



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 209 OF 2013

IN THE MATTER OF THE ESTATE OF JULIUS GATHEMIA KIHARA (DECEASED)

SAMUEL NJIHIA NJONGORO..... APPLICANT

VERSUS

CHRISTINE NJOKI GATHEMIA..... RESPONDENT

RULING

1. The subject of this application is a judgment delivered by this court on 17th May 2017 and which is pending full execution. In the judgment, this court found that the applicant was a creditor to the estate of the deceased, and that the respondent was under law entitled to refund the money the estate owed to him. The court directed that within 60 days of the judgement, Wangai Nyuthe & Co. Advocates refunds KShs.1,000,000/= to the applicant; that in the meantime the grant be confirmed on the basis that land parcel Dagoretti/Mutuini/640 be registered in the name of the respondent who was, within 60 days, to sell 0.25 Ha of it and use part of the proceeds to settle the debt of KShs.2,000,000/= refund to the applicant; that the amount was to carry interests at the rate of 5% per annum above the prevailing interest rate of Barclays Bank from 2011 to the date of judgment; and that the applicant was to execute without reference in case of any failure.

2. The applicant filed summons dated 24th March 2018 for execution of the judgment seeking orders that:

- a) L.R No. Dagoretti/Mutuini/640 be subdivided and 0.25 Ha be sold in satisfaction of the judgment and decree;
- b) leave be granted to the creditor to sell the portion 0.25 Ha Dagoretti/Mutuini/640 by way of public auction pursuant to the court's judgment and order of 17th May 2017;
- c) warrants of sale by way of public auction be issued to Kingpin Auctioneers for execution; and
- d) the costs of this application be borne by the estate of the deceased.

3. The application was based on the grounds that this court in its judgment of 17th May 2017 confirmed the grant issued to the administrator, the respondent herein, and directed that within 60 days she sells 0.25 Ha of Dagoretti/Mutuini/640 and use the proceeds to settle the debt owing to the applicant; that 10 months later the administrator has declined, refused and/or neglected to comply with the court order; that leave should be given to him to sell the 0.25 Ha of L.R No. Dagoretti/Mutuini/640, to recover the amount owing; and that the warrants of sale should be given to Kingpin Auctioneers to advertise and sell the 0.25 Ha of L.R No. Dagoretti/Mutuini/640 by way of public auction.

4. The application was opposed by the respondent through her replying affidavit dated 27th April 2018. It is her case that following the judgment delivered on 17th May 2017, she wrote to the firm of Wangai Nyuthe & Company Advocates, who acted for the deceased in the sale of Dagoretti/Mutuini/640 and who are currently holding the original title to the said property, requesting them to release the original title deed but they have been adamant and insistent that she has to clear a debt of KShs.600,591/= which the deceased owed them before they can release the title to her. She stated that she intended to sue the firm of Wangai Nyuthe & Company Advocates for the release of the said original title but has not been able to do so owing to financial constraints, and that if this court enabled her access the original title deed to the parcel, it would be easy to complete the subdivision and dispose the 0.25 Acre parcel of land in compliance with the court's judgment. She further stated that her efforts of getting an interested buyer of the property have also been hampered by the existing caution registered over the entire parcel of the land by the applicant at the land registry.

5. Parties filed their written submissions which I have considered.

6. I have looked at the correspondence between the firm of A.N. Kirika & Company Advocates who are acting for the respondent and Wangai Nyuthe & Company Advocates who acted for the deceased in the intended sale of Dagoretti/Mutuini/640 and who are in current possession of the original title of the property. I also note that the firm of Wangai Nyuthe & Company Advocates has expressed its willingness to release the title to the respondent for purposes of execution on the condition that the respondent gives an undertaking and a payment plan on how to settle the debt of Kshs.600,591/= owed by the deceased and which is the reason she does not have the title.

7. In the judgment delivered on 17th May 2007 Dagoretti/Mutuini/640 was to be registered in the name of the respondent, and within 60 days of the registration she was to sell 0.25Ha of it and use part of the proceeds to refund the applicant Kshs.2,000,000/= plus interest. That has not been done one year later. This application was not necessary as the judgment asked that, in case of default, the applicant was to execute without further reference. It was the unqualified obligation on the part of the respondent to obey the order of the court, now that she was not appealing against it, or seeking its review.

8. I allow the application with costs, but ask that upon the sale of the 0.25Ha of Dagoretti/Mutuini/640 and payment to the applicant, there be filed into court an account of the proceeds within 30 days of the sale.

DATED and SIGNED at NAIROBI this 17TH day of JULY 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 18TH day of JULY 2018

J.N.ONYIEGO

JUDGE