



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2787 OF 2007

IN THE MATTER OF THE ESTATE OF MARY GATHONI MUTAHI (DECEASED)

JAYNE MUTAHI.....APPLICANT

VERSUS

KENNETH MUTAHI MUKUA.....1ST RESPONDENT

NINA KEN MUTAHI.....2ND RESPONDENT

MIA KEN MUTAHI.....3RD RESPONDENT

RULING

1. The deceased Mary Gathoni Mutahi died intestate on 19th December 2006. The grant of letters of administration intestate was issued to her widower Kenneth Mutahi Mukua (1st respondent) on 20th May 2008. On 15th February 2012 the grant was confirmed and certificate issued in which the property of the estate was distributed to the three daughters of the deceased who were Jayne Mutahi (the applicant), Nina Ken Mutahi (the 2nd respondent) and Mia Ken Mutahi (the 3rd respondent). This was by their consent and that of the 1st respondent.

2. One of the properties of the estate was Pangani House on LR No. 209/2389/79 which was developed with 5 shops of different sizes and rear rooms that consisted of 12 single units, 1(2) No. bedroom house, 4 kitchens and extension units. The premises were rented to tenants. In the certificate of confirmation, it was agreed that the property be sold and the proceeds be distributed equally to the applicant, 2nd respondent and 3rd respondent, and that the advocates costs be borne by the estate, which costs were to be agreed or taxed. Since that time, the property has not been sold.

3. On 22nd September 2015 the applicant filed this application complaining that the 2nd and 3rd respondents had refused to have the property sold, were collecting rent and sharing it between themselves to her exclusion, and that even when she has got a buyer they have been unwilling to have the property sold because they were benefitting from it by way of rent which they were not sharing. The application was brought for them to provide account of the rents collected from 15th February 2012 to date, to pay her 1/3 of all such rents and for the court to order the sale of the property to any purchaser willing to pay the highest price after valuation.

4. The 1st respondent filed a replying affidavit to oppose the application, although in it he stated that:

“13. THAT I am willing and ready to dispose the subject property, (even today) once a suitable buyer has been identified and the offer is acceptable to all beneficiaries.”

He also agreed that the property be valued by a professional valuer to determine the current purchase price. His point of departure was the allegation that at the confirmation it was agreed that before the property was sold he was to continue to collect rent and use it for his upkeep until a suitable buyer is identified. He further stated that it was agreed that even after the sale the applicant, 2nd and 3rd respondents were to continue taking care of him.

5. The applicant swore a further affidavit to deny that there was any agreement to take care of the 1st respondent, either before or after the confirmation of grant, or at all. The 1st respondent claimed that the sale was being hampered by the fact that the lease over the property had expired, and its renewal was being pursued. The applicant responded that indeed the lease had expired, but that its renewal had been sanctioned except for the signing of the same. The 1st respondent stated that there had been attempt to sell the property by public auction but the same could not go through as the price offered was too low. The applicant stated that she was unaware of the said public auction. It is evident that on 1st September 2010 Murage & Mwangi Advocates, acting for the applicant, 2nd and 3rd respondents, instructed Ellan Traders to sell the property by public auction, and the reserve price was Kshs.80,000,000/=. On 3rd May 2012 Ellan Traders wrote to say that following instructions dated 5th March 2012 they had advertised the property for sale and that the highest bidder was at Kshs.45,000,000/=. The applicant swore that she was unaware of this, and that she had herself got a buyer for Kshs.60,000,000/= which her sisters had refused saying they could not accept anything less than Kshs.100,000,000/=. She had herself got the property valued by Tuliflocks Limited at Kshs.59,000,000/=as at 25th February 2016. Lastly, the applicant stated that it was the 2nd and 3rd respondents, and not the 1st respondent, who were collecting the rent and who did not want the property sold. The 1st respondent was, according to her, not a beneficiary of the estate and had no claim to the property. The 2nd and 3rd respondents did not respond to the application, and the replying affidavit of the 1st respondent did not state that he was responding on his behalf and that of the two respondents.

6. Looking at the certificate of confirmation, the Pangani property belongs to the applicant and the 2nd and 3rd respondents, each having equal share. The 1st respondent was not declared a beneficiary of the estate, and he has no claim to the property in question. The 2nd and 3rd respondents know this well, and I do not see how they can allow the 1st respondent to be collecting the rents. I find that the rents are being collected by the 2nd and 3rd respondents. They are supposed to account to the applicant for the rents. If the 1st respondent is collecting such rent, now that he says he is so collecting, he will also account. Further, I find that there was no agreement that the 1st respondent be taken care of by the applicant and the 2nd and 3rd respondent, either before or after the sale of the property. Lastly, I find that the only lasting solution to the dispute between the parties is to implement what was agreed on in the certificate of confirmation in regard to the Pangani property: that the property be sold and the proceeds be equally shared among the applicant and the 2nd and 3rd respondents.

7. Consequently, I allow the application dated 17th September 2015, and make the following orders:-

(a) the respondents shall within 30 days file into court a true and accurate account of all the rents received from 15th February 2012 to date;

(b) the applicant shall be entitled to 1/3 of such rents, and therefore she will within 14 days of the filing of account file a replying affidavit to challenge the account;

(c) the parties shall within 14 days agree on a reputable and registered valuer who shall value the

property and file a report, failing which the applicant shall within 30 days of failure appoint a registered and reputable valuer to so value and file report;

(d) the matter shall be heard on 7th November 2016 to appoint a property agent (and parties shall be at liberty to agree on one before then or each side can bring names of two property agents) to sell the property and file the proceeds as will be directed;

(e) costs, fees and or commissions when filed and agreed or taxed shall be borne by the estate as directed by the court.

DATED and SIGNED at NAIROBI this 15th day of SEPTEMBER 2016.

A.O. MUCHELULE

JUDGE

DELIVERED AND SIGNED this 19TH day of SEPTEMBER 2016.

W. MUSYOKA

JUDGE