



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CIVIL APPEAL NO. 80 OF 2014**

**BETWEEN**

**KENETH LITSWA ASEGA.....APPELLANT**

**VERSUS**

**ALICE MUHONJA.....RESPONDENT**

***(Being an Appeal from the Ruling of the High Court of Kenya at Kakamega,***

***(Hon. S. J. Chitembwe, J.) dated 26<sup>th</sup> February, 2014***

**in**

**KAKAMEGA SUCC. CAUSE NO. 124 OF 1986)**

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**JUDGEMENT OF THE COURT**

1. This is an appeal from a ruling of the High Court (Chitembwe, J.) delivered on 15<sup>th</sup> October 2014 revoking a grant of letters of administration and cancelling the appellant's title to a parcel of land known as title number Kakamega/ Kegoye/643 that he had acquired on the strength of that grant.

**Background**

2. William Shambari, also known as William Sabali Chalenga (deceased) died on 2<sup>nd</sup> July 1992. His widow, Zilipo Vuyigi Sabali, his son Samuel Madega Sabali, and three daughters, Grace Emabale, Alice Muhonja and Finike Embolani survived him. With the consent of all the beneficiaries, grant of letters of administration in respect of the estate of the deceased was issued to Samuel Madega Sabali (Samuel) by the Senior Resident Magistrate's Court in Vihiga in 33Succession Cause No. 77 of 1999. It would appear from the record that the deceased had two assets, namely; Title number Kakamega/Kegoye/643 (the property) and Kakamega/Kegoye/644. In his application to the court for confirmation of the grant, Samuel did not indicate the names of the other beneficiaries. On 27<sup>th</sup> August 2002 the court confirmed the grant issued to Samuel and distributed the property, in its entirety to him, while the widow of the deceased was to have a life interest. The court issued a certificate of

confirmation of grant on 27<sup>th</sup> August 2002.

3. Samuel died subsequently after which it came to light that he had transferred the property to himself exclusively on 23<sup>rd</sup> November 2001 and obtained a title deed in respect of the property on 27<sup>th</sup> August 2002. It also emerged that pursuant to an agreement for sale dated 4<sup>th</sup> June 2007, Samuel sold the property to the appellant. The property was thereafter transferred to the appellant on 14<sup>th</sup> January 2008 and a title deed issued to him on the same date.

4. On 18<sup>th</sup> December 2008, one of the daughters of the deceased, Alice Muhonja, commenced Succession Cause No. 651 of 2008 at the High Court at Kakamega, seeking orders for annulment or revocation of the grant of letters of administration issued to her late brother, Samuel, by the Magistrate's court; cancellation of the appellant's title over the property; restoration of the property in the name of the deceased; and issue of a fresh grant of letters of administration in her name to enable her take over the administration of the estate of the deceased. That application was based on the grounds that Samuel kept the other beneficiaries of the deceased in the dark and secretly applied for confirmation of grant; that he misled the court that he was the sole heir to the deceased; that it was during a commemoration ceremony for the deceased that she and her sisters learnt that the property had been transferred to the appellant when they were asked to "keep off" the property; and that investigations in the lands office then revealed that the property had indeed been transferred to the appellant on 14<sup>th</sup> January 2008.

5. In answer to the respondent's application, the appellant protested that he was improperly joined as a party in that application; that he purchased the property from Samuel, who was at the time the sole proprietor having obtained title by transmission; and that he is an innocent and bonafide purchaser and the legal owner of the property entitled to use and occupy the same.

6. On 9<sup>th</sup> July 2009, the appellant gave notice of preliminary objection in which he urged that the respondent's application was incompetent to the extent that it sought to revoke a grant issued to a person (Samuel) who was already deceased and that there was misjoinder of the appellant in the application.

7. The court dismissed that preliminary objection in a ruling delivered on 29<sup>th</sup> October 2009. By the same ruling, the court appointed the respondent as the administrator of the estate of the deceased and also held that the respondent was properly joined in the application.

8. Thereafter the Judge heard the respondent's summons for revocation and for cancellation of the appellant's title. In his ruling, the subject of this appeal, delivered on 15<sup>th</sup> October 2014, the Judge found that even if the siblings of Samuel consented to his appointment as the administrator of the estate of the deceased, that, "*did not empower the late Samuel to disinherit the other beneficiaries.*" The learned Judge went on to say that: "*It is clear to me that Samuel was not entitled to the entire estate and the other three sisters were to benefit.*"

9. The learned Judge rejected the appellant's contention that he was an innocent purchaser for value without notice; made a finding of fact that the appellant is a neighbour to the respondent and was aware that Samuel had sisters, but did not bother to inquire from them and simply dealt with Samuel who had the title deed; that the appellant lives in the neighbourhood and that there was evidence to show that the respondent was cultivating the property.

10. Regarding the appellant's contention that his title to the property was protected under Section 93(1) of the Law of Succession Act, the Judge was of the view that where the court is satisfied that a grant was obtained through fraud or concealment of material facts or by untrue allegations, the grant can be

revoked. In those circumstances, the court held, the acts done by the administrator can be revoked.

11. In the end, the Judge held that the act of Samuel transferring the property to himself as the absolute owner when he was the administrator was fraudulent. He ordered the cancellation of the title in favour of the appellant and further ordered that the property revert to the estate, and be distributed equally between Grace Embale, the respondent, Finika Embolani and Samuel (deceased). Essau, the other sibling would not share in the property, having already benefited from the adjoining property known as Title Number Kakamega/Kegoye/644. The Judge also revoked the grant in favour of Samuel and ordered a fresh grant to be issued to Grace Embale, the respondent, Finika Embolani, and the appellant jointly.

12. Aggrieved by that decision, the appellant presented this appeal.

### **The appeal and submissions by counsel**

13. When the appeal came up for hearing on 19<sup>th</sup> November 2015, learned counsel, Miss. S. Rauto for the appellant and Mr. Kahi David for Chitwah for the respondent agreed to file written submissions and to dispense with an oral hearing.

14. In her written submissions, Miss Rauto condensed the grounds of appeal contained in the memorandum of appeal to the complaints that the learned Judge was wrong to find that the appellant was not a bona fide innocent purchaser for value of the property; that the Judge erred when he revoked a grant of letters of administration in the name of a deceased person without substitution; and that the Judge should have upheld that the appellant's title to the property on account of the protection accorded under Section 93(1) of the Law of Succession Act.

15. The respondent did not file any submissions.

### **Analysis and determination**

16. We have considered the appeal and the submissions. There are two main issues that require consideration. The first is whether the Judge erred in revoking the grant of letters of administration issued to Samuel. The second is whether the Judge correctly interpreted and applied Section 93(1) of the Law of Succession Act to the extent that he found that the same did not accord protection to the appellant's title.

17. We first address the question whether the learned Judge was wrong to revoke the grant issued to Samuel when he (Samuel) was deceased and before substitution.

18. There is no doubt that under Section 76 of the Law of Succession Act, the court is empowered to revoke or annul a grant where it is satisfied that such grant was procured through fraud, concealment of material facts or misrepresentations. The relevant part of that section 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. Although Samuel obtained the consent of the other beneficiaries of the estate to apply for the grant of letters of administration in his name, he thereafter surreptitiously dealt with the estate as though he was the sole beneficiary and transferred the property that he held in trust to himself absolutely. In his application for confirmation of grant in which he proposed to be the sole beneficiary of the property, he made absolutely no reference to the other beneficiaries and neither did he demonstrate that the other beneficiaries had agreed to that proposal. In those circumstances, we are fully in agreement with the learned Judge when he held that Samuel's act "of transferring the property...from his status as an administrator to that of being the absolute owner was fraudulent as it disinherited his sisters."

20. The assertion that the Judge revoked the grant issued to Samuel when he was deceased and without substitution is not entirely correct. As we have indicated earlier in this Judgment, the appellant took a preliminary objection to the respondent's application. The court dismissed that objection in a ruling delivered on 29th October 2009. In the same ruling, the court appreciated that Samuel, the administrator of the estate of the deceased was himself deceased, and ordered that a fresh grant be issued to the respondent. As far as we can tell, the appellant did not appeal that decision. In effect therefore, by the time the grant was subsequently revoked by the court in the ruling appealed from, the respondent had effectively been substituted as the administrator in place of Samuel. There is therefore no merit in this complaint.

21. The next issue is whether the learned Judge misconstrued the provisions of Section 93(1) of the Law of Succession Act which provides:

*"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."*

22. According to the appellant, that provision rendered his title to the property indefeasible; it insulated and protected his title from attack no matter the sins of the administrator. The learned Judge addressed that issue as follows:

*"My view is that if the court is satisfied that the grant was obtained fraudulently and should be revoked then whoever benefited from the revoked grant should be affected. In such a case where the person holding a confirmed grant transfers a property to another person then the transfer is affected if the grant is revoked. The provisions of section 93 do not sanction unlawful act and what was intended was where a grant is properly and lawfully issued. The underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property."*

23. The view taken by the Judge is consistent with the interpretation accorded to Section 93(1) of the Law of Succession Act by this Court. In the case of **Musa Nyaribari Gekone and others vs. Peter Miyienda and Another, Civil Appeal No. 2 of 2014**, this Court reaffirmed that estate property transferred by an administrator may in certain circumstances be traced. We cited, with approval a decision of the High Court in Meru in **Adrian Nyamu Kiugu vs. Elizabeth Karimi Kiugu and Anor**

**[2014] eKLR** where the court, in reference to Section 93(1) of the Law of Succession Act 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.”** [Emphasis added]

24. 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 **section 93 (1)** of the Law of Succession Act (Cap 60) but also **section 143** of the Registered Land Act, this Court 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.”***

25. Undoubtedly therefore, there are circumstances when estate property transferred by an administrator is traceable to the purchasers.

26. Like the court below, we are not ourselves satisfied that the appellant can be considered to be an innocent purchaser for value without notice. As the learned Judge found, the appellant is a neighbour to the respondent and was no doubt aware that Samuel was not the sole heir of the estate of the deceased. He made no attempt to make enquiries from the other heirs before dealing exclusively with Samuel. He was, as the Judge found, aware that the respondent was cultivating the property. We are therefore not persuaded that there is merit in the appellant’s complaint.

27. In conclusion therefore, we uphold the decision by the High Court. In our judgment, the learned Judge correctly revoked the grant of letters of administration to Samuel and correctly ordered the cancellation of the appellant’s title to the property. It is also our finding that the Judge correctly interpreted and applied Section 93(1) of the Law of Succession Act to the circumstances of this case.

28. The result of the foregoing is that the appeal is devoid of merit. It is accordingly dismissed. Each party shall bear its own costs of the proceedings in the High Court and of this appeal.

Orders accordingly.

**Dated at Kisumu this 4<sup>th</sup> day of March, 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

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