



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 90 OF 1996

IN THE MATTER OF THE ESTATE OF AKALA LITILI MUKHASI (DECEASED)

JOHN KIPSEREM MARITIM.....OBJECTOR/APPLICANT

V

FRANCIS LIYALI AKALO.....1ST RESPONDENT

SIMEON KIPTOO METTO.....2ND RESPONDENT

WINFRED JEPKOECH BARSULA.....3RD RESPONDENT

RULING

1. The objector (**JOHN KIPSEREM MARITIM**) is one of the beneficiaries of the estate of **AKALA LITILI MUKHASI** (the deceased) and was confirmed to receive **5.0 Acres** of land from parcel No. **UASIN GISHU/NDALAT SCHEME/454** vide the grant confirmed on 20.6.2016 by **Kimondo (J)**. The objector filed this instant application on 8.11.2017 seeking for the following orders:

1) That a caution be filed at the land registry prohibiting the transfer, subdivision and dealings in any way in respect to land parcel no. UASIN GISHU/NDALAT SCHEME/454 pending hearing and determination of the application for revocation and or annulment of grant dated 16.9.2016.

2) That a temporary injunction do issue restraining the beneficiaries of the above estate, their servants, agents and/or assigns from in any way dealing with and/or interfering with, use and/or doing any act that is inconsistent with the applicant's right as the beneficial owners of L.R No. UASIN GISHU/NDALAT SCHEME/454 pending the hearing and determination of the application for revocation and/or annulment of grant dated 16.9.2016.

3) That status quo over L/R No. UASIN GISHU/NDALAT SCHEME /454 be maintained pending the hearing and determination of the application for revocation and or annulment of grant dated 16.9.2016.

4) That costs of the application be provided for.

2. The application is premised on grounds that he has filed summons dated 16th September 2016 seeking revocation and/or annulment of the grant with a view to rectifying the mode of distribution, but the same has never been heard. In his supporting affidavit he deposes that he purchased 8.1 acres of land and not 5.0 acres as alleged in the affidavit and he never signed the purported consent on the mode of distribution. He is apprehensive that his interests will be prejudiced as the 2nd and 3rd respondents have since initiated the process of registering the land.

3. The petitioner/ 1st respondent is one of the sons of the deceased as well as the administrator. He states that he had exchanged his land with the objector for 5 acres of land and he sold to him a further 3.1 acres of land. At paragraph 8 he has given the mode of distribution as follows:

I. Francis Luyali Akala	1.0 acres
II. John Kipserem Maritim	8.1 acres
III. Johnah Kipkemboi Tarus	3.1 acres
IV. Jackson K. Kisorio	1.1 acres

V. Joseph Maresi	0.6 acres
VI. Nelson Kiptoo	0.1 acres
VII. Sarah Maritim	0.2 acres
VIII. Atunatos Musiomi Akala	0.5 acres

4. He urged the court to delete the name of the 3rd respondent (**WINFRED JEPKOECH BARSULA**) and amend the certificate of confirmation of grant for the reason that he had never sold a piece of land to her, thus she was not entitled to inherit from the deceased.

5. The 3rd respondent deposes in her affidavit that the application has been brought after an inordinate delay, the application of grant of letters was done in the year **1996** and gazette **vide Gazette notice no. 3132 and grant was issued on 15.4.1996**. She insists that she bought her respective parcel from the deceased and that the objector has a tendency of filing applications and not canvassing them to the end such as the application dated 16.9.2016. He is described as only delaying the wheels of justice.

6. Parties were directed to file submissions, however it's only the objector who has filed. He relied on the said application and his supporting affidavit.

ANALYSIS

7. The objector urges this court to allow a caution to be lodged at the land registry. A caution may be instituted by the person who claims interest on that land as provided by section 71 of the Land Registration Act.

(1) A person who—

1. (a) **claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;**
2. (b) **is entitled to a licence; or**
3. (c) **has presented a bankruptcy petition against the proprietor of any registered land, lease or charge may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.**

(2) A caution may either—

- (a) **forbid the registration of dispositions and the making of entries; or**
- (b) **forbid the registration of dispositions and the making of entries to the extent expressed in the caution.**

(3) **A caution shall be in the prescribed form, and the Registrar may require the cautioner to support the caution by a statutory declaration.**

(4) **The Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act.**

(5) **Subject to this section, the caution shall be registered in the appropriate register.**

8. In this case the objector claims to have interest and therefore it is upon him to lodge a caution with the land registrar. As stated above the caution forbids further registration or any transaction with the said land, the 3rd respondent had stated that registration of the new title deed was ongoing. In *Joseph Kibowen Chemjor v. William C. Kiseru* [2013] eKLR the learned colleague held as follows,

“Cautions are provided for in the Land Registration Act[4]. Under Section 71 a caution may be lodged by a person who claims the right to obtain an interest in land capable of creation by an instrument registrable under the statute. A caution may also be lodged by a person claiming entitlement to a licence or by a person who has presented a bankruptcy petition against the proprietor. The essence of a caution is to forbid the registration of dispositions in the subject land because the cautioner is apprehensive that such registration may obliterate his interest in the land. Cautions are registered by the Land Registrar.”

9. The petitioner/1st respondent had urged that the confirmation of grant that had been issued be amended by removing the 3rd respondent and issuing her share to the objector. This means he is acknowledging the applicant's claim to the acreage stated. He even goes further in his replying affidavit and states at paragraph 10 that the family has never sold land to the 3rd respondent. The petitioner earlier in his affidavit for confirmation of grant, had listed the 3rd respondent as one of the beneficiaries to the estate of the deceased, to have bought 2.0 acres of land from the deceased, the same is dated 26.4.2014. The consent on mode of distribution of estate also lists the 3rd respondent was to receive 2.0 acres whereas the objector was to receive 5.0 acres. The objector's signature is indicated on the same, however he denies ever signing the said document.

10. The petitioner seeks for amendment of the grant. He has raised this in a replying affidavit. Section 74 of the Law of Succession Act provides for the rectification of grant where there is an error. It provides as follows:

Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose of in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered or amended accordingly.

As stated above, the affidavit by the petitioner and the consent for confirmation had the names of the beneficiaries and the same was adopted by the court. The petitioner's allegation that the 3rd respondent name be deleted from the grant for the reason that she was not sold the land is not an error, he does not offer an explanation as to how her name appeared throughout the proceedings and there was no objection from the time of institution of suit in 1996. There is definitely some mischief on the part of the 1st respondent

11. This court is guided by the decision in *Re estate of Charles Kibe Karanja (deceased)* [2015] eKLR where the court held as follows:

“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 made in the matter. It does not replace the grant of representation, and it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed. In short 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. A party wishing to have rectified or altered or amended a certificates of confirmation of grant, need not approach the court through Section 74 of the Law of Succession Act, for the reasons that I have given above; rather they ought to apply for review of the orders made upon the application for confirmation of grant, where the alterations sought are fundamental; or for amendment of the certificate under Rule 73 of the Probate and Administration Rules to address minor errors or mistakes in the body of the certificate.

A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. 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 effected without touching the orders made by the court at the distribution of the estate. Consequently, such changes cannot and should 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. The remedy of review of court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure rules. Among the imported procedures is the device of review under the Civil Procedure Rules. In the relevant rules on review under the Civil Procedure Rules, an order of the court can be revised on the grounds of an error on the face or the record or discovery of new and important evidence that was not available at the time of the making of the order sought to be reviewed or for any other sufficient reason.

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be 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. Where assets are discovered after the court has confirmed the grant or a heir or survivor of the deceased who had previously been previously unheard of materializes after distribution, 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”

12. The petitioner's request if allowed will alter the mode of distribution and the beneficiaries, as seen above the amendment is not on the names or descriptions but rather the land to the deceased. Amendment shall imply one of the beneficiaries who had benefited shall have to lose out. I am satisfied that the applicant's request will preserve the property from further mischievous alienation pending hearing and determination of the summons for revocation.

I therefore order that:

- a) The applicant do file a caution at the land registry so as to prohibit the transfer, subdivision and any further dealings which would alienate the property **L.R. No. UASIN GISHU/NDALAT SCHEME/454** pending hearing and determination of the revocation
- b) The current existing status quo be maintained with no further acts of alienation such as selling, leasing, transferring or constructing thereon pending hearing and determination of the application dated 16th September 2016 seeking annulment and/or revocation.
- c) Costs of this application shall be borne by the 1st respondent (**FRANCIS LIYALI AKALO**).

DELIVERED, SIGNED & DATED THIS 14TH DAY OF AUGUST 2019 AT ELDORET

H. A. OMONDI

JUDGE