



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 487 OF 2013

IN THE MATTER OF THE ESTATE OF MBUVI MUNYAO ALIAS JOSEPH MBUVE MUKUTHI- DECEASED

PIUS MUKUTHI MBUVE.....APPLICANT

VERSUS

JOHN MUASYA MBUVE

JANE MICHAEL MUINDI.....PETITIONERS/ RESPONDENTS

RULING

1. Before me for determination are two applications. The application dated 16.9.2020 appears to have been spent because it seeks interlocutory reliefs pending the hearing of the application dated 27.2.2020. At the exparte stage, interim orders restraining the respondents from disposing or interfering with the deceased's estate particularly land parcel number Mitamboni/Mitamboni/[xxxx] pending the applicant's earlier application dated 27.2.2020. As the Applicant's gravamen is in the earlier application, I will therefore concentrate on the application dated 27.2.2020 as the one dated 16.9.2020 is already spent.

2. The Application dated 27.2.2020 seeks three reliefs. Firstly, rectification of the schedule of distribution in the grant that was issued to the respondents on 22.11.2018 so as to give actual acreage to each of the parties who were allocated the 40 acres of land parcel Mavoko Town Block[xxxx] ; Secondly, rectification to indicate that the respondents hold the following five properties namely [Particulars Withheld]Cooperative Society Kiimani, 20x100 feet and 2½ acres, Mitaboni Market Plot [xxxx] and Commercial Plot No [xxxx](Lukenya Ranching & Cooperative Society Limited) in trust for the beneficiaries being CMM, JMM and PMM; Thirdly, a rectification of the certificate of grant to indicate that out of the 55 Acres from [Particulars Withheld] Cooperative Society(Kiimani) to reflect that out of the 55 acres, Teresia Wayua Nzioka and Phelista Kavindu Kithuka getting 25 acres each then the remaining 5 acres to be shared equally amongst the beneficiaries.

3. The application is supported by an affidavit deponed by the applicant on 27.2.2020 and a further affidavit deponed on 8.3.2021. He averred that he had not understood the mode of distribution and felt that there was no fairness on the same. He stated that his concern was the distribution of Mavoko Town Block [xxxx] which did not indicate the acreage he was to take. He also proposed that the properties [Particulars Withheld] Cooperative Society Kiimani, 20x100 feet and 2½ acres, Mitaboni Market Plot[xxxx] and Commercial Plot No [xxxxx] (Lukenya Ranching & Cooperative Society Limited) be held by the respondents in trust for the beneficiaries. In addition, he proposed that out of the 55 acres in [Particulars Withheld] Cooperative Society Limited, Teresia Wayua Nzioka and Phelista Kavindu Kithuka get 25 acres each then the remaining 5 acres to be shared equally amongst the beneficiaries. The deponent pointed out that in the application for grant, the property [Particulars Withheld] Cooperative Society Limited was indicated as being 50 acres whereas in the confirmed grant, it was indicated as 55 acres. The applicant also took issue with the proposed mode of distribution whereby he has been lumped up with strangers and that the administrators have been given liberty to hold some of the properties for future use a situation that can give rise to abuse and that the properties ought to be held in trust. The applicant sought for the rectification of the grant to avert more problems.

4. By replying affidavit deponed on 15.10.2020, the 1st administrator/respondent and with the consent of the 2nd respondent opposed the application and denied selling the property Mitaboni/ Mitaboni/[xxxx]. It was pointed out that the applicant had been scuttling efforts to transmit the property Mitaboni/ Mitaboni/[xxxx]that was to be shared amongst all the five beneficiaries. It was averred that the applicant had sold his share out of the said land to a third party even before transmission has taken place. It was further averred that the applicant was present in court and consented to the proposed distribution and that the present application is an afterthought meant to derail the distribution of the estate.

5. Vide replying affidavit deponed by the 2nd respondent on 7th May, 2020 it was averred that on 30th November, 2014 family members of the deceased sat and agreed to the mode of distribution as evidenced by minutes of the meeting annexed to the affidavit. It was also averred

that the mode of distribution was consented to by all the parties including the applicant and steps have already been taken to distribute the properties in accordance with the grant that was eventually confirmed and therefore the applicant cannot run away from what he had agreed upon.

6. Parties agreed that the applications be canvassed vide written submissions.

7. In their submissions dated 8.3.2021, counsel for the applicant in placing reliance on section 74 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules challenged the respondents for attempting to transfer the land Mitaboni/ Mitaboni/[xxxx] without involving the applicant. It was also submitted that the applicant never renounced his right over some of the properties. It was finally submitted that the respondents holding some of the properties for future use is likely to be abused and that there is need to have them hold in trust for the beneficiaries. The court was urged to grant the orders sought.

8. In response, vide submissions dated 30.12.2020 by the respondents' counsel, the court was reminded that the properties [Particulars Withheld]Cooperative Society Kiimani, 20x100 feet and 2½ acres, Mitaboni Market Plot [xxxx] and Commercial Plot No [xxxx] (Lukenya Ranching & Cooperative Society Limited) are held by the respondents in trust for the beneficiaries. It was submitted that the respondents are in the final stages of transmission of the land that is the subject of the grant and therefore the orders sought ought not to be entertained. It was also submitted that the applicant squandered his part of the proceeds from the estate by selling the same to other persons and now wants to disturb other beneficiaries. It was finally submitted that the applicant did not meet the threshold to warrant the orders sought as the respondents were duly allowed to administer the estate of the deceased and have powers vide section 82 of the Law of Succession Act.

9. The record shows that Mutua Munguti Makau was the original administrator of the estate of the deceased but he passed on pursuant to which a rectified grant was issued to include his widow Veronica Kamene Mutua. This means that the original grant mentioned by the applicant does not exist.

10. I have considered the rival affidavits and the submissions filed and find the issues for determination as follows;

a. Whether the application has merit.

b. What orders the court may make?

11. In addressing the first issue, the relief of rectification is set out in Rule 43 (1) of the Probate and Administration Rules, which echoes **Section 74** of the Law of Succession Act. Rule 43(1) says:-

“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 time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made.....”

12. The import of the above provisions of the law is that rectification of grants is limited to three instances, to wit; **errors in names and descriptions of persons or things; 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.**

13. In the matter of the **Estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR** the court stated;

“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 of 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.....”

14. The applicant in his affidavit has not pointed out to the court the errors in names and descriptions of persons or things; errors as to time or place of death of the deceased. In the absence of such proof, the application dated 27.2.2020 lacks merit. What the applicant has indicated is his dissatisfaction with the mode and shares of distribution of the property of the deceased. If that is the case, then his application is inappropriate as he ought to seek to have the certificate of confirmation of grant revoked by filing the appropriate application for the court's consideration. Suffice to add that the responsibility to seek rectification of the grant falls squarely under the shoulders of the administrators. There is no evidence that the applicant had approached the administrators over the discrepancy in the confirmed grant and that they failed and or refused so to act. It is inappropriate for a beneficiary to proceed by himself and file an application for rectification without involving the administrators and other beneficiaries. It is instructive to note that the applicant's affidavit does not contain a consent by the rest of the beneficiaries so as to legitimize the application for rectification of the confirmed grant. The rectification of the said grant amounts to a redistribution of the estate which requires the involvement of all the beneficiaries. As this was lacking, I find the applicant's application for rectification not merited in the circumstances. Further, it is noted that the applicant fully participated in the confirmation of the grant by signing the consent to distribution as well as appearing in court and confirming that he had no objection to the confirmation of the grant. At this stage and in the absence of an application for revocation of the certificate of confirmation of grant, the respondents ought to be allowed to continue with the distribution of the estate of the deceased. That being the position, the first issue is answered in the negative.

15. In regard to the 2nd issue, it is noted that the applicant is challenging the distribution arrived at by the administrators. However, the manner in which he has approached the court is not proper. In order to ensure that the applicant is not thrown under the bus by the administrators, this court will grant him some limited period within which to lodge the appropriate application while at the same time issue an order for maintenance of status quo for that limited period.

16. In the result, the following orders are hereby made:

a). *The Applicant's applications dated 16.9.2020 and 27.2.2020 are ordered dismissed with no order as to costs.*

b). *The Applicant is granted leave to file an appropriate application, if any, challenging the certificate of confirmation of grant within fourteen (14) days from the date hereof failing which the administrators shall be at liberty to proceed with the exercise of distribution of the estate.*

c). *An order of status quo regarding the estate of the deceased shall be maintained for fourteen (14) days pending the filing of the appropriate application by the applicant and in default the status quo order shall lapse.*

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF MAY,2021.

D. K. KEMEI

JUDGE