



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 86 OF 2017

IN THE MATTER OF ESTATE OF WARURU KAIRU (DECEASED)

R U L I N G

1. Before me is an application by way of Notice of Motion expressed to be brought under Order 45 Rules (1) and (2) of the Civil Procedure Rules and Rule 63 and 73 of the Probate and Administration Rules, and filed on 6th September, 2017. Seeking orders that the certificate of confirmation of grant issued by the **Musyoka J** on 25th April, 2014 be reviewed, substitution of deceased beneficiaries, that a licenced surveyor be directed to sub-divide the land as per the confirmed grant dated 25th April, 2014 and that the court directs the Officers Commanding Police Division Limuru/Ngecha, Gilgil Karunga, Njoro/Ngata to provide security for that purpose.
2. The application is based on the grounds that an asset of the estate, namely, land reference number **TIGONI/MABROUKE BLOCK 1/1479** measuring approximately 0.0524 Hectares was inadvertently left out of the confirmed certificate of grant, and that the named deceased beneficiaries ought to be substituted.
3. The Applicant, **George Kairu Waruru** swore the supporting affidavit, in his capacity as one of the administrators herein. He deposed that a grant of letters of administration was made on 7th December, 2005 and confirmed on 25th April, 2014. That land parcel number **TIGONI/MABROUKE BLOCK 1/1479** measuring approximately 0.0524 Hectares was inadvertently left out of the confirmed certificate of grant. He asserted that the said asset ought to devolve upon **Samuel Ngugi Kuria**. He also deposed that the grant should be rectified to substitute the names of the deceased beneficiaries with their next of kin; that the family is otherwise in agreement concerning the mode of distribution in the confirmed grant and the review only relates to the inclusion of land parcel number **TIGONI/MABROUKE BLOCK 1/1479** in the estate and substitution of the deceased beneficiaries.
4. **Grace Wanjiru Waruru** filed her replying affidavit on 11th October, 2017 in her capacity as an administrator. She deposed that she was not opposed to the rectification sought save that Kairu Brothers, whom I understand to be members of the 1st and 2nd houses represented by the Applicant, and Samuel Ngugi Kuria should be summoned to confirm their consent. She proposed certain changes regarding the distribution of assets in the 3rd house and asserted that certain unnamed deceased beneficiaries in the said house ought to be substituted. She attributed delay in distribution of the estate to actions by one beneficiary, **Alice Wangui Ng'ang'a**.
5. **George Kairu Waruru** filed his further affidavit on 14th June, 2018 and reiterated the contents in his supporting affidavit. He deposed that **Grace Wanjiru Waruru's** proposed new mode of distribution is contrary to the earlier filed mode of distribution. He expressed apprehension that such proposal may further delay the distribution of the estate.
6. **Alice Wangui Ng'ang'a** in response filed an affidavit to counter the replying affidavit filed by **Grace Wanjiru Waruru**. She contended that she has always been ready to co-operate in the distribution of the deceased's estate. She deposed that the new mode of distribution proposes to alter her share and that the administrator should be held to the terms of the certificate of confirmation of grant.
7. The application was canvassed by way of written submissions. The Applicant through his counsel submitted that the asset **TIGONI/MABROUKE 1/1479** had been inadvertently omitted from the original schedule of assets and that the Applicant had subsequently sought to introduce it through a supplementary affidavit prior to confirmation of grant. It was submitted that the affidavit by **Grace Wanjiru Waruru** seeks to re-distribute the estate afresh and should not be entertained. Counsel emphasised that the present application was only intended to include the estate property that was excluded and to replace the beneficiaries who are deceased.
8. Counsel relied on several cases including the decision **In the matter of the Estate of Charles Kibe Karanja Succession Cause No. 339 of 2001**, where it was held that a grant may be altered to correct superficial errors. Also cited was the decision **In the matter of the Estate of Wilfred Koinange Karuga alias Wilfred Koinange (Deceased) Succession cause no. 2287 of 2012** where a grant was rectified to include estate assets earlier left out.
9. In her written submissions, **Grace Wanjiru Waruru** contended that she has no objection to the inclusion of the Tigoni asset and substitution of deceased beneficiaries including those belonging to the 3rd house. She made further reference to her new proposals on the proper share of the estate due to **Alice Wangui Ng'ang'a**, a member of the 3rd house.

10. The court has considered the material canvassed in respect of the application filed on 6.9.17. There is no dispute that **George Kairu Waruru** is the administrator representing the 1st and 2nd houses of the deceased. The administrator representing the 3rd house is **Grace Wanjiru Waruru**. In principle, the latter does not oppose the application. However by her affidavit and submissions, she has sought to re-agitate the issue of distribution within the 3rd house and to propose the substitution of certain deceased beneficiaries therein with others.

11. It would appear from the Applicant's annexure "**GKW1**" to the supporting affidavit that the asset **TIGONI/MABROUKE/1479** was erroneously left out in the judgment of **Musyoka J**, read on 25th April 2014. This is because the record reflects that pursuant to the summons for confirmation of grant filed on 14th June 2006, the present Applicant had on 20/9/12 filed supplementary affidavit which stated in part that:

"the land title number TIGONI/MABROUKE BLOCK 1/1479 being property of the estate of Waruru Kairu was not included in the distribution schedule of property of the estate of Waruru Kairu ...

The land title number TIGONI/MABROUKE BLOCK 1/1479 registered in the deceased's name Belonged to Kairu Brothers and was held in trust by Waruru Kairu

... This supplementary affidavit seeks to include the land, title number TIGONI/MARBROUKE BLOCK 1/1479 as part of the property of the estate of Waruru Kairu for the purpose of distribution."

12. The present Applicant has the consent of the members of the 1st and 2nd houses who have executed a joint consent in endorsement of the inclusion of the above land parcel and its devolution upon **Samuel Ngugi Kuria**, a purchaser. This application therefore appears to be an entirely 1st and 2nd houses' affair and does not in any way interfere with the distribution in favour of the members of the 3rd house. In my view, the facts of this application bring it within the provisions of Order 45 Rule 1 of the Civil Procedure Rules. It would seem that by some inadvertence, the court while distributing the estate failed to include the Tigoni asset which was introduced through the supplementary affidavit of the Applicant, filed on 14th June, 2006.

13. Such mistake requires no further elaboration and can be corrected by this court under the Civil Procedure Rules. As regards the actual distribution of the new asset, the members of the 1st and 2nd houses are agreed and have executed a consent thereto. The prayers for substitution are based on the undisputed fact of the death of certain beneficiaries in the 1st and 2nd house. This is in order. In the circumstances, this court grants prayer 1 of the application filed on 6th September 2017. Additionally, the District Surveyor Kiambu, is directed, to survey the other parcels of land earlier distributed, in accordance with the rectified certificate of grant to be issued pursuant to this ruling. Prayer 2 and 3 of the application are allowed in these terms.

14. As regards the depositions and pleas contained in the Replying affidavit of **Grace Wanjiru Waruru** (and opposed by **Alice Wangui Nganga** and the Applicant) seeking on behalf of the 3rd house, the re-distribution of certain assets of the estate, and substitution of alleged deceased beneficiaries, a substantive application must be made or appeal filed to enable all the parties who are likely to be affected, to respond. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 21ST DAY OF NOVEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

Mr. Njehu holding brief for Mr. Kinoti for the Applicant

Respondents – No appearance

Court Clerk - Kevin