

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO 2165 OF 1996

IN THE MATTER OF THE ESTATE OF KIMANI WANYORO (DECEASED)

SUSAN WAMAITHA.....
.....**APPLICANT**

VERSUS

NAOMI NJOKI KIMANI.....**1ST**
RESPONDENT

MARY NJERI KIMANI.....
2NDRESPONDENT

WARIARA KIMANI.....**3RD**
RESPONDENT

AHMED NOORDIN.....**4TH**
RESPONDENT

RULING

The dispute before the court relates to the inheritance of a property known as LR.No.36/II/222 on 6th Street Eastleigh Section II. There are several orders that have been made by this court relating to how the particular property is to be distributed among the beneficiaries to the estate of the deceased. In essence, the court ordered that the suit property be shared equally between the three widows of the deceased. The Applicant in this application is one of the widows of the deceased. She has been residing in the suit property. Rawal J (as she then was) made an order on 18th February 2009 to the effect that the suit property be sold so that the proceeds therefrom be distributed to the three widows of the deceased. From the evidence placed in court, it was apparent that after the said order was issued, the suit property was apparently sold to the 4th Respondent without the participation of the applicant. It is not clear what purchase consideration was paid to the other beneficiaries of the estate of the deceased. After the purported sale, the applicant was forcefully removed from the suit property. This court restored the applicant to the suit premises. Proceedings in this regard took more than three (3) years to be resolved. In the process, much water has passed under the bridge.

The Applicant now wishes to amend the application that she filed on 9th February 2011 to put in focus the real issues in controversy which relates to the circumstances under which the suit property was sold and whether the sale should be nullified by the court. The application has been strenuously opposed by the 4th Respondent. He filed a replying affidavit in opposition to the application. The 1st, 2nd and 3rd Respondents supported the application. The 4th Respondent also filed a preliminary objection to the application. In it the 4th Respondent states that the Applicant lacks *locus standi* to bring the application. He further states that there existed no privity of contract between the Applicant and the 4th Respondent in respect of the sale of the suit property to warrant the orders that are being sought by the Applicant in the proposed amended application. The 4th Respondent further averred that he was the duly registered owner

of the suit property and that the suit property can no longer be considered to be part of the estate of the deceased. Finally, the 4th Respondent stated that the application, if allowed, would mean that what is sought to be canvassed is barred by the provision of **Section 136** of the **Government Land Act** (now repealed).

During the hearing of the application, this court heard oral rival submission made by Mr. Kinyanjui for the Applicant and Mr. Kimondo Mubea for the 4th Respondent. The court was informed that the 3rd Respondent Wariara Kimani is deceased. However, Anthony Kimani had obtained a grant of letters of administration *ad litem* to enable him prosecute the case on behalf of the estate of the said Wariara Kimani (deceased). Mary Njeri Kimani was present in court. Anthony Kimani made oral submission in support of the application. Mr. Ochieng for the tenants concurred with the submission made by Mr. Kimondo Mubea. The issue for determination by this court is whether the applicant established a case for this court to grant her application to amend the application so as to bring into focus the real issues in controversy. That this court has jurisdiction to grant the Applicant such leave is not disputed. Under **Rule 73** of the **Probate and Administration Rules**, this court has power under its inherent jurisdiction to grant orders to meet the ends of justice and to prevent abuse of the due process of the court. The first issue that this court shall address is whether the Applicant has *locus standi* to prosecute the application. It was contended on behalf of the 4th Respondent that the Applicant did not *locus standi* to prosecute the application as she was not the administrator of the estate of the deceased. Mr. Kimondo Mubea submitted that if the Applicant had any grievance, he should resolve the same with the administrator of the deceased without involving the 4th Respondent who purchased the suit property as a result of an order issued by this court.

Mr. Kinyanjui was of a contrary view. He submitted that since the matter in dispute relates to the actual administration of the estate of the deceased in which the Applicant was a beneficiary, the Applicant had the requisite *locus standi* to prosecute the application. Having considered the rival submission made in that regard, this court took the following view of the matter: that the Applicant is a beneficiary of the estate of the deceased is not subject of dispute. She is aggrieved in the manner in which the sale of the suit property was conducted and the proceeds of the sale of the same was applied. From the pleadings that she has filed in court, it is her case that after the suit property was sold pursuant to the order of the court, she was to have benefited from the proceeds of the sale. That was not the case. It is also her case that it was not clear from the various conflicting agreements filed in court what the actual purchase consideration was. This is legitimate issue for this court to investigate by hearing the complaint lodged by the Applicant. This is because it involves the distribution of a property that comprises the estate of the deceased to the beneficiaries. I was not persuaded by the argument advanced by the 4th Respondent which was to the effect that the Applicant had no *locus standi* to prosecute her complaint. As a beneficiary of the estate of the deceased, the Applicant has every right to seek the intervention of the family court where the issue is in regard to whether she has been justly provided for by the administrators of the estate of the deceased as directed by the court. Further, it is apparent that the Applicant's application cannot be properly adjudicated and a determination made without the inclusion of the 4th Respondent who is purported to have purchased the suit property pursuant to an order of the court. The reason why the 4th Respondent is a necessary party is because an allegation has been made to the effect that the 4th Respondent colluded with some of the administrators to deny other beneficiaries what is justly due to them from the proceeds of the sale of the suit property. Furthermore, for a period of three (3) years, this court had to deal with and determine the question whether the 4th Respondent had unlawfully evicted the Applicant. The court held that indeed the 4th Respondent had unlawfully evicted the Applicant from the suit premises. The court went ahead and ordered the 4th Respondent to restore the Applicant to the suit premises. The 4th Respondent complied with this order of the court after protracted litigation. The 4th Respondent therefore cannot be excluded from these proceedings.

The other issues raised by Mr. Kimondo Mubea essentially touch on the merits of the Applicant's application. Those issues cannot be addressed in the present application where the Applicant essentially seeks the leave of this court to amend her pleadings so as to take cognizance of the developments that have taken place since the time that she filed the initial application. It is in the interest of justice that all

issues in controversy relating to whether or not the administrators acted lawfully in the sale and subsequently in distributing the proceeds of the sale of the suit property to the beneficiaries. This court finds no merit with the objection lodged by the 4th Respondent and the tenants in opposition to the Applicant's application to be allowed to amend her pleadings.

In the premises therefore, this court is of the view that for the purposes of determining the real issues in controversy and bringing a finality to the matters in dispute between the Applicant, the administrators and the 4th Respondent, it will allow the Applicant leave to file the amended application. The amended application shall be filed and served within fourteen (14) days of today's date. The Respondents shall be at liberty to respond to the application fourteen (14) days after service. There shall be no orders as to cost.

DATED IN NAIROBI THIS 13TH DAY OF FEBRUARY 2014.

L. KIMARU

JUDGE