



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 676 of 1991

IN THE ESTATE OF WAIRIMU MWEGA NUGI (DECEASED)

IN THE MATTER OF AN APPLICATION

BY

ANDREW CHEGEAPPLICANT/CO-ADMINISTRATOR

VERSUS

JOSEPH FRANKLIN MWEGA RESPONDENT/CO-ADMINISTRATOR

RULING

On 3rd February 2012, Andrew Chege, the applicant, filed an application by way of summons dated 02.02.2012 against Joseph Franklin Mwega, the respondent, seeking against him, his lodgers and or licensees orders to the effect that he should vacate forthwith the property known as LR 330/891 and give vacant position thereof to the applicant. An order for the officer commanding Kileleshwa Police Station to assist in enforcement of the order of eviction was also sought. This being a civil matter, the order for police intervention was not necessary.

On 9th March 2012, the advocates for the respondent filed grounds of opposition to the application. They contended that the application is frivolous, misconceived and an abuse of the court process. They further contended that the law of Succession Act does not provide for remedies such as are sought in the application.

When the application came up for hearing on 23.05.2012, Advocate Mwangi Gachimu for the applicants contended that the court has powers to make orders such as are sought in the application. He pointed out that the respondent is the applicant's co-administrator and opined that the court has wide powers to make the orders sought so as to meet the ends of justice and that administrators and executors of estates are subject to the jurisdiction of the court. It was Mr. Mwangi Gachimu contention that property No.330/891 was vested in the name on the applicant by dint of the certificate of the confirmation of the grant and that consequently the applicant was entitled to remove and eject from the property the respondent and other persons not entitled to be on it. As far as he was concerned, his client came to court as a beneficiary to enforce his right to inheritance in the estate of the deceased. In doing so, he submitted, the Applicant was obviating duplication of suits.

The record in this cause shows that the deceased died on 22nd November 1990 domiciled in Kenya. Her estate comprising three properties all situate in Nairobi was distributed 15th October 1993 by this court in this cause. She was survived by her son, Andrew Chege (the applicant) who was a minor, and her

husband, Joseph Franklin Mwega Nugi. The grant of letters of administration was made to the deceased's said husband and advocates K. Mwaura & Company. The deceased's said minor son attained majority age in 1991 and on 11.10.2010 administrators K. Mwaura & Co. Advocates paved way for Andrew Chege. He is now an adult aged 39 years.

According to the certificate of confirmation of the grant dated 15.10.1993, property No.Thigiri LR 330/891 along with property No. Thigiri 17/186 were given to Andrew Chege, the applicant, while plot No.156/1/A Umoja Phase II was given to the deceased's sister, one Susan Nyambura Ngunyi. The affidavit sworn by Andrew Chege on 02.02.2012 in support of the application, shows that the Respondent is presently in possession of property No. Thigiri LR 330/981 and that he resides in one part of it while he leases out the other part but does not account to the applicant for the rent collected. The applicant avers that the respondent does not pay rates for the property No.Thigiri LR 330/891 which have now escalated to Shs. 1,148,921/=. The applicant is apprehensive that he might lose his inheritance if the property is sold for non-payment of rates. The property (338/891) was transferred to the name of the applicant on 23.09.2011.

The respondent did not file a replying affidavit to refute or controvert the averments contained in the affidavit sworn by the applicant in support of the application. The respondent merely filed grounds of opposition dated 06.03.2012. The applicant states in paragraphs 10, 11, 12 and 13 of his affidavit in support of the application:-

10.THAT I am entitled to L.R. No.133/891 as a matter of right as the only beneficiary/heir to the property and at the prime age of 39 years I am able to exercise my proprietary rights and obligation in respect thereof.

11.THAT as the court record will clearly show the transfer to my name was through the Court's assistance since the respondent had relentlessly refused to execute documents for the transmission and transfer of the property to me despite numerous demands. I have been advised by my counsels on record that the transfer effectively determined the administrators' role over this property.

I annex hereto copies of correspondence with the respondent collectively in a bundle marked as exhibit "CAN-6" and a copy of the Title marked "CAN-7".

12.THAT I verily believe that the respondent will never allow me to take possession and or use and enjoy the property or any proceeds from the property unless he is compelled to by the Honourable Court hence my present application which I urge the Court to allow in the interest of justice.

13.THAT the respondent's intention to hold on to the property has been expressed in his latest response to my demand to him and his tenants to vacate L.R. 330/891, wherein he clearly states that he will not willingly release the property to the beneficiary and has also incited his lodgers/licensees not to comply hence the need to offer the applicant police protection.

I annex hereto copies of the demand and replies to demand collectively in a bundle marked "CAN-8".

Is the applicant entitled to the orders he seeks? The averments contained in the applicant's affidavit in support of the application were not denied. Counsel for the respondent contended that the law of Succession Act does not provide for "remedies" such as the applicant seeks. He also contended that the respondent has a legitimate claim to continue in occupation of the subject property but he did not show what legal right the respondent has or the basis of his claim. Both the applicant and the respondent are adults. The title to the subject property No. L.R. 330/891 is vested in the applicant. In short, the applicant is the legal owner. The said property is the applicant's legacy from his late mother. The certificate of confirmation of the grant dated 15.10.1993 clearly shows that the court endorsed the applicant's inheritance to the property. On 23.09.2011 the legal title to the subject property was registered in the name of the applicant.

Pursuant to **Section 47** of the **Law of Succession Act**, this court has jurisdiction to entertain any

application and to determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient. Under **Rule 73 of The Probate and Administration Rules** made pursuant to **Section 97** of the Law of Succession Act, the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court are not limited. The stance taken by the respondent through his counsel is that the applicant should file suit for the orders he seeks. Why should the road to justice be made long and tortuous? This is a succession matter. The applicant is entitled to the subject property. Why should he be compelled to institute another suit that may take years to determine while his right to the inheritance in these succession proceedings is as clear as daylight? I am not persuaded by the submission made by the respondent's counsel that this court cannot make the orders sought by the applicant. I do not subscribe to the view that the applicant should enforce his right to the property through another suit. In my view, it is within the amplitude of the powers of this court under the law of Succession Act to make such orders as are necessary to give effect to the distribution of the estate as contained in the certificate of confirmation of the grant.

Accordingly, I allow the application. I order that:

- 1.the respondent, Joseph Franklin Mwege, shall within 30 days of the date hereof vacate the property known as L.R. Thigiri 330/891 and give possession of the same to the applicant, Andrew Chege.
- 2.So that the order herein given is meaningful, I also order that the respondent shall desist from collection of rent from the tenants in the subject property with effect from the date of this ruling and further that the applicant shall be the person entitled to collect rent from the tenants in the subject property No. L.R. Thigiri 330/891 from the date hereof.
3. the respondent shall pay the costs of this application.

G. B. M. KARIUKI, SC

JUDGE

Dated and delivered at Milimani Law Courts, Nairobi, on this 25th day of April 2013 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.

W. MUSYOKA

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JUDGE