



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 184 OF 2004

IN THE MATTER OF THE ESTATE OF PHILIP ABUGA OTORA. (DECEASED)

DAVID OMAE PHILIP.....PETITIONER

AND

THERESSAH BOSIBORI NYANGENA.....APPLICANT

AND

MARK MUMA RIOGI.....INTERESTED PARTY

RULING

1. **Philip Abuga Otor**a hereinafter referred to as the deceased, died on the 21/3/1995. David Omae filed a petition for letters of administration intestate on the 30th July 2004. David is the son of the deceased. In his affidavit in support of the petition he listed himself and Andrew Nyagena Abuga and John Ondieki Abuga as sons of the deceased. He listed land parcel no. West Kitutu/ Bomatara/533 and 163 as the only assets of the deceased.

2. On the 4/8/2004 **Therresah Bosibori Nyagena** filed a summons to revoke the grant of letters of administration issued to David Omae Philip on the 25th May 2005. Her reasons for seeking the said order was that property West Kitutu/ Bomatara/ 1163 was registered in the name of Bonareri Otor and not the deceased, to support this she attached a certificate of official search which states that Title No. West. Kitutu/ Bomatara /1163 is 0.7 Ha and the proprietor is Bonareri Otor and that the land certificate was issued on the 10/7/1973.

3. On the 17/6/2015 Mark Muma Riogi filed a summons for alteration and/or revocation of the grant seeking to have land parcel no. West/ Kitutu/ Bomatara/ 1163 removed from the list of assets of the deceased or that the grant to be revoked. Theressah Bosibori filed an affidavit opposing Mark's application. The application was also opposed by David Omae the petitioner.

4. By a consent dated the 9/2/2016 the parties agreed to remove L. R No. 1163 from the proceedings so that the succession cause could be filed since the land did not belong to the deceased in this case. The parties went quiet.

5. On the 18/9/2020 Mark Muma Riogi who claims that he is entitled to inherit the subject land parcel filled an application dated 3/8/2020 seeking an order that the Court be pleased to cancel the name of David Omae Philip from land parcel title No. West/ Kitutu/ Bomatara/ 1163 and reinstate the name of the deceased Bonareri Otor. He based his application on the consent dated the 9/2/2016 that the said parcel of land be removed from the proceedings. He claims that he went to the Land Registry here in Kisii and found that David Omae Philip had been wrongly and unlawfully registered as the owner of the said parcel of land. He deposes that several communications have been made to the Kisii County Land Registrar with an aim of rectifying the register in respect of the said land but the Land Registrar has declined to rectify the register demanding a court order to authorise him to do so.

6. The application was opposed by the respondent. Mr. Masese for the petitioner/ respondent filed grounds of opposition which he submitted on as follows; that the petitioner was registered as the proprietor of the said land parcel. That his problem is whether this is the right forum to seek the prayer being sought by the applicant. That the applicant abandoned the earlier application he brought in court and that he has a new application that does not concern the original application he made in court. That they agreed that the said parcel No. 1163 could not be part of the deceased's estate. That since the registration has taken place he has to come to court by way of an authorised way and not the manner he has done. Mr. Momanyi in response argued that the petitioner used the proceedings to have the said parcel of land registered in his name and it was a mistake, that there was no grant. That this is the forum they can use and that the court stated that it was a mistake to have the land parcel included in the deceased herein. The applicant sought to have the application granted.

ANALYSIS AND DETERMINATION

7. The applicant filed the application dated 16/6/2015. The respondent argues that this application is pending and that the applicant has once again come to court on the same issue. The applicant's current application is dated the 3/8/2020 in it he seeks a cancellation of the petitioner's name from the said land parcel. He also that the name of Bonareri Otoro be reinstated as owner of the said parcel. In his application dated 16/6/2015 he sought to have the grant of letters granted to David Omae Philip on the 25/5/2005 be altered to remove from the cause L.R. West/ Kitutu/ Bomatara/1163 and or revoked. In my view the consent dated 9/2/2016 compromised the application dated 16/6/2015, the parties agreed that parcel no. West/ Kitutu/Bomatara /1163 be removed from this succession cause and that the land does not belong to the deceased. There is the issue of the right forum that has been raised by the respondent. I am aware that the court with the jurisdiction to cancel titles is the Land and Environment Court. The applicant is not a beneficiary of the deceased's estate. The court noted that the land does not belong to the deceased. It is apparent that the applicant wants to have the land revert back to the original owner who is Bonareri Otoro. In the affidavit filed by Ms Theressa Bosibori the certificate of search indicates that the registered proprietor is Bonareri Otoro. The order made by the court on the 9/2/2016 was made with the consent of all parties. It is a court order which in my view can be served on the Land Registrar together with the appropriate application seeking a cancellation of the name of David Omae from the register if that is what is on record at the Land Register. In the event the Land Registrar finds that the order of 9/2/2016 is not adequate to act upon then the applicant should move to the ELC Court and seek an order seeking cancellation of the title. I decline to grant the orders sought. No order as to costs.

Dated, signed and delivered at KISII on this 18th day of December 2020

R.E. OUGO

JUDGE

In the presence of:

Mr. Momanyi For the applicant

Respondent Respondent

Ms. Rael Court Assistant