



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 13 OF 2003

IN THE MATTER OF THE ESTATE OF KUBUTA KAMARA NGUURO ALIAS PHARIS NJEGEGU (DECEASED)

JERUSHA WAMBUI MUSA.....APPLICANT

VERSUS

NAHASHON NYAGA PHARIS.....1ST RESPONDENT

MICHELINA WAMBUI KAMARA.....2ND RESPONDENT

PHOEBE WAWIRA NJEGEGU.....3RD RESPONDENT

PAULINE WANJIRU NJEGEGU.....4TH RESPONDENT

MARRY NJERI NJEGEGU.....5TH RESPONDENT

JAMES KANGERI NJEGEGU.....6TH RESPONDENT

LUCAS NJAGI NJEGEGU.....7TH RESPONDENT

R U L I N G

A. Introduction

1. This ruling pertains to the applicant's chamber summons dated 30/04/2019 in which she seeks the amendment/rectification of the confirmed grant dated 30/01/2007 to the effect that Wanguru P.T.B. 146 to be registered in the name Moses Karonzo Mbogo of I.D. No. 02690079, the applicant's husband.

2. It is the applicant's case that the aforementioned plot was not included as part of the deceased's estate at the time the petition for letters of grant was filed. Further, the applicant stated that the deceased bequeathed the aforementioned plot to Moses Karonzo Mbogo as a gift prior to his death who has consequently exclusively developed the plot for a period of twenty two years and paid the rates therein. In her testimony before court, the applicant testified that she was advised to leave the plot from the deceased's estate when commencing the probate proceedings by her advocate.

3. The respondent, who are beneficiaries to the deceased's estate oppose the summons on the grounds that the applicant purposively left out the suit property from the list of the deceased's estate and that the deceased had never allocated the plot to any one at the time of his death. Further the respondents denied the existence of any agreement between the beneficiaries that the suit property devolves to the applicant's husband. The respondent further state that the suit property should devolve in equal shares to all the beneficiaries of the deceased.

B. Analysis & Determination

4. The issue which arises is whether the applicant has satisfied the court on her prayer for amendment of the grant. As stated herein, all the other beneficiaries oppose the proposed amendment. The applicant proposes that the amendment be made to the effect that the suit property discovered be registered in favour of her husband. This is opposed by the respondents who propose that the suit property be equally distributed amongst the deceased's beneficiaries.

5. In this matter the administrator is seeking to amend the grant to include a property which she willfully left out of the deceased's estate during the petition for letters of grant. An issue of distribution has arisen. It is not in doubt that such an amendment would bring substantial

changes to the certificate of confirmation of grant as it would reflect properties on the grant which were not in the petition and the distribution would be unilateral rather than by consent of the parties during the confirmation of the grant or by an order of the Court after considering all facts. In a similar application which was before Justice Musyoka he stated as follows: -

“In re estate of Charles Kibe Karanja (deceased) [2015] eKLR

“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. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

6. I am in agreement with the finding in **Charles Kibe Karanja** case that as an application for review would provide opportunity to include the properties which have been discovered after the confirmation of the grant and the distribution would have to take into account the properties which have been discovered.
7. The issue of discovery of assets which were not included in the grant is not a matter of amendment and distribution; it calls for an overhaul of the grant to give an opportunity to consider all the assets of the deceased and distribution of the estate afresh to include the discovered assets.
8. However, Article 159(d) of the Constitution provides that the court shall decide matter without undue regard to technicalities. The filing of this application for amendment instead of one for review in a case where the parties were not represented by counsels is in my view a technicality that should not be allowed to deny parties substantive justice. The parties are very clear in their evidence that they are seeking to have a parcel that was left out in the cause included in the grant. For this reason, the court under the principles set out in the Overriding Objective finds that this application is not defective for Article 159(d) comes to its aid.
9. In so far as the inclusion of the plot Wanguru PTB 146 in this cause is not opposed by the respondents. The opposition by the respondents is about the distribution of the asset. I therefore hold that the inclusion is not opposed and is merited.
10. The beneficiaries in this case shared the estate without any controversy and the orders for confirmation of grant was granted. The existence of this plot was in the knowledge of the administrator but she chose to leave it out. Her case is that the plot was given to her husband by the deceased during his lifetime and that he has developed it extensively having held it for about 22 years.
11. The issue of having developed the plot was disputed by the respondents who said that it is recently that the proposed beneficiary started developing the plot and was stopped by them. At the time, he was stopped Karonzo had only done foundation for two rooms contrary to what the applicant told the court that her husband had constructed three shops and four (4) rooms. In addition, he applicant fenced off the plot using iron sheets only two days before the hearing of this application. The construction only started after the death of the deceased.
12. The husband of the applicant is not a beneficiary as defined by Section 40 of the Law of Succession Act. The children of the deceased who are the rightful beneficiaries have already shared out the estate of the deceased save for the plot in issue herein. I believed the respondents that this plot was deliberately left out from the list of deceased's assets with an intention to later sneak it in so that may benefit it go to the applicant and her husband in exclusion of all other beneficiaries. This is confirmed by the fact that the applicant did not serve the application on her siblings even after the court so directed on 6/05/2019. On 28/05/2019, she came to court alone just for the court to remind her again to serve the application.
13. The deceased died intestate in this case and distribution of his estate should be guided by the law on intestacy. If the deceased wanted to give the plot to the applicant's husband, he would have done so during his lifetime. The claim by the applicant that her husband paid the cost of subdivision of the deceased's land LR. Ngariama/Lower Ngariama/10 and was to be compensated with the Wanguru plot is not a convincing reason. All these debts, if any, ought to have been sorted out during the lifetime of the deceased.
14. It was also claimed that the applicant's husband took care of the deceased by giving him a goat for soup the act of taking care of a parent in old age does not give an added advantage in inheritance to that beneficiary.
15. From the foregoing analysis, I reach a conclusion that plot No. Wanguru PTB 146 should be shared equally by all the beneficiaries of the deceased as provided by the law.
16. I find no merit in this application save for the inclusion of the plot in the grant.
17. I hereby direct that the grant be rectified by including Wanguru PTB 146 to be shared equally by all beneficiaries.
18. An amended certificate of grant to issue.
19. Each party to meet their own costs.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

Mr. Kaahare for Anne Thungu for the Applicant

All respondents present