



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CIVIL APPLICATION NO. 264 OF 2015

IN THE MATTER OF THE ESTATE OF JOHN MILAMBO OTIENO (DECEASED)

-between-

ALEX MITO MILAMBO.....OBJECTOR/APPLICANT

-and-

FANUEL OGORE AKIRI.....PETITIONER/RESPONDENT

JUDGMENT

1. This judgment relates to the confirmation of the grant jointly issued to the parties herein in compromising an application for revocation which the Objector had filed challenging the issuance of a grant to the Petitioner and its confirmation. The joint grant was issued on 28/01/2016.

2. The application for confirmation was filed by the Objector by way of a Chamber Summons dated 11/03/2016 which was amended on 01/04/2016. The application was supported by the Objector's Supporting Affidavit sworn on 11/03/2016, a Further Affidavit sworn on 04/04/2016 and a Further Further Affidavit sworn on 04/07/2017. The Petitioner opposed the confirmation application by filing a Replying Affidavit he swore on 07/09/2016.

3. The application was disposed of by way of written submissions where both parties duly filed their respective submissions and relied on some judicial decisions in supporting their positions.

4. The Objector's case is straight-forward. He contends that he is the only surviving child to the deceased herein and as such the only beneficiary entitled to the estate which consists of the parcel of land known as **Kanyamkago/Kawere I/110** (hereinafter referred to as '**the property**') as the free property. He further contends that the Petitioner herein is a stranger to the estate and has no color of right over the estate and the property. He prays that the property which is now illegally registered in the Petitioner's name be reverted to the name of the deceased and be transferred to him accordingly and that the Register be rectified to delete all the entries made by the Petitioner.

5. The Objector submitted that the Petitioner had failed to prove any entitlement to the estate and the property and as such the prayers sought ought to issue. He relied on the decisions of **Rukaria M'Twerandu vs. Leonard Kimeu Mwanthi (2016) eKLR**, **Re Estate of John Robert Otieno Wasonga – Deceased Migori High Court Succession Cause No. 228 of 2015** (unreported), **Re Estate of Paul Mwaura Thuo (Deceased) (2017) eKLR**, **Shadrack Kinyua Mwaniki Magondu vs. John Mwangi Kinyua & Another (2015) eKLR** and **In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased) (2015) eKLR**.

6. In opposing the confirmation application, the Petitioner deponed in paragraph 9 of his Affidavit as follows: -

'THAT I know on my own knowledge that before the filing of the petition and the present application, the suit property was registered in the name of my late grandfather one MR. OTIENO before the same was later transferred and registered in the name of the deceased JOHN MILAMBO OTIENO and thereafter the succession the same was registered in my name and am holding the same in trust.'

7. In his submissions, the Petitioner argued that his right and interest in the estate and the property was further vindicated by the letter dated 12/05/1997 by the Area Chief which indicated that the two parties herein were the only ones entitled to the estate and the property. The said letter was annexed as an exhibit by the Objector in the application for revocation of the grant issued to the Petitioner on 20/02/1998. It was the Objector's further submission that the confirmation ought to be done to the Petitioner and the Objector but not to the Objector alone and opposed the prayer for rectification of the register. He relied on the decision in the case of **Re Estate of Gitau (Deceased) (2002) 2 KLR 430**.

8. **Sections 107, 108 and 109** of the **Evidence Act**, Cap. 80 of the Laws of Kenya places the burden of proof of any fact upon a party which desires the Court to believe that such a fact exist. **Sections 26 and 29** of the **Law of Succession Act**, Cap. 160 of the Laws of Kenya (hereinafter referred to as **'the Act'**) defines who dependants to a deceased are for purposes of intestacy succession. **Part V of the Act (Sections 32 to 42 inclusive)** variously provides for the distribution of the properties forming an estate of a deceased.

9. In this case therefore it is imperative that the relationships between the parties and the deceased are looked into to determine how the property shall devolve. The Objector deponed and submitted that he is a son and the only surviving child to the deceased. That fact was not disputed at all by the Petitioner. That being so, I find and hold that the Objector herein, **ALEX MITO MILAMBO**, is the only surviving son and child of the deceased.

10. As to the Petitioner herein, the Petitioner himself did not indicate his relationship with the deceased. He only talked of his late grandfather one Mr. Otieno allegedly in whose name the property was registered in before the registration to the deceased. The Petitioner was not a son to the deceased. The relationship between the Petitioner's grandfather one Mr. Otieno and the deceased or the Objector remain unknown.

11. The Petitioner seemed to place a lot of premium on the Chief's letter dated 12/05/1997. I have carefully considered a copy of the said letter. Whereas the Chief commended the two parties herein to benefit from the property, he did not indicate the relationship each had with the deceased. The said letter does not therefore assist the Petitioner or at all and it cannot be a valid basis for seeking and/or demonstrating any beneficial interests in the property. Further, despite the clear position taken by the Objector, the Petitioner did not see the need to at least avail any further evidence to prove his entitlement to the property.

12. From the evidence before Court, the Petitioner has failed to prove any relationship with the deceased. I hence find and hold that the Petitioner herein, **FANUEL OGORE AKIRI**, is not in any way related to the deceased. If at all it is true, that the Petitioner's grandfather had any interest in the property as alleged then such may be subject of other proceedings before the appropriate forum. The Portioner having deponed that he is holding the property in trust did not disclose in whose trust he is holding it. The foregone therefore unveils the fact that the Objector herein is the only beneficiary to the estate of the deceased.

13. **Section 38 of the Act** provides that *'where an intestate has left a surviving child or children, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.'* Having found that the Objector is the only surviving child to the deceased and the Objector having deponed that no spouse survived the deceased, I find that the property subject of the estate must wholly devolve to the Objector herein.

14. On the prayer for rectification of the register and in view of the foregone analysis, I find no justification for the entries made in favour of the Petitioner. The entries were made in favour of a stranger to the estate and that alone is a solid ground why such entries cannot be sustained in the register. For purposes of good order and for the right history of the property, the entries must be removed from the register.

15. Based on the foregone and for ease of further administration of the estate by the rightful heir, the following final orders do hereby issue: -

(a) The Grant jointly issued to the parties herein on 28/01/2016 be and is hereby revoked and a Fresh Grant shall forthwith issue in the sole name of the Objector herein, ALEX MITO MILAMBO.

(b) The Fresh Grant be and is hereby deemed confirmed at issuance and the sole property forming the estate of JOHN MILAMBO OTIENO, the Deceased herein, being KANYAMKAGO/KAWERE I/110 shall wholly devolve to ALEX MITO MILAMBO.

(c) The Land Registrar shall accordingly rectify the register in respect to the parcel of land known as KANYAMKAGO/KAWERE I/110 by removing all the entries made in favour of FANUEL OGORE AKIRI and shall forthwith issue a valid title document to ALEX MITO MILAMBO.

(d) The Petitioner shall bear the costs of this cause as well as any costs pursuant to execution of the orders herein.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 08th day of March 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Marvin Odero Counsel instructed by Messrs. Okong'o Wandago & Company Advocates for the Objector/Applicant.

Mr. Nyagesoa Counsel instructed by Messrs. Nyagesoa & Company Advocates for the Petitioner/Respondent.

Ms. Nyauke - Court Assistant