



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 2136 OF 2015**

**IN THE MATTER OF THE ESTATE OF PETER NJUBI NJOROGI (DECEASED)**

**RULING**

1. Peter Njubi Njoroge the deceased whose estate the proceedings herein relate died on 3<sup>rd</sup> June 2015. Prior to his death, he had executed a written Will dated 7<sup>th</sup> August 2013 expressing his wish on how he wanted his estate managed and or administered after his death. Consequently, he appointed the firm of E.N. Omotii and Co. Advocates as executors and trustees.
2. The deceased was survived by a widow Irene Waithira Njubi, Seven children and two grandsons. Among the assets comprising the estate as listed in form P & A 5 are Naivasha Mwachirigiri Block 1//276 and 313, Naivasha L.R. No. 1556/60, Karai/Gikambura/295, 1137 and 1616, Muguga/Kanyariri/T.226, Kiambogo Block 2/15979, Plot at Nakuru, Shares in 7 companies, motor vehicles registration Nos. KAN 708W (sold), KBQ 188 (sold), KWW 537 (sold), Kajiado/Kaputei North/33233 (sold) and 33234 (sold).
3. Having petitioned for a grant of probate with written Will on 26<sup>th</sup> August, 2015, Edward N. Omotii from the law firm of Omotii and Co. Advocates as the appointed Executors obtained a grant of probate with written Will dated 30<sup>th</sup> November 2015. The said grant was later confirmed on 16<sup>th</sup> September 2016 and the Estate distributed as per the written Will.
4. On 3<sup>rd</sup> May 2018, the Executor filed summons of even date seeking rectification of grant pursuant to rule 43, 49, 59 and 73 of the Probate and administration rules on grounds that during confirmation and distribution of the estate, some of the properties were left out hence the prayer to include them in the amended certificate of confirmation of grant as proposed in the application. The omitted properties were listed as land parcel Nos. 1556/419 – 448 whatever that means. It would appear that the description of the land parcel is not complete for one to know the full particulars of the land parcel in question. However, from the affidavit in support, the parcels in question seem to be products of L.R. Naivasha 1556/60.
5. The Application is supported by an affidavit in support sworn on 3<sup>rd</sup> May 2018 by Edward N. Omotii who averred that the properties in question were omitted in the testator's Will hence the need to redistribute them.
6. The Executor attached copies of the proposed subdivision approval in respect to land parcel No. Naivasha 1556/60 giving rise to L.R. No. Naivasha 1556/419- 448 which the beneficiaries now want to distribute among themselves. During the hearing, counsel for the applicant basically adopted the contents contained in the affidavit in support.
7. I have considered the application herein, supporting affidavit and counsel's oral submissions. The law governing rectification of a grant is entrenched under Section 74 of the Succession Act which provides that 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 and the grant of representation, whether before or after confirmation may be altered and amended accordingly. Rule 43 of the Probate and Administration rules is a replica of Section 74.
8. In the instant application, the applicant is seeking inclusion of some Assets which were purportedly omitted in the deceased's Will and the certificate of confirmation of grant and their distribution. For all purposes and intents, redistribution of the estate is not an error calling for rectification of a grant in a manner envisioned under Section 74 of the succession Act and rule 43 and the Probate and Administration rules. It is a question bordering on review of the grant. Rectification basically deals with apparent errors and is not a panacea to fundamentally change the character of the grant (**See in the matter of the estate of Muniu Karingo (deceased) Nairobi High Court Succession Cause No. 2668 of 1997.**)
9. The Executor is seeking to redistribute L.R. No. 1556/60 through the back door which upon the proposed sub-division and approval gives rise to L.R. Nos. 1556/419 – 448. A perusal of Paragraph 6 of the Will herein is reflective of L.R. No. 1556/60 Naivasha as having been bequeathed in equal share to Damaris Wakonyo Njubi, Lucy Nyagaki Njubi, Margaret Wambui Njubi, Grace Wairimu Njubi and James Kimani Njubi provided that James Kimani Njubi occupied the portion where the testator's house is erected.
10. The rectification being sought herein is intentionally and ideally calculated at the court sanctioning an illegality by rewriting the Will thus altering the Wishes of the deceased. This is clear from the sub-divisions of the original land which gave rise to different acreage with each portion allocated to each beneficiary yet the intention of the deceased was to have the land equally shared out.
11. What stopped the Executor from executing the Will as per the confirmed grant in which the same land (LR Naivasha 1556/60) is referred to and distributed equally amongst the beneficiaries as per Paragraph 6? The Executor cannot amend the Will through the back door. There is no asset left out. The approved subdivision of L.R Naivasha 1556/60 was done on 10<sup>th</sup> November 2015 long after the deceased had died and the petition for the grant of representation filed but before a grant of probate and subsequent confirmation would issue. The Executor was all along aware that he was committing an illegality by sub-dividing the deceased's land in different sizes in acreage contrary to the deceased's wishes that the land be shared out equally amongst the beneficiaries.

12. In any event, any property not mentioned for distribution in a Will, cannot casually be included in a certificate of confirmation of grant of probate with written Will. Such property can only be dealt with separately as an intestate estate although within the same file. However, in this case, there were no such parcels of land during the lifetime of the deceased so as to be included or regarded as part of the estate. The creation of several parcels of land out of the original land owned by the deceased and which the deceased had already directed on how to be shared is an absurdity on the part of the Executor.

13. Accordingly, I do not find any merit in the application herein capable of granting the orders sought. The Executor should enforce the confirmed grant as per the written will reflecting the express desire of the deceased. For those reasons, the application herein is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2018.**

**J.N. ONYIEGO**

**JUDGE**