



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO 251 OF 2014

IN THE MATTER OF THE ESTATE OF PAULO OMONDI ONYANGO (DECEASED)

MARIA APONDI OMONDI.....1ST ADMINISTRATOR

ROSA ODINGA OMONDI.....2ND ADMINISTRATOR

FREDRICK ONGESA OMONDI.....4TH ADMINISTRATOR

BRIGITA AKONGO OMONDI.....3RD APPLICANT

SELFINA ODERA OMONDI.....4TH APPLICANT

HELLEN KWAMBOKA.....5TH APPLICANT

STEPHEN AMONDI AKUMU.....6TH APPLICANT

VERSUS

LILIAN AKINYI OHOWA AKA LILIAN OMONDI.....3RD ADMINISTRATOR

RULING

INTRODUCTION

1. In their Summons for Rectification of Certificate of Confirmation of Grant and/or review dated 6th December 2020 and filed on 15th December 2020, the Applicants sought for orders that the Certificate of Confirmation of Grant of Letters of Administration intestate made to Maria Apondi Omondi and confirmed on 3rd November 2020 and dated 19th November 2020 be rectified and/ or reviewed.
2. They also sought that upon prayer one being granted the full effect, the intent of the consent agreed on at the time of mediation be adopted, the names of all the administrators be included and the obvious omissions of LR Nos North Ugenya/Simur/1035, 1137 and 1135 be corrected.
3. The said Summons were supported by the Affidavit of Stephen Omondi Onyango that was sworn on 6th December 2020. He averred that he was the son of George Otieno Omondi (deceased), a son to the deceased herein and that he had the authority of the 1st, 2nd, 3rd, 4th and 5th Applicants to swear the Affidavit on their behalf.
4. The Applicants averred that they had engaged in a mediation meeting and came to an agreement which was signed by the parties. They contended that the Mediation proceedings were in respect of LR No Kisumu/Manyatta 'A'/5203 that belonged to the deceased, Kisumu/Manyatta 'A'/5204 that belonged to Brigita Akong'o Omondi and the portion of 1/5 of LR No Kisumu/Manyatta 'A'/210 that was to be distributed. They outlined the schedule of what they agreed at the Mediation meeting.
5. They stated that it was apparent that there was an error in the manner in which the Certificate of Confirmation was prepared. It was their contention that the said Certificate excluded other properties in which there was no dispute. They were emphatic that unless the errors were corrected, properties which did not form part of the deceased's estate would end up being distributed.

6. In opposition to the said application, on 29th April 2021, the 3rd Administrator filed a Replying Affidavit that she swore on 28th April 2021. She averred that the Applicants' application was misconceived, an afterthought and an abuse of the court process.
7. She contended that she was aware that this matter was referred to Court Annexed Mediation on 2nd December 2019 and a Mediator was duly appointed on 3rd December 2019. She confirmed what had been agreed upon during mediation meeting.
8. She pointed out that prior to the Mediation Session, she discovered that original land parcel no Kisumu/Manyatta 'A'/3348 had been secretly subdivided to create land parcels No Kisumu/Manyatta 'A' 5203 and Kisumu/Manyatta 'A'/5204 which were sold unprocedurally by the 1st Applicant and 3rd Applicant to John Oliech and Calvins Otieno respectively.
9. She stated that she believed that this position would be regularised through family arrangements and that each beneficiary would get the share she or he was entitled to but that the Applicants herein had been evasive whenever the issue was raised.
10. She contended that if the present application was allowed, some beneficiaries would be prejudiced as they would not benefit from the deceased's estate. She was emphatic that the Applicants would not be prejudiced if family members met to regularise the position of the disputed parcel of land before the Certificate for Confirmation of Grant was finally issued by this Court.
11. The Applicants' Written Submissions dated 15th August 2021 were filed on 27th September 2021 while those of the 3rd Administrator were dated 10th November 2021 and filed on 17th November 2021.
12. The Ruling herein is based on the said Written Submissions which parties relied on in their entirety.

LEGAL ANALYSIS

13. The Applicants submitted that the purpose of Court Annexed Mediation was to arrive at an amicable resolution of disputes based on the law and not to promote illegalities. It was their argument that the Certificate of Confirmation of Grant issued on 19th November 2020 was totally defective and incapable of being used to transmit the estate.
14. They contended that the records of ownership of the property LR Kisumu/Manyatta/'A' 3348 showed that it was owned in ½ share each as between the 4th Applicant and the deceased as confirmed by the search certificate. They argued that this position was confirmed when the initial Certificate of Confirmation of Grant was issued on 21st February 2017.
15. They submitted further that the same was also confirmed at No 1 of the Mediation Settlement Agreement and added that it was obvious that there was an omission in the construction of Mediation Settlement Agreement at No 3 as the two (1 & 3) sic were contradictory. They argued that it was not possible for the Mediator to have acknowledged ownership of the 4th Applicant's half share of the property and still allowed distribution of her property while dealing with the estate of the deceased.
16. They were emphatic that the proprietorship of the 4th Applicant was protected by Sections 24 and 25 of the Registration of Land Act (**now repealed**) and that the same could not be defeated save as provided by the same Act, hence the need for a review and/ or rectification of the impugned Certificate of Confirmation of Grant to her property from the deceased's estate.
17. They urged the court to rectify the Certificate of Confirmation of Grant to include all other administrators apart from Maria Apondi Omondi who was the only one mentioned. They added that the said Certificate of Confirmation of Grant did not contain the full list of assets to be distributed which included LR Nos North Ugenya/Simur/1035, 1098, 1137 and 1135.
18. They added that the Mediation Settlement Agreement was full of grave errors and illegalities which had led to an unusable certificate of confirmation of grant.
19. On her part, the 3rd Administrator invoked Section 74 of the Law of Succession Act which she argued, provides for rectification of errors in names and descriptions, time and place of deceased's death and purpose of limited grant.
20. It was her contention that the Certificate of Grant sought to be rectified had included three (3) parcels of land being Kisumu/Manyatta 'A'/5204 and 5203 (subdivision of land parcel no Kisumu/Manyatta 'A'/3348) and land parcel no Kisumu/Manyatta 'A'/210. She agreed with the Applicants that the same Certificate left out the parcels of land that were prior distributed in the Original Certificate for Confirmation of Grant issued on 21st February 2017 and revoked being LR Nos North Ugenya/Simur/1035, 1098,1137 and 1135.
21. She placed reliance on the case of **Re Estate of Musa Matu Runga Nyeri Succession Cause No 139/2013** (eKLR citation not provided) where the court while dealing with a similar issue, relied on the case of **Re Estate of Charles Kibe Karanja (Deceased) [2015] eKLR** where Musyoka J gave meaning to Section 74 by demonstrating the difference between grant of representation and certificate of confirmation of grant that provisions in Section 74 are on alterations of grants of representations and not Certificate of Confirmation of Grant.
22. She argued that in light of the above decisions, this court could not grant the orders sought as Section 74 of the Law of Succession Act did not extend its jurisdiction to the rectification of Certificate of Confirmation of Grant. She added that even if the orders sought were within the discretion of this court, the same could not be granted for the reason that the Applicants had confirmed that land parcel No Kisumu/Manyatta 'A'/5203 and Kisumu/Manyatta 'A'/5204 were subdivided without following the procedure of Law of Succession.

23. She also pointed out that the Applicants questioned the legality of the Mediation Settlement Agreement yet they moved this court to adopt the same.

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

25. Section 74 of the Law of Succession 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.”

26. Rule 43(1) of the Probate and Administration Rules provides:-

“Where the holder of a 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 or 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.”

27. From the language of Section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, it would appear that the provisions relate to rectification of errors in grants of representation.

28. Notably, it appeared to this court that the Applicants sought to rectify the Certificate of Confirmation of Grant. In the foregoing, and as submitted by the 3rd Administrator, the certificate of confirmation of grant had nothing to do with Section 74 of the Law of Succession Act. It was not one of the documents to be rectified under Section 74 of the laws of Succession Act because the provision is limited to grants of representation, whether full or limited. That would then mean that if there are any errors on the face of a certificate of confirmation of grant, the same would not be available for rectification under Section 74 of the Law of Succession.

29. The errors on the impugned certificate of confirmation of grant would therefore be errors on the face of the record, which would be redressed through a review application, filed under Rule 63 of the Probate and Administration Rules, which imports the provisions in the Civil Procedure Rules on review.

30. Having said so, it was clear that the Summons that this court had been called upon to determine had serious technical flaws and would ordinarily be dismissed on technical grounds. However, Article 159 (2) (d) of the Constitution, 2010 calls upon courts to eschew procedural technicalities and focus on the substance of matter before them.

31. This court took into account that the Applicants had also grounded their application on Order 45 of the Civil Procedure Rules, 2010 which provides for the right of review of orders. Order 45 of the Civil Procedure Rules provides that in an application for review, an applicant must demonstrate:-

a. that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him at the time when the decree was passed; or

b. that there has been some mistake or error apparent on the face of the record; or

c. that there is any other sufficient reason.

32. Notably, an error ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two (2) opinions can hardly be said to be an error apparent on the face of the record as was held in the case of **Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR.**

33. The undated Mediation Settlement Agreement filed on 15th July 2020 which was adopted as judgment of this court on 2nd November 2020 indicated that parties agreed that they would reconfirm the measurement of the land in dispute No 3348 and further agreed that sub-number 5204 belonged to Brigita Akongo Omondi and 5203 belonged to Paulo Omondi Onyango. However, a reading of the Certificate of Confirmation of Grant dated 19th November 2020 showed that this was not incorporated as agreed.

34. According to the Search conducted on 19th August 2014, it was evident that indeed the deceased jointly owned Kisumu/Manyatta/3348 together with Birigita Akongo Omondi in half (½) equal shares. The 3rd Administrator did not rebut this evidence. Her claim that the said parcel of land was in dispute was therefore immaterial as she ought to have raised the issue before the Mediation Settlement Agreement was adopted as Judgment of this court. Once the Mediation Settlement Agreement was adopted as a judgment of the court, the court became *functus officio* and could not reopen litigation on the said issue.

35. As the Mediation Settlement Agreement was consensual, the same could not be appealed against. The only remedy that was open to an aggrieved party was to demonstrate that there had been a mistake, misrepresentation, duress, coercion or undue influence. That was not a matter that was before this court. Suffice it to state that parties were now estopped from contesting the said Mediation Settlement Agreement after it was adopted as an order of the court.

36. Going further, both parties agreed that although LR Nos North Ugenya/Simur/1035, 1098, 1137 and 1135 had been included in initial Certificate of Confirmation of Grant that was issued on 21st February 2017, the same had been left out in the Certificate of Confirmation of Grant that was subsequently issued on 3rd November 2020. Three (3) administrators were also omitted in the subsequent Certificate of Confirmation of Grant that was issued on 3rd November 2020.

37. A reading of the impugned Certificate confirms that indeed the aforesaid land parcels belonging to the deceased's estate were left out. Notably, the 3rd Administrator did not oppose the inclusion of the other Administrators' names that were missing on the Certificate of Confirmation of Grant as only the 1st Administrator had been mentioned.

38. Accordingly, having critically analysed the parties' affidavit evidence and their respective Written Submissions, this court was satisfied that there were errors apparent on the face of the court record which required to be rectified and that there was merit in the present application seeking a rectification of the Certificate of Confirmation of Grant that was issued on 3rd November 2020.

DISPOSITION

39. For the foregoing reasons, the upshot of this decision was that the Applicants' Summons for Rectification of Certificate of Confirmation of Grant and/or review dated 6th December 2020 and filed on 15th December 2020 was merited and the same be and is hereby allowed in terms of Prayers No (1), (2), (3), (4) and (5).

40. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF MARCH 2022

J. KAMAU

JUDGE