ***NYANCHWA/BLOCK 1/9520*** are not mentioned.

The next issue we need to ventilate is whether it was proper for the learned Judge of the High Court to entertain the application by the two respondents which was introducing into the original Succession Cause, matter of the distribution of L.R. No. ***KISII MUNICIPALITY/BLOCK 11/68*** which was not mentioned in the Petition for Letters of Administration by Julius and Daniel and in respect of which no grant was issued by the court. In our view, that is the crux of this appeal as the appellant has maintained all along that he was unfairly included in a matter in which he was not a party when it was filed.

In our view, it is not in dispute that on the date of the demise of Teresa, she was the registered owner of three pieces of land. These included ***KISII MUNICIPALITY/BLOCK 11/68***. It was, in law a requirement that on her demise, these properties would only be alienated or distributed after Letters of Administration in respect of her estate is obtained and the grant is confirmed.

In short immediately Teresa passed on, there was need to apply for grant of representation of her estate before any dealings could be implemented in respect thereof. This apparently was not done in this case until in 2009 vide *Succession Cause No. 62 of 2009,* this was close to eight (8) years later. And when *Succession Cause No. 62 of 2009* was filed, only one property of the three left behind by the deceased was mentioned and no mention was made of two others including the subject property and that one

property mentioned is the one in respect of which grant was obtained leaving the fate of the other two completely unknown notwithstanding that they were also subject of the same Succession Cause. In our view, the Petitioners, namely Julius and Daniel are the ones who erred in failing to make them the subject of their petition. It was proper and in our view just in dealing with the application for revocation which sought to put every property left out of the original application on board and to enable the court have a full overview of the entire estate of the deceased part of which had been left out of the application, so as to be able to ventilate whether the entire Petition before the court covered the entire estate or not and the effect of leaving some properties out. In our considered view all the respondents were telling the court, was that the Petition that left out those other two properties could not be genuine. The court was therefore entitled to consider the application for revocation as it was bringing to the courts' view that the application was not valid. The appellant's name naturally had to be included as it was the act of the appellant and the late Daniel that resulted into that failure to reveal to the court all properties left behind by the deceased. The respondents could not leave out the appellant and the property in his application as his claim was, that part of the estate was alienated before the grant was applied for, obtained and confirmed by the court. Further, for purposes of executing any orders sought, the appellant had to be included. The appellant, was thus in our considered view, not a stranger to the suit but a necessary party, and the court cannot be faulted for hearing the application.

The next matter we now consider is whether the property ***KISII/MUNICIPALITY/BLOCK 11/68*** was subject of Succession. The appellant says that property had been distributed by the deceased Teresa before her death and therefore could be lawfully sold to the appellant. That arguement cannot in our view be valid. Both parties agree that the document prepared by Teresa allegedly on 22nd October, 1996, was not a will. In any case, it states in respect of her wish in respect of the properties that the person she preferred to take any particular property or share in a property *"will take"* and not *"has taken"* or *"takes."* That in our view means that she was doing no more than expressing a wish in respect of each property but was not giving out the properties as a gift inter vivos as is being suggested by Julius. That wish would have only come to fruition after the death and thus the legal implementation of that wish was to be pursuant to the provisions of the ***Law of Succession Act.*** We do not see any short cut to it. As she died while she was still the registered owner of the same three properties, there was need to deal with them only after the Letters of Administration either intestate or if one felt the document prepared by Teresa was a will, the Letters of Administration with will annexed had to be obtained and confirmed as we have stated elsewhere in this Judgment. In short the property ***KISII MUNICIPALITY/BLOCK 11/68*** was subject of Succession.

But the appellant, through his advocate poses another issue and that is that as the lease had expired sometime after the death of Teresa, and had been renewed by Daniel, it was only proper that Daniel would deal with the property as he would have dealt with his own property. The answer to that is that a look at the Abstract of title in the record before us demonstrates that as on 31.10.2007 this property was still registered in the name of the deceased Teresa Nyanchero. On the date of her death in 2001, it was in her names. If the lease expired after 2001, it would only have been renewed in her name and not in that of Daniel as it was her property and she died intestate. There was no evidence that the property was reallocated to any other person after the lease expired, so it remained in the deceased's names and would only have been renewed in her name or else if it had already been allocated to another person the word ***"renewed"*** would not be applicable. We are of the view that if the lease expired and Daniel applied for its renewal, he must have done so as a representative of the deceased for renewal would only be done in the name of the original owner namely Teresa. Thus whether the lease expired or not is neither here nor there. Daniel still had to comply with the law of Succession before he could transfer this property into his name and thereafter sell it to the appellant before following the proper channels provided by law as was done in this matter.

What do the above lead us to? The property was part of the estate of Teresa who died in the year 2001 intestate. ***Section 51*** provides that in such a case, before any action is taken to distribute the estate an application for grant of representation shall be made and the way to make such an application is clearly spelt out under that provision. That was not made as far as this property was concerned. When such an application was made on 19th February, 2009, this property was not included as one of the properties left behind by the deceased. That was contrary to the provisions of ***Section 52*** of the ***Law of Succession Act***

Chapter 160 of the Laws of Kenya. In the intervening period between the death of the deceased and the filing of the application for Letters of Administration i.e between 16th June, 2001 and 19th February, 2009, Daniel and the appellant had entered into two agreements for sale of the subject property and the property had been sold and transferred from the deceased's name to Daniel and then sold to the appellant, notwithstanding that no Letters of Administration had been applied for, obtained and confirmed as is required by law. That offended the provisions of ***Section 45 (1)*** of the ***Law of Succession Act*** which states:-

> **"45 (1) Except so far as expressly authorised by this act, or by any other written law, or by a grant of representation under this act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with,any free property of a deceased person."**

We think what Daniel and the appellant did amounted to intermeddling with the property of Teresa. Clearly they had no legal right to have the property sold and transferred to the appellant before Letters of Administration intestate were applied for, obtained and confirmed as they did in this matter. ***Section 55*** of the same ***Act*** provides:-

"55. No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71."

It is clear from the above, that even if Daniel had obtained grant of representation, *(which in this case he had not even applied for and obtained)* still he could not transfer Teresa's property to himself and thereafter to the appellant without that grant having been confirmed. ***Section 71 (1)*** states:-

> **"71 (1) After the expiration of a period of six months or such shorter period as the court may direct under Sub Section (3), from the date of any grant of representation, theholder thereof shall apply to the court for confirmation of the grant in order to enforce the distribution of any capital assets."**

The above was not done in this case and so distribution of the assets of Teresa was done illegally.

The appellant says all that was done as far as Land Parcel ***NO. KISII MUNICIPALITY/BLOCK 11/68*** was concerned was done with the knowledge and consent of the second respondent who had received ksh. 3,000,000/= of the sale price of Ksh.6,000,000/=. The second respondent denied that allegation and the High Court found that the purported signature of the second respondent in the affidavit filed on 19th February, 2009, upon which Julius relied to prove consent, was even without the benefit of a document examiner clearly different from the known signature of the second respondent and thus rejected that allegation that the second respondent consented to the petition by Julius and Daniel for Letters of Administration and found further that the grant of representation was applied for by Julius and Daniel without the consent of the second respondent and first respondent. For us, we would add that even if the second respondent and first respondent had consented to Julius and Daniel applying for grant of representation of the estate of Teresa and even if second respondent had consented to the premature transfer of ***KISII TOWN/BLOCK 11/68*** to Daniel and thereafter to the appellant and even if he had taken half the price paid for that sale, still all it would have meant was that he colluded in illegal activities and in our mind two wrongs cannot add to a right. The second respondent's active consent in the transaction that ended in complete violation of the ***Law of Succession Act*** did not and cannot make that transaction legal. It remains illegal and all who participated and/or could have participated in such illegality would still have taken part in an illegal activity.

We have considered the appeal before us independently of the decision of the learned Judge of the High Court whose decision we have also considered in depth.

Having done so, we see no reason to necessitate our faulting the decision of the learned Judge. It will stand as it was based on cogent grounds.

The appeal stands dismissed with costs to the respondents. Judgment accordingly.

Dated and Delivered at Kisumu this 1st day of November 2013.

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR