



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2534 OF 1994

IN THE MATTER OF THE ESTATE OF SAMUEL RUHWA

KAMUNGE ALIAS SAMUEL RUHWA KAMUNGE (DECEASED)

FRANCIS KARIUKI GITAU.....APPLICANT

VERSUS

JANE GITHITHI RUHWA.....1ST ADMINISTRATOR/RESPONDENT

CHRISTINE WACUKA.....RESPONDENT

RULING

1. The Applicant herein filed an application for rectification of grant via summons dated 20th June, 2019 and brought under **section 81** of the **Law of Succession Act** and **rule 73** of the **Probate and Administration Rules**. In it, the Applicant seeks that the Certificate of Grant of Letters of Administration issued on 2nd November, 2013 be rectified and/or amended to read that the beneficiaries of Land Parcel No. Kiambaa/Kiambaa/T.104 that is Hannah Wanjiru Mwangi, Christine Wacuka Ruhwa, Rachel Wairimu S. Ruhwa and Jane Githithi Ruhwa do have distinct and separate portions of the land and for each to have his/her own title deed.

2. The application is premised on the ground that some of the beneficiaries are not in good terms and as such, it would be prudent that each beneficiary has his or her own title deed in respect of Kiambaa/Kiambaa/T.104 to utilize and develop without any interruption or interference.

3. The Applicant swore an affidavit on 20th June, 2019 in support of the application in which he deposed that he is one of the beneficiaries in the deceased's estate with regard to Kiambaa/Kiambaa/T.104. That his aunt Hannah Wanjiru Mwangi, now deceased, left a written will in which she bequeathed him all her interest in the suit property. That it is therefore prudent and necessary that he have his own portion so that he can deal with it in a manner he deems appropriate.

4. A ruling had been delivered in this matter on 1st November, 2013 by Justice L. Kimaru where he directed that Kiambaa/Kiambaa/T.104 measuring 0.22 acres be inherited by Christine Wacuka Ruhwa, Rachel Wairimu Ruhwa, Hannah Wanjiru Mwangi and Jane Githithi Ruhwa. A Certificate of Confirmation of Grant dated 1st November, 2013 was consequently issued in which the four (4) beneficiaries are listed to share in the property.

5. On 11th September, 2019 Christine Wacuka Ruhwa filed a replying affidavit sworn by herself on 11th September, 2019 in which she deposed that the instant application is an abuse of court process as there is nothing left for the court to distribute. That the application should therefore be dismissed as frivolous, scandalous and vexatious. That the application is merely an attempt by the Applicant at justifying his illegal occupation of the suit property which was not allotted to him or his deceased father.

6. It was Christine's statement that she is a daughter of the deceased and that she has lived on the suit land since 1970. In 1973, she built a semi-permanent house on a portion of the property where she lived together with her son.

7. Christine deposed that the court directed that the property be inherited jointly because the land measures a very small acreage and is therefore indivisible. That the land is approximately a quarter ($\frac{1}{4}$) acre and if each of the four beneficiaries is to get a divided share, it would be one sixteenth) of an acre.

8. It was Christine's statement that the Applicant has filed this application merely to justify his illegal occupation of the suit property which

was not allocated to him or his deceased father. She asserted that ten (10) years after the deceased's death, the Applicant's father who had no prior occupancy of the suit land and without any right thereof decided to construct a permanent dwelling house on the suit property claiming that he was entitled to half of the property. This was during the pendency of the determination of the succession cause. The grant was eventually confirmed and the land allocated to the Applicant and her three (3) sisters.

9. Christine contended that upon the death of her sister Hannah Wanjiru Mwangi, the Applicant changed tune and claimed that Hannah had by her last written will and testament bequeathed him all of her properties. She raised suspicion with the will stating that a mother could not have disinherited all her nine (9) children, her husband and two (2) grandchildren to leave all her properties to a nephew. She asserted that the purported will is a fallback plan after the court ruled that the Applicant's father had no share in the disputed land and is therefore aimed at circumventing the court's ruling without having to appeal. That in any event, the Applicant had failed to present to the court a grant of representation of the late Hannah's estate.

10. On 11th September, 2019 Jane Githithi Ruhwa, the 1st Administrator of the estate of the deceased herein, filed an affidavit sworn by herself on 10th September, 2019 in response to the application. She stated that the Applicant herein is a son to the late John Gitau Ruhwa and therefore a grandson of the deceased herein. That as such, the Applicant is a stranger to the matters regarding the estate of the deceased since nowhere in the confirmed grant did the court distribute any of the deceased's properties to him.

11. Jane contended that the certificate of confirmation of grant annexed to the application and which lists the Applicant as one of the beneficiaries of the deceased's estate has been materially altered. She accused the Applicant of forgery stating that he had inserted his name wherever his father's name appeared thereby assigning himself all of his late father's inheritance. She urged that there is pending a Criminal Case Number 2513 of 2016 in the Chief Magistrate's Court at Kiambu where the Applicant has been charged with falsifying and altering the certificate of confirmation of grant.

12. It was Jane's statement that the Certificate of Confirmation of Grant dated 1st November, 2013 specifically stated that the suit property was to be inherited jointly by the deceased's four (4) daughters. Consequently, the Applicant through his then Advocates G. Kamonde signed form R.L.19 and Form R.L.7 transferring the property to the four daughters as joint tenants. The forms were duly registered at the Kiambu Land Registry indicating that the land parcel was jointly owned by the surviving tenants. She urged that the court ordered that the suit property be inherited jointly since it was not factually or legally possible to divide the quarter ($\frac{1}{4}$) acre plot into four (4) portions since the Kiambu County Government would not issue approvals for such a subdivision.

13. On 1st October, 2019 the Applicant filed a further affidavit sworn by himself on 30th September, 2019 in which he deposed that he is the administrator of the estate of the late Hannah Wanjiru Mwangi who was a co-proprietor of the suit property. He annexed a copy of a grant issued to him on 16th March, 2016 in relation to the estate of Hannah Wanjiru Mwangi.

14. The Applicant noted that whereas the court in its ruling of 1st November, 2013 distributed the suit property to the deceased's four daughters, there was nothing in the ruling to make the co-owners of the land joint tenants as opposed to tenants in common. That the resultant grant was therefore erroneous in stating that the owners were joint tenants contrary to the court's ruling. He urged that even though the land is 0.22 acres, it is legally possible to divide the same and register long term leases and give each beneficiary a portion on which they have built their homes.

15. Learned Counsel Mr. Chege filed written submissions dated 8th October, 2019 on behalf of the Applicant in which he asked the court to allow the application as prayed. Counsel stated that the court had in its ruling stated that the suit property be inherited by the four daughters in equal shares but that the Certificate of Confirmation of Grant issued on 2nd November, 2013 states that the property be inherited jointly. That the word jointly was erroneously indicated necessitating the instant application to rectify that error in line with **section 74 of the Law of Succession Act** and **rule 43(1) of the Probate and Administration Rules**.

16. It was Mr. Chege's submission that the inclusion of the word "jointly" in the Certificate of Confirmation of Grant introduces the doctrine of survivorship in the property which was not the case in the ruling delivered by this court. That if the court had intended that the property should be held jointly, the ruling would have expressly stated so since it had clearly stated the nature of the rights of the other beneficiaries in the other properties. Counsel urged that without stating the nature of the individual rights in the property, the presumption accorded by **section 91 of the Land Registration Act** is that the interest held in the property is held as tenants in common in equal shares.

17. In opposition, learned Counsel Mr. Githuka filed written submissions dated 8th November, 2019 on behalf of the 1st Administrator Jane Githithi Ruhwa in which he asked the court to dismiss the application with costs.

18. Mr. Githuka stated that the general rule of pleadings is that a party is confined to his pleadings, and the court is therefore confined to considering the prayers sought. Counsel noted that the Applicant had by his summons for rectification of grant not sought a declaration of tenancy in common as opposed to joint tenancy. That the Applicant's submissions on rectification in respect to the nature of land tenancy are unfounded as they have not been pleaded in his application. Counsel urged that what the Applicant is seeking is an order that the beneficiaries of the suit property do have distinct and separate portions of the suit property and that each of them to have their own title deed.

19. Mr. Githuka contended that the suit property measures 0.22 acres which is less than an acre and it is therefore not possible to subdivide it into four (4) separate and distinct portions. Counsel asserted that the **Physical Planning Act** and the Kiambu County Government spatial planning does not permit the creation of such tiny plots as it is impractical to make any meaningful use of such a plot.

20. Mr. Githuka stated that the deceased's estate comprised of three (3) parcels of land: Kiambaa/Waguthu/64, Kiambaa/Kiambaa/T.104 and Loc.1/Mukarara/169. On 1st November, 2013 Kimaru J confirmed the grant of the deceased's estate in the terms that Kiambaa/Waguthu/64 be divided into eight (8) equal portions and each beneficiary to inherit a portion and Loc.1/Mukarara/169 be divided into four (4) equal portions for four (4) beneficiaries. That with regard to Kiambaa/Kiambaa/T.104 the learned Judge made no holding as to the apportionment

or tenancy but only stated that it would be inherited by the deceased's four (4) daughters.

21. Mr. Githuka asserted that the modalities of how the suit property was to be held was left to the four (4) beneficiaries. Counsel noted that the four (4) beneficiaries all executed the requisite Transfer Form R.L.7 stating that they will hold the suit property as joint tenants. That before the execution thereof, the Transfer Form was approved and executed by the Applicant in his capacity as Administrator together with Jane Githithi Ruhwa the 1st Administrator. The Transfer was registered at the Kiambu Land Registry and a title issued jointly to the four (4) beneficiaries. The Applicant has since been removed as an Administrator pursuant to a consent order adopted by this court on 11th June, 2018. He was replaced by one Peter Kimani Gitau who is now co-administrator of the deceased's estate.

22. It was Mr. Githuka's statement that if the orders are granted, the Applicant will use them to make a claim for himself to the suit property when the court did not grant the Applicant or his late father any inheritance in that land. Further that allowing the application will disinherit the 1st Administrator Jane Githithi Ruhwa since the Applicant failed to capture her in the scope of the orders sought. Counsel accused the Applicant of abusing the process of rectification stating that the orders sought are not available under **section 74** of the **Law of Succession Act** and **rule 43** of the **Probate and Administration Rules**.

23. Learned Counsel Mr. Mwangi filed written submissions dated 11th November, 2019 on behalf of the Beneficiary Christine Wacuka Ruhwa in opposition to the application.

24. Mr. Mwangi stated that the Applicant brought the instant application for rectification of grant when he is neither an administrator nor a beneficiary of the deceased's estate. Counsel asserted that the **rule 43** of the **Probate and Administration Rules** is specific that an application for rectification of grant under **section 74** of the **Act** can only be made by the holder of a grant. That such application cannot be made by a beneficiary or a stranger to the estate of the deceased. He urged that the Applicant had by an order of this Court been removed as an Administrator and so he lacks the capacity to make this application.

25. Counsel argued that the other limb of **section 74** is that a grant may be altered or amended before or after confirmation of grant. That the law does not however state whether a grant can be amended after it has been executed. Counsel urged that the grant herein was partially executed with the full knowledge and participation of the Applicant who was an administrator at the time. That having executed the relevant transfer forms, the Applicant cannot be heard to be complaining years later that he did not understand the meaning of the term "jointly" at the time of the execution. Further that the Applicant has failed to demonstrate any of the three (3) circumstances contemplated under **section 74** for which a grant may be rectified.

26. The law on rectification of grants is provided under **section 74** of the **Law of Succession Act** which provides the errors that may be rectified by the court and **rule 43** of the **Probate and Administration Rules** which provides the procedure for seeking relief.

27. **Section 74** of the **Law of Succession Act** states thus:

"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."

28. Further **rule 43(1)** provides *inter alia* that:

"Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made..."

29. A reading of the two provisions above shows that an error which may warrant the grant of an order for rectification of grant must relate to: the names or descriptions of any person or thing; the time or place of the deceased's death and in the case of a limited grant, the purpose for which the grant was made.

30. The crux of the matter herein is the manner in which the suit property was to be held by the beneficiaries. In a ruling delivered in this matter on 1st November, 2013 Kimaru J distributed the estate of the deceased as follows:

1. Kiambaa/Waguthu/64 measuring 3.6 acres shall be divided into eight equal portions. Each beneficiary shall inherit a portion.
2. Kiambaa/Kiambaa/T.104 measuring 0.22 acres shall be inherited by Christine Wacuka Ruhwa, Rachel Wairimu Ruhwa, Hannah Wanjiru Mwangi and Jane Githithi Ruhwa.
3. Loc.1/Mukatrara/169 measuring 6.5 acres shall be divided into four (4) equal portions which shall be inherited by John Gitau Ruhwa, David Kamunge S. Rugo, George Kahihu and Kahugo Ruhua Kamunge.

31. In distributing the deceased's estate Kimaru J specified the manner in which the deceased's properties would be shared amongst the beneficiaries. With regard to the suit property however, the learned Judge did not indicate whether the property would be held by the beneficiaries as tenants in common or as joint tenants. The decision was therefore left to the discretion of the four (4) beneficiaries who registered the property in their names as joint owners, with the requisite transfer forms executed by the then Administrators Jane Githithi Ruhwa and Francis Kariuki Gitau the Applicant. Upon the death of Hannah, the property devolved to the three (3) surviving beneficiaries in whose names it is now registered.

32. The property having been registered in the joint names of the four (4) beneficiaries during Hannah Wanjiru's lifetime demonstrates that they intended to hold the property as joint tenants. It is therefore too late for the Applicant to claim that the beneficiaries did not intend to hold the property as such, or to purport to seek a rectification of grant after the property was long distributed. The property having been registered in the names of the beneficiaries as joint tenants then the doctrine of survivorship (*jus accrescendi*) applies. Upon Hannah's death therefore, her share in the property extinguished and devolved to the three (3) surviving tenants: Christine Wacuka Rubua, Rachel Wairimu Ruhwa and Jane Githithi Ruhwa, unless they, out of magnanimity of hearts, wish to accommodate Hannah's estate.

33. If the four (4) beneficiaries were dissatisfied with the manner in which the confirmed grant was framed, they would have moved the court to rectify the term "jointly". In any case, the Applicant was the Administrator of the estate at that time and he signed the transfer to the four (4) beneficiaries in those terms. Even now nothing stops the holders of the title from changing the mode of ownership.

34. Whereas the Applicant stated that the late Hannah Wanjiru Mwangi left a valid written will in which she bequeathed him all her interest in the suit property, that will does not apply to the suit property Kiambaa/Kiambaa/T.104 which was held under joint tenancy. I note that the 1st Administrator Jane Ruhwa and the beneficiary Christine Wacuka took issue with the authenticity of the will cited by the Applicant. This, however is not an issue for determination in this cause.

35. The upshot of the above is that the application for rectification of grant filed by way of summons dated 28th June, 2019 is devoid of merit. The Applicant has failed to demonstrate an error in the grant of the deceased's estate to warrant the grant of the rectification orders sought. For this reason, the application fails and is hereby dismissed. Costs shall be borne by the Applicant. It is so ordered.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF DECEMBER, 2019.

.....

L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the 1st Administrator.

In the presence ofAdvocate for the Beneficiary Christine Wacuka Ruhwa.