

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.....2ND RESPONDENT

WARIARA KIMANI.....3RD RESPONDENT

RULING

The estate of the deceased in this succession cause was distributed by the court on 15th April 2008 after the beneficiaries had failed to agree on the mode of distribution. It appeared that the bone of contention between the three houses that comprise the dependants of the deceased was in respect of a property situate at Eastleigh in Nairobi known as LR.No.36/11/222 (the suit property). One of the widows of the deceased, Naomi Njoki Kimani resides on this property. Apart from that, she collects or collected rent from the said suit premises. The court made the following order in regard to the suit property:

“That in the event Naomi Njoki Kimani fails to avail to the other two houses their respective shares of rents she has collected from LR.No36/11/222 – Eastleigh –Nairobi, amounting to Kshs.2,675,200/- as at December 2007, then her share would be proportionately reduced to the amount due and payable by her to other two houses. Till the same is settled, the properties given to her shall not be transferred in her names.”

This order is reflected in the certificate of the confirmation of grant. Apparently, the 1st respondent took no action further to the order issued by the court. On 18th February 2009, pursuant to an application made by the 2nd and 3rd respondents, the court made the following observations:

“As regards the second prayers of the sale of Eastleigh property, I do note that Naomi has not even in these applications responded to the specific averments of her failure to share the rents so far collected by her. Her failure to refute those specific averments made in paragraph 10 of the affidavit in support shall compel me to accept the veracity of the said averments. Naomi has been consistent in not giving accounts of the rent collected and that was the reasons for the further directions of the court as specified hereinbefore. Till to-date she has not relented and persisted with impunity in her refusal to obey the court orders. I shall give her last opportunity to do so within 30 days from the date hereof. In failure thereof, the applicants shall be at liberty to sell LR.No.36/22/222 situate at Eastleigh, Nairobi as prayed in prayer No.2 of the summons dated 19th June 2008.”

Pursuant to this order, the 3rd respondent deponed that the suit property was sold. The 3rd respondent annexed a copy of re-conveyance dated 25th November 2009. The fact that the suit property has been sold is not an issue for determination by this court. That issue is pending determination before the Court of Appeal.

What is of concern to this court is what emerged from the application filed by the applicant dated 10th

February 2011. In the said application, the applicant sought several orders, including an order that the 2nd and 3rd respondents be restrained from evicting them from the suit premises pending the hearing and determination of the appeal pending in the Court of Appeal. Before the application was heard, the 2nd and 3rd respondents, without any court order, purported to evict the applicant and the 1st respondent from the suit premises. In their replying affidavit, the 2nd and 3rd respondent denied that they instigated the eviction. It was their case that the eviction was undertaken at the instance of persons who had purchased the suit property. What was not denied, and indeed it was conceded by the 2nd and 3rd respondent, is that the order that was purportedly used to evict the applicant and the 1st respondent from the suit premises was the certificate of confirmation of grant which was issued by this court on 15th April 2008.

Having read the two (2) rulings that are the subject of this application, it was clear to the court that none of the said rulings authorized or gave permission to anyone to evict the applicant and the 1st respondent from the suit premises. While it may be true that the court had given authority to the 2nd and 3rd respondents for the suit property to be sold, when it comes to evicting a person who is reluctant to leave a suit premise, the 2nd and 3rd respondents or anyone acting under the authority was required to obtain a court order. This court therefore holds that the purported eviction of the applicant and the 1st respondent from the suit premises was unlawful. In the circumstances, the only course of action that this court can take is to restore the *status quo ante* before the unlawful act of the 2nd and 3rd respondents and those acting under them.

When this court heard the application on 28th February 2011, it gave the order that the applicant and the 1st respondent be restored into possession of the suit premises with immediate effect. That order is hereby confirmed. The applicant and the 1st respondent shall have the costs of this application. If the 2nd and 3rd respondents wish to further pursue the giving effect of the said order of this court by securing the eviction of the 1st respondent from the suit premises, they will be required to file an appropriate application or suit in court. it is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF MARCH, 2011

L. KIMARU
JUDGE