



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 185 OF 2010**

**In the Matter of the Estate of Solomon Nkabu Ngaruni-Deceased**

BEATRICE WANJA NKABU.....1<sup>ST</sup> PETITIONER/RESPONDENT

GEORGE MURIUNGI M' NKABU.....2<sup>ND</sup> PETITIONER/.RESPONDENT

Versus

FRANCIS NTEERE NKABU.....2<sup>ND</sup> APPLICANT

HELLEN NKIROTE TIMOTHY.....3<sup>RD</sup> APPLICANT

**RULING**

[1] Before me is Summons for Rectification of Grant dated 26<sup>th</sup> November 2013 in which the following orders have been sought:

**1. That this honourable court be pleased to review and rectify the Confirmed Grant of Administration and distribution as per paragraph 4 and 6 of the supporting affidavit in the interest of justice and fairness.**

**2. That the costs of this application be in the cause.**

The said application is expressed to be brought pursuant to Rule 43 of the Probate and Administration Rules and is premised on the following grounds:

**1. That the Grant herein was confirmed on 12<sup>th</sup> July 2011 but some family members were dissatisfied on distribution.**

**2. That the 2<sup>nd</sup> Petitioner, who is a joint-Administrator engaged surveyors who subdivided the estate properly without adhering to the confirmed Grant.**

**3. That it is only fair that the deceased's estate is re-distributed as per applicant's proposal in order attain fairness and to bring sanity to the deceased's family.**

**4. That all the beneficiaries save the 2<sup>nd</sup> Petitioner have agreed on the proposed re distribution of the estate, hence, the need for court's intervention in the interest of justice and**

**fairness.**

[2] In a nutshell, the Applicant is seeking for Rectification of the Confirmed Grant so that the estate is re-distributed as follows:

**1. Beatrice Wanja Nkabu to get three (3) acres to hold in trust for all the daughters of the deceased.**

**2. The balance to be shared equally among the following:**

**i. Francis Nteere Nkaabu**

**ii. George Muriungi Nkabu**

**iii. Hellen Nkirote Timothy to hold in trust for her sons**

**iv. Peter Karani Timothy and Joshua Kirimi Gitonga.**

According to the applicant, the re-distribution is necessary to bring in some dependants who were left out. Despite the consensus, the current Co-Administrator has been the problem and has placed bottleneck in dealing with the estate of the deceased.

[3] The 1<sup>st</sup> Petitioner submitted inter alia that the 2<sup>nd</sup> Petitioner has colluded with private surveyors namely M/S J.G HALAKE to portray the size of the land to be smaller whereas the land register and the size on the ground are in agreement. This forced the 1<sup>st</sup> Petitioner and the other dependants to file an application dated 17<sup>th</sup> January 2012 which was allowed on 24<sup>th</sup> January 2012 in the following terms:

**“that this honourable court be pleased to orders stay of implementation of the confirmed Grant herein in view of the offences already committed by the 2<sup>nd</sup> Administrator George Muriungi M’ Nkabu under Section 94 and 95 of the Law of Succession Act pending the hearing and determination of the application.”**

It was further submitted that on 10<sup>th</sup> December 2012, with consent of parties, the honourable court recorded the following orders:-

**1. “That an order is hereby issued cancelling the previous survey of the deceased’s estate L.R ABOGETA/U-KITHANGARI/476.**

**2. That the District Surveyor do ascertain the acreage and survey the land as per the confirmed grant.**

**3. Dependants to finance the survey expenses.”**

And that the above consent orders had not been implemented because the 2<sup>nd</sup> Administrator had inter alia engaged in prolonged and unrelenting wanton interference and destruction of the estate by cutting down mature trees and selling them, following each Makau J on 8<sup>th</sup> October 2013, directed the aggrieved parties to file a formal application for rectification of Grant, hence, this application. She beseeched the court to allow the rectification.

### **Estate administered**

[4] The 2<sup>nd</sup> Petitioner opposed the application and deposed inter alia that the Certificate of Confirmation could not be rectified at this juncture as it had already been executed and title deeds issued. In addition, at the time of Confirmation of Grant all the parties appeared in court, agreed on the mode of distribution and signed the necessary consents. Therefore, the only remedy available to the applicants if

any was to file a civil suit. The 2<sup>nd</sup> Petitioner filed submissions in support of his position. He contended that after the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner were appointed as Administrators they embarked on the process of distributing the estate and did it in accordance with the Grant. He argued that they consulted each other and hired a surveyor who surveyed the estate as provided in the Grant. Consequently, titles were processed and each of the beneficiaries was issued with his own title. Moreover, each of the beneficiaries took possession and occupation of, and has developed their respective portions of land. None of them had complained of any unfairness. Accordingly, the matter had become *factus official* and the remedy of the Applicant lied elsewhere and not in succession cause. On this basis, the 2<sup>nd</sup> Petitioner urged the court to dismiss the application.

### **Affidavits by other beneficiaries**

[5] The beneficiaries of the estate namely: Mary Gakii Solomon, Doreen Mukiri Solomon and Lucy Kithiru Solomon, all swore affidavits deposing inter alia that it was the will of both the deceased that the land be shared equally among all their children. They urged the court to review and rectify the Grant to give effect to the constitutional right of the beneficiaries to inherit and the deceased parents' will on the distribution of the estate.

### **DETERMINATION**

[6] I have carefully considered this Application and the rival contentions by the parties. The application dated 26<sup>th</sup> November 2013 is expressed to be brought under rule 43 of the Probate and Administration Rules, and is essentially one for rectification of grant. I have said before and I will restate it once more that, the scope of rectification of grant is cut out in section 74 of the Law of Succession Act, and relates to errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant. I wish to add, however, that the scope of rectification includes all other minor errors of whatever nature but which are not substantive in nature or likely to require copious evidence to discern. Therefore, re-distribution of the estate in the manner proposed by the Applicant is quite substantial and substantive matter which cannot be dealt with through mere rectification of grant. It may, therefore, not be profitable to engage my mind at this stage on the request for re-distribution herein. I will, therefore, be concerned with compliance with the orders made on 10<sup>th</sup> December 2012 in order to bring sanity in these proceedings. The court with the consent of the parties *inter alia* ordered that:-

**“...the survey done on the estate involving the deceased land L.R ABOGETA/UPPER KITHANGANI/476 be and is hereby cancelled...a new survey be done by the District Land Surveyor to ascertain the acreage on the ground and sub-divide the same as per the confirmed Grant for purposes of transmission to the dependants...’**

There has been claims that the above orders were not complied with; instead the 2<sup>n</sup> Administrator continued with prolonged wanton interference and destruction of the estate by cutting down and selling mature trees in the estate. The 2<sup>nd</sup> Petitioner denied these allegations. However, matters of survey continue to feature in these proceedings. Accordingly, I order:-

**(a) That the joint administrators herein, within 30 days from today, shall engage the services of the District surveyor or surveyors, Meru to ascertain the acreage on the ground and subdivide the estate property as per the confirmed grant herein and to file a report thereto. The report shall be filed within the same period of time allowed herein before. But, should the 2<sup>nd</sup> Petitioner not cooperate, the 1<sup>st</sup> Petitioner shall, within 21 days of the expiry of the time first above permitted, engage the services of the District surveyor or surveyors, Meru to ascertain the acreage on the ground and subdivide the estate property as per the confirmed grant herein. A report thereto to be filed. For the avoidance of doubt, no private surveyor shall sub-divide the estate property unless with the consent of the administrators and the beneficiaries.**

**(b) All beneficiaries shall bear the cost of the subdivision. These orders are made in the**

