



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 607 OF 2009

IN THE MATTER OF THE ESTATE OF MAKOKHA NYILISI MUSA (DECEASED)

RULING

1. The application, that I am called upon to determine, is dated 7th August 2019, and it seeks that Catherine Munjeresa be substituted, as administratrix, with Mark Nyangweso, and that the certificate of confirmation of grant be amended to reflect the names of Zedekiah Sakwa Makokha and Mark Nyangweso Makokha, as administrators. It further seeks that the shares allocated to the second house, in the estate, be altered in the manner reflected in the application. There is also a prayer that the restriction placed on Butso/ /Shikoti /656 be removed.
2. In the said application, the applicants propose a new mode of distribution, in which they introduce two new beneficiaries, being Ben Ramsey Muyonga, a son to a deceased daughter of the deceased, known as Nora Nangabo, and to a Gabriel Osundwa, whom they wish to be given part of their shares in recognition for his financing their mother's treatment and the succession cause.
3. The application is not opposed. The same came up for hearing on the 6th July 2020, when the applicants submitted that they only wished to alter the share that devolved upon the second house, arguing that the other beneficiaries would not be affected. They submitted that the application was in good faith, and was in accord with the wishes of the beneficiaries affected.
4. The main issues for determination are whether the deceased administrator could be substituted and whether the certificate of confirmation of grant could be amended.
5. On the first issue, it will be noted that the application is not purported to be founded on any particular provision of the law. However, the Law of Succession Act, Cap 160, Laws of Kenya, provides, at section 81, for what should happen where one of several administrators dies. It talks about the vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative. It states as follows:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”

6. With regard to that the court in *In Re Estate of Joel Rukwaro Thuku (Deceased)* [2018] eKLR, observed that:

“5. The law regarding the status of a grant where deceased administrators or executors have died is well settled under Section 81 of the Law of Succession in case one or more of several executors or administrators dies. For clarity purposes, I wish to reproduce Section 81 which provides as follows:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them.”

6. From the wording of this section, there is nothing like substitution unless there is a continuing trust and there is only one surviving executor or administrator in which case the court shall appoint an additional executor or administrator.”

7. From the above, it is clear that the orders for substitution sought herein are not available for granting, as they are not tenable in law.
8. With regard to the issue of amendment of the certificate of confirmation grant, so that the same can capture the additional proposed mode

of distribution and the proposed beneficiaries, the court in *In Re Estate of Charles Kibe Karanja (Deceased)* [2015] eKLR, the court said:

“It goes without saying that the provisions in Section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a grant of representation. In probate practice, the term “confirmed grant” has gained currency and it is understood by some to mean the certificate of confirmation of grant. It is a misconception. The certificate issued upon a grant being confirmed does alter the grant of representation made in the matter. It does not replace the grant of representation, and it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed. In short it is the evidence of the confirmation of the grant. From the wording of Section 74, it is plain that the same was not tailored to for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not. A party wishing to have rectified or altered or amended a certificates of confirmation of grant, need not approach the court through Section 74 of the Law of Succession Act, for the reasons that I have given above; rather they ought to apply for review of the orders made upon the application for confirmation of grant, where the alterations sought are fundamental; or for amendment of the certificate under Rule 73 of the Probate and Administration Rules to address minor errors or mistakes in the body of the certificate.

A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. 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 effected without touching the orders made by the court at the distribution of the estate. Consequently, such changes cannot and should 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. Among the imported procedures is the device of review under the Civil Procedure Rules. In the relevant rules on review under the Civil Procedure Rules, an order of the court can be revised on the grounds of an error on the face or the record or discovery of new and important evidence that was not available at the time of the making of the order sought to be reviewed or for any other sufficient reason.

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 previously 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.”

9. That was reiterated in *In Re Estate of Njagi Rurima (Deceased)* [2020] eKLR, where the court said:

“There is no provision in the Act that permits rectification or amendment by adding a new beneficiary in the grant or to redistribute the estate.”

10. In *In Re Estate of John Mwaka Koka (Deceased)* [2019] eKLR, the court stated that:

“19. ... it is clear from the orders sought in this application that what is sought by the applicant herein is strictly speaking not an order for rectification but one for review. Section 74 of the Law of Succession Act which deals with rectification states as follows:-

“Errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose of in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered or amended accordingly.”

20. The reliefs sought are not restricted to rectification of errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose of, in a limited grant. They are in fact prayers which substantially seek to alter the judgement delivered by this court on distribution of the estate. They therefore ought to be treated for what they seek, review of the judgement.”

11. The applicant herein seeks that the certificate of confirmation of grant be amended to reflect or accord with their proposed mode of distribution, which introduces two new beneficiaries, who were initially not part of the proceedings. As stated above, such an amendment goes to the core of the distribution, and completely affects or alters the distribution of the estate ordered by the court, and the same cannot, therefore, be effected through an amendment of the certificate of confirmation of grant.

12. In an upshot, I find that the application is neither well founded nor properly conceived, and I hereby proceed to dismiss the same, for the reasons given.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF July, 2020

W MUSYOKA

JUDGE