



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1447 OF 1999

IN THE MATTER OF THE ESTATE OF FIDA HUSSEIN ADAMALI (DECEASED)

RULING

1. The grant of representation with written will in respect of the estate herein was made jointly to Najmudin Esmail Adamali and Kutbudin Esmail Adamali, on the 27th October 1999 and confirmed on 24th June 2003. Among the assets comprising the estate is a property on Brook Side Drive forming L.R. 1870/111/265 which was bequeathed to Nafisah Esmail Adamali and Fawzia Esmail Adamali alias Fauzia Esmail Adamali alias Fawzia Mamuji as tenants in common.

2. For one reason or the other, the administration of the estate seems not to have been completed since 2003. Consequently, Najmudin Esmail Adamali one of the executors moved to this court through the firm of Kamwendwa Advocates vide Summons for Certificate of Grant pursuant to Rule 43 of the P & A Rules and Section 74 of the Law of Succession seeking;

(1) That this Honourable Court be pleased to make Najmudin Esmail Adamali as the sole executor of the will of Fida Hussein Adamali (Deceased).

(2) That the grant of representation made to the said Najmudi Esmail Adamali and Kutbudin Esmail Adamali in this matter on the 27th October 1999 and confirmed on 24th June 2003 be rectified in the following respects:-

(i) The estate of the deceased on all that property on Brookside Drive forming L.R. No. 1870/111/265 be transferred to and or registered as a whole in the name of Fawnaf Holdings Limited.

(ii) That costs of this application be provided for.

3. The application is premised upon grounds set out on the face of it and an affidavit sworn on 22nd June 2020 by Najmudin Esmail Adamali the surviving executor to the estate. The applicant averred that his co-executor passed away on 16th November 2016 thus leaving part of the estate not fully administered. A copy of the death certificate of the deceased co-executor was attached and marked NEA-3. He therefore sought the removal of the name of the deceased executor and a fresh grant of probate with written will and the certificate thereof to issue in his name as the sole surviving executor.

4. He further averred that, L.R. 1870/111/265 which was bequeathed to Nafisah Esmail Adamali alias Nafisah Esmail Adamali and Fawzia Esmail Adamali alias Fauzia Esmail Adamali alias Fawzia Mamuji who have since relocated to Canada be transferred and registered in the name of their company known as FAWNAF HOLDINGS LIMITED. A copy of a deed of settlement was attached as proof of the said agreement. That the shareholders of the said company are Nafisa Esmail Adamali alias Nafisah Esmail Adamali and Fawzia Esmail Adamali alias Fauzia Esmail Adamali alias Fawzia Mamuji, Adam Adamali (brother) and Ruibab Adamali (sister in law).

5. During the hearing, Mr. Kamwendwa literally adopted the averments contained in the affidavit in support of the application. I have considered the application herein and the affidavit in support. The application is seeking rectification of the grant and the certificate thereof on grounds that, one of the executors is deceased and the beneficiaries of L.R. 1870/111/265 would like to have the same transferred and registered in the name of their company known as Fawnaf Holdings Limited.

6. The law governing rectification of a grant is Section 74 of the law of Succession and Rule 43 of the Probate and Administration Rules. It provides for alteration and rectification of grants in circumstances where, 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 exist.

7. In this case, the purpose for the grant is to administer the estate through duly appointed executors. One of the executors has since died as

evidenced from the death certificate. In the circumstances, the purpose or objective of administering the estate to completion cannot take place. Accordingly, rectification of the grant is inevitable by removing the name of the deceased co-executor pursuant to Section 81 of the Law of Succession and leave the surviving executor as the sole executor for purposes of vesting all executorship powers into his hands so as to complete the administration of estate. For those reasons, the first prayer for removing the name of the deceased executor from the grant is merited and justified hence allowed as prayed.

8. Regarding the second prayer of transferring L.R. 1870/111/265 to accompany, this is not an issue of rectification of a grant. This prayer does not fall under factors listed under Rule 43 of the P and A Rules or Section 74 of the Law of Succession. Basically, the applicant is seeking to review the confirmed grant by seeking redistribution of the estate.

9. Review under the Law of Succession can only occur under Order 45 of the Civil Procedure Rules pursuant to Rule 63 of the P and A Rules under the Law of Succession. This prayer is therefore misplaced under the principles governing rectification of a grant. Secondly, the grant of probate herein with written will cannot be amended or reviewed to alter the will of the testator in distributing his estate. What the applicant is technically seeking from this court is for this court to rewrite the will.

10. This court has no powers to interfere with or alter the mode of distribution of the estate. I cannot touch the will as that will amount to interfering with the deceased's wishes. Any person intending to transfer their share to a company, should transfer the property first into their names and thereafter transfer it to the company.

11. For those reasons, the second prayer is dismissed. Accordingly, I do allow rectification of the grant of probate and the certificate thereof only to the extent that the name of Kutbudin Esmail Adamali who is now deceased be removed from the grant and the certificate of confirmation thereof and that a fresh grant and a certificate of confirmation do issue to reflect the name of Najmudin Esmail Adamali as the sole executor for purposes of completing the administration of the unadministered part of the estate. Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2020.

J. N. ONYIEGO

JUDGE