



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 77 OF 2013

IN THE MATTER OF THE ESTATE OF OBED ABURILI OTENYO (DECEASED)

BETWEEN

GEORGE OCHOLA ABURILI.....APPLICANT

AND

JOSEPH ACHICHI ABURILI.....RESPONDENT

R U L I N G

1. By summons dated 05th July, 2019 and filed on 08th July, 2019, brought under section 83(g) of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, the Applicant prays THAT:

(a) That Joseph Anjichi Aburili (*Respondent*) be directed to produce to court a full and accurate account of rent received from premises situated on LR NO. WEST BUNYORE/EBUSIKHALE/2253 and LR NO. WEST BUNYORE/EBUSIKHALE/2287 from 06th May, 2005 to date

(b) That upon compliance with prayer (a) above, Joseph Achichi Aburili (*Respondent*) be compelled to surrender vacant possession of LR NO. WEST BUNYORE/EBUSIKHALE/2253 to the Applicant and Joel Ngala Aburili

2. The application is based on grounds among others that **LR NO. WEST BUNYORE/EBUSIKHALE/2253** which is developed and has tenants in the premises who pay rent was by an order dated 12th April, 2018 distributed to the Applicant and **Joel Ngala Aburili** and that the respondent has exclusively been receiving rent from therefrom from 06th May, 2005 to date.

3. The application is supported by Applicant's affidavit sworn on 05th July, 2019 in which he reiterates the grounds on the face of the application.

4. The application is opposed on the basis of a replying affidavit sworn by the Respondent on 16th July, 2019. He avers that the prayer for accounts does not lie since the estate of the deceased has already been distributed. He further avers that the Applicant had on 01st April, 2011 unlawfully transferred **LR NO. WEST BUNYORE/EBUSIKHALE/2253** to himself and sold and transferred it to one Dorcas Ayoma Mbalanya as shown by a copy of sale agreement; green card and letter from purchaser's advocate demanding vacant possession marked JAA1 to 3 respectively.

5. The Respondent further avers that there is no evidence that **LR NO. WEST BUNYORE/EBUSIKHALE/2253** and **LR NO. WEST BUNYORE/EBUSIKHALE/2287** are rental properties or that any rent has been collected therefrom and that it is the Applicant that ought to account for the proceeds of sale.

6. I have considered the application in the light of affidavits on record and annexures thereto and submission by both parties.

7. The court record demonstrates that prior to distribution of deceased's estate by an order dated 12th April, 2018, the parties were heard on merit and the court distributed **LR NO. WEST BUNYORE/EBUSIKHALE/2253** to the Applicant and **Joel Ngala Aburili**.

8. The Applicant has not demonstrated that **LR NO. WEST BUNYORE/EBUSIKHALE/2253** and **LR NO. WEST BUNYORE/EBUSIKHALE/2287** are rental properties or that the Respondent has been collecting any rent therefrom.

9. The court does not issue orders in vain. **LR NO. WEST BUNYORE/EBUSIKHALE/2253** has been distributed to the Applicant and Joel Ngala Aburili and as long as that order subsists, the Respondent has no right being in occupation of the said assets

10. The Respondent's submission that the Applicant ought to take his claim for vacant possession to the Environment and Land Court is preposterous for the reasons that this court is not toothless and has power to execute its own orders. Indeed, the Applicant moved the court under the court's inherent powers which are preserved under Section 3A of the Civil Procedure Act. Such powers are to be used in situations such as this where the parent Act has not provided a specific provision to deal with the situation.

11. The Applicant has also invoked Section 1A of the Civil Procedure Act. Overriding objectives in this section have been expressed differently and broadly to include the principle to achieve or attain justice, and fairness in the circumstances of each case; reduce costs and delay. From the foregoing, I find that this court has power to compel the Respondent to give vacant possession to safeguard its integrity and to make certain that its orders are not blatantly violated.

Disposition

12. In the end, this court makes the following orders:

1) The prayer for rendering of a full and accurate account of rent received from premises situated on LR NO. WEST BUNYORE/EBUSIKHALE/2253 and LR NO. WEST BUNYORE/EBUSIKHALE/2287 from 06th May, 2005 to date is declined

2) An order is hereby issued compelling Joseph Achichi Aburili (Respondent) to surrender vacant possession of LR NO. WEST BUNYORE/EBUSIKHALE/2253 to the Applicant and Joel Ngala Aburili.

3) In the event that the Respondent does not give vacant possession within 30 days from today's date, the Applicant shall be at liberty to apply for his eviction

4) Respondent shall bear the costs of this application

DATED AND SIGNED AT KISUMU THIS 21st DAY OF November, 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Applicant - Mr. Onsongo hb for Mr. Bogonko

For the Respondent - Mr. Maua hb for Mr. Odeny