



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 102 OF 1998**

**IN THE MATTER OF THE ESTATE OF FRANCIS M' MURITHI (DECEASED)**

**KENNETH KIMATHI.....PETITIONER**

**VERSUS**

**VERONICA KANARIO MURITHI.....1<sup>st</sup> INTERESTED PARTY/APPLICANT**

**CATHERINE MURIITHI.....2<sup>nd</sup> INTERESTED PARTY/APPLICANT**

**MARTHA NTARARA MURITHI.....3<sup>rd</sup> INTERESTED PARTY/APPLICANT**

**RULING**

1. Before this court are two applications all premised on **Section 74 of the Law of Succession Act, Rule 43 of the Probate and Administration Rules**. The first one is dated 7<sup>th</sup> August 2019 and was filed by **Catherine Murithi** seeking rectification of the grant issued to the applicants herein on 20/12/2018 to reflect the content of the judgement of 30/12/2018 and the orders of 09/07/2019 to the effect that the shares of the deceased beneficiaries be held by their respective personal representatives.

2. In support of the first application, it was her averment that while in the process of implementing the grant of representation herein, it was discovered that the names of deceased beneficiaries were included in the grant contrary to the import of the judgement of 30/10/2018 hence making it difficult to implement the grant.

3. The second application is dated 4<sup>th</sup> October 2019 and was filed by **Martha Ntarara Murithi** seeking amendment of the rectified grant by adding **L.R. Ntima/ Igoki/2491 and L.R. No. Kiirua/ Nkando/427**. She also sought amendment of the grant to substitute beneficiaries of the deceased dependants.

4. To augment the second application, it was averred that the grant of the estate of the deceased was confirmed on 20<sup>th</sup> December 2018. That subsequent to the confirmation of the grant two parcels of **L.R. Ntima/ Igoki/2491 and L.R. No. Kiirua/ Nkando/427** were not included in the list of the assets of the deceased. She stated further that one beneficiary **Luke Kiumbe** passed on 9<sup>th</sup> September 2019 and Antony Gatobu Kiumbe was appointed the legal representative of the estate to hold in trust for the other siblings.

5. None of the parties opposed any of the applications.

**ANALYSIS AND DETERMINATION**

6. This Court delivered its judgement on 30<sup>th</sup> October 2018 and distributed the estate of the deceased. Part of its judgement held as follows;

**“As some of the beneficiaries are deceased, their children shall take, the share which their parent would have taken had he not died. The persons listed in paragraph 3 of their affidavit sworn on 24<sup>th</sup> July 2018 by the interested parties shall take the share of their deceased parents as shown below;”**

7. The court listed the beneficiaries who have so far passed on and included the respective children and/or representatives of the estate. During the rectification of the grant, this court notes, the amendments were not done to reflect the content of the judgement of 30/12/2018 and the orders of 09/07/2019 to the effect that the shares of the deceased beneficiaries be held by their respective personal representatives. Accordingly, I allow the 2<sup>nd</sup> interested party's application dated 7<sup>th</sup> August 2019 to the extent only that the certificate of confirmed grant shall be amended to accord with the judgment of the court and subsequent orders thereto on the shares of the deceased heirs.

8. However, I see two dilemmas in the second application dated 4<sup>th</sup> October 2019. The first is the quest by the 3<sup>rd</sup> Interested Party seeks to appoint **Anthony Gatobu Kiumbe** as the personal Representative of the estate of **Luke Kiumbe** who passed on 9<sup>th</sup> September 2019. Such appointment of personal representative of a deceased dependant cannot be done in these proceedings. I have not even been shown any grant issued to Anthony Gatobu Kiumbe. I see only annexed copy of the burial permit which is not a grant of representation and cannot be a basis for order sought from the court.

9. In these proceedings, the court can only make a general order that such share of a deceased heir shall devolve equally amongst the children of the deceased heir. But, where there are disputes, especially of the identity of the beneficiaries or their respective entitlements, my view is that such share should be transmitted to the personal representative of the deceased heir to hold as such pending ascertainment of the beneficiaries of the deceased heir and their respective entitlements.

#### **Discovery of Assets**

10. The second dilemma causes even more trouble. The 3<sup>rd</sup> interested party attempted to invoke Section 74 of the Law of Succession Act to include **L.R. No. NTIMA/IGOKI/2491 & L.R. NTIMA/IGOKI/ 427** as part of the estate of the deceased. It was her averment that the assets were not included in the list of assets.

11. I have lamented before that such substantive matters cannot be carried through under the limited jurisdiction in section 74 of the Law of Succession Act. Perhaps the misconception in invoking section 74 emanates from the fact that, upon review, rectification of grant will ordinarily ensue. The substantive remedy is review of judgment, and rectification of grant is merely corollary and consequential. **In re estate of Charles Kibe Karanja (deceased) [2015] eKLR Musyoka J** stated the following on Section 74 of the Law of Succession Act and discovery of new assets;

**“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules.....”**

**Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....”**

**New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”**

12. Masterly exposition. In light thereof, the jurisdiction for rectification of grant is restricted to simple matters stated in the section; it is therefore incapable of resolving further distribution of the estate. Be that as it may, the court answers to a higher calling; to ascertain all the assets of the deceased and distribute them to the rightful beneficiaries. There is absolute need in this proceedings that all the assets of the estate of the deceased are brought in and distributed to the beneficiaries. I should therefore invoke the inherent jurisdiction of the court and deal with the matter. See **Rule 73 of the Probate and Administration Rules** that provides: -

**“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”**

13. Details of the assets as well as mode of distribution of the assets of the deceased have been provided. Of significance is that none of the parties has opposed the mode of distribution proposed by the applicant. In the interest of justice I should review the decision of the court herein. Accordingly, I allow the inclusion of **L.R. Ntima/ Igoki/2491 and L.R. No. Kiirua/ Nkando/427** as estate property. I also order that these properties shall be distributed equally amongst all the beneficiaries of the estate. A duly amended certificate of confirmation of grant be issued. It is so ordered.

**Dated signed and delivered in open court this 24<sup>th</sup> day of February, 2020**

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**F. GIKONYO**

**JUDGE**

**Thangicia for applicant**

**Muriera holding brief for Kaumbi for applicant**

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**F. GIKONYO**

**JUDGE**