



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

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 66 OF 2018**

**IN THE MATTER OF THE ESTATE OF**

**MONICA MIRAE (DECEASED)**

**BETWEEN**

**GABRIEL MBURU KAMAU.....APPELLANT**

**AND**

**STEPHEN KIMANI KAMAU.....1<sup>ST</sup> RESPONDENT**

**AUGUSTINE NJOROGE KAMAU..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. B. J. Bartoo, RM dated 31<sup>st</sup> May 2018 at the Thika Magistrates Court in Succession Cause No. 270 of 2004)***

**JUDGMENT**

1. This is an appeal against the ruling and order of the trial court dismissing two applications filed by the appellant.
2. The first application was a summons for rectification of grant dated 10<sup>th</sup> February 2017 made under **section 74** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** seeking an order that, *“The Certificate of Confirmation of grant issued on the 5<sup>th</sup> day of October 2005 be amended and rectified to specifically show that LR CHANIA/MAKWA/789 be subdivided according to a mode/sketch/map agreed upon by the beneficiaries and drawn by GEO-SPATIAL SYSTEMS LTD, a surveying firm.”*
3. The second application was a summons dated 25<sup>th</sup> January 2018 seeking an order that, *“PLOT NO. 3 GATUKUYU MARKET which was inadvertently omitted in the SUMMONS FOR RECTIFICATION OF GRANT dated 10<sup>th</sup> February 2017 be included in these proceedings and MARY NYAMBURA NGURI be listed as a co-beneficiary of the property known as PLOT NO. 3 GATUKUYU MARKET.”*
4. This matter concerns the estate Monica Mirae (“the deceased”) of Mangu Village, Thika who died on 15<sup>th</sup> October 2019. She was survived by three sons; Augustine Njoroge Kamau, Stephen Kimani Kamau and Gabriel Mburu Kamau who applied for grant of letters of administration. They were issued with a grant of letters of administration intestate on 29<sup>th</sup> December 2004. According to the Certificate of confirmation dated 5<sup>th</sup> October 2005, all the deceased’s properties were to be shared equally between the deceased’s three sons. In particular, the properties in dispute in this application, CHANIA/MAKWA/789 (“Plot 789”) and Plot No. 3 Gatukuyu Market (“Plot No. 3”), were shared equally amongst the three brothers.
5. The appellant filed an affidavit sworn on 10<sup>th</sup> February 2017 in support of the application for rectification. He deponed that Plot 879 originally belonged to the deceased and her three sons as shown in the certificate of title dated 9<sup>th</sup> December 1985. In the circumstances, he stated that only 25% of the Plot belonging to the deceased is what forms part of the deceased’s estate hence the court should correct the error on the certificate of confirmation of grant. He further deponed that the parties had agreed to subdivide Plot 879 according to the mode of subdivision already agreed upon in terms of Sketch plan/map prepared by Geo-Spatial Systems Limited which shows the part each beneficiary has been using as A, B, C, and D that he has developed part A and D. In part D he has developed a quarry and water pump. He adds that development and investment of the water pump is recognised by the Lower Chania Water Resources Users Association of which he is a member and also is also supported by the local administration. He therefore prayed that the summons for confirmation be rectified to reflect that Plot 789, *“To Share Equally (in terms of Sketch Map drawn by Geo-spatial Systems Limited)”*.
6. As regards Plot No. 3, the appellant in his deposition sworn on 24<sup>th</sup> January 2018, stated that it does not form part of the deceased’s estate as it was distributed earlier in Thika Succession Cause No. 6 of 1980 to the deceased and her three sons in addition to one Ambrose Warui

and Joseph Nguri Mirae. It was thus erroneous for the administrators to include it in the distribution amongst themselves. He stated that Ambrose Warui died unmarried while Joseph Nguri Mirae left a wife Mary Nyambura Nguri who should be enjoined to the proceedings. He therefore proposed that the summons for confirmation be rectified to reflect that Plot No. 3 be shared equally between, “*Gabriel Mburu Kamau, Stephen Kimani Kamau, Augustine Njoroge Kamau and Mary Nyambura Nguri.*”

7. The respondents filed a joint affidavit filed on 21<sup>st</sup> February 2017 to oppose the summons for rectification. As regards the Lower Chania Water Resources Users Association, the respondents stated that it never claimed a beneficial interest in the property and that the subject pump was put on land reserved by the Government. They claimed that the appellant’s intention is to hive off some land in order benefit himself to the detriment of his brother, Augustine and if the appellant so wished, he could hive off his land and donate it to the Association. The respondents contended that even though the deceased was entitled to 25% of Plot 789, the parties herein are the beneficiaries and are entitled to equal shares. In any event, title has already been issued in the names of the three beneficiaries.

8. The trial magistrate visited Plot 789 and observed that the part D referred to by the appellant was a quarry and that the water pump was in a reservoir and thus not part of the estate property. She also observed that the entire land was occupied by the three beneficiaries and there was no separate portion for the deceased. In addition, the trial magistrate found that the deceased was a joint tenant of Plot 789 and when she died, the beneficiaries registered her death by filing her death certificate and a certificate of title issued in their names. In the circumstances, the learned magistrate proceeded to dismiss the application.

9. The trial magistrate dismissed the summons regarding Plot No. 3 as there was no evidence to support the claim on behalf of Mary Nyambura Ngure.

10. The parties canvassed the appeal by way of written submissions which I have considered. The appellant raised the issue that the trial magistrate considered non-existent applications because she cited the wrong dates for the application in the ruling. It is not in doubt that the court was referring to the applications filed by the appellant as it is clear that the appellant responded them and was heard and ultimately the court delivered its decision. Since there was no prejudice occasioned to the appellant, this argument lacks merit.

11. Although several issues have been raised by the appellant in the memorandum of appeal. The main issue for consideration is whether the learned magistrate erred in law and in fact in dismissing the appellant’s application for rectification of the grant. This calls for a consideration of the applicable provision that is **section 74** of the **Law of Succession Act** deals with circumstances under which grants of representation that may be rectified by the court. It stated as follows:

*74. Errors in names and descriptions or in setting out 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.*

12. A close reading of these provisions will show that rectification of grants is provided in three clearly defined cases: *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. Does the appellant’s case, which I have outlined above, fall within the provisions of **section 74** aforesaid? As I understand the appellant’s case is that only 25% of the Plot 789 belonged to the deceased and was available for distribution. It is not disputed however that even that 25% would be shared equally between the brothers hence all the beneficiaries would end up have an equal share of the entire property. This is a fact that the appellant does not dispute as Plot 789 is actually shared equally amongst the three beneficiaries but he proposes that certificate of confirmation should state, “*To Share Equally (in terms of Sketch Map drawn by Geo-spatial Systems Limited)*”.

14. It is clear from the proposed rectification that the appellant wants the court to resolve the issue of subdivision which is not within the purview of an application for rectification. The deceased’s estate, in so far as Plot 789 is now in the names of the beneficiaries, has been administered since each beneficiary is entitled to an equal share. The trial magistrate, after visiting Plot 789, concluded that each beneficiary occupied a distinct portion of the land. I therefore find that any dispute as to occupation or boundaries must now be determined elsewhere.

15. I also find that the trial magistrate was correct in dismissing the claim in respect of Plot No. 3. Once again, the introduction of a different beneficiary and assertion of a claim on behalf of another person cannot amount to rectification. I also doubt that the appellant could make the claim on behalf of another person without evidence in that respect.

16. I have evaluated all the material before the trial court as the first appellate court, and I have found that the appellant’s case does not fall within the purview of rectification of a grant under **section 74** of the **Law of Succession Act**.

17. The appeal is dismissed. Since this is a family matter there shall be no order as to costs.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of MAY 2020.**

**D. S. MAJANJA**

**JUDGE**

Appellant in person.

Wakarura Irungu and Company Advocates for the 1<sup>st</sup> respondent.

2<sup>nd</sup> respondent in person.