



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**SUCCESSION CAUSE NO. 1 OF 1997**

**FORMERLY SUCCESSION CAUSE NO. 76 OF 1992**

**IN THE MATTER OF THE ESTATE OF NGORU BARICO alias NTHAKA NGURU BARIGU (DECEASED)**

**PATRICK KITHAKA NGORO.....PETITIONER/1<sup>ST</sup> APPLICANT**

**JOSEPH NJIRU NJERU.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**NJERU NDAKA NGURU.....PETITIONER/RESPONDENT**

**RULING**

1. The Applicants in their application dated 26 May 2020 sought orders *inter alia* that this Court varies or sets aside its orders of 26 November 2019 and to issue an order compelling the Petitioner/Respondent to execute all the conveyance documents pertaining to the estate of NGORU BARICO alias NTHAKA NGURU BARIGU (the deceased).

2. The application is brought under Rule 49 and 63(1) of the Probate and Administration Rules and premised on the grounds on the face of the summons *inter alia*; that the Petitioner/Respondent obtained the orders in the Amended Summons for Rectification of the confirmed Grant dated 4 April 2018 by concealment and non-disclosure of material facts and that the Applicants only became aware of the resultant orders issued on 26 November 2019 in February 2020. That the Applicants herein were never aware of the summons to rectify the grant and only became aware when surveyors started to enter the deceased's land L.R. No. EVURORE/EVURORE/838.

3. The application is supported by the Applicants' Affidavit sworn on the 26<sup>th</sup> May, 2020 in which they deposed; that the 1<sup>st</sup> Applicant and Petitioner/Respondent were appointed administrators of the deceased's estate vide the grant issued on 14 June 2011. The said grant was confirmed on 10 April 2018 to the terms *inter alia* that one of the deceased's lands L.R. No. EVURORE/EVURORE/838 be shared amongst the 1<sup>st</sup> Applicant, 2<sup>nd</sup> Applicant, the Petitioner/Respondent and one Margaret Mwendu Munyiya. They were each to get 10, 2, 8 and 2 acres respectively. Thereafter, the administrators sought the Land Control Board's consent to sub-divide the said land which was granted. While all this was happening, the named beneficiaries had already taken possession of their respective portions and even developed their respective portions. Form RL 19 was lodged and the suit land transmitted to the administrators.

4. However, the Petitioner/Respondent has since refused and/or neglected to sign the required documents and even threatened to never sign any transmission documents in favour of the beneficiaries for implementation of the grant. On 9 January 2020 the Petitioner/Respondent was seen touring the suit land with strangers and upon enquiry, he informed that 2<sup>nd</sup> Applicant that he had sold land. It was deponed that the Petitioner/Respondent then maliciously reported at Ishiara Police Station that the 2<sup>nd</sup> Applicant had assaulted him on that particular date and that the complaint is still pending at the police station.

Up to that point, the Applicants were not aware of the summons for rectification dated 4 December 2018 filed by the Respondent. The said summons was accompanied by consent dated on the even date in which the Applicants added that the signatures therein were forged and were not theirs.

5. On 23 February 2020, the Applicants filed summons seeking for orders to compel the Respondent to surrender Forms RL19 and that the Deputy Registrar of this court be authorized to execute all the necessary transfer documents pertaining to the deceased's estate. The Applicants later realized that the Respondent already caused the rectification of the confirmed grant vide his summons dated 4 December 2018 wherein the relevant orders issued on 26 November 2019.

6. The Petitioner/Respondent opposed the said application via his replying affidavit sworn on 29 June 2020. He referred to the application as

an afterthought as the Applicants were present in court when his summons for rectification of the confirmed grant was allowed and that they had even executed a consent in support. He explained that he even paid for the Applicants' transport to and from court during the rectification proceedings.

He deponed that the rectification was to remove the said Margaret Mwende Muniyithya, his daughter in law, as a beneficiary, and have her share in his name a fact well known to the Applicants.

7. According to him, he has never refused to sign any document to have the grant implemented, his only issue was that the Applicants wanted him to solely cater for the sub-division and title deed costs.

He added that he had only sold 6 acres out of his initial share to KUPPET Self Help Group and has never interfered with the rest of the land.

The petitioner/respondent/administrator deponed that he only included the 1<sup>st</sup> Applicant, his cousin, and the 2<sup>nd</sup> applicant, his son, in this his father's succession cause because he had no siblings. Despite all this, his son, the 2<sup>nd</sup> applicant assaulted him on 9 January 2020 when he had brought surveyors to the said land. He added that the 2<sup>nd</sup> applicant also chased him from his own home and has continued to waste the said land by destroying trees.

8. According to the Petitioner/Respondent, the Applicants were only against him because there was no more money to squander after he sold his portion to KUPPET.

9. The application was dispensed with by way of written submissions.

10. The Applicants submitted that the Respondent/Administrator obtained the rectification orders of 26 November 2019 by concealment and non-disclosure of material facts by failing to disclose to this court that the transmission of the estate from the administrators to the beneficiaries as per the grant issued on 10 April 2018 was incomplete owing to the Respondent's refusal to execute the necessary documents; by failing to serve the summons for rectification to the applicants and to other beneficiaries of the deceased; and by failing to inform the court that the Applicants herein were unaware that he had sold part of the land to KUPPET.

11. It was further submitted that the Respondent fail carry out his duties as outlined under section 79, 82 and 83 of the Law of Succession Act thus frustrating his co administrator. That the grant obtained on 26 November 2019 was only a cover up to the fact that he had secretly sold his 6 acres and the remaining 2 were not enough for him thus opting to disinherit his daughter in law, contrary to the grant. They argued that these acts amounted to intermeddling; the grant first issued in 2011 ought to have been executed first before the Respondent could sell his share of the estate.

12. It was submitted for the respondent through his counsel that rule 63 under which the present application was brought allowed for the applicability of some civil procedure rules in succession matters; accordingly, Order 45(1) of the Civil Procedure Rules allowed for a decree to be reviewed where, inter alia, there is discovery of new and important evidence which was not within one's knowledge even after due diligence. He argued that the applicants herein have failed to satisfy these requirement.

In addition, so it was submitted, that the Applicants failed to prove how the deceased's estate was being wasted by the Respondent so as to invoke the provisions of Order 40 Rule 1 of the Civil Procedure Code.

13. The main issue in the present application is the rectification done by this court on 26 November 2019 and an Amended Certificate of Confirmation of Grant issued to that effect. That rectification was done after the Respondent/Administrator filed a summons dated 4 December 2018. The Applicants' case is that they were not aware of the said summons.

14. According to the Summons for Rectification, the 2 acres given to Margaret Mwende was to be given to the respondent herein since Margaret had left her matrimonial home since her husband, the respondent's son, died and their efforts to trace her were futile. She had no children with the respondent's son.

However, I note that when the Summons came up for hearing on 16 September 2019 both administrators, the 1<sup>st</sup> applicant and the respondent herein, were present and this Court ordered that the summons be served upon the said Margaret Mwende Muniyithya and all other beneficiaries before the parties could be heard.

15. The hearing was then slated for 17 October 2019. Again, both administrators, the said Margaret and other beneficiaries were present. On this particular day, Margaret indicated her intentions to oppose the summons and was given 14 days to file her Replying Affidavit. The summons was ultimately fixed for hearing on 26 November 2019. On that date, the Applicants herein were present. Margaret had neither filed her affidavit nor was she present in court. There being no any other objection, this court then proceeded to rectify and confirm the said grant.

The applicants are now seeking an order of review of this court's order of 26 November 2019 which in effect gave the share of Margaret Mwende to her father in-law the respondent.

16. The conditions under which a party can seek review and setting aside of court's order are well spelt out under Order 45(1) (a) and (b) of the Civil Procedure Rules which provides:-

**45 (1) Any person considering himself aggrieved-**

**By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

17. The provisions of Order 45 of the Civil Procedure Rules (previously Order XLIV) is applicable in the Law of Succession matters. Rule 63 (1) of the Probate and Administration Rules provides:-

**63. (1) Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.**

Looking at the proceedings and evidence in this matter, the Applicants were at all times aware of the rectification proceedings filed by the respondent and were even present in court when the order they seek to review was made.

18. The applicants who were present in court at all material times for the rectification proceedings did not oppose those proceedings. For them to come to court seven(7) months down the line claiming that they were not aware of the proceedings and that the consents were forged is incredible. With their physical presence in court, the written consents of the applicants were not really necessary. I believed the respondent that the applicants had consented to the rectification because all their actions and conduct in court during those proceedings point to that truth.

19. It is imperative to note that when the court noticed that the share that the respondent wanted to allocate himself was that of his daughter in-law whose husband was deceased, the court directed that she be served. The respondent effected service on her and she appeared in court. The court explained to the beneficiary about the rights in the grant and asked her to file a replying affidavit to the application for rectification. The said Margaret did not comply and did not come for hearing of the summons.

20. The respondent had made it absolutely clear that after his son died, Margaret Mwendu left his home. In this application, it has not been disputed that Margaret and the respondent's son were not blessed with any children.

If it was wrong for the respondent to take the share of his daughter in-law who had shown no interest to defend it, then the applicants should have proposed another beneficiary closer to Margaret or to them. No such proposal was put up for consideration by the court.

21. I have looked at the shares of the applicant in the confirmed grant and I note that the shares of the applicants remain intact after the orders for rectification. The orders of 26<sup>th</sup> November, 2019 do not in any way affect the applicant and only affect the respondent and his family.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2020**

**F. MUCHEMI**

**JUDGE**

In the presence of :-

Court Assistant: Rahab

Ms. Muthoni for Administrator/Respondent

Ms. Maina for Applicant