



**In re Estate of Rigworo Onsare (Deceased) (Succession Cause
348 of 2011) [2023] KEHC 18049 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 348 OF 2011
REA OUGO, J
MAY 26, 2023**

BETWEEN

JOHN ONTOBO OTOKI APPLICANT

AND

SAMWEL MBAKA RIGWORO 1ST RESPONDENT

ISAAC OGEKA RIGWORO 2ND RESPONDENT

RULING

1. Before me is application dated October 15, 2019 by John Ontobo Otoki (the applicant). The applicant seeks to have the grant issued on the December 7, 2012 rectified to include equal share and or 1/3 share each. That the Court be pleased to order the Kisii County Surveyor and Land Registrar visit LR No Bassi/Bogetaorio II/608 and fix beacons and/or boundary to realize the grant and that the OCS officer commanding Station Itumbe Police Station to ensure compliance of the Court orders.
2. The application is supported by the applicant's affidavit and grounds on the face of the application. The applicant claims that the grant issued on the December 7, 2012 was issued to the 3 sons John Ontobo Otoki , Samwel Mbaka Rigworo and Isaac Ogeka Rigworo. That the portions held on the ground are not equal. That he seeks a rectification of the grant to reflect equal share i.e, 1/3 share each. That the Kisii Surveyor and Land Registrar to visit the Land Parcel No. Bassi/Bagetaorio II/608 to fix beacons and/ or boundary to reflect equal share and that the OCS Officer Commanding Station Itumbe Police Station to ensure compliance of Court Orders.
3. The application was opposed. Samwel Mbaka Rigworo, 1st Respondent filed a replying affidavit on the November 4, 2019. He depones as follows; that the letters of administration were issued to the 3 sons of the deceased and at confirmation of the grant they were to share the parcel of land on equal basis. They have since lived as such and constructed their respective homesteads. That to his knowledge the applicant is a troublesome person who in spite of having been given his share of land wants to cause



unnecessary disharmony in the family. That since the property was administered and registered in their respective names, the court became functus non official and any claim can only be channeled to the relevant court and that the applicant ought to have sought for transfer of his portion of land for himself to get a title. That there is nothing being reviewed or amended as sought by the applicant and that the application is incompetent, an abuse of the due process and ought to be dismissed.

4. On the December 11, 2019 the parties agreed as follows before Justice Ndungu ; that each party is entitled to an equal share of the land in question and that the subject of the usual provision for access roads and the need to as much as practically possible maintain each of the parties where they occupy as their resident at the moment. That the County Surveyor be jointly appointed to visit the land and along their above lines do the necessary survey work and file a report in court in 60 days. That counsels lead the process and all parties urged to cooperate to bring the matter to rest. That the expenses to be shared equally.
5. The parties could not agree so they engaged different surveyors. David Lemaiyan for the applicant testified that he visited LR Basii/ Bagetaorio 11/608 and subdivided the land into 3 equal portions taking into account how the beneficiaries have settled and he mapped out an access road to access the sub plots. That the total acreage of the deceased's land is 3.0Ha. That John Ontobo occupies 0.95Ha in the area marked 'A'. That parcel 'C' for Samuel Mbaka part of what he occupies falls into parcel 'B' owned by Isaac Ogega. Isaac who appears in person indicated he had no problem with the surveyor's report.
6. Jared Nyagaka a private surveyor testified that he visited the subject land and took measurements of the new boundaries. John Ontobo is in parcel marked 'A', Samuel Mbaka in 'B' and Isaac Ogega in parcel 'C'. He measured parcels 'B' and 'C'. 'B' is 0.91 Ha and 'C' is 1.00 Ha. The road was 0.1 Ha. He did his calculations and found that parcel 'A' is 0.99 Ha.
7. Parties filed written submissions. Mr Ochoki submitted as follows; that the measurements in the certificate of confirmation does not reflect the actual measurements on the ground as the portions are not equal. That since the beneficiaries agreed that the land parcel be shared equally then the grant should be rectified to reflect that each beneficiary is entitled to a 1/3 equal share of the subject suit property. That the report by the respondent should be ignored because the person who carried out the survey was not licensed, the said surveyor admitted he had not read the court order and that he was only accompanied by the 1st respondent. Reliance was made on the case of *Samwel Okinyi Aroni & 2 others vs Sospeter Ochiengo Aroni (2019) eKLR*, where this court held as follows;

' The chief function of the Succession Cause is to ensure the estate of the deceased is distributed to the rightful heirs. The court is given wide powers under section 47 reproduced above to ensure this happens. Rule 73 of the Probate and Administration Rules pronounces the court's inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court'.
8. The 1st Respondent submitted as follows; there are 2 issues for determination the first is whether there is an error to be corrected in the certificate of confirmation of grant and no. 2 whether the surveyors report depicted the exact measurements for distribution as required by law. On the first issue it submitted that the provisions of section 74 are restricted and that it only permits rectification of a grant for the following; errors in the names and description of persons or thing; errors as to time or place of death of the deceased and in cases of a limited grant, the purpose for which such limited is made. That the applicant has not led evidence that he was not aware of the way property was to be distributed albeit not indicated in the certificate of confirmation. That from his affidavit there no error occasioned on the confirmation of the letters of administration capable of being corrected as envisaged



under section 74 of the *Law of Succession Act*. Reliance was made the case of the *Estate of Hasalon Mwangi Kabero [2013] eKLR*. It was further submitted that the omission that is equal share and or 1/3 share each on the certificate of the confirmation of grant is not an error capable of being corrected. That where an omission is made or discovered after confirmation the correct approach should be to have the certificate of cancelled so as to reopen the confirmation. On the issue it was submitted that there are 2 demarcations on the ground being the 1st demarcation and the 2nd by the 1st surveyor. That he purported to distribute the estate on paper and gave different demarcations on the ground. That such a discrepancy failed to actualize the intent of the confirmed grant. That it is not in doubt that the 2nd road of access can only be acceptable by the consent of all parties since each beneficiary had an access to the public road. That the dimensions to be consumed by the purported road of access will be unnecessary. That the estate ought to be distributed equally and mutation be prepared confirming the ground and the acreage of each beneficiary without conferring any due advantage to any of the beneficiaries. That the application is not merited and such an omission is not an error that can be corrected under the present application and is not provided for in law. That the court can under rule 47 of the probate and administration rule may exercise its discretion to order for equal distribution of the estate without any disadvantage to any of the beneficiaries and based on fresh demarcations without the forceful road of access since each beneficiary has the benefit of the road access already existing on the ground before the demarcation.

Determinaton

9. I have considered the affidavits filed by the parties, their written submissions, the law and the orders being sought. Section 74 of the *Law of Succession Act*, Cap 160, provides as follows;

'Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.'
10. The applicant seeks to have the grant that was confirmed on the December 7, 2012 rectified to include equal share and or 1/3 share each. I agree with the applicant's submissions that the orders issued on the December 11, 2019 show the parties acceded to prayer (iii) sought in the summons to the effect that the Land Registrar was to visit the subject land and cause the same to be sub-divided into three equal portions. This happened when the County Surveyor Mr Lemaiyian visited the parcel of land and tendered his report. The report by the 1st Respondent's surveyor was done by someone who is not licensed to carry out survey exercises in the county.
11. The certificate of confirmation of a grant issued on December 7, 2012 names the 3 beneficiaries John Ontobo Otoki, Samwel Mbaka Rigworo, Isaac Ogega Rigworo. LR No Bassi/Bagetaoirio II/608 the only assets of the estate was to be registered in the names of 3 beneficiaries jointly. From the surveyor reports the land is 3.0Ha and the beneficiaries are currently occupying their portions. The court is not functus officio as claimed by the respondent. A court can hear an application of rectification to correct an error as provided under section 74 of the Act . In my view what the applicant seeks to rectify is the description of the share from jointly to equal or 1/3 share. In the order dated December 11, 2019, the parties agreed that each of the parties herein are entitled to an equal share of the land subject to the provisions for access roads. The case cited by the respondent dealt with a different issue. The applicant in the said matter wanted to include a parcel of land in the certificate of grant which had been confirmed.



12. In my view the order sought is necessary to enable the parties proceed with completion of the administration process. The certificate of confirmation of grant issued on the December 7, 2012 shall be amended to read, 'all the estate to be registered in the names of John Ontobo Otoki, Samwel Mabaka Rigworo and Isaac Ogega Rigworo in equal shares taking into account the provision for access roads. This is subject to portions each of the parties currently occupy as their residents. No orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAM THIS 26TH DAY OF MAY 2023.

R.E.OUGO

JUDGE

In the presence of:

Mr. Marita For Applicant

For the 1st & 2nd Respondent Absent

Aphline C/A

