



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.93 OF 2015

IN THE MATTER OF THE ESTATE OF HENRY MWITHIMBU KARIGU (DECEASED)

MARY MUTHONI MUKKIRA & 12 OTHERS.....APPLICANT

VERSUS

VERONICAH MUTUA & 7 OTHERS.....RESPONDENT

RULING

1. By order of court made on 26th November, 2019, both applications, the one for stay of execution pending appeal and that of rectification of grant were to be heard together. This ruling is therefore in respect of the said two applications.

Application for rectification of grant

2. Before me is a Summons dated 20th November 2019 and filed on 22nd November, 2019, expressed to be brought under section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules. The applicants are Mary Mukiira, Rose Kaburu Gatua and Silveria Mwari Mwithimbu.

3. The application sought rectification of the certificate of grant by way of amendment of the Judgment delivered on 29th May 2019 for purposes of clarity and specificity in the following manner:

i. SHIRIKISHO BUILDING PLOT NO B11/163 the building is developed wherein the Eastern side of the plot on Mosque Hill Road contains 2 shops so one plot goes to Rose Karuru Gatua and the other goes to Mary Muthoni Mukiira.

ii. SHIRIKISHO BUILDING as is on the grant to read as SHIRIKISHO PBUILDING PLOT NO BII/163.

iii. In so far as the provision a (ii) of the Judgment, the Western side of the plot facing Uchumi Supermarket Ltd will generate 1 (one) Title jointly and severally owned by heirs.

iv. In so far as provision a (d) is concerned, the plot referred to herein being PLOT NO BII 164B the plot has been developed and is in active utilization and the same borders Tom Mboya Street and Kirukuri Street. The ½ acre facing the Tom Mboya side to go to MARY MUTHONI MUKIIRA as she has been in occupation of the said plot since 1976.

v. The representatives of the Estate of the Late Veronica Gacheri the 17th Applicant have not been provided for notwithstanding she was a daughter of the deceased and therefore a beneficiary to the estate. The same be effected to make reasonable provision for her shares in the estate.

4. The application is supported by an affidavit sworn jointly by Mary Muthoni Mukiira, Rose Karuru Gatua and Silveria Mwari. They depose that in the Judgment entered and delivered on 29th May 2019, the name of **Silveria Mwari** has been misspelt as Cecilia Mwari and the anomaly would give difficulties in the transfer process. Further that the Learned Judge omitted to include **Veronica Gacheri's** representatives who is the 17th applicant in the Judgment.

5. Further they averred that a seamless distribution of property in the absence of specific description of the property to be distributed to the beneficiary would create logistical difficulties.

6. The said application is opposed by **George Mugambi Mwithimbu**. He avers that the said summons was served on his advocate on 20th November 2019 despite having been filed on 1st November 2019. The application also amounts to grave abuse of the court process in that the certificate of confirmation of grant seeking to be rectified has not been extracted as per the judgment of the court dated 29th May 2019.

7. The deponent further states that in the judgment of this honourable court in particular (d), the court gave ½ share of the said Wanja Building to the 1st Applicant which in effect means that he would retain the other half but the certificate of confirmation does not show the beneficiary of the other half.

8. That the judgment did not remove the deponent as the co-administrator and the applicants have decided to completely exclude him in the administration the estate of the deceased and that the application before court is not only incompetent and bad in law but totally misconceived and intended to steal a match against.

9. That in response to the applicant's affidavit paragraph 3,4, 5, 6, the matters raised therein are not curable by way of review but by way of an appeal at the court of appeal.

10. The question to be answered is whether the rectification sought could be carried through under section 74 of the Law of Succession Act?

11. Rectification of grants is provided for in section 74 of the Law of Succession Act, Cap 160, Laws of Kenya and Rule 43(1) of the Probate and Administration Rules. Section 74 provides 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."

Rule 43(1) provides as follows:

"Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made."

12. From the language of section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, the scope of rectification of grants of representation is limited to *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. I may add that such other minor errors in that genre could also be rectified.*

13. Other major or substantial issues should be addressed through application for review of judgment or appeal. See **In the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR** where the court stated;

The law on rectification or alteration of grants is Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules..... 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.....

14. See also **In the matter of the estate of Hasalon Mwangi Kahero [2013] eKLR**

Where the court stated:

"when dealing with an application for rectification of grant to add a full name of person who was omitted."

An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error" It would be an error if say a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word "error" too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43.

15. In this case the applicant seeks to have the name of one of the beneficiaries namely **Silveria Mwari** which was misspelt as Cecilia Mwari to be rectified accordingly. I do note that the name appeared as Cecilia Mwari in the will. But, it seems her name is Silveria Mwari. It is not disputed that these names refer to one and the same person. Such rectification falls under errors that may be rectified under section 74 of the law of succession Act. I order that the name indicated as Cecilia Mwari shall now be rectified to read **Silveria Mwari**.

16. Similarly, description of estate property known as Shirikisho building, falls within court's power to rectify grant. This does not alter the core of the judgments but simply gives a proper and complete description of the said property. I order rectification of the description of the property to read SHIRIKISHO BUILDING BII/163.

17. However, I do note that other quite substantial amendments were sought which relate to the specific shops or side of building to be occupied by the respective beneficiaries as well as issues of a deceased beneficiary. It bears repeating that the scope of rectification of grant under section 74 of the Law of Succession Act is quite limited and cannot handle such substantial issues which may require further evidence or visit to the locus in quo or interrogation by appellate court. Perhaps, a proper application for review of judgment or appeal is the way out of this quagmire. For that reason, I grant only the two rectifications; of the name of Silveria Mwari and description of Shirikisho building. Let, parties seek directions from the court on how to proceed on those matters I have not granted.

18. Be that as it may, I do note that clarity is required in respect of Wanja building along Tom Mboya. I agree with GEORGE MUGAMBI that in accordance with my judgment, and by necessary implication, the property should be shared between the persons to whom the property had been bequeathed in the will and Mary Muthoni; each taking one half as per my order. The other order that all other properties shall be shared as per the Will should not cause any confusion as it is founded on the will. Perhaps, parties may appear before the judge for specific details in the will to be provided in the certificate of confirmation of grant with will annexed.

Application for stay of execution

19. By summons dated 20th November 2019 and filed on 22nd November, 2019, brought under section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules, and Article 159(2)(d) of the Constitution of Kenya 2010. George Mugambi Mwithimbu a Co-administrator/Applicant has applied for stay of execution of the judgment and decree of this court, (**Gikonyo, J**), dated 29th May, 2019 confirming the Grant of letters of administration with a Will annexed made on 20th January, 2016. The summons is supported by the affidavit of George Mugambi sworn on the same day, 20th November, 2019.

20. The Applicants argue that they have an arguable appeal with overwhelming chances of success: pursuant to direction of the court made on 26th July, 2017 the matter proceeded for hearing for only the issues of the validity of the will and the same was concluded and the court delivered a Judgment in which it held that the will was valid and also made an order for reasonable provision in favor of the respondents whereas the respondents application for reasonable provision dated 17th November 2016 has not been canvassed before court by the parties in view of the said direction.

21. Being aggrieved by the said Judgment the Applicant filed a Notice of Appeal at the Court of Appeal on 12th June 2019 giving notice that he intends to appeal. Subsequently the applicant filed this application for stay of execution of the Judgment and Decree.

22. That if the order for stay is not granted, the Applicant will suffer substantial loss in that vide the judgment/decree, he was dispossessed of a 1/2 of a property bequeathed to him by the Deceased in the will and the same given to the Respondents without giving him an opportunity to be heard as required by the rules of natural justice.

23. The Applicant moved timeously to the Court of Appeal on 9th July 2019 but owing to the lack of Judges of the Court of Appeal his matter has not been heard and that unless this application is heard his intended appeal against the judgment at the Court of Appeal will be rendered nugatory and as a result of which he will suffer irreparable loss and damage hence the urgency.

24. The Application for stay of execution is unopposed. Nonetheless, I note that this property was subject of the rectification application.

25. The Applicant filed his submissions to the application on 9th June 2020. Counsel for the Applicant submitted that as per the courts directions of 15th February, 2017 the applications dated 18th July 2016, 17th November, 2016, and 22nd November 2016 were shelved and what proceeded for hearing was the validity of the Will and hearing to that effect was concluded on 21st January 2019. That a ruling date was reserved for 21st May 2019 but was not ready and the same was rescheduled to 29th May 2019 when a Judgment instead of a ruling was delivered.

26. This latter submission is erroneous. I wish counsel consulted the record. According to the record, on 2nd April, 2019, the matter was scheduled for judgment on 21st May 2019. On the appointed date, the judgment was adjourned to 29th May 2019 when the judgment was delivered. That issue is settled.

27. He submitted that in the Judgment the Honorable court redistributed and/or gave ½ share of the developed plot on Tom Mboya street to Mary Muthoni Mukiira the 1st Respondent whereas the entire property was bequeathed to the applicants by the deceased in his will.

28. Counsel further argued that it's a cardinal principle of the Rule of Natural Justice under Articles 47 and 50 of the constitution of Kenya 2010 that no party should be condemned unheard and that in this case the court condemned the applicant unheard by giving away a ½ share of the property on Tom Mboya street bequeathed to him by the deceased without giving him an opportunity to be heard.

29. I have read the application, as well as the submissions filed. Stay of execution pending appeal is at the discretion of the court. However, the discretion is exercised upon defined principles of law. Under Order 42 of the Civil Procedure Rules, the applicant should show sufficient cause why the right of immediate realization and enjoyment of the fruits of judgment should be interfered with by the court. But, as that remains the predominant consideration, the court must be guided by the following; (1) whether substantial loss would ensue unless stay is granted; (2) whether the application was made without unreasonable delay; and (3) the need for appropriate security where necessary. Order 42 rule 6(1) and (2) provides;

a. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make

such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

b. *No order of stay shall be made under sub rule (1) unless-*

i. *The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and*

ii. *Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant*

30. In **Butt v Rent Restriction Tribunal** (Civil App No. NAI 6 of 1979), the Court of Appeal stated **that**;

a. *“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

i. *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.*

ii. *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

iii. *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

31. I am aware that both parties have rights. On one hand; the applicant has right of appeal which includes legitimate expectation that his appeal will not be rendered otiose, and, on the other; the respondents have the right to immediate realization of fruits of judgment which should not be postponed or interfered with by the court unless for sufficient reason. In balancing these competing rights and interests, the court relies on ever-assuring and established judicial method, which rests on the singular dependability of the *fact-base*, and which vindicates the principles of fairness, objectivity and legitimacy – to entertain the *account from the other side*; and thereafter, to weigh, check and balance the two streams of evidence, in order to arrive at a valid, fair and just result.

32. What are the circumstances of the case?

33. The Applicants are dissatisfied with the decision of this court and have filed appeal- this is their right. His major complaints are that the court distributed ½ a share in Wanja Building along Tom Mboya street to Mary Muthoni. Yet, the entire property had been bequeathed to him in the will. He lamented that he was not heard before this order was made. He also stated that once this property is distributed, it may be transferred to third parties, thus, making it impossible to recover it- something that will render his appeal nugatory should it succeed.

34. I note that Mary seems to state in the application for rectification that she is occupying and using a particular side of the said property. This is assuring and important consideration in this ruling. As the major contention is on this property, I order stay of distribution of this property until the appeal herein is heard and determined. However, status quo shall be maintained on this property, and specifically, Mary Muthoni will continue to occupy whatever side of the property she is currently occupying as the appeal is pursued. I should add however that the Court of Appeal is still in operation and the applicant should fast-track his appeal so that he does not use his indolence in prosecuting the appeal to the detriment of the other parties.

35. These orders are made in the best interest of and justice for the parties concerned. I order each party to bear own costs. It is so ordered.

Dated, signed and delivered at Narok through Teams Application this 23rd day of November, 2020

F. GIKONYO

JUDGE