



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 862 OF 2013

IN THE MATTER OF THE ESTATE OF KANYINGI GATWE, (DECEASED)

AND

ANTONY DAVID MUCIRI KANYINGI.....APPLICANT

VERSUS

AMOS NJOGU KANYINGI1ST OBJECTOR

ROSE KABIA KANYINGI.....2ND OBJECTOR

PAULINE WANGUNDI KANYINGI.....3RD OBJECTOR

CATHERINE WANJIKU KANYINGI.....4TH OBJECTOR

RULING

1. This is a matter which relates to the estate of the deceased, **Kanyingi Gatwe**, who died on 2nd September, 1999. Grant of letters of administration of the estate of **Kanyingi Gatwe** (deceased) were issued to Antony David Muciri Kanyingi and confirmed on 12th July, 2016. The administrator now applies to amend the certificate of confirmation of grant to include some properties which were inadvertently left out of the list of properties due for distribution. The objectors in their objection indicated that they are not objecting to the inclusion of the said properties but to the mode of distribution advanced by the administrator. That from the original grant all the properties of the deceased were supposed to be shared equally among all the twelve beneficiaries.

2. The issue which arises is the amendment of the certificate of confirmation of grant. As stated, the parties are not opposed to the amendment of the certificate of grant but on the mode of distribution. Under **rule 49** of the **Probate and Administration Rules**, it is provided:

“A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in these rules shall file a summons supported if necessary by affidavit.”

The rules further provide at **Rule 73**:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

These rules give a party a leeway to file an application which is not otherwise provided for under the rules and affirms the inherent jurisdiction of the Courts to make such orders as may be necessary for the ends of justice. In this matter the administrator is seeking to amend the grant to include properties which were omitted by error. An issue of distribution has arisen. 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. 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.....

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 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.....

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.”

3. I am in agreement with this finding 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. 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. This can best be done in an application for review and not rectification which is very specific as to what the Court can rectify, that is to say “errors in names, description or in setting out the time and place of deceased’s death or the purpose of limited grant” as provided under **Section 74** of the **Law of Succession Act**. **Rule 63** of the **Probate and Administration Rules** provides:-

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the Court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, nameLY Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.) shall apply so far as relevant to proceedings under these Rules.

Order XLIV is now **Order 45 Civil Procedure Rules of 2010**. Review is therefore provided for under **Rule 63**. A party who discovered a new matter of evidence after the order or decree has been made may apply for review to the Court which made the order. **Order 45 Rule 1 Civil Procedure Rules** provides:

“1. (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

4. Where property is discovered after confirmation, the parties have a window to go back to Court with an application for review for the confirmation of the grant to be reconsidered within the same cause rather than file another cause.

5. **In conclusion**

Though there is no dispute that some properties of the deceased which were not included in the estate of the deceased have been discovered, there is nevertheless a dispute on the mode of distribution. I am of the view that the proper approach is to move the Court with an application for review to include the discovered assets in the estate of the deceased and to include them in the distribution of the estate after the grant is reviewed and set aside. The application to amend the grant is without merits. I dismiss it. Each party to bear its own costs.

Dated and delivered at Kerugoya this 21st day of February, 2018.

L. W. GITARI

JUDGE

Ruling read out in open Court, parties present, court assistant Naomi Murage this 21st day of February, 2018.

L. W. GITARI

JUDGE

21.02.2018