



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1099 OF 2018

IN THE MATTER OF THE ESTATE OF MARGARET WACHUKA MUGO (DECEASED)

ANTHONY GICHUHI MUGO.....APPLICANT

-VERSUS-

JAMES MUGO MBUTHI.....1ST RESPONDENT

PAULYNNE NYAMBURA MUGO.....2ND RESPONDENT

CHRISTINE WAIRIMU MUGO.....3RD RESPONDENT

FRANCIS MWANGI MUGO.....4TH RESPONDENT

CAROLINE NJOKI MUGO.....5TH RESPONDENT

CONSOLATA WANJIKU MUGO.....6TH RESPONDENT

IMELDA NYANDO AMANI.....7TH RESPONDENT

RULING

1. The deceased Margaret Wachuka Mugo died intestate on 10th May 2017. She was survived by the following children: -

- a) Anthony Gichuhi Mugo (applicant);
- b) Paulyne Nyambura Mugo (2nd respondent);
- c) Christine Wairimu Mugo (3rd respondent);
- d) James Mugo Mbuthi (1st respondent);
- e) Francis Mwangi Mugo (4th respondent);
- f) Caroline Njoki Mugo (5th respondent);
- g) Consolata Wanjiku Mugo (6th respondent)

Her other son Patrick Kariuki Mugo died and left Imelda Nyando Amani (7th respondent), Shamir Mugo Kariuki and Margaret Wachuka Kariuki.

2. The estate of the deceased comprised:-

- (a) LR No. Dagoretti/Riruta/4572;
- (b) LR No. Dagoretti/Riruta/4577;
- (c) LR No. Dagoretti/Riruta/45778;
- (d) LR No. Gilgil Plot No. 1952;
- (e) Shares in Eveready company and Safaricom Ltd and
- (f) Money at Barclays Bank and Kenya Women Finance Trust.

3. The grant of letters of administration intestate was on 27th February 2019 issued to the applicant. The same was confirmed on 3rd March 2020. This followed a consent. The distribution of the estate of the deceased to the respective beneficiaries had been agreed on.

4. The application dated 18th January 2021 by the applicant was brought under **section 74** of the **Law of Succession Act (Cap 160)** and **rules 43, 63 and 74** of the **Probate and Administration Rules** to rectify the certificate of confirmation for him to utilise the entire land in portion M. for a period of 13 years to recover his investment in the school, or, in the alternative, for him to collect rental income from portion A. for a period of five years and also collect the entire loan owned by Pauline Mugo to the estate from portion E. all totalling to Kshs.10,200,000/=, or, in the alternative, in the event the estate cannot compensate him for his 50% shareholding in portion M., an order do issue for him to absolutely own 50% of the land in portion M. and the remainder be held by the family trust on behalf of the family.

5. In the certificate of confirmation, the applicant was to get 50% absolutely of portion M. and the balance (50%) was to go into a family trust to be created and registered for all the beneficiaries in equal share. Portion A. was to go into the family trust created and registered for the benefit of all beneficiaries in equal share.

6. It is therefore clear that the application was intended to vary the distribution of the estate as had been agreed in the certificate of confirmation. The substantial complaint by the applicant was that the respondents were frustrating the administration of St. Anthony High School on portion M. to the extent that the agreement in the certificate of confirmation was not working.

7. The respondents opposed the application, first that it was fatally defective, and secondly, that it was wanting in merits.

8. **Section 74** of the **Act** provides as follows:-

“Errors in names and descriptions, or in setting fourth 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.”

And **rule 43(1)** of the **Probate and Administration Rules** states as follows: -

“43(1) 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 the 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 issued.”

According to **Black’s Law Dictionary, 10th Edition**, at page 1467 **“rectification”** relates to correction or definition of something which is erroneous or doubtful. Where the parties to an agreement have determined to embody its terms in the appropriate and conclusive form, but the instrument meant to effect this purpose is by mutual mistake so framed so as not to express the real intentions of the parties, an action may be brought to rectify the instrument. Where, for instance, a name has not been properly recorded, or a parcel of land has not been properly described, rectification may be sought to correct the errors.

9. In the **Estate of Muniu Karugo (Deceased) HC P & A No. 2668 of 1997**, it was observed that rectification is meant to cure minor errors, mistakes and irregularities, but cannot be used to fundamentally change the character of the grant. Rectification cannot be used to change the beneficiaries or the distribution contained in the certificate of confirmation. A contentious application that touches on the issue whether or not one should be included, or removed from the list of beneficiaries, or whether the nature of the distribution, including whether a property belonged or did not belong to the estate of the deceased, is not one that can be determined under **section 74** of the **Act** or **rule 43(1)** of the **Rules**.

10. The error envisaged under **section 74** of the **Act** and **rule 43(1)** of the **Rules** must essentially relate to a mistake to a name or description or time and place of the deceased’s death, or for the purpose of a limited grant. Any substantial amendment to a grant or a certificate of confirmation cannot be cured under the provisions (**In Re Estate of Henry Mwithimbu Karigu (Deceased) [2020]eKLR**).

11. In any case, the orders in the certificate of confirmation followed the consent of all the beneficiaries of the estate of the deceased. By the consent, the beneficiaries became contractually obligated to share the estate in the manner contained in the certificate of confirmation. It is trite that a consent order or judgment may only be varied or set aside for fraud, collusion, misrepresentation, or for any reason which would

enable the court to set aside an agreement (**Brooke Bond Liebig (T) Ltd –v- Mallya [1975] EA 266**).

12. Other than granting leave for the firm of Angaya, Nasimiyu & Associates Advocates to come on record for the applicant, I find that the application dated 18th January 2021 is fatally defective and lacking in merits. It is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2021.

A.O. MUCHELULE

JUDGE