



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 27 OF 2020

IN THE ESTATE OF THE LATE BOSCO BONO

GRACE KHISA MALENYA.....PETITIONER/APPLICANT

VERSUS

JANE KILIMO.....OBJECTOR/RESPONDENT

RULING

The case for the Petitioner/Applicant

1. Pursuant to the provisions of *sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and Order 51 Rule 1 of the 2010 Civil Procedure Rules*, the applicant approached this court under certificate of urgency seeking the following orders:-

a. *Spent*

b. An order of stay of execution of this court's order to the effect that the title deed No. Trans Nzoia/Mito mbili SFT/96 be cancelled and the same be registered in the name of Bosco Bono, pending the hearing and determination of this application and pending the hearing and determination of the intended appeal to the Court of Appeal.

c. An order of inhibition in respect of land reference No. Trans Nzoia/Mito mbili SFT/96 now in the name of Bosco Bono forbidding any dealings on the said parcel of land pending the hearing and determination of this application and pending the hearing and determination of the intended appeal to the Court of Appeal.

d. The cost of this application be provided for.

2. The application is supported by 5 grounds that are set out in the amended Notice of Motion, with the following being the major grounds:-

a. The applicant was aggrieved by the said order of cancellation of the title deed dated 27th October, 2020.

b. The applicant has filed a Notice of Appeal and has applied for proceedings.

c. That the intended appeal shall be rendered nugatory should the title deed be cancelled.

d. That the respondent shall not be prejudiced in any way if the application is allowed.

e. That the applicant has just learnt that the title deed has already been canceled.

3. In addition to the grounds of appeal, the applicant has deposed to a 19 paragraphs supporting affidavit, of which the following are the major matters:-

a. The applicant is the registered proprietor of land parcel No. Trans Nzoia/Mito mbili SFT/96 after having acquired the same through succession on presumption of death of the deceased. The deceased later resurfaced.

b. The respondent filed an application to have the grant nullified and the court proceeded to nullify the grant. On 27th October, 2020, this court (Chemitei, J) ordered the cancellation of the title and ordered the same to be registered in the name of Bosco Bono and the register was rectified accordingly.

c. Being aggrieved by the said order, the applicant filed a Notice of Appeal and a letter requesting for proceedings.

d. That the intended appeal shall be rendered nugatory should the title deed be cancelled and be registered in the name of Bosco Bono as he will definitely transfer the same to 3rd parties.

e. The applicant stands to suffer substantial loss and damage given the massive development and the expenses she has used to obtain the title deed.

4. Counsel for the applicant also has learned that the title deed has already been cancelled and is now in the name of Bosco Bono to which she has annexed a search certificate marked as annex "GKM 2."

5. The applicant has also requested for an order of inhibition in respect of the subject suit land to forbid any dealings on the said title deed pending the hearing and determination of this application and pending the hearing and determination of the intended appeal in the Court of Appeal.

6. The respondent will not suffer any prejudice should the application be allowed as the respondent is not the owner of the land. The applicant has also deposed that he will abide by any conditions which this court will order for the due performance of the decree. She has also deposed that she has an arguable appeal and for that reason she prays the court to grant her an order of stay of execution.

The oral submissions of the applicant

7. During the hearing of this application on 8th December, 2020, M/S Munialo for the applicant submitted that she is seeking prayers No. 3 and 5 of the amended Notice of Motion; which relate to an order of inhibition and an order to provide or costs. She has also submitted that the suit property has already changed hands in that there was a transfer that was effected on 19th November 2020.

8. Furthermore, she has submitted that the court has jurisdiction to grant the orders sought. She also has submitted that this application is brought under order 42(1) of the Civil Procedure Rules.

9. She has also submitted that a Notice of Appeal has already been filed and that leave of this court was not required because the pleadings by the parties had not been closed by the time she filed an amended Notice of Appeal.

10. She has cited the case of *Alice Karuru Kithinji vs Gideon Kithinji Limberia* being *Court of Appeal (Nyeri) Civil Application No. NAI 85 of 1997*, wherein that Court granted an order of inhibition; in an application that is similar to the instant application.

The case for the Objector/Respondent

11. The respondent filed a 12 paragraphs replying affidavit in opposition to the application.

12. The major averments are as follows:-

- a. The application is unmerited and is an abuse of the court process.
- b. On 27th October, 2020 this court ordered title deed No. Trans Nzoia/Mito Mbili SFT/96, which was registered in the name of Grace Khisa Malenya be cancelled and the register be rectified and the new title deed be issued in the name of Bosco Bono.
- c. The applicant obtained the title deed to the suit land on 4th May 2011 by claiming presumption of the death of Bosco Bono Wamachichi, which confirmed the position in paragraph 3 of her affidavit sworn on 29th October, 2020.
- d. Furthermore, the respondent has deposed that it is not in dispute that Bosco Bono Wamachichi is indeed alive and therefore there was no estate from which the applicant could have obtained the said title deed as confirmed by paragraph 4 of her sworn affidavit dated 29th October 2020.
- e. The respondent has also averred that the applicant has not fulfilled the conditions to warrant a grant of the orders sought. She also has averred that the applicant seeks to continue benefiting from an illegality as she has been doing for close to a decade to the detriment of the respondent.
- f. The respondent has further averred that the application was brought in bad faith and is an attempt to unfair and unjustly enrich herself by acquiring title through an obviously fraudulent process. She also has averred that the register has already been rectified and therefore there is nothing for the court to stay in respect of which she has annexed a copy of the official search, which shows the current proprietor of the subject property as being Bosco Bono.
- g. Finally, she has deposed that this court is now *functus officio* and cannot grant any further orders.

13. The respondent filed 8 grounds of opposition to the application. The main grounds include the following:-

- a. The court is *functus officio* and therefore lacks jurisdiction to grant the orders sought.
- b. The court also lacks jurisdiction to grant an order of inhibition as this is an exclusive preserve of the Environment and Land Court under Sections 2 and 68 of the Land Registration Act No. 3 of 2012 and Articles 162(2) and 165(5) and b of the 2010 Constitution of Kenya.
- c. The other ground advanced by the respondent is that this application is an abuse of the court process as there is an existing and unprosecuted application dated 29th October 2020, which seeks similar orders.
- d. The counsel for the respondent has also advanced the ground that the amended Notice of Appeal prejudices the respondents right to a fair hearing as envisaged under Article 50 of the Constitution and that the instant application is fatally defective and cannot be cured by invoking the oxygen principle or by Article 159 of the Constitution.
- e. Counsel has also stated that Order 51 of the Civil Procedure Rule does not contemplate amendments in respect of an application brought by way of notice of motion since the same is not a pleading under order 8 of the Civil Procedure Rules.
- f. He has further stated that leave of the court ought to have been sought and obtained first before the filing of the amended Notice of Appeal.
- g. And finally it is on the basis of the foregoing grounds that he seeks dismissal of the application.

14. In his oral submissions, in this court counsel has submitted the same grounds that are set out as grounds of opposition to the application except that he has pointed out that the authority cited by counsel of the applicant is not applicable in the instant application, because it was a decision rendered in 1997 when the High Court had jurisdiction to hear and determine land matters.

15. In a short reply counsel for the applicant orally submitted that this court has jurisdiction to entertain and determine the application and that there is only one application on record. She also has submitted that the amended Notice of Motion was in response to the respondents replying affidavit since the pleadings had not been closed. And for that reason, no leave of the court was required to amend and file the amended notice of motion.

16. Finally, she has urged the court to invoke the provisions of Article 159 of the Constitution and the Oxygen Principle that is provided for in the Civil Procedure Act.

Issues for determination

17. I have considered the affidavits of both parties, I have also considered their oral submissions in this court. Additionally, I have considered the grounds of opposition of the respondent.

18. After considering the foregoing, I find the following to be the issues for determination:-

- a. Whether the applicant has satisfied the conditions for the grant of the order of inhibition.
- b. Who bears the costs of this application"

a) Whether the applicant has satisfied the conditions for the grant of the order of inhibition.

19. On 27th October, 2020 this court (Chemitei J) cancelled title deed No. Trans Nzoia/Mito mbili SFT/96 which was registered in the name of Grace Khisa Malenya (the applicant herein) and directed that a new title deed be issued to Bosco Bono Wamachichi.

20. The official search dated 19th November 2020 shows the proprietor of the suit land as being Bosco Bono Wamachichi. It also shows a caution which was registered over the suit land in favour of Jane Jerono Kilimo, who was claiming an interest as a bona vide purchaser of the suit land. It is clear therefore that the suit land had already been transferred to Bosco Bono Wamachichi as at 19th November 2020. The said Jane Jerono Kilimo only claims an interest in the suit land as a bonafide purchaser for value. Even if the court were to grant the orders sought, they will be directed to Jane Jerono Kilimo, who is not the registered owner of the suit land. Stated differently the court will be issuing orders in vain. Such orders will bring disrepute in the administration of justice.

21. I therefore find on the affidavit of the Applicant that she is not the registered owner of the suit land. She is in effect inviting the court to interfere with legal rights of Bosco Bono Wamachichi in the suit land. And the provisions of article 159 of the Constitution and the oxygen principle cannot be invoked to interfere with the legal rights of Bosco Bono in the suit land. Furthermore, the applicant will not suffer anything if the suit land is transferred to a third party. I therefore find that she has not met the conditions for the grant of an order of inhibition.

22. In view of these findings by this court, I find it moot to consider the other issues raised by both counsel.

23. The suit land is the property of Bosco Bono Wamachichi and not Jane Jerono Kilimo and for that reason the orders sought cannot in law be granted.

b) Who bears the costs of this application"

24. The applicant has failed in her application in this court. It therefore follows that the respondent will have the costs of this application.

25. In the premises, the application is hereby dismissed with costs to the Respondent.

Ruling signed, dated and delivered in open court at Kitale this 14th day of December 2020.

J. M. BWONWONG'A

JUDGE

14/12/2020

In the Presence of

Ms Munialo for the Applicant

Mr. Gemenet holding brief for Mr. Aseso for the Respondent

Ms Chemosop - Court Assistant



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