



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION NO. 1 OF 1965

IN THE MATTER OF THE ESTATE OF RAHEMTULLA ALI BUX (DECEASED)

MOHAMED ASIF YUSUF RAHEMTULLA.....APPLICANT

VERSUS

REHMAT ALI BUX

MOHAMED YUNAS RAHEMTULLA ALI BUX.....RESPONDENTS

RULING

1. The deceased in respect of whose estate these proceedings relate died intestate in 1964. A grant was issued on 23rd November, 1967 to Jenab Bibi, Mohamed Hanif Rahemtulla and Mohamed Yusuf Rahemtulla as joint administrators. The estate was distributed before the Kadhi's Court in succession case No. 7 of 1999 in accordance with Islamic Law on 13th May, 1999.

2. Following the death of the three administrators, Mohamed Asif Yusuf was appointed as a new administrator on 11th May, 2000 before the High Court vide succession Case No. 175 of 1999. On 17th November, 2008 afresh grant was issued to a new administrator despite the existence of the Kadhi's court's confirmed grant.

3. Among the assets listed as comprising the estate of the deceased was 2/16 share in Mombasa Block XIII/66 and 67. Vide summons for revocation of grant dated 15th June, 2016, one Mohamed Asif Yusuf Rehemtulla a grandchild to the deceased sought to the grant revoked on grounds that the grant issued on 17th November, 2008 confirmed on 24th February, 2010 was obtained frequently.

4. The application for revocation was however dismissed on 24th January, 2020 with the court ordering that: -

1. The application dated 15th June, 2016 is hereby dismissed.

2. The respondents shall appoint a valuer to undertake valuation of Plot No. Mombasa/Block XIII/67.

3. The respondent shall thereafter sell Plot No. Mombasa/ Block XIII/67 at market value.

4. The respondents shall distribute the proceeds of sale of the property to the registered owners thereof in accordance with their shares.

5. To facilitate the aforesaid valuation and sale, the applicant and any other beneficiary in possession of the property, shall vacate the property on or before 31st March, 2020

6. All rents from the property shall with effect from 1st February, 2020 be deposited in court.

7. Valuation fees shall be paid from the rent proceeds.

8. This being a family matter each party shall bear own costs.

5. Pursuant to the said orders, the administrators issued to Lilian Kathure Rintari one of the tenants in Mombasa/ Block XIII/67 seeking her

to vacate the premises as a tenant to pave way for the valuation, sale and distribution of proceeds therefrom amongst the beneficiaries.

6. Aggrieved by the notice to vacate premises, the said Lilian (Tenant) moved to this court vide a notice of motion dated 15th September, 2020 filed pursuant to Section 47 Law of Succession Act seeking: -

1. Spent

2. That this court be pleased to enjoin the applicant as an Interested party in this case.

3. That the Interested party be allowed to deposit her rent in court on the demised premises on Plot L.R Mombasa/Block XVIII/76.

4. That an order be issued barring the beneficiaries of the estate herein either by themselves, their agents, servants and/or employees from in whatsoever manner interfering with the applicant's quiet possession of the demised premises on plot L.R No. Mombasa /Block XVIII/76.

5. That this Honourable court be pleased to make any other or further orders as it may deem fit and just to grant.

6. That costs of this Application be provided for.

7. The Application is premised upon grounds stated on the face of it and an affidavit sworn on 17th September, 2020 by the applicant herein. It is the applicant's case that she is a standing tenant of over a period of 20 years on plot L.R Mombasa/ Block XVIII/67 which is one of the assets of the estate in this case.

8. She averred that she has been served with notice by Y. A. Ali Advocates asking her to vacate the same premises allegedly on orders from the court. She stated that her business is so vast and that it was not possible to acquire alternative premises within such a short notice. That if the vacation notice is implemented, she will stand to lose.

9. In response, Waheed Khan the caretaker of the Rahemtulla Ali Bux on behalf of the legal representatives of the estate filed a replying affidavit sworn on 25th September, 2020 stating that the vacation notice served upon the applicant was in implementation of the court orders issued on 24th January, 2020. That the court directed the premises be vacated on or before 31st March, 2020. That the notice given was reasonable for the applicant to look for alternative premises.

10. When the application came up for hearing, Mr. Mokaya for the Interested party submitted that his client was discriminated at as some tenants in the same premises were not served with the vacation notice. He basically adopted the averments contained in the affidavit in support.

11. Mr. Hassan appearing for the estate opposed the application urging that the applicant has no interest in the estate as she is not a beneficiary of the estate hence the joinder application cannot apply. As regards the applicant's request to deposit rent in court, Mr. Hassan submitted that the same was not tenable as the prospective buyer wants vacant possession of the premises. He urged the court to dismiss the application.

Determination

12. I have considered the Application herein, affidavit in support and oral submissions by both counsel. The issues that emerge for determination are: -

1. Whether the applicant has met the criteria for joinder as an Interested party.

2. Whether this court can stop the vacation notice served against the applicant.

13. The applicant herein is a tenant occupying and doing business in one of the estate's premises otherwise known as Mombasa/Block XIII/67.

There is no dispute also that the applicant is not abeneficiary of the estate. Her interest is that of a tenant to the same premises. Does she have any interest or *locus standi* in the estate?

14. *Locus standi* is basically the right to appear or be heard in court or other proceedings. See **Ibrahim v Hassan & Charles Kimenyi Macharia, Interested party (2019) eKLR**. The applicant in this case has no *locus standi* to be heard in so far the estate is concerned. She has no ascertainable beneficial interest in the estate hence cannot not be enjoined in the proceedings.

15. Having held as above, the next question that renders itself for an answer is whether this court can stop the vacation notice? For the court to issue the orders sought, it must evaluate the background and source of the force behind the notice to vacate and possible eviction.

16. There is no dispute that the notice to vacate arose out of a lawful court order issued by a competent court on 24th January, 2020. That order was precipitated by the need to complete administration of the estate which has been running since 1964. For this matter to lie as pending in the court registry is a mockery of justice. Litigation must come to an end.

17. The applicant admitted being a periodic tenant who in law is entitled to one month's notice (30 days). She cannot claim superior rights to demand longer period. There is no tenancy agreement suggesting that she is entitled to a longer period than she was given.

18. Besides, the estate cannot remain undistributed because of perceived 3rd party unwarranted rights or claim. For the property to be sold as per the court order there must be vacant possession.

19. The applicant cannot insist on staying in the premises as if the court order was nothing to her. If she has any claim over breach of her rights, the forum is not the probate court but a court remedy elsewhere. See **Kipngetich Arap Cheruiyot vs Peter Kiprop Rotich Civil Appeal No. 128 of 2008** where the court held that: -

“Claims by 3rd parties to deceased person’s properties although sometimes lodged in succession cause of the deceased person are better litigated in separate suits.”

20. In the instant case, the applicant has technically achieved a prolonged notice to vacate the premises through the back door by filing this suit. Her claim is not based on any factual basis. It is meant to extend her stay thus further delaying distribution of the estate. Accordingly, the application is dismissed for lack of merit. I award costs to the respondents.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 12TH DAY OF MARCH, 2021.

J.N. ONYIEGO

JUDGE