



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO.1044 OF 2010

IN THE MATTER OF ESTATE OF NJAU KANYORIA alias NJAU s/o KANYORIA (DECEASED)

PAUL GATHUMBI NJAU.....APPLICANT

BETWEEN

SAMUEL KANYORIA NJAU.....RESPONDENT

RULING

What is before me is the summons for rectification of grant dated 7th February 2018 under s.74 of Laws of Succession Act and rule 43 (1) and (2) of P&A Rules.

The application is brought by the administrator one Paul Gathumbi Njau who has also sworn the supporting affidavit. He seeks orders: -

1. THAT the Certificate of Grant issued to the said PAUL GATHUMBI NJAU on the 27th July 2012 be rectified or amended in the following respects as provided for by Rule 43 (1) of the Probate and Administration Rules regarding the distribution of L.R MAHIGA/MUNYANGE/263 to include DUNCAN NJAU GITHUMBI.
2. THAT Grant be rectified in the schedule of grant DUNCAN NJAU GITHUMBI 1.2145 Acres out of L.R MAHIGA/MUNYANGE/263.
3. THAT parcel L.R MAHIGA/MUNYANGE/263 be transferred to the beneficiaries in terms of their respective shares as per the annexed surveyor's sketch plan drawn to scale.
4. THAT costs of this application.

It is his contention that after the certificate of grant was confirmed on 27th July 2012, he noted that one of the beneficiaries – Duncan Njau Githumbi had been left out. He now seeks that the grant be rectified and part of the estate namely Mahiga/Munyange/263 be redistributed to cater for the new beneficiary's share of 1.2145 acres. Three of the beneficiaries have signed the consent form dated 7th February 2018 in approval of his proposal.

The application is opposed vide the replying affidavit of Samuel Kanyora Njau. He depones that the said Duncan Njau Githumbi is not a beneficiary of the deceased's estate but a son of the Administrator /applicant who wants to use him to get a bigger portion of that estate. That the beneficiaries to the estate were listed when the petition was filed in form P&A 5 and the said Duncan Njau was not one of them, and neither was he a dependent of the deceased.

The applicant filed a further affidavit sworn on 24th April 2018 reiterating his previous affidavit and annexing copies of what he referred to sketch map drawn at the instructions of the deceased, minutes of meetings of the Executive clan, family members and the area chief.

Counsel, Mr. Warutere for the Applicant, Mr. Muchiri wa Gathoni for Respondent made oral submissions in arguing the same. Mr. Warutere relied on the annexures to seek rectification of the grant as sought in the summons General.

Mr. Muchiri wa Gathoni submitted that the application was incompetent as it was not for rectification of the grant as provide for under s.74 of the Law of Succession Act which clearly speaks of errors and the addition of a beneficiary would not be said to be rectification of an error. That the applicant was the administrator who was using this application to bring his own son into the estate as a beneficiary and there was no truth in the averment that he was omitted in advertently.

He submitted further that the consent signed by some of the beneficiaries was worthless as the same beneficiaries had appeared in court and

confirmed the distribution before the estate was distributed and the affidavit in support of the summons for confirmation of grant sworn on 17th November 2010 clearly indicated the beneficiaries. That the minutes annexed to the supporting affidavit from the clan, the assistant chief were worthless. Truly if these were an expression of the wishes of the deceased they ought to have been supported by a will/document.

In response Mr. Warutere argued that by stating that the minutes were worthless counsel was giving evidence, that the meeting where the minutes were made was not denied and his submissions about the same ought to be expunged from the record.

That the court had discretion under rule 43 of the P&A rules to grant the orders sought. In any event the court could summon the chief to come and confirm the meeting.

The issue for determination is whether;

1. Duncan Githumbi was inadvertently omitted as a beneficiary.
2. Whether the grant can be rectified to include Duncan Gathumbi as a new beneficiary.
3. Whether the grant can be rectified to re-distribute the Estate under s.74 of Laws of Succession Act.

On the first issue I have perused the record. By a letter dated 10th November 2010 the senior chief Mahiga location wrote to the Registrar High Court Nyeri about the deceased Njau Kanyoria and those who had survived him as his rightful heirs. He listed them thus:

1. Samuel Kanyoria Njau- son
2. Paul Githumbi Njau- son
3. James Ndiritu Njau- son
4. Joseph Maina Njau-son
5. Ann Wambui Maina-Daughter-in-law
6. Beatrice Waruguru Njau-daughter

The applicant herein is the one who filed the petition and in form P&A 5 listed the heirs to the estate as listed above. On 2nd May 2012 he filed summons for confirmation of grant and swore an affidavit listing the beneficiaries to the estate. The certificate of confirmation of grant was issued on 27th July 2012 and those beneficially entitled were listed therein. Nowhere in these documents does the name Duncan Gathumbi appear yet it is the applicant who filed all these documents, and who swore all the affidavits and who got the other beneficiaries to sign consents.

The said Duncan Githumbi is his son and all along he was aware of the issues he is raising now all that time – why were these issues not raised then?

I have perused the minutes of meetings held by the Njau Kanyoria family dated 22nd June 2016. These came 4 years after grant was confirmed. They are not signed by the beneficiaries but by the chief and elders who made “recommendations” on how the estate should be redistributed.

There are other minutes of 1st August 2014 by the **Gemu Executive and Njau Kanyoria family**. There is no mention of 1.2 acres of land for Duncan Githumbi except for a mention of “pathway from Duncan farm to Wangari’s “.

It is not clear whether ‘Duncan’ and ‘Njau Githumbi’ mentioned there are one and the same person. Hence, clearly as a grandchild of the deceased Duncan Njau Githumbi would inherit from his grandfather if his father was deceased, of if there was a will giving him a share of the estate. As it is except for the allegations by the applicant, and the documents generated in meetings held after the confirmation of the grant, there is no thing before me to show that Duncan Njau Githumbi is a beneficiary of the estate of Njau Kanyoria.

On the 2nd and 3rd issues- s.74 provides for rectification of errors in names and descriptions, time and place of deceased’s death, purpose of limited grant. The section is headed: **Errors may be rectified by court** and states:

*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.***

There is no provision for rectification to add a new beneficiary and or redistribute the Estate.

Dealing with a similar issue in **Re Estate of Musa Matu Runga Nyeri Successin Cause no. 139/2013** I relied on the persuasive authority of Hon Justice Musyoka **In re estate of Charles Kibe Karanja (Deceased) [2015] eKLR** where he gave meaning to s. 74 by demonstrating the difference between grant of representation and certificate of confirmation of grant:

*It goes without saying that the provisions in Section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a grant of representation. In probate practice, the term “confirmed grant” has gained currency and it is understood by some to mean the certificate of confirmation of grant. It is a misconception. **The certificate issued upon a grant being confirmed does alter the grant of representation... It does not replace the grant of representation...it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed... it is the evidence of the confirmation of the grant.** From the wording of **Section 74**, it is plain that the same was not tailored to for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not. (emphasis mine)*

The Judge went on to state, and in the circumstances of the provisions of the law, I am in agreement, that,

“If...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. The proper approach ought to be an application for review of the orders made at the confirmation of the grant.

This is because addition of new assets and or beneficiaries is not the same as rectification of an error as envisaged by the law.

Review is not directly provided for in the law of succession, it is read into the same by virtue of “*Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules...*” Hence in this case;

“an application ought to [have been] made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error” and the “Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed...”

Duncan Njau Gathumbi was not ‘discovered’ as a new heir who was omitted inadvertently. He was always there as the son of the applicant. His inheritance from his grandfather can only come through his father unless he establishes that he was a dependant of grandfather or his grandfather willed some property to him. Recommendations by elders and the assistant chief long after the distribution of the estate cannot amount to wishes of the deceased, but only give the impression of machinations after the fact.

Hence, Duncan Njau Gathumbi is not beneficially entitled to the estate herein.

The grant cannot be rectified under s. 74 of the Law of Succession Act to include him as a beneficiary or to redistribute the Estate.

The application is dismissed.

No orders as to costs

Dated, Delivered and signed at Nyeri this 30th day of April 2019.

Mumbua T Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Mr. Kinuthia Holding Brief for Muchiri wa Gathoni for Respondent.

Mr. Warutere for applicant

Judge