



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 267 OF 1997

IN THE MATTER OF THE ESTATE OF SAMUEL MUTHUI NGABU (DECEASED)

AND

BETWEEN

ESTHER MUTHONI MUTHUI.....APPLICANT

AND

ALEXANDER MUTHUI.....1ST RESPONDENT

ALICE WAMBUI.....2ND RESPONDENT

RULING

[1] Before the Court for determination is the application dated **19 February 2016**. It was filed herein on **22 February 2016** under **Rule 73** of the **Probate and Administration Rules** for orders that:

[a] Spent

[b] Spent

[c] Spent

[d] The Amended Certificate of Confirmation of Grant issued on **11 February 2016** in the name of **Alexander Muthui Ngabu** be nullified and a fresh Amended Certificate of Confirmation of Grant be issued in the joint names of **Alexander Ngabu Muthui, Alice Wambui and Esther Muthoni Muthui**;

[e] Costs be in the cause.

[2] The application was premised on the grounds that the Amended Certificate of Confirmation of Grant in question is erroneous, and that the Court ought to issue a fresh Amended Certificate in the joint names of the beneficiaries. In support of the application, the Applicant relied on her affidavit sworn on 10 February 2016, wherein she averred that there is in existence a Judgment of the Court (**Hon. Nambuye, J.**, as she then was) to the effect that the Grant herein should be issued in the joint names of the three beneficiaries; namely, **Alexander Ngabu Muthui, Esther Muthoni Muthui and Alice Wambui**. That although an appeal and cross-appeal were filed, the same were withdrawn by consent; and the Judgment aforementioned affirmed, and only varied to the extent that the shares of Highlands Inn were to be shared between the beneficiaries equally.

[3] It was further averred by the Applicant that the 1st Respondent subsequently lodged an Amended Certificate of Confirmation of Grant which did not comply with the Judgment of the Court; and to correct the anomaly the Advocates for the parties prepared a Consent Letter dated ... to correct the anomaly. Thereupon, a Grant was issued in the joint names of the three beneficiaries dated 27 July 2009. Thus, it was the averment of the Applicant that, in view of the Judgment of Hon. Nambuye, J., the Consent of the parties and the Grant dated 27 July 2009, the Certificate of Confirmation of Grant had to be in the joint names of the three beneficiaries; but that the 1st Respondent purported to apply for and caused an Amended Certificate of Grant to be issued in his sole name dated 11 February 2016. It is this irregularity that the Applicant seeks to have corrected.

[4] To buttress her averments, the Applicant annexed to her affidavit copies of the Order of the Court of Appeal dated 10 April 2008, the Consent Letter dated 2 July 2009, the Grant of Letters of Administration issued on 27 July 2009 and the Amended Certificate of Confirmation of Grant issued on 11 February 2016.

[5] The 1st Respondent opposed the application. He relied on his Replying Affidavit filed on 9 June 2017 wherein he conceded that indeed the Court of Appeal made orders that the shares of the deceased in Highlands Inn Ltd be shared equally among the beneficiaries. He averred that the said Highlands Inn Ltd was a pub and restaurant business operated by the deceased and that the same was subsequently taken over by the Applicant; and that it collapsed in 2003 due to fraud and mismanagement by the Applicant. He therefore averred that, given the Court Ruling dated 9 April 1998, it is imperative that the Applicant be called to account for some Kshs. 11,000,000/= paid to Highlands Inn Ltd by IGAD, which amount should, in his proposition, be shared equally amongst all the beneficiaries.

[6] The 1st Respondent annexed several documents to his affidavit to give the Court a picture of the financial situation in which Highlands Inn Ltd was at the material time. He also annexed the Ruling made herein dated 9 April 1998 whereby the Applicant, as the Objector, was not only restrained from intermeddling with the estate of the deceased, but was also required to render accounts within 45 days, in respect of income received from, inter alia, Highlands Inn.

[7] Having carefully considered the application and perused the record herein, there is no dispute that, notwithstanding the divergence of positions regarding the mode of distribution of the deceased's estate, some compromise was reached when the matter went to the Court of Appeal by way of Appeal and Cross-Appeal. In that compromise led to the withdrawal of the Appeal and Cross-Appeal, the Court of Appeal had the following to say in its Order dated 10 April 2008:

“We have considered the request and considered the fact that the dispute between the parties relates to the estate of a deceased person and concerns people who are related to each other in one way or another; and are minded to grant their request. Consequently, the order which commends itself to us, which we hereby make, is that the appeal filed on 28th August 2003 by Esther Muthoni, and the cross-appeal lodged on 12th January 2007, be and are hereby marked withdrawn by consent, and the shares of the deceased in Highlands Inn Ltd shall be part of the estate of the deceased to be shared between the beneficiaries in equal shares. Otherwise the confirmed grant is affirmed subject to that variation. We make no order as to costs.”

[8] There is similarly no contestation that, following withdrawal of the appeal and cross-appeal, the parties negotiated a further consent in terms of the Consent Letter dated 2 July 2009 and agreed that:

“By Consent a grant of letters of administration intestate be and is hereby issued to Alexander Ngavu Muthui, Alice Wambui and Esther Muthoni Muthui as per the judgment of Hon. Lady Justice Nambuye delivered on 12 March 2003 by Hon. Justice Omondi Tunya.”

[9] Thereafter, an amended Grant of Letters of Administration Intestate dated 27 July 2009 was issued in the joint names of the three beneficiaries aforementioned. That Grant is annexed to the Supporting Affidavit and is marked Annexure “EM4”. In the premises, it is manifest that it was erroneous for an Amended Certificate of Confirmation of Grant to issue in the sole name of Alexander Muthui Ngabu as was done vide the Amended Certificate of Confirmation purportedly issued on 11 February 2016. It is similarly out of tune with the Order of the Court of Appeal for the Amended Certificate of Confirmation of Grant to exclude the deceased's shares in Highlands Inn Ltd as it did.

[10] In the premises, I am satisfied that the application dated 19 February 2016 is meritorious and is hereby allowed. Thus, pursuant to Rules 47 and 73 of the Probate and Administration Rules, it is hereby ordered that:

[a] The Amended Certificate of Confirmation of Grant issued on **11 February** 2016 in the name of **Alexander Muthui Ngabu** be nullified and that a fresh Amended Certificate of Confirmation of Grant be issued in the joint names of **Alexander Ngabu Muthui, Alice Wambui and Esther Muthoni Muthui;**

[b] **Costs be in the cause.**

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 31ST DAY OF JULY 2019

OLGA SEWE

JUDGE