



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 2183 OF 1995**

**IN THE MATTER OF THE ESTATE OF NICHOLAS KAKAI (DECEASED)**

**ALICE BASWETI NAITERA.....APPLICANT**

**VERSUS**

**MERCY WANJIRU NAITERA.....RESPONDENT**

**RULING**

1. The deceased died intestate on 27<sup>th</sup> July 1995 at Nairobi. On 20<sup>th</sup> May 1996 Letters of grant of administration were issued to Alice Basweti Naitera & Mercy Wanjiru. Subsequently on 9<sup>th</sup> April 1997 the same were confirmed naming Alice Basweti Naitera as the only deceased's widow, and Mercy Wanjiru, Antony Gichigo, Anne Wairimu, Susan Wangari, Christopher Gichengo, John Ogachi and Simon Ombati as the deceased children surviving him. They listed the following properties as the only assets of the deceased Nairobi/Block 79/346, Njiru plot and deceased's death gratuity. The same stated that Nairobi/Block 79/346 be equally shared among all children and their step mother, Njiru plot 12.2% share each, appointed Kaai Mugambi & Co. Advocates and N. Kiagayu & Co. Advocates be appointed as joint trustees for sale of entire estate.

2. On 3<sup>rd</sup> March 1998 the widow of the deceased filed an application seeking revocation of the said grant of letters of administration. The said application was dismissed by Justice Mitey on 12<sup>th</sup> May 2000. Subsequently via an application dated 8<sup>th</sup> July 2002 Mercy Wanjiru Naitera sought orders to have Alice Basweti Naitera vacate from Land Reference Number Nairobi/Block 79 /346 and seeking to be allowed to offer the same for sale. The said application came for hearing on 28/1/2014 the respondent despite being served did not attend court and ex-parte orders were issued to the applicant by Justice L. Kimaru. On 25<sup>th</sup> July 2014 Mercy Wanjiru Naitera filed an application seeking eviction orders against her step mother Alice Basweti Naitera and her children from **Land Reference Number Nairobi/Block 79/346** and seeking that the trustees cause the same to be valued and sold. The application was heard before Justice L. Kimaru on 16<sup>th</sup> September 2014 and allowed. Alice subsequently filed the application dated 19<sup>th</sup> February 2015.

3. The application dated 29<sup>th</sup> May 2014 is brought under section **35(1)a, b(2)(3)(4)(5), Section 37 Order 12 rule 7, Order 22 of the Civil Procedure Rules 2010**. The applicant seeks the following orders;

i. Prayers i is spent

ii. That there be a temporary stay of execution of the order herein given on 28<sup>th</sup> January 2014 and all other consequential orders and/or further proceedings in this matter pending hearing and

determination of this application.

iii. That this honourable court be pleased to set aside, review and/or vary the order herein given on 28<sup>th</sup> January 2014.

iv. That the respondent herein be ordered to comply with the order made by Justice J. K Mitey.

v. That costs of this application be provided for.

4. The application was grounded on grounds that both the applicant and respondent are administrators of the deceased's estate adding that the respondent has obtained eviction orders against her to facilitate renovations and access for viewing by would be purchasers. She deponed that she has been in and out of the hospital and has lost touch with her advocate and could not prosecute the application dated 29<sup>th</sup> May 2014 and that she had not been involved in the decision to sell the house or on how the same was to be shared. She avers that she is the only surviving wife of the deceased and thus has a life interest in the deceased's property. That the respondent has instructed auctioneers to evict her out from the matrimonial home and intends to sell the house. She depones that she has school going children, she's unemployed and cannot afford to obtain alternative accommodation and that it was only fair if the orders therein were set aside.

5. The applicant in her supporting affidavit reiterated the grounds as laid out in her application. She deponed that Patrick Maina Nderitu and Mercy Wanjiru Naiterra applied for letters of administration without her knowledge and only learnt of the citation much later and she appointed an advocate to represent her interests. That she instructed her advocate to set aside the orders of 28/1/2014 that though she made the said application and given a date. When the same come up for hearing the same was not listed and later on lost touch with her and she could not take another date. That she has been in hospital since May 2014 and has not been able to give her advocates on record full instructions to prosecute the matter to set aside the same. That the respondent obtained orders to evict her and sell off the house and on 17<sup>th</sup> February 2015 she instructed Auctioneers who threw out all her house hold goodness and she and her children were forced to spend the night in the cold and that the children's learning has been disrupted. She avers that failure to prosecute the application dated 29<sup>th</sup> May 2014 was not intentional but due to unfortunate situations on her ill health. She prays for an opportunity to prosecute the same adding that the respondent be ordered to give an account of all other properties belonging to the deceased.

6. The respondent filed an affidavit dated 10<sup>th</sup> June 2014 and 24<sup>th</sup> March 2015. In her affidavit dated 10<sup>th</sup> June 2015 she gives a background of the matter at the stage of confirmation of the grant and depones that Buru Buru phase 5 house no. Nairobi Block 79/346 was to be divided equally among the beneficiaries of the deceased and that she is not aware of the many other of the properties which the applicant refers to. She depones that the applicant had refused to vacate the premises and that the process of administering the estate has been transparent. In her affidavit dated 24<sup>th</sup> March 2014, she depones that the applicant's application has been overtaken by events as she has been evicted and that the house is being sold as was directed by the court and that any reinstatement of the applicant in the house would undo the orders of distribution and unfairly place the applicant in an advantageous position in respect of the estate and in control of their inheritance which she has controlled ruthlessly until the eviction was effected.

7. I have considered the oral submissions. The applicant submits that the issue in this matter is the mode of distribution of the deceased estate and that the certificate of confirmation it was indicated that L.R Nairobi Block 79/346 be distributed equally. That she is a wife of the deceased and therefore the surviving spouse and that the co- administrator has not been involving her in the applications filed in court and has not mentioned that she is a co- administrator. That the parties have not agreed on the mode of distribution. That there are other properties of the deceased including the death gratuity and that before the deceased died he had made provision for the first house who had been given a house at Buru Buru, that the property in issue was given to the applicant and that being a matrimonial home it should not be sold. That since she has not agreed on the mode of distribution there should be a stay of execution of the orders given so that the house is not sold and that the court should also grant an order to have the

dependents go back to the drawing board and agree on the mode of distribution. That she has no means of survival and no alternative place and hence her application to be reinstated to the house.

8. Whilst opposing the application the respondent stated that the court is being called upon through back door to reconsider the dispute between the applicant and the respondent and seeking to reopen the case afresh for hearing. That there is no allegation that the applicant was pushed aside that what was submitted on the first house was from the bar. That her counsel was served and that what the applicant is asking cannot happen if she is asking for the distribution of the estate and that she will gain if she were to be granted the orders and that her claim of life interest should have been conversed before the determination of the estate but she failed to do so thus it is too late. That the estate has been distributed and the property mentioned in Njiru has not been allocated. That the court's order rejecting her application to cancel the grant still stands. That this is an appeal through the back door. The respondent asked the court to consider the time factor for review as has been inordinate delay. In response the applicant stated that the issue has not been conversed as she is a surviving spouse and cannot be denied her right in law. That she was not agreeable to the mode of distribution but the applicant never got a chance to respond to the application and she is not seeking to frustrate any court order.

9. I have taken note that this matter has been in court for almost 9 years with the grant of letters of administration having been confirmed way back on 9th April 1997. This matter was last in court on 18th January 2005 before it came up for the said application on 28/01/2014. In essence the application before this court seeks review of the orders of 28<sup>th</sup> of January 2014. The order of 28<sup>th</sup> of January 2014 granted the orders sought in the application dated 8<sup>th</sup> of July 2002 seeking to have the applicant vacate the premises in issue or the alternative if a buyer is found to have the Deputy Registrar execute the conveyance in documents. It is apparent from the court record that the applicant did not appeal against Justice Mitey's order where he declined to revoke the letters of administration.

10. In this application the applicant has expressed dissatisfaction in the mode of distribution and claims that her rights as a surviving spouse should be taken into account. If the applicant was dissatisfied with the mode of distribution she should have appealed. It is apparent that her advocates was served and did not attend the hearing of the application dated 8<sup>th</sup> July 2002. I find no justifiable cause to review the said orders. The orders sought by the applicant to be reinstated in the said premises are tantamount to granting final orders and are orders that are not sought in the application dated 29<sup>th</sup> May 2014. The parties should comply with the orders of Justice Mitey if they have not done so. I therefore decline to grant the orders sought in the application dated 29<sup>th</sup> May 2014. No orders as to costs. It is so ordered.

Dated, signed and delivered this 15 day of *June* 2015.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Applicant** .....  
.....**For the Respondent** .....  
....**Court Clerk**