



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 153 OF 2015**

**IN THE MATTER OF THE ESTATE OF JANE WAITHENGENDIRITU alias**

**WAITHENGENDIRITU S/O NDIRITU alias NDIRITU JANE WAITHENGENDIRITU (DECEASED)**

**GODFREY MATU NDIRITU.....PETITIONER/RESPONDENT**

**VERSUS**

**PHYLISS WANJIRU MWANGI.....APPLICANT**

**RULING**

1. This application dated 18<sup>th</sup> March 2021 brought under **Section 74 of the Law of Succession Act** and **Rule 43 of the Probate and Administration Rules** seeks to rectify the acreage of Land Parcel Title Number Nyeri/Island Farm/114 which measures approximately 7.4 Hectares equivalent to 18.3 Acres.

2. In opposition to the said application, the respondent filed a Replying Affidavit dated 13<sup>th</sup> October 2021.

**The Applicant's Case**

3. It is the applicant's case that Land Parcel Title Number Nyeri/Island Farm/114 measures approximately 7.4 hectares equivalent to 18.3 acres and not 6 acres as intimated by the administrator in his pleadings prior to the confirmation of the grant. The court relying on the information given by the petitioner, distributed the 6 acres of the suit property thus leaving out 12 acres yet to be distributed. As such, the applicant urges the court to rectify the grant confirmed on 11<sup>th</sup> June 2019 to reflect the actual shares of the beneficiaries based on the correct size of the land.

4. The applicant proposes that the suit property be shared out as follows:-

- a) Miriam Gathoni Gitonga
- b) Jerioth Wanjiku Kinyua
- c) Mary Wangui Wanjohi
- d) Alice Wanjira Wangombe.....2 acres to be shared equally
- a) Godfrey Matu Ndiritu
- b) Ephraim Maina Ndiritu
- c) Anthony Ndirangu Ndiritu
- d) Phylis Wanjiru Mwangi.....15 acres to be shared equally

5. The applicant contends that no prejudice shall be suffered by any of the parties to the deceased's estate if the orders sought are granted.

**The Respondent's Case**

6. The respondent contends that the applicant seeks to fundamentally alter the certificate of confirmation of grant issued on 11<sup>th</sup> June 2019. The respondent further states that during the confirmation of the grant, the applicant and the other sisters wanted to be registered only in the one (1) acre where the graveyard and their mother's house are situated thereby renouncing any other rights over the remainder of the suit property. As such, the respondent strongly opposes the mode of distribution as proposed by the applicant.

7. The respondent further states that the suit property does not measure 6 acres but he believes that it does not measure 18.3 acres and as such, he is in the process of engaging a surveyor to measure the land. He estimates that the suit property is around 12 acres. He further contends that the certificate of confirmation of grant should remain as is save for the acreage.

8. Parties disposed of the application by way of written submissions.

### **The Applicant's Submissions**

9. The applicant relies on **section 74 of the Law of Succession Act** and **Rule 43(1) of the Probate and Administration Rules** and submits that the suit property measures approximately 7.4 hectares (18.3 acres) and has annexed a certificate of official search to demonstrate this. She further submits that the respondent misdescribed the property in terms of the acreage and the court distributed the property based on that mis-description. The court only distributed 6 acres leaving out 12 acres undistributed. The applicant therefore states that the rectification being sought falls within the ambit of **section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules**.

10. The applicant submits that although the respondent has disputed the acreage, he has not tendered any material evidence to controvert the applicant's claim. The respondent admits that the size of the land was understated he wants to engage a surveyor to ascertain the correct acreage. It is argued that the respondent did not file any survey report to demonstrate the correct size of the land. The applicant thus states that she has discharged the burden of proof as no contrary evidence has been placed to counter her claim and therefore the rectification ought to be allowed.

11. The applicant further submits that in light of the new evidence, she and her sisters are entitled to a share of the undistributed property. She is apprehensive that the respondent wants to benefit from the undistributed property as he claims that the applicant and her sisters are not entitled to the acres of the suit property but should only be allocated the one acre that was allocated to them during the confirmation of the grant.

12. The applicant urges the court to allow her application for rectification as the error contained in the certificate for confirmation dated 11/6/2019 is curable under **section 74 of the Law of Succession Act**.

### **Issues for determination**

13. After careful analysis, the main issue for determination is whether the application dated 18/3/2021 is merited and thus worth of the grant of the reliefs sought.

### **The Law**

14. Rectification of grant is provided for in **Section 74 of the Law of Succession Act, Cap 160 Laws of Kenya** and **Rule 43(1) of the Probate & Administration Rules**. **Section 74** 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.**

15. **Rule 43(1)** provides:-

**Where the holder of the grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time and place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made.**

16. Thus, rectification of grant of letters of administration is limited to matters set out in section 74 of the Law of Succession Act. These matters specifically refer to corrections of error which the court may order without changing the substance of the grant. These include errors in names, description of any person or thing or an error as to the time or place of death of the deceased or the purpose for which a limited grant was issued. An error which is envisaged under the section is a mistake which may occur on the face of the grant like typing errors in names of persons or things.

17. The issue of rectification of grant has been addressed in various decisions in the High Court which I have considered here as persuasive authorities.

### **18. In the matter of the Estate of Hasalon Mwangi Kahero [2013] eKLR**

**"An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased's death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if say, a word in the full name of a person is omitted or a word or number or figure in a**

description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word “error” too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43.”

19. Similarly in In the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased) [2013] eKLR:-

**“The law on rectification or alteration of grants is Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules....What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general....**

**Where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the Law of Succession Act, the applicant ought to approach the court under order 44 of the Civil Procedure Rules. A review under Order 44 of the Civil Procedure Rules may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision-Order 44 of the Civil Procedure Rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant.”**

20. The applicant seeks to have the grant rectified to indicate that the land L.R Nyeri/Island Farm/114 measures 7.4 hectares (18.3 acres) and not 6 acres as intimated by the petitioner during the confirmation of the grant. I have perused the application dated 18/3/2021 and the annexures, particularly the certificate of official search which shows that the said land measures 7.4 hectares. In my considered view, the official search produced by the applicant is sufficient proof of the acreage of the land L.R. Nyeri/Island Farm/114.

21. The question then arises is whether such an error can be rectified within the ambit of section 74 of the Law of Succession Act. Section 74 provides for errors that may be rectified by a court to include 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. The error in this instant case is one of the description of property however, the resultant effect of such rectification will result to redistributing the estate. Such an error if rectified by the court is so fundamental that it will go to the core of the distribution. This has already been witnessed as the applicant and the respondent differ on the mode of distribution of the remainder of the suit property. In this regard, the proper approach would be for the parties to apply for an application of review of the orders made at the confirmation of grant which would accommodate the undivided shares of the suit property. The court may then review its orders made in confirming the grant which essentially distributed the deceased’s estate. It is my considered view that altering the shares of the beneficiaries in the estate is not within the list of errors that can be rectified by way of rectification of grant under section 14 of the act.

22. Consequently, I find the application dated 28/07/2021 not merited and dismiss it accordingly.

23. In the interest of justice, this court directs the administrator in consultation with the beneficiaries to file an application for review of the orders issued on 11<sup>th</sup> June 2019 only in regard L.R. Nyeri/Island Farm/114 to include the acreage left out in the grant.

24. That the said application to be filed within 30 days failure to which any of the other beneficiaries may file the application.

25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through videolink this 24<sup>th</sup> day of February, 2022**