



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 293 OF 2004

IN THE MATTER OF THE ESTATE OF JOSEPH MUNYAO KELLI (DECEASED)

HOSEA MUCHUGU MUTHOGA.....INTERESTED PARTY/APPLICANT

VERSUS

JACINTA WANZA MAKENZI.....PETITIONER/RESPONDENT

AND

AGNES MUTINDI KITHUSI.....1ST OBJECTOR

MARSDEN KELLI.....2ND OBJECTOR

KELVIN MUTINDA KELLI.....3RD OBJECTOR

SYLVIA MWENDE KELLI.....4TH OBJECTOR

PETER MUTINDA MUNYAO.....5TH OBJECTOR

RULING

1. The application dated 18th September 2018 by Hosea Muchugu Muthoga was brought under **section 47** of the **Law of Succession Act (Cap. 160)** and **rules 49 and 47** of the **Probate and Administration Rules** seeking the following orders: -

“1). THAT this Honourable Court be pleased to order Jacinta Wanza Makenzi the petitioner herein to forthwith deliver up vacant possession of the property known as Nairobi/Block 77/20 to Hosea Muchugu Muthoga the interested Part/Applicant herein within fourteen (14) days of the order being made and in default the Interested Party/Applicant be at liberty with the assistance of the police to evict her from the property;

2). THAT this Honourable Court be pleased to order Jacinta Wanza Makenzi to pay mesne profits in respect of the property known as Nairobi/Block 77/20 to Hosea Muchugu Muthoga the Interested Party/Applicant herein at the rate of Kshs.25,000/= per month calculated from 25th February 2011 until she gives vacant possession of the property to him; and

3). THAT the costs of this application be provided for.”

2. The brief history of this case is that the deceased Joseph Munyao Kelli died intestate on 14th October 2003. He left two widows, Agnes Mutindi Kithusi and Jacinta Wanza Makenzi. The children of Agnes Mutindi Kithusi are Marsden Kelli, Kelvin Mutinda Kelli and Sylvia Mwendu Kelli. The child of Jacinta Wanza Makenzi is Peter Mutinda Munyao.

3. The estate of the deceased comprised LR No. Kangundo/Kikambuani/488, LR No. Kangundo/Kikambuani/493, LR No. Kangundo/Kikambuani/453 and Nairobi Block 77/20 Buruburu. This last property is the subject of the two applications.

4. What happened was that Nairobi/Block 77/20 Buruburu was, through the order of this court made on 16th November 2010, sold by public auction to allow the proceeds to be shared by the beneficiaries of the estate of the deceased as indicated in the certificate of confirmation that had been issued. Hosea Muchugu Muthoga is the one who bought the property and is since the registered proprietor of the property. The registration was on 20th September 2017. Jacinta Wanza Makenzi has refused to vacate the house. She says this was her matrimonial home. Her case is that the order of the court made on 16th November 2011 for the sale of property should be set aside and or reviewed because it was based on misrepresentation of facts, was an error apparent on the face of the court, it was not based on sound law, and so on. She does not want to vacate the house and opposes the application by Hosea Muchugu Muthoga. In turn, Hosea Muchugu Muthoga opposed her application.

5. According to the first house of the deceased, Hosea Muchugu Muthoga has a good title and should get vacant possession of the property.

6. There was a consent of the beneficiaries of the estate of the deceased dated 3rd May 2005 that made Jacinta Wanza Makenzi and Kelvin Mutinda Kelli the joint administrators of the estate of the deceased. On 19th September 2008 the court ordered that the deceased's estate be registered in the joint names of the two to hold in trust for themselves and the rest of the beneficiaries in equal shares. It was expected that the administrators would in turn share the estate to the beneficiaries. They had serious disagreement. It was this disagreement that led the rest of the beneficiaries to apply to have the present property sold and the proceeds sold. The court shared the other properties. Jacinta Wanza Makenzi was aggrieved by the order. She went to the Environment and Land Court, and also to the Court of Appeal. She was not successful on each front. Her present application seeking the review or the setting aside of the orders made to sell the property is therefore an afterthought. She participated in the application dated 9th February 2020 that led to the orders. She had an opportunity to say that this was her matrimonial property. In any case, from day one (from the day the petition was filed), it was common ground that this property (Nairobi/Block 77/20) was one of the properties of the deceased. No new material evidence that could not reasonably be obtained at the time of the application has been demonstrated. Neither has any error or mistake apparent on the face of the record been shown to exist. Lastly, it has taken Jacinta Wanza Makenzi about 9 years to seek the prayers. She is not saying why she could not come earlier. In fact, my view is that she has come back to this court after unsuccessfully trying other avenues. She is merely forum shopping. The delay is not only inordinate but is also intended to obstruct and delay the cause of justice.

7. In my ruling dated 26th June 2019 at paragraph 4, I indicated as follows:

“4. This court, in distributing the estate of the deceased, ordered that the property above be sold and proceeds be shared by the beneficiaries. The applicant bought the property and the proceeds have been made available to the beneficiaries including the respondents. The property's title has already passed to the applicant who has a certificate of lease. There is no dispute regarding the ownership of the property. The property was sold in execution of the orders of the court in regard to distribution of the estate of the deceased. The court that ordered the sale must make sure that title passes and vacant possession is given to the buyer. In any case under Sections 82 and 83 of the Act, it is incumbent upon the administrators of the estate of the deceased to make sure that the applicant gets the property herein. The applicant is now owed by the estate the vacant possession of his house.”

8. I order that within 30 days from today, Jacinta Wanza Makenzi does deliver vacant possession of Nairobi/Block 77/20 to Hosea Muchugu Muthoga, failing which the bailiff of this court will forcefully evict her and put Hosea Muchugu Muthoga into possession.

9. Hosea Muchugu Muthoga asked for mesne profits at the rate of Kshs.25,000/= per month from 25th February 2011 to the date when she gives up vacant possession. He became the registered owner of the property on 20th September 2017. He got Claytown Valuers to value the house to determine what rent would be payable if it was occupied by a tenant. They indicated Kshs.25,000/= per month. They were considering, among other things, rent of similar properties in the neighbourhood. Of course the house is presently occupied by Jacinta Wanza Makenzi. It is not on rent. **Section 2 of the Civil Procedure Act (Cap 21)** defines (“mesne profits”) in the following terms:-

“ ‘mesne profits’, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

10. Doing the best that I can, after considering all the facts of the case, I order that Jacinta Wanza Makenzi shall pay to Hosea Muchugu Muthoga Kshs.500,000/= (Five Hundred Thousand Shillings) being mesne profits over the property.

11. Jacinta Wanza Makenzi shall pay costs on the application dated 18th September 2018. Her application dated 18th July 2019 is dismissed with costs.

DATED and DELIVERED at NAIROBI this 2ND DECEMBER 2020.

A.O. MUCHELULE

JUDGE