



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2679 OF 2011

IN THE MATTER OF THE ESTATE OF MOSES KANG'ETHE MACHUA alias MOSES KANG'ETHE alias MOSES MACHUA alias MOSES KANG'ETHE MASHUA alias MOSES K.MASHUA alias MOSES KANG'ETHE HIRAM MASHUA (DECEASED)

RULING

1. The Court has be it an application by Summons for the Rectification of a Grant. The Application is brought under **Section 74 of the Law of Succession Act** and **Rule 43(1)** of the **Probate and Administration Rules**, and All Other Enabling Provisions of the Law).

2. The Application is brought by Mathew Mashua Kang'ethe and Nicholas Mbiriri Kang'ethe who are the Administrators of the Estate of Moses Kang'ethe Machua alias Moses Kang'ethe alias Moses Machua alias Moses Kang'ethe Mashua alias Moses K. Mashua alias Moses Kang'ethe Hiram Mashua who died on the 24th day of November 2011. They are seeking the following Order, THAT:

1. The Certificate of Confirmation of Grant of Letters of Administration issued to Mathew Mashua Kang'ethe and Nicholas Mbiriri Kang'ethe in this matter on the 31st day of July 2013 be rectified in the following respects:-

*a. That the Land Registrar, Kajiado Lands Registry be and is hereby directed to remove the Caution lodged by the Deceased's wife, to wit, the late Mrs. Grace Watur Kang'ethe, on the Deceased's property known as L.R. No. **Loitoktok/olkaria/551** and to thereafter cause the said property to be transferred to the intended beneficiary, to wit, Nicholas Mbiriri Kang'ethe pursuant to the Grant of Letters of Administration issued by this Honourable Court to the administrators on **24th July 2012** and confirmed on **31st July 2013** in accordance with the Law.*

*b. That the Land Registrar, Nairobi Lands Registry be and is hereby directed to remove the caution lodged by the Deceased's wife, to wit, the late Mrs. Grace Waturi Kang'ethe, on the Deceased's property known a L.R. No. **1160/328** (Original No. 1160/143/2) and to thereafter cause the said property to be transferred to the intended beneficiaries, to wit, John Kongo Kang'ethe (1 acre), Stephen Gitahi Kang'ethe (1 acre) and Mathew Mashua Kang'ethe, John Kongo Kang'ethe, Nicholas Mbiriri Kang'ethe, Stephen Gitahi Kang'ethe, Rosalind Wanjiru (the remaining portion) pursuant to the Grant of Letters of Administration issued by this Honourable Court to the administrators on **24th July 2012** and confirmed on **31st July 2013** in accordance with the Law.*

c. That the Land Registrar, Nairobi Lands Registry be and is hereby directed to remove the

caution lodged by the Deceased's wife, to wit, the late Mrs. Grace Waturi Kang'ethe, on the Deceased's property known as L.R. No.37/245 and to thereafter cause the said property to be transferred to the intended beneficiary, to wit, Rosalind Wanjiru pursuant to the Grant of Letters of Administration issued by this Honourable Court to the administrators on 24th July 2012 and confirmed on 31st July 2013 in accordance with the Law.

2. *That the costs of this Application be in the Cause.*

3. The Application is supported by the upon the joint affidavit of Mathew Mashua Kang'ethe and Nicholas Mbiriri Kang'ethe filed herewith, the nature of the case, and the reasons which will be offered at the Hearing.

4. The salient points of the Supporting Affidavit are repeated here. They are that:

We, **MATTHEW MASHUA KANG'ETHE**, an adult male of sound mind residing at Ongata Rongai and of P.O. Box 51619 – 00200 Nairobi, and **NICHOLAS MBIRIRI KANG'ETHE**, adult of sound mind residing at Karen and of P.O. Box 9486 – 00100, Nairobi, being the Administrators of the Estate of the above-named Moses Kang'ethe Machua alias Moses Kang'ethe alias Moses Machua alias Moses Kang'ethe Mashua alias Moses K. Mashua alias Moses Kang'ethe Hiram Mashua do hereby make oath and state as follows, **THAT:**

1. The Grant of Letters of Administration Intestate in respect of the Deceased's Estate was made to us by this Honourable Court on the 24th day of July 2012 and confirmed on the 31st July 2013.

Now shown to me and attached hereto marked as "Exhibit MN-1" is a copy of the Confirmed Grant of Letters of Administration Intestate aforesaid.

2. At the time of the making and confirmation of the said Grant, we inadvertently omitted to highlight to the Honourable Court the fact that there had been registered, on all of the properties of the Deceased in the respective Lands Registries, Cautions by our late mother and the Deceased's wife, the late Mrs. Grace Waturi Kang'ethe.

3. Consequently, and upon issuance of the said Confirmed Grant of Letters of Administration Intestate we have been completely unable to effect the transmission of any of the Deceased's properties comprised in his said Estate to the designated beneficiaries due to the existence of the aforesaid Cautions.

Now shown to me and annexed hereto as Exhibit MN-2 (a) Exhibit MN-2 (b) are copies of correspondence passing between us and the Lands Registrar-Kajiado Registry and the Hon. Presiding Judge, Environment & Land Court – Nairobi, in that regard.

4. We therefore make this affidavit in support of the Summons for Rectification of Grant filed herewith seeking for the removal of the Cautions registered on the Deceased's properties by our late mother to enable the transmission thereof to the intended beneficiaries.

5. It is in the interest of justice that the prayers sought in the Summons for Rectification of Grant filed herewith be granted to enable the beneficiaries of the Deceased's Estate take the bequests made to them.

6. What we have deponed hereinabove is true to the best of our knowledge, save for the matters on information and belief sources and grounds whereof have been disclosed.

5. It is unclear how such an application, where any order would be directed at the Registrar of Lands can be termed a Summons for Rectification. What part of the Certificate of Confirmed Grant is the Court expected to correct and/or amend?

6. As is apparent from the above, the Application is brought by the sons of the Deceased who are also the Administrators. The problem put succinctly is that their Mother pre-deceased their father, the Deceased in this matter. Prior to and at the time of her death it seems that the Mother of the Administrators and Beneficiaries (“Mrs Mashua”) had registered a Caution against the properties. The Court has not been informed why she registered that Caution. The Parties have not sought fit to inform the Court the subject of the caution nor what was the interest that the caution was intended to protect.

7. In light of the fact that the caution was in fact registered by the Land Registry against the title suggests that Mrs Mashua had demonstrated good cause. She could have been asserting a claim as joint owner, she could have been claiming matrimonial rights or something else. Sadly the Administrators have not sought to inquire into that aspect of the caution and simply treated it as an inconvenience to be removed so they can acquire what they perceive as they rightful entitlement.

8. There is complaint that the Land Registry has refused to simply comply with their request. In the view of this Court the Land Registry has behave completely appropriately and within the protections of the Constitution of Kenya.

9. The Deceased Mrs Mashua was asserting a proprietary right. In any event, the caution is also property because it is a “chose in action”. That is a right that can be asserted after following a certain procedure. Mrs Mashua is now deceased. She passed away on a date that is not clear from the pleadings but the Applicants assert that it was before the Deceased to whom this Succession Cause applies.

10. Whatever the right or claim she asserted, it cannot be assumed that it simply dies with her. In fact that is the view taken by the Land Registry. The Caution belonged to Mrs Mashua. It now belongs to her estate. It is highly likely that no-one has taken the trouble to obtain Letters of Administration and/or a certificate of confirmed grant in relation to her estate. The Court has not been told. It is also likely that she owned other property. What happened to that property? She may have been a wife and a mother but she was also a person entitled to the protection of **Article 30** of the **Constitution of Kenya 2010**.

11. It seems to the Court that the simplest and most correct way for the Beneficiaries and/or Administrators to proceed would be to obtain the appropriate grant for the Estate of Mrs Mashua, if they have not done so already. Once they have done so, they will have the requisite power and authority to discharge the cautions which will then release the aforesaid properties into the Estate of Moses Kangethe.

12. In the circumstances, the Application is misconceived. The Application is therefore dismissed. The costs of the Application shall not be drawn on the Estate.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered, signed and dated this 24th day of January 2018

In the Presence of:

Court Clerk: Patrick

Counsel for the Petitioner/Applicants: Mr Clive Mshweshwe