



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 82 OF 1990

IN THE MATTER OF THE ESTATE OF PATRICK WAGURA KAHUGA (DECEASED)

JOSEPH THAMAINI WAGURA.....1ST APPLICANT

JAMES GITONGA WAGURA.....2ND APPLICANT

SUSAN WANJIRU WAGURA.....3RD APPLICANT

ANNE TERESA WANJIKU.....4TH APPLICANT

MARY GORETTI WANJIRA.....5TH APPLICANT

MARY WAIRIMU WAGURA.....6TH APPLICANT

-VERSUS-

MARY WANJIKU MBAI.....1ST RESPONDENT

PETER MAHUGU WACHIRA.....2ND RESPONDENT

AND

PAUL KIBIRA MAKARU.....INTERESTED PARTY

RULING

What is before me is the Summons General dated 9th April 2018 brought under Rules 49 and 73 of the Probate and Administration Rules by Paul Kibira Makaru, the interested party.

He seeks for an order that the ‘Certificate of Confirmation of grant issued on 13th April 1993 and later rectified by the Court be rectified again to include all the beneficiaries and their respective shares of 5% (being 8.05 acres) out of I.R.428/1(Formerly described as Nyeri/Kamatongu /2276).’

The application is supported by the grounds set out on the face of the summons and his affidavit sworn on the date.

In summary the applicant was made a party to these proceedings vide a court order issued on 22nd February 2018. His claim is based on the fact that he is the son of one Gabriel Makaru Chiuri alias Gabriel Makaru Shiuri. Makaru Chiuri was the plaintiff and Wagura Kahugu (deceased herein) was the defendant in **Nyeri HCC 115 of 1984**. According to the judgment delivered on the 21st September 2007 by the Hon Okwengu J.(as she then was), the subject matter was Nyeri/ Kamatongu/2276 comprising of 161 acres. She found and held that the plaintiff was entitled to 5% of the land i.e 8.05 acres. The defendant was ordered to *sign the application for Land Control Board Consent* for the subdivision of the suit land so that the plaintiff would get his 5% share and the defendant his 95% share each to be registered in their respective names. The defendant Wagura Karugu died on 8th April 1990 before the matter came to an end. This cause was filed on the 27th September 1990 by John Wambugu Wagura, one of his sons. Among the deceased properties was Title no L.R 2276 North of Nyeri Town. No liabilities were indicated in the form P&A5. A grant was issued to him on 3rd March 1992. It was confirmed on 22nd April 1993 whereby the administrator became the absolute heir of all the deceased’s estate set out in the grant including the suit property. It is noteworthy that at the material time the suit Nyeri HCC 115 of 1984 was still pending.

It is on the strength of this judgement, and the consent on record duly executed by the beneficiaries of the late Gabriel Makaru Chiuri distributing the 5% (8.05 acres) out of land parcel reference number I.R 428 (Formerly described as Nyeri/Kamatongu/2276) that he seeks this order.

On the 22nd February 2018, Mr. Karweru for the Petitioner sought by way of oral application for the correction of description of the suit property on the face of the confirmed grant from **L.R 2276 to I.R 428/1**. I allowed the same as it was supported by the title deed which bears both numbers. I hasten to add here that while writing this ruling a noted, to my consternation that the registry had extracted a completely different order, **a certificate on confirmation of grant for the Estate of Gabriel Makaru Chiuri alias Gabriel Makaro Shiuri issued to Paul Kibira Makaru with respect to I.R 428/1**, and which I inadvertently signed as it clearly bore the “checked and verified by” stamp of the in charge of the registry. That grant was obviously erroneously issued and I do hereby revoke it and any actions that may have taken place subsequent to its erroneous issuance. The same certificate of confirmation of grant is accordingly expunged from the record.

Back to the application before me, there was no response to it by the other parties in the cause. When it came up for hearing on 16th October 2018 Mr. Andrew Kariuki for the applicant pointed out that the application was not opposed. His position was that the rectification would now bring everything to order. Mr. Karweru for the Respondent raised a matter of law stating that the application was a non-starter, as the interested party had a judgment which he could execute. He submitted that there was nothing to rectify.

The real question here is can this court grant the orders sought through the application as filed? Can the outcome of the judgment in Nyeri HCC 115 of 1984 be a basis for the rectification of the grant. In other words, can the remedy of rectification of a grant be used as a mode for the execution of a judgment to include a judgment creditor and his share in the distribution of an intestate estate?

The application is anchored on Rules 49 and 73 of the Probate and Administration Rules. Under **rule 49** of the **Probate and Administration Rules**, it is provided:

“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.”

The rules further provide at **Rule 73**:-

“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.”

The applicant is stating that there is no provision in the rules for the kind of orders he is seeking, yet he says he wants the grant RECTIFIED. Legally he is way off. There are elaborate provisions of the law and procedure on rectification of a grant under **Section 74** of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules. **Section 74** provides for the errors on grants of representation that may be rectified by the court. It provides:

“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, may be rectified by the court; and the grant of representation whether before or after confirmation, may be altered and amended accordingly”.

The procedure for seeking the relief is set out in Rule 43 (1), which echoes **Section 74** of the Law of Succession Act by stating:

“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 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.....”

As was held in **Re estate of Kanyingi Gatwe (Deceased)(2018)eKLR** these rules give a party a leeway to file an application which is not otherwise provided for under the rules and affirm the inherent jurisdiction of the Courts to make such orders as may be necessary for the ends of justice. Clearly the provisions of the law restrict rectification of a grant in only three clear circumstances as follows: *Errors in names and descriptions of persons or things*;

1. *Errors as to time or place of death of the deceased*;
2. *In cases of a limited grant, the purpose for which such limited is made*; (See **Re matter of the Estate of Hassalon Mwangi Kahero (2013) eKLR**)

An error is a mistake and for the purposes of **Section 74** and Rule 43, it must relate to a name or description or time and place of the deceased's death, or the purpose of a limited grant. What the interested party seeks is not a mere rectification of an error as required by the rules. The prayer in the instant application if granted will make substantial changes to the certificate of confirmation of grant by adding new beneficiaries and interfering with the mode of distribution.

Courts have affirmed the position of the law by finding and holding that this cannot be done through an application for rectification as envisaged by s. 74 LOSA and rule 43 of the P&A rules. *In re estate of Charles Kibe Karanja (deceased) [2015] eKLR it was held: -*

“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of

the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant”

In *Re estate of George Ragui Karanja (Deceased)(2016)eKLR* it was held:-

“In any event, distribution of an estate cannot be revisited through a rectification application, for such applications are ideal for correction of errors and omissions going by the language of section 74 of the Law of Succession Act. Redistribution amounts to a revision of the orders made by the court at the confirmation of grant. Such orders should be disturbed only through appeal or review or by the consent of the parties.” (emphasis mine).

The award against the deceased in HCC 115 of 1984 became a liability to the estate hence the submission by Counsel for the petitioner that interested party was free to enforce the said judgment through execution proceedings. In fact, his words were that there was nothing to rectify.

On the question whether this court can grant the orders of rectification on the ground of the award in HCC 115 of 1984, the answer is no.

So should this application be dismissed? The applicant herein may have sought a rectification of the grant. That order is not available. The applicant could proceed to start execution proceedings? This matter has been pending before the courts since 1984. **1984!** What for when the claim is admitted, the land is available and all that is required is the paper work? It would fly in the face of the Constitutional fiat at article 159 that requires that justice shall not be delayed.

The beneficiaries are supposed to share the "**net intestate estate**" the estate of a deceased person in respect of which he has died intestate after payment of the expenses, debts, liabilities and estate duty set out under the definition of "net estate", so far as the expenses, debts, liabilities and estate duty are chargeable against that estate;

The facts of this case clearly show that all along the administrator and beneficiaries were aware of the court case HCC 115 of 1984. After the deceased died, they substituted him and fought the plaintiff's claim. The record is awash with documents, statements and affidavits including those of the administrator herein, acknowledging that the distribution of the suit land would await the outcome of the case. And that he had made provision for the 8.05 acres to fulfil the judgment. In an affidavit sworn on the 20th May 2009, John Wambu Wagura, the administrator deponed at paragraph 19:

“That upon the conclusion of HCC no 115 of 1984, we again sat down and carved out our agreed area which was to be given to one Makaru Chiuri waiting the formal formalization”

It is also clear from the record the only thing between the applicant's family and their entitlement to their father's share of the property are the administrators' family wrangles with regard to their own shares. The applicant and his family are not parties to those and those wrangles should not be used to delay their entitlement, which in any event takes precedent to the beneficiaries' interests! There is no dispute about the entitlement of the applicant's father to 8.05 acres out of L.R 2276 otherwise known as I.R 428/1.

The administrator is bound by the same law to fulfil his duty by settling the liabilities of the deceased before distributing the estate to the beneficiaries. The mode of distribution in a confirmed grant touches on the residue assets of the deceased after all the liabilities have been paid off. In *Re Estate of David Kyuli (Deceased)(2016)eKLR* the Court stated:-

“The estate that is distributed is what remains after debts have been paid and liabilities settled.”

By the administrator's own words on oath, the land has already been carved out on the ground. All that needs to be done is for him, before distributing that part of the estate, is to proceed and fulfil the orders of the court.

On 23rd September 2011, Justice Serگون told the administrator in a judgement to proceed to complete the administration according to law expeditiously. 7 years down the line he has not.

The applications as filed may not have fulfilled the requirements of the law, but this court has the inherent jurisdiction to make orders to ensure the ends of justice.

I find in favour of the applicant and order that the administrator to settle this liability of the estate carrying out the formal requirements of executing the relevant documents to do so within 30 days hereof.

The applicant's prayer for a 'confirmed grant' distributing their father's share in this cause cannot be granted in this cause. The consent filed herein ought to be filed in the requisite file. That prayer is denied.

Due to the infractions in procedure, each party will bear its own costs.

I cannot leave this matter here. The cause has been pending before this court since 1990. The family cannot agree on the mode of distribution. **I direct that this matter be placed before a court annexed mediator to assist the family to settle that issue.** The matter be mentioned before me within 30 days hereof to confirm the appointment of a mediator on ,25th February 2019.

The Deputy Registrar is directed accordingly.

Dated, delivered and signed at Nyeri this 25th January 2019.

Mumbua T Matheka

Judge

In the presence of:

CA- Jerusha

Ms Mwikali for Mr. Karweru for 1st to 6th Applicant

Mr. Kinuthia for Andrew Kariuki for interested party

Waweru Gatonye on record for 1st and 2nd respondent N/A

Mr. Karweru to serve the orders to the other parties.

Mumbua T Matheka

Judge

25/1/19