



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 463 of 2014

(Formerly Kisii High Court Succession Cause No. 505 of 2010)

IN THE MATTER OF THE ESTATE OF ESTHER NYAKERARIO Aias **ESTHER NYAKERARI (DECEASED)**

BETWEEN

WAIRUNGU RIOBA TURUKA.....PLAINTIFF/RESPONDENT

-VERSUS-

MASERO RIOBA TURUKA.....DEFENDANT/APPLICANT

RULING

By a Notice of Motion Application dated 10/2/2021, filed in court on 19/02/2021, the applicant sought the following orders:-

1. Spent.
2. Spent.
3. Upon hearing of this application inter partes, the court be pleased to issue orders staying the auction and sale of Plot No. 51, in Isebania Town.
4. Upon hearing of this application inter partes the court be pleased to adopt the agreement for payment of Kshs. 500,000/= only as agreed by the parties as an order of the court.
5. In the alternative to prayer 4 above, an order do issue compelling the respondent to give first priority to the applicant and other siblings to buy his shares as ordered by court and to abide by other consequential orders.
6. Costs be provided for.

The application is based on the grounds appearing on the face thereof and the Supporting Affidavits of Masero Rioba Turuka, Mwita Rioba Turuka, Turuka Rioba Turuka, Magabe Rioba Turuka, Nyawacha Rioba Turuka, Ngocho Rioba Turuka and Steven Mwita Rioba. The applicants briefly deponed:-

- a) That judgement in this matter was delivered on 11/12/2019 which ordered that within 90 days the family members discuss the mode of distribution of the estate of their deceased mother Esther Nyakerario.
- b) Consequently, the family convened a meeting on 20/2/2020 and 27/2/2020 presided over by the chief and the respondent asked the family members to give him a total of Kshs. 500,000/= as settlement and leave Plot No. 51 Isebania Town for the remaining beneficiaries.
- c) That the report and subsequent agreement was compiled on 5/3/2020 and filed in court.
- d) That the beneficiaries gave the respondent the responsibility to follow up with his advocates and draft a consent to be signed by all parties, to be adopted as an order of the court but the respondent did not do as agreed.

- e) That had it not been the Corona pandemic, the beneficiaries would have paid off the Kshs. 500,000/= as agreed.
- f) That about a month ago, auctioneers visited Plot No. 51 in Isebania Town.
- g) The judgement of 11/12/2019 was specific that in the event Plot No. 51 in Isebania Town was to be sold, the six (6) applicants would have priority to buy their siblings shares as valued.
- h) That three (3) other beneficiaries have renounced any claim in the said property save for the respondent who wants to sell the property.
- i) That there is malice in the respondent wanting to sell the plot without the knowledge and consent of the remaining nine (9) beneficiaries.

The application was opposed. The respondent filed a replying affidavit dated 29/4/2021 sworn by the respondent. The respondent deponed:-

- i. That through his advocates, he instructed that Plot No. 51 in Isebania Town be valued and sold to give effect to the judgement of 11/12/2019.
- ii. That as per the judgement of 11/12/2019, the court ordered that himself and his brother be paid Kshs. 388,800/= each which hasn't been paid to date.
- iii. That the court further ordered that Plot No. 51, shall devolve equally to all the 10 beneficiaries at 1/10 share each which has not been given to him or his brother Maroa Rioba Turuka.
- iv. That on the meetings held at the chief's office, no consensus had been reached. The chief and the elders misapprehended the judgement by assuming that the hearing of the succession cause was being conducted before them which was the sub-division of Plot No. 51 into 1/10 shares.
- v. That he did not accept to be given costs of Kshs. 500,000/= as to forgo his entitlement in his mother's estate.
- vi. That it is in the interest of the beneficiaries that Plot No. 51 of the estate be valued and sold so that the proceeds thereof of Kshs. 388,800/= be paid to himself and his brother and also 1/10 share of the estate.
- vii. That as of November 2019, the petitioners had accumulated a further sum of Kshs. 216,000 in form of rent due to him and Maroa Rioba Turuka which have not been paid and which will have to come from the sale proceeds of Plot No. 51.

The applicant filed a further affidavit dated 10/8/2021. He reiterated the averments in his supporting affidavit of 10/2/2021 and in response to the alleged accumulated rent of Kshs. 216,000/=, the applicant deponed that it is a mere exaggeration and that his brother Maroa Rioba Turuka has not sworn any affidavit to confirm that he has not been paid his rent arrears; That the other five beneficiaries by their earlier affidavits are in agreement that the shares of the four brothers be bought by them.

The application was canvassed by way of written submissions which I have duly considered.

Analysis and Determinations

The main issues to be determined by this court are:-

- a) Whether the respondent proposed a payment of Kshs. 500,000/= as settlement.
- b) Whether the execution proceedings commenced by the respondent are proper.

The decree as rendered by this court dated 11/12/2019 is quite lengthy and I need not reproduce the whole of it. In order to determine the first issue, the relevant part of the decree is as follows:-

"2. THAT all parties shall convene a meeting to be presided over by elders or the area Chief over the distribution of the Plot No. 51 in Isebania Town. The meeting shall be held within 90 days of this judgement. The resultant agreement shall be filed in this matter and shall form the Court's judgement on the distribution of the Plot No. 51 in Isebania Town." (emphasis mine).

Both parties are in agreement that two separate meetings were convened as directed, before the area Chief. A copy of the minutes of the meeting and the list of attendees is annexed to the supporting affidavit of Masero Rioba Turuka and marked as 'A-001'. The first meeting was convened on 20/2/2020 and the second one was convened on 27/2/2020. The applicants contend that there was a clear agreement and a solution reached in both meetings. In particular, the respondent asked to be paid Kshs. 500,000/=. The same was however not done on time as the corona pandemic set in, hindering the payments to be done on time. The respondent denies this fact and submits that there is no agreement that has been filed in this court to show that he agreed to be paid Kshs. 500,000/=.

I have considered the copy of the minutes and the list of attendees. The copy of the minutes were filed in court on 28/1/2021. In the said

separate meetings, both the respondents and the applicants were present.

On the payment of Kshs. 500,000/=, from the minutes of 20/2/2020, it was recorded as follows:-

‘Weirungu Rioba Turuka “protestor” expressed himself and wished that he be paid as stated in the judgement.’

In the second meeting of 27/2/2020, it was recorded:-

“Weirungu Rioba Turuka demanded that he be given Kshs. 500,000/= and withdraw the case. Turuka Rioba Turuka requested that they be given time to solicit the amount demanded by Weirungu. He suggested that they be considered for a period of one month.”

It is quite clear from the minutes that the respondent made demands to be paid an amount of Kshs. 500,000/= which Turuka Rioba Turuka on behalf of the 5 applicants conceded. They were willing to do so and asked for a period of one month to pay. The applicants submitted that they found it difficult to fulfil their obligation due to the corona pandemic but they are still willing to pay the money as agreed in the meeting.

The respondent has not demonstrated to this court that he was coerced to attend the meetings or the proposal to be paid Kshs. 500,000/= was a decision he reached due to concealment of material facts not within his knowledge. There was nothing further that the parties were supposed to do in terms of breaking down the payment terms or any other resolution which would have been reached in the meetings in form of an agreement as submitted by the respondent. Order No. 2 as extracted above was clear that once the parties filed the minutes on the agreement reached, they would form part of the court’s judgement. There was again no further step that was needed by any of the parties to reduce the minutes of the meetings in to a consent to be adopted as an order of the court. The minutes of the meeting as they stand and the agreements reached therein would automatically form part of the court’s judgement. The respondent cannot now run away from that.

The first issue is now well settled, that the respondent did propose a payment of Kshs. 500,000/= as settlement and the applicants agreed to pay the money. It is common knowledge and the court cannot lose sight of the fact that the onset of the pandemic disrupted the daily livelihoods of many people.. I shall give the applicants the benefit of doubt on why they were not able to make the payments within the agreed period they said they would.

On the second issue, the respondent commenced execution proceedings on the basis that no agreement had been reached between the parties. Even if it were the position which it is not, especially on the respondent’s part, the court’s decree has not been reviewed or set aside, the decree particular on what would happen in the event parties convened a meeting and no consensus reached or if at all no meeting would take place. In summary Order No. 3 (i) – (vii) of the decree issued on 11/12/2019 was as follows:-

- i. The Plot shall devolve equally unto the remaining 10 children of the deceased;**
- ii. The costs of valuation be borne by all the beneficiaries equally and if settled by one, the cost be off - set from the other beneficiaries’ respective shares;**
- iii. Each of the beneficiaries of the deceased be entitled to a tenth (1/10) of the value of the Plot;**
- iv. The Petitioner and the 5 other children who are willing to buy the shares of the rest in the Plot be given first priority to buy off their siblings’ shares as valued;**
- v. That if the Petitioner and the other 5 children are unable to buy off their siblings, a mutual interest buyer be considered by the beneficiaries;**
- vi. In the event they fail to get a willing buyer, the Plot be sold and the proceeds shared equally among the 10 beneficiaries;**
- vii. The petitioner and the 5 brothers shall each refund the rental income received of a sum of Kshs. 259,200/=. The remaining four (4) brothers shall each receive the sum of Kshs. 388,000/= in settlement of the rental arrears upto December 2019.**

In commencing the execution proceedings through valuation of Plot No. 51 Isebania Town, the respondent was acting in isolation and to the detriment of the other nine (9) beneficiaries and in contravention of the aforementioned court orders. The execution proceedings are not proper. In the event that the respondent was convinced that the other beneficiaries were unwilling to adhere to the court orders, it would have been prudent to move this court appropriately for further directions. None of the beneficiaries has a superior right over the other, to commence execution proceedings.

In his response, the respondent mentioned his brother one Maroa Rioba Turuka as being an aggrieved party. The respondent has not demonstrated that he has any authority to swear an affidavit or advance the case on behalf of his other three (3) brothers in regard to the dispute before this court. From the minutes on record, it is noted that Maroa Rioba Turuka attended the meetings but chose not to participate. He sat in silence and listened to the arguments. It therefore goes without saying that he is bound by the decree of this court dated 11/12/2019 unless he files his own separate affidavit stating his position. The same applies to all the other beneficiaries who have not filed any affidavit in court.

Having reached the foregoing conclusions and despite finding that there were two separate meetings in which the respondent stated his

position and the decision in the minutes do form part of the court judgement, I believe that it is in the best interest of justice that all the beneficiaries be accounted for in the estate of the deceased.

The respondent submitted that he does not have a problem with the applicants buying his share on a first priority basis and so do his brothers on his side.

To this end, I hereby direct that all the parties shall comply with **Order No. 3 (i) – (vii)** of the decree issued by this court on 11/12/2019.

In the end, the application by the applicant dated 10/2/2021 partially succeeds as follows:-

- i. The execution proceedings and the intended auction of Plot No. 51, in Isebania Town be and are hereby stayed.**
- ii. That all the beneficiaries shall abide by the terms of Court Order No. 3 (i) - (vii) issued in the decree dated 11/12/2019.**
- iii. Each party shall bear their own costs.**

DATED, SIGNED AND DELIVERED AT MIGORI THIS 9TH DAY OF DECEMBER, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of

Ms. Kijana for the Applicants.

Mr. Mwita for the Respondents.

Nyauke Court Assistant