REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 972 OF 2011

IN THE MATTER OF THE ESTATE OF DISHON ONDIEK MAYABI (DECEASED)

RULING

1. The application for determination is a summons for rectification of grant dated 1st November 2018. What it seeks to have rectified is, not the grant itself but, the certificate of the confirmation of the grant. It is brought at the instance of Samson Mayabi Ondiek, one of the administrators of the estate of the deceased, who I shall hereafter refer to as the applicant. He avers, in his affidavit in support, sworn on 1st November 2018, that some of the beneficiaries have died, among them being Charles Amukoa and Enos Kweno. He would like the dead children replaced by their own children or their widows, as survivors of the deceased.

2. The proposed rectification is resisted by Margaret Ayoma Andia, who is a daughter-in-law of the deceased, whose own husband, a child of the deceased, has passed on. She is also an administratrix of the estate. I shall refer to her as the respondent for the purpose of this ruling. She swore an affidavit on 14th March 2019. She holds the view that the proposed distribution is a ploy by the applicant to circumvent an environment and land cause pending before the Chief Magistrate's Court, being Kakamega CMCELC No. 4 of 2018, where she and others have been sued by the Diocese of Kakamega Registered Trustees over Kakamega/Sergoit/51, which she avers the applicant had caused to be registered in his name, subdivided it and sold portions of it to the said Diocese of Kakamega Registered Trustees without following due process. She takes the position that Kakamega CMCELC No. 4 of 2018 should be disposed of first before the proposed rectification is addressed.

3. The application was argued orally on 19th November 2019. Both sides breathed life to the averments made in the two rival affidavits.

4. The application is premised on section 74 of the Law of Succession Act, Cap 160, Laws of Kenya and Rule 49 of the Probate and Administration Rules. Section 74 provides as follows:

> "74. Errors may be rectified by court
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> > 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."

Rule 49 says:

> "A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit."

5. It is not clear why the applicant cited Rule 49 of the Probate and Administration Rules, since the Rule which effectuates section 74 of the Law of Succession Act is Rule 43. The relevant portion, for the purpose of this ruling, is Rule 43(1), which 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."

6. From the language of section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, it should be clear that the provisions are about two things, an error and a grant.

7. The provisions focus on rectification of errors. The equivalent word for error is mistake. See *Concise Oxford English Dictionary*, Twelfth edition, Oxford University Press, New York, 2011, page 485. In *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, St. Paul, 2004, page 659, error is defined, in the context relevant to this ruling, as a mistake of law or fact in a tribunal's judgment, opinion or order. Mistake is defined, in the same text, at page 153, as an error. It would, therefore, follow that section 74 of the Law of Succession Act is to be invoked to correct errors or mistakes, whether of law or fact, relating to grants of representation.

8. Since section 74 of the Law of Succession Act is about rectification of grants of representation, we should ask ourselves, what then is a grant of representation? The interpretation section of the Law of Succession Act, section 3, does not define a grant of representation, but Rule 2 of the Probate and Administration Rules does, in the following terms:

> ""grant" means a grant of representation, whether a grant of probate or of letters of administration with or without a will annexed, to the estate of a deceased person."

9. The Law of Succession Act, at sections 53 and 54, provides for the forms that the grant may take. The provisions say as follows:

> "Forms and Grants
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> 53. Forms of grant
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> A court may—
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> (a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—
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> (i) probate of the will to one or more of the executors named therein; or
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> (ii) if there is no proving executor, letters of administration with the will annexed; and
>
> (b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.
>
> 54. Limited grants
>
> A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act."

10. The summons dated 1st November 2018, seeks rectification, not of the grant, but of the certificate of confirmation of grant. It carries only one prayer, which states:

> "THAT the Certificate of Confirmation of Grant issued to SAMSON MAYABI ONDIEK, MARGARET AYUMA ANDIA & ENOS KWENO in this matter on 19th April 2011 at the principal magistrate's court at Vihiga be rectified and or amended and be issued with proper names as follows … "

11. The question then is, is a certificate of confirmation of a grant equivalent to a grant, to be rectified or amended through section 74 of the Law of Succession Act? The answer to that question is that a certificate of confirmation of grant is not a grant of representation. Grants of representation take either of the the forms stated in sections 53 and 54 of the Law of Succession Act. They are either a grant of probate or of letters of administration intestate or of letters of administration with will annexed or limited grants. A certificate of confirmation of grant is just that, a certificate to evidence the fact that a grant of representation has been confirmed under section 71 of the Law of Succession Act. The confirmation process does not produce another grant, the confirmed grant. No. It does not. The grant issued at the initiation of the cause remains intact even after confirmation, the certificate of confirmation does nothing more than to confirm that the persons appointed, under the grant confirmed, have been approved by the court to continue to administer the estate and to distribute it in accordance with the distribution schedule set out in the certificate.

12. To that extent, therefore, the certificate of confirmation of grant has nothing to do with section 74 of the Law of Succession Act. It is not one of the documents to be rectified under section 74, for that 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.

13. The other thing about section 74 is that it is fairly specific about the errors that can possibly be rectified under that provision. It is limited to correction or rectification of errors relating to names and descriptions, setting out of time and place of the deceased's death, and purpose of a limited grant. The discretion given to the court by section 74 of the Act can only be exercised to remedy the mistakes that are set out in that provision.

14. I have stated the position above, in paragraph 13 foregoing, so that I can interrogate whether, if one were to hypothesize that section 74 of the Law of Succession Act is not confined, in application, to grants of representation and the discretion donated can be utilized to correct errors in certificates of confirmation of grant, the summons dated 1st November 2018 discloses errors that would be liable to rectification under that section. It requires reiteration that section 74 is about correction or rectification of errors. The question I ask here is whether the said summons is about errors.

15. My understanding of the said summons is that some of the survivors of the deceased have died. In the wisdom of the applicant, these persons should be substituted, in the certificate of confirmation of grant, with their own survivors. To my mind, no error is disclosed in that state of facts. There is no mistake to be corrected or rectified. What that would mean, if section 74 were to apply to certificates of confirmation of grants, which is not the case, is that the discretion provided by section 74 would not be available to address the situation since there are no errors to be rectified. The circumstance created by the death of those survivors does not result in an error, but in change of circumstances, and section 74 was not designed to deal with changed circumstances. In the context of a grant representation, change in circumstances would invite revocation of the grant under section 76(e) of the Law of Succession Act. So, even if section 74 were to apply to certificates of confirmation of grant, the discretion given under that provision cannot possibly be used to achieve what the applicant seeks in his application dated 1st November 2018.

16. Confirmation of grants is principally about distribution of the estate. Indeed, section 71(1) talks about confirmation of grant being obtained "in order to empower distribution of any capital assets." In this cause, the grant was confirmed, on 19th April 2011. It is envisaged, under section 83(f) (g) of the Law of Succession Act, that the administrators would complete distribution of the assets six months after the confirmation of the grant. It is now eight years since the grant was confirmed, yet the administrators do not appear to have distributed the estate, in terms of the section 83, to the persons listed in the certificate of confirmation of grant dated 19th April 2019. The court distributed the estate on paper in April 2011, and by the end of that year, in accordance with section 83, the administrators ought to have completed the exercise of distribution on the ground. If they had done so, the challenge that they now have would not be there.

17. What the summons dated 1st November 2018 seeks is a redistribution of the estate. The applicant is telling the court that some of the survivors of the deceased have died, he would like them removed from the scheme of distribution and replaced with other individuals. In other words, he would like to rework the distribution that the court approved and confirmed on 19th April 2011. Such an exercise cannot be achieved through section 74 of the Law of Succession Act, since that provision is about errors or mistakes, within the narrow confines of the provision. The issue now before me is not errors but about the estate being redistributed, which cannot be done by merely rectifying the certificate of confirmation of grant. Distribution of an estate is governed by section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules. Any redistribution of the estate must be done while paying due regard to section 71 and Rules 40 and 41, since these provisions carry certain safeguards, which would, most certainly be overlooked or disregarded where redistribution is purported to be achieved through a mere rectification of the certificate of confirmation of grant. There are questions, which are addressed through those provisions, relating to inclusivity; such as whether the other administrators and survivors or beneficiaries are involved in the process, or are aware of what is transpiring or, have executed any consents, among others. The rectification process, under section 74 and Rule 43 does not address those concerns, since it has nothing to do with distribution, but mere correction of superficial errors.

18. The other concern would be that bringing on board of children or widows of sons and daughters of the deceased, who have themselves died, during the course of administration, and especially after the distribution of the estate through confirmation, would be tantamount to conducting several successions within one succession cause, that is to say successions in the estates of the children of the deceased being undertaken within the succession cause of their dead parent. Such an approach would facilitate direct passage of inheritance from the estate of the dead parent to the widows and children of the dead sons and daughters of the deceased, without first passing through the estate of the dead son or daughter. Such mode of succession would be against public policy. The property due to the dead son or daughter of the deceased must be subjected to a separate succession cause, where there would be an opportunity to ascertain the persons beneficially entitled to that estate and the mode of distribution of the estate to the persons so ascertained as beneficially entitled. Such persons would include creditors. Conducting a succession within another succession would disadvantage many people, who may not get notice of the goings-on. Such notices are the subject of section 67 of the Law of Succession Act and Rule 7(4) of the Probate and Administration Rules. Sections 51 and 71 of the Law of Succession Act, and Rules 7(7), 26, 40 and 41 of the Probate and Administration Rules, also provide safeguards designed to ensure that all the persons beneficially entitled are not excluded from the process, and have an opportunity to be heard in the course of it, should they so desire to be heard.

19. It would be prudent that where a child of the deceased dies after confirmation of grant, those entitled to succeed him initiate a succession cause in his estate, to distribute, among other assets, the property that would be due to the estate of such dead child from the estate of his or her deceased parent. Upon representation being granted to the estate of such child, the administrator of his or her estate should then move to the estate of the deceased parent of the dead child to claim that the share due to the dead child pass to them as administrators of his or her estate, whereupon the share being devolved to them they then pass it to the estate of the dead child for distribution in accordance with the law applicable to that estate.

20. In the context of the summons dated 1st November 2018, it should be demonstrated, that the persons sought to be introduced into the cause as widows or children of the dead children of the deceased, are themselves administrators of the estates of the persons whose shares they are being introduced to take. So that upon the shares being devolved to them, they would, in turn, take them to the estate of the said person for distribution amongst all those beneficially entitled. To allow any other approach is to sanction shortcuts, which, ultimately disadvantage other persons who may have a beneficial interest in the property. There is no evidence that the persons sought to be introduced, through the flawed process of rectification of the certificate of confirmation of grant, are administrators of the estates of the persons that they are purported to be survivors of. They would have no capacity, by virtue of sections 45 and 79 of the Law of Succession Act, to receive property that belongs to a dead person, that is the person whose share they are purported to be introduced into this cause to take without holding a grant of representation to the estate of that person.

21. Then there is the matter of the pending environment and land cause, in Kakamega CMCELC No. 4 of 2018. It was argued that the rectification application should be dealt with only after that case is finalized. The counter argument is that the case should have no impact on the succession process. In view of what I have stated above, it would not matter either way. The rectification application is incompetent, and the significance of the environment and land case is, therefore, neither here nor there.

22. In the end, I find that the application, dated 1st November 2018, is not merited, for the reasons that I have discussed above. It is for dismissal, and I hereby dismiss the same, with no order as to costs. Should any party be aggrieved by these orders, there is twenty-eight (28) days leave to move the Court of Appeal, appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF MARCH, 2020

W. MUSYOKA

JUDGE