

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 293 OF 2004

IN THE MATTER OF THE ESTATE OF JOSEPH MUNYAO KELLI (DECEASED)

HOSEA MUCHUGU MUTHOGA.....APPLICANT

VERSUS

JACINTA WANZA MAKENZI.....1ST RESPONDENT

SYLVIA MWENDE KELLI.....2ND RESPONDENT

RULING

1. Nairobi/Block 77/20 in Buruburu formed part of the estate of the deceased Joseph Munyao Kelli who died intestate on 14th October, 2003. On 11th November 2010 the Court ordered that the property be sold and the proceeds be shared by the beneficiaries as indicated in the Certificate of Confirmation. The property was subsequently sold in a public auction for Kshs. 5,500,000/- to the applicant Hoses Muchugu Muthoga who has since been issued with a Certificate of Lease. The applicant has applied to evict Jacinta Wanza Makenzi (1st respondent) who is one of the administrators of the estate of the deceased. She is staying in the house and, since the sale, has refused to vacate from the same. The sale and transfer of the house to the applicant was really frustrated by her. She states that she filed an appeal to the Court of Appeal when she was aggrieved by the orders of this Court relating to the distribution of the estate. She sought that the applicant's application should await the resolution of that appeal. However, it is clear that in **Court of Appeal Civil application No. 240 of 2017** at Nairobi her application seeking leave to appeal out of time was dismissed.

2. The 1st respondent raised the issue of the jurisdiction of this Court to grant the orders sought. This issue was prominently taken up by the 2nd respondent Sylvia Mwendu Kelli who raised a Preliminary Objection to say that the applicant is asserting ownership of the property and therefore he ought to have filed a substantive suit at the Environment and Land Court created under **Article 162(2)** of the Constitution, as this Court has no jurisdiction to determine the dispute.

3. The response was that what the applicant was seeking was for the 1st respondent, as administrator of the estate of the deceased, to vacate in completion of the administration of the estate under **Section 83 of the Law of Succession Act (Cap. 160)**.

4. This Court, in distributing the estate of the deceased, ordered that the property above be sold and the proceeds be shared by the beneficiaries. The applicant bought the property and the proceeds have been made available to the beneficiaries, including the respondents. The property's title has already passed to the applicant who has a Certificate of Lease. There is no dispute regarding the ownership of the property. The property was sold in execution of the orders of the Court in regard to the distribution of the estate of the deceased. The Court that ordered the sale must make sure that title passes and vacant possession is given to the buyer. In any case, under **Sections 82 and 83 of the Act**, it is incumbent upon the administrators of the estate of the deceased to make sure that the applicant gets the property herein. The applicant is now owed by the estate the vacant possession of his house.

5. I am aware of the principles in **MUKISA BISCUIT CO. LTD -v- WEST END DISTRIBUTORS LTD [1969]EA 696**. I am also familiar with **Article 162(2) (b) of the Constitution** that created the Environment and Land Court, whose jurisdiction has been outlined in **Section 13 of the Environment and Land Court Act, No. 19 of 2011**. However, this Court is not dealing with a dispute relating to the ownership of the property. It is dealing with the execution of orders in the administration of the estate of the deceased.

6. Consequently, the Preliminary Objection dated 20th November 2018 by the 2nd respondent is not sustained. It is dismissed with costs.

DATED and DELIVERED at NAIROBI this 25TH day of JUNE, 2019.

A.O. MUCHELULE

JUDGE