

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 601 OF 2004

IN THE MATTER OF THE ESTATE OF ANDREA NYUMBIRE

LICHIPAI alias NYUMBILE OLUCHIBIA (DECEASED)

RULING

1. The application that I am tasked with determining is a summons dated 3rd April 2018. The same is headed summons for rectification of grant. It seeks equal distribution of the parcel of land on the ground.
2. The deceased was said to have been survived by two sons, who were both appointed administrators of the estate. At confirmation of the grant, the property, Butso/Indangalasia/597, was shared between the two at a ratio of 3.7:9 acres, on an application dated 16th May 2012. The confirmation application was brought by Simon Musolini Nyumbile, and the affidavit was sworn by him. It was he that he proposed that he gets 3.7 acres, while his brother, Thomas Nyumbile Makare, gets 9 acres. Both of them appeared before Chitembwe J on 23rd October 2012, and informed the court that they had agreed on distribution, so that Simon Musolini Nyumbile took 3.7 acres and Thomas Nyumbile Makare 9 acres. The application was allowed, a certificate of confirmation of grant was duly issued in those terms.
3. The application dated 3rd April 2018 has been brought at the behest of the same Simon Musolini Nyumbile. He now seeks that the property be shared equally between him and Thomas Nyumbile Makare.
4. Rectification of grants is provided for by section 73 of the Law of Succession Act, Cap 160, Laws of Kenya. It states as follows:

“74. Errors may be rectified by court 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.”
5. It would be seen from the above provision that rectification of grant would be sought to correct errors in the names and descriptions, or setting forth of the time and place of the deceased’s death or purpose of a limited grant. The process is for corrections of mistakes with respect to such matters. Is there an error or mistake herein? None has been alleged. The applicant herein seeks a redistribution of the estate so that property is shared equally between him and Thomas Nyumbile Makare. There is no error to correct.
6. The discretion to rectify a grant is not available where the parties seek a redistribution of the estate. It was the applicant who proposed the distribution that led to the grant being confirmed. He is now seeking that the said orders be revisited to change the terms of distribution. At the oral hearing of the application, he blamed Thomas Nyumbile Makare for giving himself a bigger share of the land, yet the application to confirm the grant was not brought by Thomas Nyumbile Makare, but by the applicant himself, Simon Musolini Nyumbile. There can be no basis for him to now turn around and blame Thomas Nyumbile Makare, for the distribution that was proposed in that application. When both of them appeared before Chitembwe J, they indicated that they had agreed. It was open to him to file a protest but he did not. In any case, he could not raise a protest to his own application. He has not indicated what has now changed to require that the matter be revisited. This is a classic case of parties who approbate and reprobate, who engage in back and forth, blow hot and cold. There must be an end to litigation.
7. In I do not see any merit in the application dated 3rd April 2018, and I hereby dismiss the same. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF MAY, 2020

W. MUSYOKA

JUDGE