

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

SUCCESSION CAUSE NO. 61 OF 2011

SANTUZZA BILIOTI ALIAS MEI SANTUZZA (DECEASED)

AND

GIANCARLO FALASCONIADMINISTRATOR

RULING

The Petitioner filed an application dated 22nd June, 2011 seeking among other things the cancellation of titles to plot numbers **CHEMBE/KIBAMBAMSHE/520** and **530** respectively. The two plots seem to be registered in the names of the Respondent. The Respondent filed a preliminary objection to the application. The record shows that prayer (b) of the application which sought an order of injunction was granted. The ruling by Hon. Justice Meoli that granted the injunctive orders led to civil Appeal number 145 of 2012. The Court of Appeal delivered its ruling on 7th February, 2014.

Mr. Wameyo, Counsel for the Respondents submitted that the Respondents are the registered owners of the suit land. A vesting order was granted on 5th October, 2010 by the High Court. The Respondent bought the land through a public auction. The Applicant seeks to have the Respondent's titles in a succession cause and this is not procedural. Section 143 of the now repealed Registered Land Act and Section 150 of the New Land Act provides for ways of title deeds. The entire proceedings is disputed on land.

Counsel further contends that the Applicant alleges that there was fraud. This must be specifically pleaded. This calls for full hearing. The succession cause is meant for grant of letters of administration. The Respondents are third parties who enjoy legal title and a succession court cannot cancel a title deed. It is further submitted by Mr. Wameyo that the auction was done as a result of a decree of the Lower Court. Subsequently, the parties in the Lower Court regarded a comment setting aside the judgment without involving the Respondents. However, the vesting order was not set aside. The dispute herein must be the subject of a substantive suit. The Applicants must be involved in the matter as their titles are the subject of the dispute.

Mr. Michira, Counsel for the Applicant opposed the preliminary objection. Counsel contends that there is no resolution filed to show that the company has authorised the filing of the objection. The deceased's property was auctioned in a fraudulent manner as a suit was filed and judgment obtained while the owner had passed on. The issue of fraud can also be covered under the Succession Act. Counsel further contends that the issues raised in the preliminary objection are part of the grounds of opposition filed in court. It is a duplication. Most of the issues were canvassed and the court gave its ruling.

I have gone through the record herein and the judgment of the Court of Appeal in civil Appeal No. 145 of 2012. It is clear to me that what is pending is prayers (c), (d), (e) and (f) of the application dated 22nd June, 2011. Prayer (b) was granted and it led to the appeal before the Court of Appeal. Since the application was filed on 22nd June, 2011, it is not clear to me why there was no preliminary objection to the application at that time. The notice of preliminary objection was filed on 2nd September, 2014. Most of the issues being raised in the preliminary objection were raised during the hearing in relation to prayer (b) of the application.

Mr. Wameyo contends that if the Respondent's titles are canceled by the succession court, that would be unprocedural as it will amount to condemning the Respondents unheard. This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in

effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by no-beneficiaries such as where the property is being sold before a grant is confirmed.

It is established that the ex-parte judgment that led to the issuance of the vesting order was set aside. The Respondents herein would like to be heard in defence of their titles. It is not necessary that the hearing cannot be dealt with by the succession court. The Applicant can file an application for confirmation of the grant that was issued on 15th September, 2011 and list the properties as part of the deceased's estate. The Respondents can object to the application and the matter can proceed to full hearing. Similarly, this court can give directions to have the application dated 22nd June, 2011 heard by way of oral evidence and the Applicants can be made Interested Parties.

There is no rule that any issue touching on land must be heard by the Environmental and Land Court even if the land is a subject of succession proceedings. Majority of succession cases involve the distribution of land. Where the deceased land has been sold before distribution is done, the succession court can hear both the administrator and the registered owner to determine whether the land is part of the estate or was lawfully sold.

I do entirely agree with my sister Justice Meoli that there is need to have the dispute ventilated through oral evidence. It is noted in page 10 of the Court of Appeal judgment that there are several issues to be dealt with in this dispute. The Court of Appeal noted that there is the issue as to whether the suit premises form part of the estate, whether subordinate court had jurisdiction to entertain a certain application as well as the jurisdiction to challenge the sale transaction. It is possible that the administrator can file a suit and plead for cancellation of the title deeds. However, that is not the only avenue available to the Applicant. The Respondents are already parties to this dispute and the court can proceed to hear both parties.

The preliminary objection is not one that leads to the conclusion of the dispute as expected for a preliminary objection. Even if it is granted all what will happen will be parties to seek recourse in another forum and pursue the same course. This court has jurisdiction to hear and determine the dispute.

In the end, I do find that the preliminary objection lacks merit and the same is dismissed with no orders as to costs. For purposes of ending the long dispute herein, I do direct that the Applicant file within thirty (30) days hereof an application for confirmation of the grant issued on 15th September, 2011 and serve it on the Respondents herein. The Respondents shall be at liberty to file their response to the application. Thereafter, the matter to be listed for mention for further directions.

Delivered and Dated in Malindi this 17th day of December, 2014 in the presence of:

Said J. Chitembwe

JUDGE