



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamara v Kaburu & another; Wanjohi (Intended Interested Party) (Miscellaneous Application 27 of 2015) [2025] KEHC 5469 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS APPLICATION 27 OF 2015**

**EM MURIITHI, J**

**APRIL 30, 2025**

**BETWEEN**

**EMILY NGIMA KAMARA ..... APPLICANT**

**AND**

**MARY WANJIRU KABURU ..... 1<sup>ST</sup> RESPONDENT**

**JELLY NJERI KABURU ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JOSEPH GITHINJI WANJOHI ..... INTENDED INTERESTED PARTY**

**RULING**

1. The applicant filed a Notice of Motion dated 2<sup>nd</sup> July, 2024 seeking the following orders:
  1. Spent.
  2. Spent.
  3. Spent.
  4. That this Honourable Court be pleased to review, vary and/or set aside the consent order issued on 19<sup>th</sup> March, 2024.
  5. That this honourable court be pleased to bar Emily Ngima Kamara from being an administrator of the estate of the deceased herein.
  6. That this Honourable Court be pleased to join the applicant herein as an interested party in this case.
  7. That this Honourable Court be pleased to give leave to the applicant to file any necessary pleadings in this case.



8. Costs of this application.
2. The application is based on the grounds set out in the application and the supporting affidavit of Joseph Githinji Wanjohi. The applicant avers that the respondents herein are his aunties by virtue of them being sisters to his father Wanjohi Kaburu. The deceased herein is his grandfather. That he is the registered proprietor of parcel of land title number Kiine/Kiangai/2733, which he was bequeathed as a gift by his aunt the late Jelly Njeri Kaburu.
3. He avers he came to know about this matter on 20<sup>th</sup> June, 2024 when he was served with the orders issued on 19<sup>th</sup> March, 2024 by this court. That the said order was issued pursuant to the consent by the Emily Ngima Kamara and Mary Wanjiru Kaburu. He was not part of the consent yet the parties herein knew he is the registered owner of L.R. Kiine/Kiangai/2733 wherein he farms both food crops and cash crops.
4. Moreover, the respondents have now moved the lower court file being Kerugoya Chief Magistrates Court Succession Cause Number 216 of 2004 which is coming up for confirmation of grant on 4<sup>th</sup> July, 2024. That if the lower court proceeds and confirms the grant, he risks permanently losing his parcel of land.
5. The respondent Emily Ngima Kamara who was appointed as an administrator in the estate herein has been intermeddling with the estate by selling it to 3 parties even before the grant is confirmed. That the persons to whom the land have been sold the land by Emily Ngima Kamara have started constructing on the ground and have threatened to evict him from the land. It is imperative that the respondents be restrained from evicting him from the suit land herein.

### **The Respondent's case**

6. The Respondents on 19<sup>th</sup> July, 2024 opposed the application by Grounds of Opposition that the application is frivolous, vexatious and otherwise an abuse of the court process; and that the application has not met the threshold of the law relating to issuance of injunctions as set out *Giella Vs Cassman Brown* (1973) EA 358.
7. By a Replying Affidavit of 29<sup>th</sup> July 2024, the Respondent avers that her sisters - Mary Wanjiru Kaburu and Jelly Njeri Kaburu - secretly filed the Principal Magistrate Court Succession Cause No. 216 of 2004 - Kerugoya wherein they were appointed as joint administrators on 2<sup>nd</sup> November, 2004. The grant was confirmed on 29<sup>th</sup> July, 2005 wherein title number Kiine/Kiangai/779 was distributed thus, Kiine/Kiangai/779 Mary Wanjiru Kaburu - 1.1 acres, Jelly Njeri Kaburu - 2 acres. Further, after discovery of the sub-division of title number Kiine/Kiangai/779 into numbers 2932-2733, she placed restrictions to preserve the suit lands pending the disposal of the Summons for Revocation and/or Annulment dated 30<sup>th</sup> November, 2007. That from perusal of applicant's annexure marked "JCW1a-2b" & its crystal clear that the applicant fraudulently transferred title number Kiine/Kiangai/2733 to himself on 17<sup>th</sup> March, 2008 during the pendency of this suit.
8. Moreover, during the fraudulent transaction which led to the transfer of title number Kiine/Kiangai/2733 on 17<sup>th</sup> March, 2008 the applicant took advantage of his sister - Jelly Njeri Kaburu - who had been diagnosed with dementia since 2006. Lastly, the applicant should not be joined in these proceedings as an Interested Party as has not made out a case as a beneficiary, dependant, creditor or Public Trustee as this Court purely deals with estate of the deceased persons and for purposes connected therewith and incidental thereto.



## **Applicant submissions**

### **Whether the consent order issued on 19<sup>th</sup> March, 2024 should be set aside**

9. The grounds for setting aside a consent order were well discussed in the Court of Appeal in the case of *Board of Trustees National Social Security Fund Versus Micheal Mwalo* 2015 eKLR which was cited in the case of *Sarovar Hotels Pvt Limited India V Placid View Properties Limited: A.F. Gross & Co. Advocates* Third Party Miscellaneous Application 157 of 2017 2022 KEHC 85 KLR Commercial and Tax 4 February 2022 Ruling: as follows:

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” (emphasis mine).”

10. The respondents herein did not disclose to the court that there was a 3<sup>rd</sup> party, in this case the applicant, who was to be affected by the consent between them. The consent between the respondent was thus obtained through collusion and concealment of a material fact that L.R. Kiine/Kiangai/2733 which belongs to the applicant was being affected yet the applicant was not party to the consent and the suit herein.

### **Whether the administrator appointed vide the consent is competent**

11. The Applicant submitted that the respondent Emily Ngima Kamara who was appointed as an administrator to the estate herein via the impugned consent has been intermeddling with the estate by selling it to 3<sup>rd</sup> parties even before the grant is confirmed. The case of *In Re Estate of James Maia Lua (deceased)* (2018) eKLR was cited in submission that when faced with a similar situation where the administrator was wasting the estate of the deceased, the Court went ahead and revoked the grant issued to the administrator. It was submitted that in the present case, the administrator is already intermeddling with the estate of the deceased person by selling it to 3<sup>rd</sup> parties even before the grant is confirmed.

### **Whether the applicant should be enjoined as an interested party**

12. The applicant submits that having set aside the consent order issued herein it will be imperative to enjoin the applicant as a 3<sup>rd</sup> Party and allow him to defend his title deed to L.R. Kiine/Kiangai/2733 which forms part of this cause.

## **Respondent submissions**

13. On 29<sup>th</sup> July, 2005 the 2<sup>nd</sup> respondent(1<sup>st</sup> administrator) and Jelly Njerl Kaburu/2<sup>nd</sup> administrator) obtained the certificate of grant fraudulently, consequently, title number Kiine/Kiangai/1779 was subdivided into numbers 2932-2733, wherein the Applicant acquired title number Kiine/Kiangai/2733 on 17<sup>th</sup> March, 2008 through a fraudulent, corrupt, unprocedural and illegal scheme, the property is traceable under Section 26 of the *Land Registration Act*, such title cannot be protected under Section 93(1) of the *Law of Succession Act* and Article 40 of *the Constitution* of Kenya, 2010.
14. The respondent submits that under prayer 5 of the Summons dated 2<sup>nd</sup> July, 2024 the Applicant has sought to bar the 1<sup>st</sup> Respondent-Emily Ngima Kamara-from being the administrator of the deceased



however, he has not made any prayer under Section 76 of the *Law of Succession Act* to revoke and/or annul the grant made and/or annulment of grant made by Justice Richard Mwongo on 13<sup>th</sup> May, 2024. He has made allegations that the 1<sup>st</sup> respondent has been intermeddling with the deceased's estate by selling a share of the suit land to 3<sup>rd</sup> parties nonetheless, from the orders made by Justice Ominde on 4<sup>th</sup> July, 2024 it is crystal clear that the estate is preserved through an order of status quo until further directions/orders of this court.

15. The Applicant has sought to be joined in these proceedings as an Interested Party and participate under prayers 6 and 7 of the Summons dated 2<sup>nd</sup> July, 2024 thereof. It is their humble submissions that the 2 (two) prayers should be declined as he has made out a case as a beneficiary, dependant, creditor and/or Public Trustee as this Court/Probate and Administration Court that deals with estate of the deceased persons for purposes connected therewith and Incidental thereto as provided for under Section 2 of the *Law of Succession Act*. However, if the Applicant has any interest over the deceased's estate he will have a chance to ventilate his case by filing an affidavit of protest in regard to Summons of confirmation of Grant dated 25<sup>th</sup> July, 2024.

### Issue

16. Whether the consent order issued on 19<sup>th</sup> March, 2024 should be set aside.

### Analysis

#### Whether the consent order issued on 19<sup>th</sup> March, 2024 should be set aside

17. The Applicant/Intended Interested Party has sought to review vary and/or set aside the orders made by court on 19<sup>th</sup> March, 2024 on the grounds that he was not a party to the consent thereof, he was not involved in the proceedings leading to cancellation of title number Kiine/Kiangai/2733 and that his title deed was sacrosanct and/or protected.
18. The applicant's case is that he was the registered owner of L.R. Kiine/Kiangai/2733 which formed part of the estate herein.
19. The applicant was never served with the summons for revocation of grant which was filed by the administrator herein neither was he made aware of this case at any given time.
20. The respondents went ahead and filed the consent dated 13<sup>th</sup> March, 2024 and subsequently adopted as an order of this court on 19<sup>th</sup> March, 2024.
21. The effect of the consent is that it cancelled and/or nullified the title to L.R. Kiine/Kiangai/2733 which is registered in the names of the applicant.
22. The grounds for setting aside a consent order were well discussed in the Court of Appeal in the case of *Board of Trustees National Social Security Fund v Micheal Mwalo* (2015) eKLR which was cited in *Sarovar Hotels Pvt Limited India V Placid View Properties Limited: A.F. Gross & Co. Advocates* Third Party Miscellaneous Application 157 of 2017 2022 KEHC 85 KLR Commercial and Tax 4 February 2022 Ruling, as follows:

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or



a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” (emphasis mine).

23. The respondents did not disclose to the court that the applicant was affected by the consent between them.

24. As held in *Civicon Limited v Kivuwatt Limited & 2 others* [2015] KECA 588 (KLR), in similar circumstances, where the appellant had an interest in the subject matter, respondent’s decision to enter a consent when assessed in light of this background, may be said to have been an attempt to steal a match on the applicant. In the appeal from an order of the High Court refusing joinder of the appellant, the Court held that the appellant ought to have been joined to protect his interest as follows:

“The 1<sup>st</sup> respondent’s decision to file suit and subsequently enter a consent with 3<sup>rd</sup> respondent when assessed in light of this background, may be said to have been an attempt to steal a match on the appellant. The ambivalent position taken by the 3<sup>rd</sup> respondent in this appeal of not supporting or opposing the appeal does not help the respondents’ case at all. The 1<sup>st</sup> respondent caused the goods to be entered as transit and secured a transit bond on 23<sup>rd</sup> September 2013 after the goods had been deposited on 10<sup>th</sup> April 2013 pending a court case – presumably Mombasa HCCC No.36 of 2013 which was filed sometime in April 2013. The transit bond brought the Separator into the legal custody of 3<sup>rd</sup> respondent, in an attempt, it would appear, to defeat appellant’s claim. The Separator had previously been the subject of the suit filed by appellant, and an application in the arbitration proceedings, filed by 1<sup>st</sup> respondent. We are not informed of the outcome of any of the arbitration proceedings. In the circumstances the appellant’s interest in the Separator had been sufficiently established and it was a necessary party to the suit. It was imperative at that stage that the appellant be heard since it had a stake in the Separator.”

25. The applicant was not a party to the consent so it is not a situation of a party to a consent seeking to overturn a consent on the ground of fraud as would justify the setting aside of a contract. But the Consent cannot affect the interests of a third party who is not part of the consent, if his interest in the property is valid. His interest remains and it ought to be given effect by allowing such third party to be heard or to make appropriate intervention to assert his right.

26. The Respondent admits that the applicant acquired title number Kiine/Kiangai/2733 on 17<sup>th</sup> March, 2008 through a fraudulent, corrupt, unprocedural and illegal scheme. There shall arise a question whether his interest in the land is protected under section 93 of the *Law of Succession Act*. Applying section 93 stated as follows in *Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu & another* [2014] eKLR.

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



27. This dictum was subsequently considered and approved in *Musa Nyaribari Gekone & 2 others v Peter Miyianda & another* [2015] KECA 573 (KLR), where the Court of Appeal on an appeal from a decision of this Court observed as regards section 93 of the *Law of Succession Act*, as follows:

“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 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.”

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 immovable 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 2<sup>nd</sup> 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 3<sup>rd</sup> appellant protection.”

28. Consequently, if the transfer of the suit parcel of land to the applicant was fraudulent, it is not protected by section 93 of the [Law of Succession Act](#). That determination must, however, be reached only upon full hearing of the claim by the Applicant, and the issue now before the court is how to ensure that the applicant who appears to have an interest in the suit land is heard on his claim before a determination on the succession distribution.
29. It is noted that the Consent of 13/3/2024 only agrees to the restoration of the suit parcel of land as part of the estate of the Deceased for fresh distribution to rightful heirs and/or beneficiaries, and the applicant must be heard before such distribution.

#### **Whether the administrator appointed vide the consent is competent**

30. The applicant avers that the respondent Emily Ngima Kamara who was appointed as an administrator to the estate herein via the impugned consent has been intermeddling with the estate by selling it to 3<sup>rd</sup> parties even before the grant is confirmed.



31. The respondent submits that from the orders made by Justice Omido on 4<sup>th</sup> July, 2024 it is crystal clear that the estate is preserved through an order of status quo until further directions/orders of this court.
32. The applicant has supplied evidence in annexure “JGW5” sale agreement of 4/6/2021 and it is not possible to state the Respondent is intermeddling when there was already a confirmed Grant at the time. The only fault there appears to be in the alleged sale agreement was that the respondent as vendor did not demonstrate a power of attorney or appointment as guardian of the sister owner of the plot whom she said was mentally challenged.
33. However, if the Administrator or any person is selling estate property before the confirmation of grant such sale transaction is invalid and such purchasers are not protected under the Law of Succession Act and the present administrator may be called to account in accordance with section 83 of the Law of Succession Act, or previously, as with any other person intermeddling with the deceased estate, in terms of section 45 of the Law of Succession Act.
34. The Court takes the view, however, that instead of removing the respondent, who as a child of the deceased is at a higher degree of priority as petitioner/administrator above the applicant in terms of section 66 of the Law of Succession Act, the administrator may be retained subject to her accounting for any dealings with the Estate of the Deceased.

#### **Whether the applicant should be enjoined as an interested party**

35. The applicant submits that having set aside the consent order issued herein it will be imperative to enjoin the applicant as a 3<sup>rd</sup> Party and allow him to defend his title deed to L.R. Kiine/Kiangai/2733 which forms part of this cause.
36. The respondent submits that if the Applicant has any interest over the deceased’s estate he will have a chance to ventilate his case by filing an affidavit of protest in regard to Summons of confirmation of Grant dated 25<sup>th</sup> July, 2024.
37. The Court has found that the applicant has an interest in the deceased property, even though his registration as owner of the suit parcel of land is challenged by the Respondent as having been fraudulent and unprotected by section 93 of the Law of Succession Act. For the determination and protection of his such interest, the applicant should be enjoined in the suit to defend his interest.
38. Upon joinder, the applicant shall have opportunity to protect his interest to the portion of land which he claims either by filing such application as to ownership as he may be advised, or in a protest upon an application for confirmation of Grant dated 25<sup>th</sup> July 2024 which has already been filed by the respondent.
39. In the interests of expeditious disposal of disputes the order which commends itself to the Court in the circumstances of this case is an order for the joinder of the applicant so that he may file any application as he may be advised to protect his interest as well as by an objection in the nature of an Affidavit of Protest to the pending application for Confirmation of Grant. No purpose is served by setting aside the appointment of an administrator whose duty is merely to administer the estate toward eventual distribution of the estate to the heirs.
40. The interest of the applicant will be determined upon full hearing of any application he may file as an interested party or a protest to the application for confirmation of Grant, as the case may be, before the final distribution of the Estate of the Deceased.



## **Orders**

41. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The application for review and joinder of the Applicant is allowed in terms of Prayers Nos. 6 and 7 of the Summons dated 2/7/2024.
2. The Applicant may file such application as he may be advised for the protection of his interest in the suit property.
3. The application for Confirmation of Grant dated 25/7/2024 shall be heard on a date to be fixed in consultation with the Parties.

42. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF APRIL 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

APPEARANCES:

Mr. Mwangi K. for Mr. C.S. Macharia for Applicant.

Mr. Ngigi for the Respondent.

