



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 913 OF 2002

IN THE MATTER OF ESTATE OF NJEGA MATHANJUKI ALIAS NJEGU MATHAYUKI (DECEASED)

FELIX WAMBUGU NJAGI.....ADMINISTRATOR/APPLICANT

VERSUS

STEPHEN KARIUKI WAMBUGU.....RESPONDENT

RULING

A. Introduction

1. The applicant herein moved this court vide an application dated 10/04/2019 and wherein he basically sought for orders of rectification of grant that was issued on 14/03/2006 and confirmed on 20/02/2014 and further for lifting and/ or removal of the caution placed against the Land No. Ngandori/Kirigi/1248 by the respondent. The grounds upon which the application was based were basically that one of the beneficiaries namely Veronica Njura Wambugu who was to inherit once (1 acre) of the suit land passed on on 29/04/2016 before the applicant completed the process of execution of grant. As such, the applicant urges the court to order that the names of the said deceased Veronica be substituted with that of her son Stephen Kariuki Wambugu to facilitate him to take his mother's share in the deceased's estate.

2. In opposing the application, the respondent filed his replying affidavit sworn on 31/01/2020 and wherein he deposed to the effect that the applicant had intermeddled with the suit land and that he was selling part of the land without consulting other family members. That this was despite the fact that they lived on the suit land. He deposed that it was as a result of this that he did place a caution on the land to protect his own interests.

3. The application was canvassed by way of written submissions and wherein each of the parties supported his position as presented by their pleadings. The submissions reiterated the contents of the affidavit in support of the application and further submitted that he did not intend to change the mode of distribution but only to substitute the deceased beneficiary so as the process of distribution be determined. He further submitted that the caution placed by the respondent served no purpose except delaying the distribution of the estate. The respondent on his part reiterated the contents of his replying affidavit and submitted that the applicant had intermeddled with the estate and that was the reason for placing a caution on the suit land and as such the application was not made in good faith. Further that the matter is quite complex in itself and that the administrator had failed in his duties.

B. Issues for determination

4. I have considered the application herein, the relying affidavit in opposition to the same and further the rival written submissions by the parties. It is my opinion that the issue which ought to be decided is whether the application is merited.

C. Analysis of the law and determination

5. The instant application seeks rectification of the grant issued and confirmed in favour of the applicant. The application is for the purpose of substituting the name Veronica Njura Wambugu now deceased and who is a beneficiary in the estate of the deceased herein with one Stephen Kariuki Wambugu a son to Veronica. It was brought under the provisions of Rules 43, 49 and 73 of the Probate and Administrative Rules (1980).

6. Rule 43(1) provides for the procedure to approach court in seeking rectification of grant under Section 74 of the Law of Succession Act. Under Section 74, an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made may be rectified *by the Court*. In the persuasive authority in **the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR**, the court (Musyoka J) stated that: -

“What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out

of the time or place of the deceased's death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general....."

7. The death of a beneficiary and substitution thereof is not one of the instances envisaged under Section 74 and where rectification can be made. The grant as issued did not have any error or mistakes on names, descriptions, time or place of death of deceased and neither of such error is pleaded as the death of a beneficiary is not an error. As such, it is my view that the grant herein cannot be rectified under the provisions of Section 74 of the Act or Rule 43 of the Rules.

8. In **the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [supra]**, the Learned Judge was of the opinion that where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the Law of Succession Act, the applicant ought to approach the court for review under Order 44 of the Civil Procedure Rules which is one of the provisions of the Civil Procedure Rules imported into succession practice through Rule 63 of the Probate and Administration Rules. This is because both a grant of letters of administration and the certificate of grant are court orders which can only be amended through review and not through an application for amendment of pleadings. It is my opinion that the death of a beneficiary and substitution thereof is a 'sufficient reason' within the meaning of Order 44.

9. However, this application was also brought under the provisions of Rules 49 and 73 of the Probate and Administrative Rules (1980). Under **Rule 49** it is provided that:

"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."

Rule 73 on the other hand provides that: -

"Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

10. Under Article 159 of the Constitution of Kenya 2010, this court is obligated to administer justice without undue regard to procedural technicalities. The effect of these rules is that a party can file an application which is not otherwise provided for under the rules and the court can entertain the same and invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice and without undue regards to the form or the procedure a litigant has approached it. It is my view that despite the fact that rectification in some instances cannot be made by dint of Section 74 of the Succession Act, by invoking the above provisions of the law this court can entertain the instant application notwithstanding.

11. The applicant herein is seeking substitution of one of the beneficiaries who is deceased with the respondent who is the deceased only surviving beneficiary. In his affidavit in support of the application, he deposed that he was doing so in an effort to complete executing the grant. It is not in dispute that the said Veronica is deceased for a copy of her death certificate was attached to the application. I further note that the respondent was not opposed to the substitution of the said deceased beneficiary and/ or the share he is getting after the substitution as he never controverted the same both in his replying affidavit and the submissions.

12. In the Schedule to the amended certificate of confirmation of grant and which the applicant seeks rectification thereof, Land Parcel No. Ngandori/Kirigi/1248 is to be shared between the following: -

- 1) Agnes Koori Wambugu - 1 acre
- 2) Morris Muchangi Kina and
Caroline Wangari Wambugu - 1 acre to hold jointly
- 3) Veronica Njura Wambugu (deceased) - 1 acre.

13. The court records indicate that when the grant of letters of administration came for confirmation on 31/07/2013 all the beneficiaries were present. The respondent being a son of the deceased did not file a protest against confirmation or apply for revocation of grant. There was therefore no dispute as to distribution of the estate.

14. I further note that the grant herein was confirmed on 27/10/2006 and subsequently amended on 20/02/2014. It is clear that the grant has not been executed which has delayed the distribution to the detriment of the beneficiaries.

15. Considering all the foregoing, and the proposed amendments, I am of the considered opinion that the orders sought may be granted without affecting the substance and content of the grant. The beneficiaries' shares will not be affected save for the share of the deceased Veronica which will go to her son being her rightful heir.

16. The prayer of change in the grant for sizes of the shares from acres to hectares was not included in the application but in the submissions. I do not wish to deal with the issue that was not pleaded. However, a conversion of acres to hectares will not change the size of the shares of the beneficiaries. Furthermore, this is the work of the surveyor, not for this court.

17. As to the removal of the caution, the applicant sought that it be lifted and/ or removed so as each of the beneficiaries can get his share. The respondent opposed the same on the grounds that the applicant was in the process of selling part of the suit land and it was the reasons

why he placed a caution. The respondent attached a copy of a sale agreement in support of the assertion and which agreement or facts as to intended sale were never denied by the applicant. As such it is not in dispute that there is a caution in place and the same having been lodged by the respondent.

18. I note that the applicant in this application has given the beneficiaries their rightful shares as per the original grant. I believe he is aware that the grant must be executed as it is save for amendment that may be authorized by the court. It is only after execution that an individual beneficiary may exercise his absolute power of proprietorship of his share. For now, any land sale agreement made with a 3rd party is null and void for all intents and purposes.

19. The essence of a caution is to prevent the registration of dispositions in the subject land because the cautioner is apprehensive that such registration may obliterate his interest in the land (**See Kiptuya Ngerech Too v Peris Wangui Macharia & another [2018] eKLR**). It is my opinion that so long as the caution is in place, the land cannot be fully administered.

20. The respondent has not filed any case or even an application against the applicant in regard to the confirmed grant. Neither has he demonstrated that he has any legal interest to be protected by the caution. The succession cause has been concluded and it is in the interest of justice to have the grant executed as soon as practically possible. I am of the considered opinion that the respondent has failed to demonstrate justification of retaining the caution for these reasons, the caution ought to be lifted.

21. It is my finding that the application has merit and ought to be allowed which I hereby do. I hereby grant the following orders:

a) That the grant be and is hereby rectified for the share of Veronica measuring one (1) acre be bequeathed to th respondent and an amended grant do issue.

b) That the caution lodged against the title of LR. Ngandori/ Kirigi/1248 by the respondent is hereby lifted.

c) That each party meets their own costs.

22. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 19th day of October, 2020.

F. MUCHEMI

JUDGE

Ruling delivered in the absence of parties