



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 103 OF 1992**

**IN THE MATTER OF THE ESTATE OF NJUNGEI KAMUNYU (DECEASED)**

**JANET MURUGI NJUNGEI.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**PETER ROMANUS KAMUNYU.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**VERSUS**

**ELIZABETH WANGARI NGUGI.....RESPONDENT/APPLICANT**

**RULING**

1. By way of summons dated 17<sup>th</sup> February, 2020 and brought under **sections 47, 70, 74 and 81** of the **Law of Succession Act, CAP 160 Laws of Kenya, rule 43, 44 and 73** of the **Probate and Administration Rules**, the Respondent/ Applicant seeks for orders that:

i. *Spent*

ii. A grant of probate (or letters of administration) issued to Janet Murugi Njungei and Peter Romanus Kamunyu both of P. O. Box 433, Thika in this matter on the 8<sup>th</sup> April, 1992 and rectified on 19<sup>th</sup> February, 2019 together with confirmation of grant issued on the 26<sup>th</sup> February, 1993 and rectified on the 19<sup>th</sup> February, 2019 be further rectified to include part portion of the parcel of land left out in the confirmation of grant being parcels of land known as Plots No. 10, 27, 28 and 29 situated on L.R. No. 10821/87 (Original No. 10821/15) being the mother title as provided for by Rule 43(1) of the Probate and Administration Rules.

iii. The parcels of land known as Plots No. 10, 27, 28 and 29 situated on L.R. No. 10821/87 (Original No. 10821/15) being occupied by Plot No. 10 – Patrick Kamunyu Njunge and John Gicheha Njungei (deceased), Plot No. 27 – John Gicheha Njungei (deceased) and Janet Murugi Njungei, Plot No. 28 – open space measuring 0.079 hectares and Plot No. 29 – Clement Karari Kamau, be redistributed evenly by all the beneficiaries and included in the confirmation of grant.

iv. A review of occupation of parcel of land known as Plot No. 17 being occupied by Magdalene Njeri Gicheha and Elizabeth Wangari Ngugi be made so that Magdalene Njeri Gicheha be compensated by Elizabeth Wangari Ngugi on undeveloped parcel of land or plot.

v. Any subsequent sub-division, transfer and or transaction of the deceased's estate and properties be evenly and equally distributed amongst all the beneficiaries.

2. The application is supported by an affidavit sworn by the Applicant Elizabeth Wangari Ngugi on 17<sup>th</sup> February, 2020 and premised on the grounds that she has already developed part portion of the parcel of land known as Plot No. 17 and put up a permanent commercial building thereon. This she says was confirmed by the Deputy Registrar who conducted a site visit of the land parcel. That it would therefore be best that she compensates Magdalene Njeri Gicheha as opposed to having the building demolished.

3. The Applicant deposed that she is a widow of the deceased's son and one of the beneficiaries of the estate. She took issue with the confirmation of grant issued on 26<sup>th</sup> February, 1993 and rectified on 19<sup>th</sup> February, 2019, in particular, the distribution of the parcels of land known as Plots No. 10, 27, 28, and 29 situated on L.R. No. 10821/87 (Original No. 10821/15). She averred that these Plots were not disclosed to the court and did not therefore form part of the confirmation. Further that some of the beneficiaries have taken more parcels of land than others thus offending the principle of even and fair distribution.

4. The Applicant asserts that she has already developed part portion of the parcel of land known as Plot No. 17 and put up a permanent building thereon. She proposed that instead of having the building demolished, she be allowed to compensate Magdalene Njeri Gicheha, to whom the plot was assigned, with a similar portion of plot to be hived off her homestead. Further that Plot No. 18 and Plot No. 24 be divided equally amongst Peter Romanus Kamunyu, Clement Karari and George Ngugi Njungei (deceased) to ensure equal distribution of the

deceased's estate.

5. The Applicant asked the court to redistribute the estate of the deceased as per her proposal and rectify the grant as such. She urged that she had knowledge that the Administrators were intending to subdivide and sell the title to Plot No. 28 and the orders are therefore necessary to protect the interests of the beneficiaries.

6. In reply thereto, Peter Romanus Kamunyu, the 2<sup>nd</sup> Administrator/Respondent swore an affidavit on 6<sup>th</sup> July, 2020 on behalf of himself and the rest of the beneficiaries in which he deposed that the application is misplaced as the issues raised therein had already been canvassed in her objection and a judgment rendered. That to canvass the instant application would be tantamount to the court sitting on appeal over its own judgment. He urged the court to dismiss the application with costs in this respect.

7. According to the 2<sup>nd</sup> Administrator, there does not exist a Plot No. 28 and Plot No. 29 as alleged by the Applicant. To this end, he referred to the report from the Deputy Registrar's site visit dated 19<sup>th</sup> October, 2018 and the map prepared by M/s Geosite systems which is on record. With respect to Plot No. 10, he asserted that it is an exhausted and depleted stone quarry, which would not have fairly formed any of the beneficiary's share, and is held in trust by the Administrators as per the initial confirmation of grant dated 6<sup>th</sup> February, 1994.

8. It was the 2<sup>nd</sup> Administrator's assertion that the Applicant is a vexatious litigant who is keen on depriving the beneficiary known as Magdalene Njeri Gicheha of Plot No. 17 comprising her share of the deceased's estate. That the Applicant had attempted to access the said Plot by instituting a suit in the Environment and Land Court at Thika in ELC Case No. 772 of 2017, which suit has since been dismissed. Further that the Applicant had developed the property after the family had settled on the sub-division and whilst the application for confirmation of grant was pending before this Court.

9. The application was canvassed by way of written submissions. The Applicant in person filed written submissions dated 20<sup>th</sup> July, 2020 in which she reiterated the contents of her pleadings and asked the court to grant the application as prayed stating that to do otherwise would occasion the beneficiaries irreparable loss and damage.

10. The Applicant noted that the 2<sup>nd</sup> Administrator is now the sole administrator stating that the 1<sup>st</sup> Administrator died on 19<sup>th</sup> April, 2020 and was laid to rest on 24<sup>th</sup> April, 2020. She asked the court to grant the family time to engage in discussions to chart a way forward as opposed to replacing the 1<sup>st</sup> Administrator. I note that this issue was however not raised in the instant application.

11. In opposition thereto, learned Counsel Ms. Njoroge filed undated written submissions on behalf of the Petitioners/Respondents in which she relied on the contents of the Replying Affidavit sworn by the 2<sup>nd</sup> Petitioner/Respondent and submitted that the instant application is bad in law and ought to be dismissed forthwith.

12. Ms. Njoroge contended that the objection proceedings that had been filed hereto have been heard and determined and the estate of the deceased herein has since been distributed. Counsel asserted that both the consent to confirmation of grant and mode of distribution were signed by all the beneficiaries, including the Applicant, and the instant application, which seeks to reopen the objection proceedings, is an abuse of court process. She noted that the subdivision hereto, and which was agreed upon by the beneficiaries, took into account the location of the homesteads of each of the beneficiaries in a bid not to displace any of them.

13. Ms. Njoroge asserted that while the Applicant purports to have developed a portion of Plot No. 17, which as per the schedule of distribution belongs to Magdalene Njeri Gicheha, the Applicant undertook the said development while the Summons for Confirmation was pending in Court. Counsel contended that the Applicant is a vexatious litigant whose only aim is to displace the beneficiary Magdalene while occasioning unnecessary litigation costs to the rest of the beneficiaries.

14. Ms. Njoroge conceded that the 1<sup>st</sup> Petitioner/Respondent passed away on 19<sup>th</sup> April, 2020 but faulted the Applicant for attempting to address the issue by way of submissions, stating that this is an issue that should be canvassed in a separate application.

15. Whereas the instant application raises various issues with respect to the distribution of the estate of the deceased's estate, a reading of the ruling issued by this court on 19<sup>th</sup> February, 2019, reveals that the issues raised hereto have already been canvassed and were the subject of that ruling. The Applicant herein was the Respondent/Objector in that application. I wish to restate portions of that ruling, and in particular paragraphs 20, 21, 22 and 23 in which this court opined thus:

*20. I note that from both the Report and the map prepared by M/s Geosite systems it is clear that each of the portions assigned to each beneficiary measures approximately 0.151 hectares. This is in line with the principle of equality applied when distributing an intestate estate. In the proposed distribution, the beneficiaries who had already put up their homes were assigned the portions on which their homesteads stand. In cases where the said portions do not add up to their entitlement, they have been assigned a separate additional plot.*

*21. The Respondent herein is assigned Plot No. 20 which measures approximately 0.151 hectares. She has her homestead on the said Plot. Magdalena on the other hand is assigned Plot No. 17 measuring 0.083 hectares and Plot No. 22 measuring 0.068 hectares which altogether adds up to 0.151 hectares. From the pleadings, Magdalena has lived on Plot 17 for more than two (2) decades.*

*22. Considering that the Respondent has an additional portion which she cultivates, it is evident that all she is seeking is a larger entitlement in the deceased's estate than of the other beneficiaries. There is however no basis for her claims which are also contrary to the provisions of the **Law of Succession Act** which envisages equality in distribution of intestate estates.*

*23. There is therefore no doubt that the Respondent's claim is merely an attempt at displacing Magdalena whose portion the*

*Respondent considers prime land. Her claim is fashioned only to put her interests above those of the other beneficiaries and upset the whole subdivision. This is bearing in mind that Geosite surveys mapped out Plot No. 10 and Plot No. 27 as land held in trust for the entire family.*

16. A reading of the above excerpt reveals that the Applicant's claims that the existence of Plot No. 10 and Plot No. 27 were concealed from this court are unfounded. Further that the court extensively deliberated upon the issue of the distribution of Plot No. 17 and noted that the family had already agreed that this was the portion to go to Magdalene Njeru Gicheha. It therefore appears that the Applicant moved in to build on Plot No. 17 in a bid to thwart Magdalene's inheritance of that share.

17. With respect to the claim that there are Plots No. 28 and 29 which were not taken into account, it is noteworthy that the Deputy Registrar's report on record and which was considered in the ruling of 19<sup>th</sup> February, 2019 indicates that the entire parcel of land is subdivided into 27 plots. This was stated at paragraph 13 of the ruling of 19<sup>th</sup> February, 2019. As such, the Applicant's claim that there are Plots No. 28 and 29, which were not taken into account in the distribution, without evidence in support thereof, are unfounded.

18. The Applicant also sought that the court redistributes Plot No. 18 and No. 24. In my considered view, this is an afterthought geared to reopen the proceedings herein when the grant has been confirmed and the estate distributed. An issue for redistribution ought not to be raised in an application for rectification of grant.

19. The law on rectification of grants is provided under **section 74** of the **Law of Succession Act** which provides the errors that may be rectified by the court and **rule 43** of the **Probate and Administration Rules** which provides the procedure for seeking relief.

20. An error which may warrant the grant of an order for rectification of grant must relate to: the names or descriptions of any person or thing; the time or place of the deceased's death and in the case of a limited grant, the purpose for which the grant was made. In the instant case, the Applicant has failed to demonstrate any of these three (3) circumstances. It therefore appears that the Applicant is attempting to raise new arguments herein, without evidence in support thereof, and wrongly so, under the guise of an application for rectification of grant. In my considered view, the application is an afterthought, geared to sabotage the distribution of the deceased's estate against the cardinal rule that litigation must come to an end.

21. On the issue of substitution of the 1<sup>st</sup> Petitioner/Respondent who has since died, I note that the issue was raised in the submissions, but was not pleaded. It is trite that parties are bound by their pleadings. (See – **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR**). In the instant case, by raising a new issue in her submissions, the Applicant has deviated from her pleadings. As such, in the instant application, this court will shy away from deliberating on the effect of the death of the 1<sup>st</sup> Petitioner/Respondent, who was a co-administrator of the estate of the deceased herein.

22. Be that as it may, **section 81** of the **Law of Succession Act** provides that upon the death of one or more administrators, all the powers and duties of the administrators shall vest in the survivor or survivors of them. Additionally, in the instant case, the court has not been informed that any of the beneficiaries are minors, and further, the estate has since been distributed.

23. In the end, I find that the application for rectification of grant filed by way of summons dated 17<sup>th</sup> February, 2020 is devoid of merit. The Applicant has failed to demonstrate an error in the grant of the deceased's estate to warrant the grant of the rectification orders sought. For this reason, the application fails in its entirety and is hereby dismissed. Costs shall be borne by the Applicant. It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2020.**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the Respondent/Applicant.**

**In the presence of.....Advocate for the Petitioners/Respondents.**