



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 2952 of 2014
IN THE MATTER OF THE ESTATE OF WANJIRU PERIS KIBERA MBURU

RULING

1. The Court has before it an Amended Summons for the Amendment/Rectification of the Certificate of Confirmation of Grant brought “Ex parte and is brought under **Rule 49 of the Probate and Administration Rules**. The Applicant is Samuel Gathuru Mburu. He is the Deponent to the Supporting Affidavit. The Applicant seeks Orders that:

(1) The Certificate of Confirmation of Grant issued by this court to the Applicant on 23rd day of February, 2016 be amended so that a fresh Certificate of Confirmation of Grant is issued indicating that:

a. The sole beneficiary of the entire Estate of the Late WANJIRU PERIS KIBERA MBURU (“the Deceased”) is MBURU SAMUEL GATHURU FAMILY TRUST;

b. The Shares held by the Deceased in Cooperative Bank of Kenya Limited and Safaricom Limited as currently held in CDS account Number 1130293 in SBG Securities be transferred to Mburu Samuel Gathuru Family Trust;

c. The funds held in the Deceased’s account with the National Social Security Fund under Registration Number MSSF No 000146/82 be transferred to MBURU SAMUEL GATHURU FAMILY TRUST

d. All the dividends issued in favour of the Deceased for the shares held in Co-operative Bank Kenya Limited and Safaricom Limited with are in the custody of Co-operative Bank Kenya Limited, Share Registry Department and Image Registrars respectively be transferred to MBURU SAMUEL GATHURU FAMILY TRUST

2. The Grounds relied upon are that:

1. The sole beneficiary of the Estate of the Deceased is the MBURU SAMUEL GATHURU FAMILY TRUST and not SAMUEL GATHURU MBURU as erroneously indicated in the Certificate of Confirmation of Grant issued on the 23rd day of February, 2016.

2. The number of shares held in cooperative Bank of Kenya Limited and Safaricom Limited are not fixed and keep changing due to the rights issues by the companies.

2A The proceeds of the account of the Deceased with the National Social Security Fund under Registration Number NSSF No 000146/82 were erroneously omitted from the initial list of assets.

2B The dividends of the shares held by the Deceased in Cooperative Bank of Kenya Limited and Safaricom Limited were erroneously omitted from the initial list of assets.

3. *The Certificate of Confirmation of Grant needs to be amended to reflect the correct beneficiary of the estate of the Deceased, include the funds held in the Deceased's account with the National Social Security Fund under Registration Number NSSF No [...] include the dividends from the Deceased's shares in Cooperative Bank of Kenya Limited and Safaricom Limited and ~~include and~~ indicate the correct position regarding the shares currently held in Cooperative Bank of Kenya Limited and Safaricom Limited to enable the administrator vest the correct assets comprising the Estate of the Deceased in the correct beneficiary.*

4. The Application is brought under Rule 49 of The Probate and Administration Rules. That Rule states; *"Applications not otherwise provided for 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.* The Applicant filed a Summons on 2nd September 2016 which then needed amendment and the Amended Summons was filed on 14th March 2017.

5. It may be that the Applicant intended to refer to Rule 43 which is the Rule that allows for rectification. It provides:

"43. Rectification of grant

(1) 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 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"

Section 74 provides:

"74. Errors may be rectified by the Court

Errors in names and descriptions, or in setting fourth the time and place of the 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 or amended accordingly."

6. The Application seeks to amend the Certificate of Confirmation to reflect the correct beneficiary. The Confirmed Grant was the culmination of a process that was commenced by a Petition. The Petition was filed by the Applicant herein. The Petition is supported by the sworn Affidavit of the Applicant who was the Husband of the Deceased. The Affidavit lists the members of the family of the Deceased as follows:

(a) Samuel Gathuru Mburu – Husband

(b) Watiri Mburu – Daughter

(c) Gathuru Mburu – Son

(d) Muthoni Mburu – daughter

(e) Nyambura Mburu – Daughter

Grant of Letters of Administration was issued on 24th March 2015. The Grant was confirmed on 23rd February 2016. The Summons for Original Summons for Rectification was filed on 7th September

2016. It was amended on 14th March 2017 pursuant to an Order of the Court. At the time of Confirmation the Supporting Affidavit stated at Paragraph 5:

“The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows:-

(i) Samuel Gathuru Mburu 100% of the estate (to hold for his life interest and in trust for Watiri Mburu, Gathuru Mburu, Muthoni Mburu and Nyambura Mburu) .

Paragraph 6 of the Supporting Affidavit states “I, Samuel Gathuru Mburu with the consent of the remaining dependants wish to transfer all net Assets of the Deceased to the Mburu Samuel Gathuru Family Trust to hold in trust during my lifetime, until my demise, upon which the Dependants shall take over the Trust as joint trustees.”

7. The Grounds of the Amended Application state that; “The sole beneficiary of the Estate of the Deceased is the MBURU SAMUEL GATHURU FAMILY TRUST and not Samuel Gathuru Mburu as erroneously indicated in the Certificate of Confirmation of Grant issued on the 23rd day of February, 2016. Paragraph 5 of the Supporting Affidavit to that Application states that “The Confirmation of grant ought to be amended to reflect that the sole beneficiary of the Estate of the Deceased is the MBURU SAMUEL GATHURU FAMILY TRUST” and paragraph 10 states that the rectification is necessary to reflect the correct beneficiary. Paragraph 2 of the Supporting Affidavit states “With the consent of the deceased’s dependants, being Waitiri Mburu, Gathuru Mburu, Muthoni Mburu and Nyambura Mburu, the sole beneficiary of the estate of the deceased was to be the Mburu Samuel Gathuru Family trust to hold the net assets of the estate in trust for my lifetime, until my demise upon which the deceased’s dependants shall take over the trust as joint trustees. Copies of the consents are at pages 2 to 5 of the exhibit.”. That is consistent with the consent to the Certificate of confirmation, ie that the Applicant should have a life interest and thereafter the estate to be held in trust for the remaining beneficiaries.

8. Dealing with each of the Prayers in reverse order. Firstly, the prayer for rectification to included the shares held by the Deceased or to her account is granted so that it includes “All share held by the Deceased or to her account in the Co-operative Bank”. The same applies to the Shares held in Safaricom Limited and rectification of the Certificate of Confirmation is granted so that the Schedule of Assets includes “All shares held by the Deceased or to her account” in Safaricom Limited. Similarly prayer 2A is granted so that the proceeds of the account of the Deceased with the National Social Security Fund under Registration Number NSSF No [...] is included in the Schedule of Assets belonging to the Deceased. The prayer asks for those assets to be “transferred” to the Mburu Samuel Gathuru Family Trust. That prayer is misconceived. It is not the function of the Court to “transfer” the assets of the Deceased. The Administrators put forward a schedule of assets and intended distribution which is then confirmed. There is no jurisdiction in the Court to transfer the assets the subject of the Grant. If there is a dispute the Court may be called upon to decide on entitlement and shares on distribution. The property vests as set out in the Certificate of Confirmation. There is no re-distribution by the Court thereafter save in very limited circumstances.

9. The Schedule of Assets omits the NSSF Account No [...] and the Court Order that the certificate be rectified to include all sums and/or benefits held to that account to also be distributed to the Administrator/Applicant for Life and thereafter in trust for the remaining beneficiaries.

10. The Application before the Court seeks and order that the Certificate of Confirmation “be amended” to signify that the Trust is the sole beneficiary of the Estate. Amendment is a power granted in Section 74 in relation to errors. This Court takes the view that it does not have the jurisdiction to make any other “amendments”. It is difficult to equate a Certificate of Confirmation of Grant to a pleading and therefore it cannot be amended in the same way. The Grounds allege that in that respect of the Certificate contains “an error”.. In fact, the Certificate faithfully reflects the position as is set out in paragraph 5 of the Supporting Affidavit to the Summons for Confirmation of Grant.

11. The Application exhibits the Trust Deed dated 25th July 2014 and Certificate of Incorporation dated

10th September 2015. The signed consents of the each of the remaining beneficiaries is dated 1st October 2015 which predates the Application for Confirmation of the Grant.

12. The Second Amendment sought is for “the shares “*to be transferred*” (emphasis added). To the Family Trust. The Third is for the Funds held for the Deceased’s account with NSSF, Reg No 00146 to be transferred to the Trust Fund. In addition, the Dividends “be transferred” to the Family Trust”. The Grounds relied upon are that (1) the number of shares keeps changing. It may that the reason for that is that the Deceased had opted for her dividends to be paid in shares. That has not been explained.

13. It is therefore Ordered that:

(a) The Certificate of Confirmation be rectified to include the assets set out above, namely Co-operative Bank Limited and Safaricom Limited Shares dividends.

(b) The Application for the Court to transfer the assets to the Trust is dismissed. Any transfer to the Estate is to be made after confirmed grant is to be made by the Administrator and/or Beneficiaries in the appropriate way.

14. Although the Certificate of Confirmation of Grant is completely consistent with the Application and therefore there is no “error” as such. However, after further consideration and a review suo motto of the Court, it is readily apparent from the forms of Consent signed by the Beneficiaries on 15th October 2015, that it was within the understanding and contemplation of the Beneficiaries, if not the draughtsman of the Summons, that they were consenting to the entirety of the Estate vesting in the Family Trust namely, the MBURU SAMUEL GATHURU FAMILY TRUST. This Court therefore takes the view that the interests of justice are served by giving effect to the wishes of the Beneficiaries. Therefore it is further Ordered on reviews that the Certificate of Confirmation of Grant be rectified to name the sole beneficiary of the entirety of the Estate as the MBURU SAMUEL GATHURU FAMILY TRUST.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI this 12th April 2017

Reviewed on 31st May 2017

In the Presence of:

Clerk: Patrick

Miss Ndirangu HB Miss Maina for Applicant