

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2600 OF 2000

IN THE MATTER OF THE ESTATE OF JOSEPH NJOROGE KUNG'U (DECEASED)

RULING

1. The application that I am called upon to determine is the summons dated 30th May 2017. It is brought at the instance of George Kung'u Njoroge. It seeks substitution of a dead administrator, Alice Wagikuyu Njoroge, and rectification of a certificate of confirmation of grant dated 10th May 2011, amended on 12th June 2013, arising from the said demise of one of the administrators whose was also a beneficiary under the said certificate. The applicant complains that the said administrator died in 2008 yet the fact of her death was never brought to the attention of the court and proceedings have been conducted in the matter as if she was still alive. The dead administrator was the mother of the applicant.

2. The reply to the application is by Peter Gatungu Njoroge, through an affidavit sworn on 2nd July 2017. The deponent is equally a son of the dead administrator. He asserts that the death of the said administrator was brought to the attention of the court, and he was appointed to replace her as administrator on 26th January 2009. He goes on to state reasons why he feels that the applicant is not suited for appointment. He is accused of selling estate property without involving the administrators.

3. The applicant has reacted to that reply by swearing an affidavit on 24th July 2017 in rejoinder. He said he was not aware of Peter Gatungu Njoroge's appointment in substitution of their late mother as one of the administrators of the estate of the deceased. He asserts that the death of their late mother was good enough reason for the certificate to be amended so as to redistribute the assets allotted to her amongst the children in her house. He concedes to selling estate property to settle certain domestic issues on their late mother's side of the family. He accuses Peter Gatungu Njoroge of seeking to delay distribution for selfish reasons.

4. Directions were given for disposal of the application by way of written submissions. Parties have filed their respective written submissions, which I have read through and noted the arguments that they have articulated in them.

5. On the question of the substitution of the late administrator, ostensibly, to represent her side of the family, I have perused the record. Peter Gatungu Njoroge says that he was appointed to substitute her on 26th January 2009. The minute for 26th January 2009 indicates that the court made a substitution, order with regard to her position as objector/applicant. However, the proceedings conducted on 20th July 2009 reflect that Rawal J made an order that the registrar issues a rectified grant substituting Peter Gatungu Njoroge in the place of Alice Wagikuyu. I am satisfied therefore that the dead administrator was in fact substituted, and there is no basis for making another substitution at this stage.

6. I am alive to the fact that the certificate of confirmation of grant dated 10th May 2011, issued out of the judgment by Rawal J. of even date, confirmed Alice Wagikuyu Njoroge as administrator. The same must have been done in error as there is nothing on record to show that the appointment of Peter Gatungu Njoroge as administrator on 20th July 2009 in place of his mother was ever reversed. It would appear that no formal certificate in the form of a grant of letters of administration intestate was ever issued bearing his name, but that alone cannot take away from the appointment of 20th July 2009.

7. The other principal prayer in the application is for rectification of the certificate of confirmation of grant. Peter Gatungu Njoroge has raised the technical issue that under rule 43(1) of the Probate and Administration Rules the rectification only applies to errors in names and descriptions, or the time and place of death of the deceased, yet the application herein goes to the core of distribution. I totally agree. Indeed, rule 43(1) is about errors in a grant of representation, a certificate of confirmation of grant is not a grant of representation and therefore the rule does not apply to it. Even if it were to be assumed that it applies to such certificates, the same only goes to correct the superficial errors set out in the rule. An overhaul of the distribution, for that is what the applicant proposes, can only be done through a substantive application for review of the confirmation orders from which the certificate of confirmation of grant was generated.

8. More fundamentally, the application for rectification of a grant, which is not what is sought herein, can only be at the instance of the grant holder. The provision in rule 43(1) reads as follows –

'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 ...'

9. The applicant does not holder a grant of representation, indeed it is through the application that he seeks appointment, and therefore he does not qualify to bring an application for rectification of grant. That then means that the application dated 30th May 2017 is incompetent to that extent.

10. Peter Gatungu Njoroge has invited me to sanction the applicant for intermeddling with the estate of the deceased. I have looked at the applicant's supplementary affidavit and it is true that he concedes to have sold estate property. He does not indicate the capacity under which he sold the same, and how he was able to get the property transferred to the buyers if the administrators were not involved in the process. The property of a dead person vests in the personal representatives appointed by the court by virtue of section 79 of the Law of Succession Act, Cap 160, Laws of Kenya. As such, personal representatives are in equity also trustees with respect to the estate and they have the power to sell and convert the property, to enter into contracts and leases thereon, and to sue and be sued over the same. Anyone who is not a personal

representative cannot possibly exercise the powers spelt out in section 82 of the Act, nor those enjoyed by trustees under the law of equity and trusts. Anyone purporting to exercise such powers without appointment as personal representative would be an impostor and an intermeddler. Section 45 of the Act is also relevant, as only the persons holding a grant of representation have authority to handle the property of the dead person.

11. The application before me is for substitution and rectification of grant. I would like to confine myself to those matters. There is some evidence of intermeddling with the estate by the applicant and others; the administrators ought to have taken steps to ensure compliance with the law. Peter Gatungu Njoroge should not raise that issue as a defence, he should be in the offensive, by making relevant applications to call the applicant herein to account.

12. The application dated 30th May 2017 is wholly without merit for the reasons that I have given above. I shall hereby dismiss the same, with costs to Peter Gatungu Njoroge.

DELIVERED, DATED AND SIGNED at NAIROBI THIS 27TH DAY OF JULY 2018.

W. MUSYOKA

JUDGE