



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 158 OF 2000

IN THE MATTER OF THE ESTATE OF KISIGWA ASUGA ASUGA (DECEASED)

BETWEEN

ALBERT IMBUGA KISIGWA.....ADMINISTRATOR /RESPONDENT

VERSUS

RECHO KAVAI KISIGWAINTERESTED PARTY/APPLICANT

RULING

1. The interested party/applicant has filed an application dated 9th February, 2017 seeking for orders that:-

- 1.) That the certificate of confirmation of grant dated 7th August, 2007 issued by this honourable court in respect of the estate of the late KISIGWA ASUGA ASUGA be amended in the following manner.
- 2.) That the applicant's name erroneously captured as RACHAEL KANYANGI be amended and corrected to read RECHO KAVAI KISIGWA.
- 3.) That the land parcel known as N.MARAGOLI/KISATIRU/1863 registered in the name of RACHEL KANYANGI be corrected and registered in the name of EZINA ALIVITSA AGUFA while land parcel NO. N.MARAGAOLI/KISATURU/1861 be registered in the name of the applicant RECHO KAVAI KISIGWA.
- 4.) That costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and is supported by the affidavit of the applicant. The applicant deposes in her supporting affidavit that she is a sister- in -law to the administrator of the estate in this succession cause, **Albert Imbuga Kisigwa**. That at the time of confirmation of the grant her name was wrongly captured as Rachael Kanyangi instead of Recho Kawai Kisigwa. That she occupies and utilizes land parcel No. Maragoli Kisatiru/1861 on the physical ground while her sister-in-law **Ezina Alivitsa Agufa** occupies land parcel No. N. Maragoli/Kisatiru/1863. That the said titles were swapped when the mutation forms were lodged at Vihiga District Land Registry on 23.4.2011 in order to procure portion of the original title number N. Maragoli/Kisatiru/924 originally owned by the deceased herein. That both she and Ezina Alivitsa Agufa have extensively developed their respective parcels of land that they occupy on the ground. That Ezina will hereby not suffer any prejudice if the error in the titles is corrected. That in a ruling delivered on 15.11.2016 Hon Justice E.C. Mwitia held that any beneficiary could move the court seeking to rectify the grant to correct any anomaly in the grant.

3. The application, save the application for rectification of name, was opposed by the administrator herein, Albert Imbuga Kisigwa on the grounds that the issues raised in the application were raised substantially by the objector/applicant during viva voce evidence wherein the court made a finding thereon in paragraph 21 of its ruling. Further that this being a succession cause the court lacks jurisdiction to swap titles and or deal with property other than succession property.

4. That the applicant is asking the court to usurp the powers of the Environment and Land Court. Further that as this application is brought order under Rules 43 of the probate and administration rules ought to be brought by the petitioner/holder of a grant and therefore the application is misplaced.

5. The application was argued in court by **Miss Ashitsa** representing the applicant while **Miss Muleshe** represented the administrator. Miss Ashitsa submitted that it is not fair to order the applicant to move from the land where she has developed to another parcel of land. That Mwitia J in paragraph 21 of his ruling advised parties to agree on the swapping of the land but they have not agreed.

6. However, that this court has discretionary power to order for the titles to be swapped. The advocate urged the court to use its discretionary power to order so.

7. Miss Muleshe on her part submitted that the succession cause has been closed and titles have been issued. That this court therefore lacks jurisdiction to determine the matter. That the applicant should have moved to the Environment and Land Court to seek for the prayers being sought herein. Further that the same issues were raised by the applicant in her objection and were determined by Justice Mwita in Paragraph 19-21 of his ruling.

8. Miss Ashitsa replied that the court has jurisdiction as titles were obtained by way of a succession cause. That the court has powers to nullify a grant at any stage even after title deeds have been issued.

9. I have perused the court file in this matter. I have noted that the interested party herein had filed an objection dated 30.5.2012 seeking for revocation of grant of representation made to Albert Imbuga Kisigwa, the administrator of the estate in this succession cause. During the hearing she complained, inter alia, that during distribution of the estate she had been allocated a parcel of land elsewhere other than where she was residing. In his ruling delivered on 15th November 2016, Mwita J held the following in paragraph 21;

“ If the objector feels she has some sentimental attachment to the place she has settled on and does not want to move, she could very well approach the other beneficiary and mutually agree to swap their parcels. This is something only the two of them can agree on and resolve. I do not think it can be blamed on the petitioner. Neither can the court force parties to swap parcels of land. It is a matter for them to mutually agree or decide what to do. It cannot in itself form a basis for revoking a grant of representation or cancellation of a certificate of confirmation of grant where the administrator has complied with section 71 of the Law of Succession Act by ascertaining the beneficiaries and their respective shares in the estate”

10. The learned judge further held in paragraph 23 of the ruling that:-

“However, that notwithstanding, my view of the matter is that there is no basis for revoking the grant. It is up to the applicant and other beneficiaries to seek rectification of the certificate of confirmation of grant to correct any anomaly that there may be.”

11. The application is brought under rule 43 of the probate and Administration Rules. It was contended by the administrator that an application under the said rule for rectification of name ought to be made by the holder of a grant. In this case the application was made by the applicant who is not the holder of a grant. That the application is misplaced.

12. The court has considered that the application for rectification of name is not opposed. Though rule 43 (1) requires such an application to be made by a holder of a grant, it is to be noted that the applicant and the administrator are protagonists in the case. The administrator may not have wanted to bring the application. The court will use its inherent power under rule 73 of the Probate and Administration Rules to allow the rectification of name so as to meet the ends of justice. Prayer 2 of the summons for rectification of grant is to be allowed.

13. The applicant is further seeking for orders to swap land parcel N. Maragoli/Kisatiru/1863 with N. Maragoli/Kisatiru/1861. The application is made under Rules 43 and 49 of the Probate and Administration Rules. Rule 49 states that:

“ 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.”

14. Neither the Act nor the Rules provide for the making of the kind of application before the court for swapping of land parcels. The application is therefore properly brought under Rule 49 of the Probate and Administration Rules.

15. It was contended by the advocates for the respondent that the matter falls under the jurisdiction of the Environment and Land court as title deeds have been issued and the estate of the deceased extinguished. The advocate for the applicant on the other hand contended that the court has power to nullify a grant of representation at any stage of succession proceedings even after titles have been issued.

16. The argument for the applicant is that there was an error committed during the distribution of the estate of the deceased in this matter whereby her share of the estate was placed outside where she has settled. She is thereby asking the court to rectify the error to meet the ends of justice.

17. Both the High court and the Environment and Land Court have concurrent jurisdiction in certain matters relating to land. It is a question to be decided on a case – by – case basis as to which of the two courts is best suited to hear and determine such a matter when it is before court. In the case of **Munyasya Mulili & 3 others Vs Sammy Muteti Mulili(2017) eKLR**, Nyamweya J held that:

In Salome wambui Njau(suing as the Administrator of the Estate of peter Kiguru Njuguna(deceased) V Caroline Wangui Kiguru, Nairobi ELC suit No. (2013) eKLR , which was relied upon by the Petitioners, I held that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the Constitution and the High Court as the Succession Court under section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.....

It is thus my finding that since the dispute herein is one between the personal representatives of the deceased and the survivors, beneficiaries and dependents of the deceased, it is a succession dispute to be determined solely within the framework of the Law of Succession Act....’

On the second issue as regards this court's jurisdiction as a succession court to revoke title, this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules....'

18. The dispute herein is between a beneficiary and an administrator of an estate.

Registration of parcels of land in issue were done as a result of a succession cause. If there was any error committed during distribution of the estate, this court has powers to revisit the issue. Section 76 of the Law of Succession Act grants this court powers to revoke or annul a grant whether confirmed or not.

19. The High Court sitting as a succession court has powers to nullify any title deed issued after a succession cause. In **Anna Mutindi Vs Benard Wambua Muia(2016) eKLR**, the court while sitting at Machakos cancelled transfer and registration of land after revoking a grant issued in a succession cause. In **Re Estate of Christopher Jude A+deda(deceased) (2009) eKLR**, the court revoked a grant and cancelled a sale of land to a third party.

20. In my view a question to swap land based on a purported error committed during distribution of an estate falls under the jurisdiction of the High court and not the Environment & Land Court. I therefore hold that this court has jurisdiction to determine whether the two parcels of land should be swapped. I will therefore proceed to consider the issue.

21. It was contended by the advocates for the respondent/administrator that the issue before court has been determined, the same having been raised by the parties during objection proceedings and a decision made by Mwita J. The advocates for the applicant on the other hand submit that the issue was not determined as the learned judge left it open for any party or beneficiary to pursue with the court the issue of rectification of any anomaly in the grant.

22. I have keenly read the ruling of Mwita J dated 15th November, 2016. The learned judge in paragraph 21 of the ruling was of the view that the court could not force parties to swap parcels of land. He held that it was for the parties to mutually agree on the issue. He found that the administrator was not to blame for the predicament the applicant has found herself in.

23. It is not for this court to determine on whether or not the learned judge was right in so holding. If the applicant was not satisfied with the findings of the learned judge, she ought to have filed an appeal. For this court to find otherwise would be sitting on appeal of a brother judge. Reading the ruling in its context, the rectification the learned judge had in mind in paragraph 23 of the ruling was rectification of name and not swapping of parcels of land. The issue for swapping of the parcels of land as prayed by the applicant has therefore already been determined by Mwita J in his ruling delivered on 15th November, 2016 who rejected it. This court cannot delve into the issue.

24. Besides that, the person the applicant wishes to swap land with is not a party to this application. It is not in order for the court to issue orders affecting a third party who is not a party to the suit.

25. In the foregoing prayer 2 of the summons for rectification of grant dated 9th February, 2017 is allowed as prayed while prayer 3 is dismissed.

Each party to bear its own costs.

Delivered, dated and signed in open court at Kakamega this 22nd day of November, 2018.

J. NJAGI

JUDGE

In the presence of :

No appearance.....for administrator/ respondent

Ashitsa.....for interested party/ applicant

Court clerkGeorge

Parties:

Administrator/respondent –

Interested party/ applicant-