



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 27 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE BOSCO BONO

BETWEEN

JANE KILIMO.....APPLICANT

VERSES

GRACE KHISA MALENYA.....RESPONDENT

RULING

1. The Notice of Motion by the Applicant dated 28th June 2019 prays that;

- (a) Title deed number **TRANS NZOIA /MITO MBILI S F T /96** measuring 4.5 ha be cancelled
- (b) The said title be registered in the name of **JANE KILIMO** to hold it in trust for the estate of the late **EMMANUEL KILIMO**
- (c) Alternatively the said land be registered in the name of **BOSCO BONO WAMACHICHI** being the original proprietor.
- (d) The Respondent to surrender vacant possession of the said land.

2. The affidavit of the applicant sworn on the said date is in support of the application. The issues herein are clear as this court had already made some decisions. First of all, there was no death of one **BOSCO BONO** as found by this court on 3rd October 2018 and therefore no estate to litigate over. This position was well acknowledged by the parties and that is the position.

3. As a result of the said unchallenged position the impugned title which was fraudulently registered in the name of the respondent on 4th May 2011 for all intent and purposes and having traced its roots on the fraudulent grant should not stand in law.

4. The Replying Affidavit by the Respondent dates 9th March 2020 deponed that this court is not seized to cancel the said title as it is the preserve of the Environment and Land Court. She argued therefore that the proper forum would be for this court to refer the matter to the said court.

5. She went on to state that this court cannot issue an eviction order since its sole mandate was to simply determine the succession question. That she has been on the ground since 1970s and it would be necessary for the issues to be ventilated at the said land court.

6. The parties were ordered to file written submissions which they did and the court has perused the same as well as the attendant authorities.

7. As stated above the fact that there was no deceased person in this cause ought in fact to have this matter closed. This is a purely succession matter and the alleged deceased appeared and still alive and has gone ahead to swear the affidavit in support dated 28th June 2019.

8. This court has been given far reaching powers by the provisions of Article 165 of the Constitution as well as Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. Section 47 provides as hereunder;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:”

9. Rule 73 of course gives this court the inherent powers to make such decision that shall be necessary to ensure that justice is served all the time.

10. In view of the above, and the finding that the Respondent transmitted the title to herself illegally as the owner was still alive, nothing stops this court from making an appropriate decision over the title. This is a special case since the title on the face of it was obtained through a succession proceeding which have been declared a nullity.

11. It would perhaps have been different if the title was obtained pursuant to a legitimate succession proceeding where there was a death. In this case the registered allottee of the land is still alive. By having herself registered through the succession avenue, the respondent cannot be heard therefore to say that this court does not have the requisite jurisdiction. The above cited portions of the Succession Act were meant to insulate this court and undertake such glaring iniquities.

12. The court however agrees with the respondent that the Applicant does not have a confirmed grant issued to her in favour of the estate of the late **EMMANUEL KILIMO KIMNGOLE** and that what she is holding is a limited grant. This assertion was not rebutted by the applicant. The purpose of the limited grant is to simply ensure the collection and the preservation of the estate. In this case the Applicant cannot for now have the said title transferred to her name so as to hold it in trust on behalf of the said Kilimos estate.

13. The proper recourse is to have the title cancelled from the respondent and have it transferred to the original owner **BOSCO BONO WAMACHICHI** who shall thereafter have it transferred to the applicant or any other person that he deems appropriate.

14. The next issue of eviction in my view is a preserve of the land court. This court even though it finds that the Respondent fraudulently had herself registered as the proprietor illegally it cannot order for an eviction. This court cannot for instance litigate on the circumstances that made the parties occupy the land to date. There must be an exercise of natural justice. Each of them must be given an opportunity to adduce evidence as eviction is a drastic step.

15. More importantly the parties herein were already litigating in **Kitale ELC CASE NO. 39 OF 2010** between the respondent and the applicant. It is therefore possible that they should take the issue of vacant possession or eviction to that court. Both parties will still have an equal opportunity to fight over the land.

16. It is also noted that this court on **7th October 2019** rectified a confirmed grant which essentially was not correct as there should have never been a grant in the first place. The same is hereby reviewed and cancelled with all the attendant consequences.

17. In view therefore of the above observation the application is allowed as hereunder;

(a) The rectified certificate of confirmation of grant dated 7th October 2019 is hereby cancelled.

(b) Title deed number TRANSNZOIA /MITO MBILI S F T /96 registered in the name of GRACE KHISA MALENYA is hereby cancelled.

(c) The register in respect to the suit land herein, TRANS-NZOIA /MITO MBILI S F T /96 be rectified and a new title be issued in the name of BOSCO BONO WAMACHICHI.

(d) The prayer for vacant possession is disallowed and the parties to pursue the issue at the Environment and Land Court appropriately.

(e) The Applicant shall have the costs of this application.

Dated, Signed and Delivered at Kitale this 27th day of October 2020.

H. K. CHEMITEI

JUDGE

27/10/2020