



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
MISC. APPLICATION NO. 140 OF 2015
IN THE MATTER OF THE ESTATE OF I K M (DECEASED)

J M.....APPLICANT

VERSUS

K M.....1ST RESPONDENT
A M.....2ND RESPONDENT
Z M C M.....3RD RESPONDENT
W K G M.....4TH RESPONDENT
N N C M.....5TH RESPONDENT

RULING

1. On 16th June 2016 the applicant Jasmin Martin filed this application under **section 47** of the **Law of Succession Act (Cap 160)** and **rule 59** of the **Probate and Administration Rules** seeking to have K M (1st respondent), A M (2nd respondent), Z M C M (3rd respondent), W Kibet G M (4th respondent) and N N C M (5th respondent) vacate the premises known as LR No. [Particulars withheld] Nairobi. She asked that she and her children be left in possession of the property pending the hearing and determination of the probate matter filed in High Court Succession Cause No. 2901 of 2015 in this Court. Lastly, the applicant sought an order to issue directing the OCPD Dagoretti to provide security in the enforcement of the eviction order. In the affidavit sworn to support the application, she deponed that she was the widow of the late I K M (“the deceased”) with whom she had a child I C M who was aged 15. The deceased was the registered owner of the suit property, she deponed, and that this was their matrimonial home for 17 years leading to the death of the deceased on 17th June 2015. Her case was that the respondents were relatives of the deceased, and that on 10th June 2016 at about 6.00 pm the 3rd and 4th respondents had broken into her bedroom and that of her children (she had a baby of five months) and physically assaulted her and caused various injuries to her body. Their intention was to evict her. She had reported to Muthangari Police Station and received treatment at Nairobi Women’s Hospital and later at the Aga Khan Hospital. She swore that she feared for her life and that of her children and this is why she was asking for an order that these relatives be evicted from, what she considers to be, her matrimonial home.

2. The factual position is that the 1st and 2nd respondents were brother and sister, respectively, of the deceased. The 3rd, 4th and 5th respondents are children of the deceased from a previous marriage. Following the death of the deceased, on 30th November 2015 the applicant and Z K A petitioned the court in High Court Succession Cause No. 2901 of 2015 for the grant of letters of administration intestate. They named the 3rd, 4th and 5th respondents and her daughter to be the beneficiaries, along with the applicant. There are a series of applications in the file, and no grant has been issued. One of the applications are by the 1st and 2nd respondents challenging the role of Z K A, and also claiming that some of the property named in the petition do not form part of the estate of the deceased. They include the property in the instant application. It is also true that the deceased was one of the children of the deceased W K M who was the owner of the property in question. W K M left a Will in which he gave this property to the deceased in the following terms:-

“12. [particulars withheld] Riara Road Thompson’s Estate – I give to be held by my son I K M with whom I have lived within this property since the demise of my late wife and who together with his wife J has taken care of and looked after me in all manner of speaking, to live with his family as the beneficial occupants and to accommodate his brothers and sisters when they come to visit Nairobi. He will continue to maintain and improve the property as he has been doing so over the years. This will be held by him for the family and grandchildren to also come and stay and enjoy and the Estate Trustees may from time to time be called upon for additional maintenance or improvement expenditure from the estate if necessary.”

Lastly, on 3rd December 2015 the parties in the instant application recorded a consent before this court in the following terms:-

“By consent the applicant shall continue to occupy three bedrooms of the house and allow the respondents and interested parties unhindered access to the house in relation to the four remaining bedrooms. The respondents and interested parties shall make arrangements regarding servants, food, etc, whenever they are in the house. Parties shall maintain mutual respect as they occupy the premises. The parties shall share the common areas and facilities.”

This consent followed the applicant’s application dated 6th October 2015 seeking to restrain the 1st and 2nd respondents and their children and relations from interfering with her quiet enjoyment of the property in question and any other property of her late husband; application dated 10th November 2015 in which the applicant sought to restrain the respondents from denying her access, threatening and/or evicting her from the property; and application dated 1st December 2015 by the 3rd, 4th and 5th respondents who were seeking to be enjoined in the matter.

3. The 1st and 2nd respondents swore a replying affidavit (through the 1st respondent) to state that the property was not the matrimonial home of the applicant but that it was a family home left by their late father. They stated that by the consent order above they gained access to part of the house. However, against the order, the applicant allocated herself four bedrooms instead of three. The rest of the family was relegated to an old TV room that had been used as a storeroom. The applicant further proceeded to break a wall between two bedrooms to make one bedroom. They denied that the applicant had been attacked or assaulted as alleged, or at all. They stated that on 10th June 2016 they were not in the home, and that from 15th June 2016 and 19th June 2016, the applicant’s daughter and the 1st, 3rd and 4th respondents were away in Kericho to commemorate the deceased’s 1st anniversary and could not therefore have caused the alleged attack or assault. There was no further affidavit.

4. I saw the parties on 3rd December 2015, and have considered all the material before me. It is clear that the applicant and the respondents are on very bad terms. The dispute is over, among other things, this house that belonged to the deceased’s father. From the Will the deceased’s father left it to him to live in with his wife (applicant) and family. The deceased and his family were, however, only beneficial occupants. They were to allow in the deceased’s brothers and sisters whenever they were in Nairobi.

Further the house was to be held by the deceased

“for the family.....”

It is clear, therefore, that the applicant cannot claim that by dint of the Will she has exclusive or absolute entitlement to the house. This cannot be her matrimonial home, or property that she can, for instance, transfer or in any way dispose of. It is a family home that the deceased was given to stay in with his family, and to maintain, but allow access and accommodation to the rest of his brothers and sisters and their families. It is on this basis, I find, that the parties entered into the consent above. It would therefore be going against the Will for the court to be asked to order the eviction of the respondents from what is their family home.

5. If the applicant and/or her daughter have been assaulted by any of the respondents, that would be a criminal matter. Now that a report has been filed with the police, and depending on the investigation findings, a prosecution would ensue.

6. The result is that the application lacks merits and is hereby dismissed, but costs will abide the Cause.

7. This application, and the other applications, were brought in this miscellaneous file when there was a substantive petition in High Court Succession Cause No. 2901 of 2015 that was pending over the same deceased, estate and parties. I make order consolidating this miscellaneous file with the petition (High Court Succession Cause No. 2901 of 2015) so that all these matters can be argued and heard in the petition. Further, because this court will not be available for a long time owing to JSC engagement, I ask that this matter be mentioned before Justice Musyoka to hear, or allocate to any other available court in the Division.

DATED and SIGNED at NAIROBI this 13th day of September 2016.

A.O. MUCHELULE

JUDGE

DELIVERED AND SIGNED this 14TH day of September 2016.

W. MUSYOKA

JUDGE