



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. SUCCESSION NO. 96 OF 2013

IN THE MATTER OF THE ESTATE OF PETER MBOBI MAREGWA(DECEASED)

JAMES WAREGWA MBOBI.....PETITIONER

RULING

1. This matter relates to the Estate of **Peter Mbobi Maregwa**. The Petitioner is **James Maregwa Mbobi**. The grant of Letters of Administration to the estate was issued to the Petitioner and confirmed on 14th June, 2016. The estate comprising Land Parcel No. **Mutira/Kanyei/165** was to be shared equally among the beneficiaries who are as follows:

- Leah Wainoi Mbobi
- James Maregwa Mbogi
- John Kiragu Mbobi
- Joyce Wakarima Mbobi
- Rose Wambui Murei
- Margaret Wambui Chimwani

One of the beneficiaries Leah Wainoi Mbobi passed away before the grant was registered in the land office and sub-division and issuance of titled deeds could be undertaken. The Petitioner brought an application dated 10th July, 2017 seeking an order for the rectification of grant to remove the name of Leah Wainoi Mbobi.

2. **Joyce Wakarima**, though not opposing the application for rectification of grant since Leah Wainoi passed away, she claims that she be given a share on the portion on which the house rests since she is the one who built it for her mother.

3. The issue before this Court is rectification of grant following the death of one beneficiary. Rectification is provided under **Section 74** of the **Law of Succession Act**. It is provided:

“Errors in names and descriptions, or in setting out the time and place of deceased’s death or the purpose in a limited grant, may be rectified by the Court.”

This means that rectification is available to parties to correct errors. A party must satisfy the Court that there are errors in the grant which can be rectified without affecting the substance and content of the grant. **Rule 43 (1)** of the **Probate and Administration Rules** provides that a party shall apply to Court by Summons. It stated:

“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, he shall apply by summons.”

4. An error connotes a slip or a mistake which can be corrected without affecting the grant. In this case party who was legally entitled to a share in the estate and her name was on the list of beneficiaries passed away before the grant was fully effected. The applicant seeks to remove her name from the grant. This would alter the grant as her share would have to be taken over. This in my view is not what is envisaged under **Section 74** of the **Law of Succession Act (Supra)**. The grant was without error or mistake. The Death of the beneficiary does not amount to an error. The operating word under the provision is error. There are persuasive decisions which have dealt with the issue of rectification. In the matter of the estate of **Hasalon Mwangi Kahero [2013] eKLR** the court stated:

“An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased’s death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if say a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word “error” too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43.”

In the matter of the estate of **Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR** the Court stated:

“The law on rectification or alteration of grants is Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules.....What these provisions mean is that errors may be rectified by the Court where they relate to names or descriptions, or setting out of the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general.....

Where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the Law of Succession Act, the applicant ought to approach the Court under Order 44 of the Civil Procedure Rules. A review under Order 44 of the Civil procedure Rules may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the fact of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision – Order 44 of the Civil Procedure rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of grant.

In the case of **John Mundia Njoroge & 9 Others V Cecilia Muthoni Njoroge & another [2016] eKLR** the Court held:

“.....the only provisions of the Civil Procedure rules imported to the Law of Succession Act are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time.

Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”

Under **Order 45** of the **Civil Procedure Rules** Review can only be allowed under the following circumstances:

1) Discovery of new and important matter of evidence which, after 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.

2) Mistake or error apparent on the face of the record.

3) Any other sufficient reason which may make the court to review its order.

The death of a beneficiary or administrator is not a matter for rectification since the grant as issued was without errors or mistakes on names, descriptions, time or place of death of deceased. It could be a sufficient reason for the review of the grant but it is certainly not a mistake to be corrected on the grant through rectification. The applicant as stated in the persuasive decision in Geoffrey Kinuthia Nyamuringa ought to have approached the Court by way of review. The application seeking rectification of grant is not properly before this Court and is without merits. I dismiss the application.

Dated and delivered at Kerugoya this 9th day of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court, Petitioner present, court assistant Naomi Murage this 9th day of February, 2018.

L. W. GITARI

JUDGE

9.02.2018