



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei - J

SUCCESSION CAUSE NO. 122 OF 2010

IN THE MATTER OF THE ESTATE OF GEDION MANTHI NZYUKO (DECEASED)

MONICAH MWENGA MANTHI.....1ST ADMINISTRATOR/RESPONDENT

AARON MUTHIANI.....2ND ADMINISTRATOR/RESPONDENT

-VERSUS-

JOHN MUKULYA MANTHI.....3RD ADMINISTRATOR/APPLICANT

AND

MARY MAINA NANDEKA..... INTERESTED PARTY

RULING ON DIRECTIONS

1. The Summons dated 27th October, 2020 is brought under section 47 of the **Law of Succession Act, Rule 73 of the Probate and Administration Rules** wherein the 3rd Administrator/Applicant seeks the following orders:

*a) That an order do issue compelling the interested party to vacate from all that property known as **KIMATHI ESTATE HOUSE NO. A17** immediately but not later than 30 days after the determination of this application and in default eviction do issue immediately.*

*b) That the applicant **JOHN MUKULYA MANTHI** does pay the entire purchase price for the said property known as **KIMATHI ESTATE HOUSE NO. A17** in satisfaction of the sale agreement dated 22/12/2018 within 90 days of vacating by the interested party or eviction whichever comes first.*

c) That the interested party be ordered not to vandalize any part of the suit property and to give vacant possession in the state as it is.

d) That the cost of the application be borne by the interested party.

2. The application is supported by the affidavit of the 3rd Administrator/Applicant sworn on even date as well as grounds set out on the body of the application wherein it was averred inter alia; that the applicant is the 3rd administrator and a beneficiary by virtue of being a son to the deceased; that the suit property belongs to the estate of the deceased which upon confirmation of the grant was to be sold and the proceeds shared equally between the beneficiaries; that the initial 1st administrator George Nziuko who had been in occupation thereof was given priority to purchase it at Kshs 8 million but was unable to pay and opted to rescind the agreement and was to vacate the premises to pave way for the new owner who is the applicant who had entered into a new sale agreement with the administrators and beneficiaries at a price of Kshs 10 million; that the said George became uncooperative, refused to vacate from the property and made it difficult for the applicant herein to start paying the monies; that the said George Nziuko later passed on but the interested party herein who is not a direct beneficiary has refused to give vacant possession of the property; that the applicant is ready to comply with the payment of the purchase price to the estate within the timeline requested upon the interested party giving vacant possession. The applicant annexed copies of the various sale agreements as well as the rectified certificate of confirmation of grant.

3. The interested party strongly opposed the application vide a replying affidavit sworn on 3/2/2021 wherein she averred inter alia; that she has never participated in the succession cause and has not been made a party to the suit; that she is a wife to the late 1st administrator George Nziuko and that her family has been in occupation of the suit property that was to be purchased by her late husband upon getting his shares in other properties of the deceased that had been earmarked for sale and also secure a bank loan; that she is willing to pursue the rights of her late husband in acquiring the house as per the orders given by this court vide the ruling dated 25/11/2015; that her late husband did not renounce his right to purchase and retain the house contrary to the claim by the applicant.

4. The interested party filed a further affidavit sworn on 2/6/2021 wherein she averred inter alia; that she has already obtained a limited grant dated 26/1/2021 vide **Succession Cause No. E1265 of 2020** and has already filed a claim in the **ELC NO. E145 of 2021** where she has sued the administrators of the estate of the deceased and seeks on her own behalf and on behalf of the estate of her late husband restraining the administrators including the applicant herein from evicting or interfering with her occupation of the suit property and also an order compelling the said administrators to sell and transfer the suit property to the estate of the late George Nziuko.

5. Parties agreed to canvass the application by way of written submissions. The applicant's undated submissions were filed on 10/3/2021 while the interested party's submissions are dated 17/6/2021.

6. Messrs B. M. Mungata and company advocates for the applicant raised three main issues namely; whether the deceased signed the rescission agreement; whether the court can rewrite the contract between the parties and whether the interested party has an interest in the property and the estate at large. It was submitted that the copies of agreements availed left no doubt that the deceased George Nziuko duly signed them and that the court cannot rewrite a contract between the parties herein and hence the interested party's request to court for intervention cannot succeed. It was also submitted that the interests of the interested party will be catered for once the proceeds are shared out and she will get her husband's share. It was also submitted that the interested party being wife to a deceased administrator did not require her to obtain letters of administration of her deceased husband be enjoined into the proceedings as a person of interest. It was finally submitted that the orders are necessary for the administration of the estate of the deceased.

7. Mr. Amuga for the interested party raised three (3) issues for determination namely; whether the interested party has been properly brought into the proceedings; whether the applicant is entitled to an eviction order as sought; whether the applicant is entitled to an order allowing him to pay for and purchase the suit property as sought in the application. Regarding the first issue, counsel submitted that the interested party could not be brought into succession proceedings which had long been concluded and the entire estate distributed and that no application for joinder had been made. Regarding the second issue, it was submitted that the matters raised should be dealt with in the ELC where the interested party has already filed suit. Regarding the third issue, it was submitted that the interested party should be allowed to purchase the suit property on behalf of her late husband as earlier agreed by the family of the deceased. Reliance was placed in the cases of **In Re Estate of Domtilla Opudo (Deceased) [2017] eKLR, In Re Estate of Joseph Wamukota Wandah (Deceased) [2020] eKLR.**

8. I have considered the applicant's application, the rival affidavits and the submissions by learned counsels. It is not in dispute that the succession proceedings herein have been concluded since the grant has already been confirmed and that the estate has been distributed accordingly. It is also not in dispute that the family of the deceased agreed to have the suit property be sold and the proceeds shared equally between the beneficiaries. It is also not in dispute that the family of the deceased agreed to give the beneficiary in occupation of the said suit property an option to purchase the same. It is not in dispute that the said beneficiary has since passed on and that his wife who is the interested party herein has lodged a civil suit before the **ELC vide No. E145 of 2021** against the administrators herein who include the applicant herein and which dispute is pending determination. It is also not in dispute that this court being a succession court is mandated to distribute the estate of the deceased to his beneficiaries and which it has successfully accomplished. That being the position, I find the singular issue for determination is whether this court has the requisite jurisdiction to entertain the matter.

9. From the foregoing observations, it is now clear that even though this court has already concluded the function of distributing the estate, it is being called upon to adjudicate a dispute over ownership of one of the assets already distributed by the beneficiaries. Upon the confirmation of the grant, the administrators were then to proceed to carry out the exercise of distribution between the beneficiaries as per the certificate of the confirmed grant and in the event of disputes relating to the land in question then they are expected to take the dispute to the Environment and Land Court for adjudication. Further, the administrators were expected to have the titles to the properties transmitted into their names from where they could effect transfer of ownership to those entitled to benefit therefrom. The issue herein concerns the use and occupation as well as title to land which should be within the purview of the ELC by dint of Article 162(2)(b) of the constitution. One of the prayers sought is for eviction of the interested party from the suit property for which this court is not seized with once the distribution was concluded. As there is already a suit before the ELC which is the right forum, the parties herein should ventilate their issues before the said court as this court clearly lacks jurisdiction to hear and determine the dispute. Suffice to add that the administrators still have the capacity and locus standi to appear before the said ELC and present their defenses on behalf of the estate if need be.

10. In the result, it is my finding that the 3rd administrator's application dated 27/10/2020 lacks merit. The same is dismissed. Each party to meet their own costs.

It is so ordered.

Dated and delivered at **Machakos** this **15th** day of **July, 2021**.

D. K. Kemei

Judge