



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 97 OF 2011

In the Matter of the Estate of M’ Ndatho M’ Nabea alias Ndatho

Nabea alias Joseph M’ Ndatho M’ Nabea (Deceased)

CECELIA MUKOMUGA.....PETITIONER

RULING

Rectification of grant or re-distribution of estate

[1] By a Chamber Summons Application dated 22nd September, 201 brought pursuant to Rules 43, 67, and 73 of the Probate and Administration Rules and Section 74 of the Law of Succession Act, the Applicant/Petitioner is seeking for the following orders:

1.spent
2. **The honourable court be pleased to amend, correct and rectify Certificate of Confirmation of Grant dated 3rd July 2013.**
3. **That upon rectification of the Grant of the Letters of Administration the same be rectified in terms of paragraph 10 of the supporting affidavit herein.**
4. **That the court do issue orders of inhibition preventing any further dealings in parcel NO. Nyaki/Thuura/2243 and any other resultant number pending hearing and determination of this application and this cause and also cancel resultant number s until hearing and determination of this application and cause.**
5. **The court do order the Government Survey Meru to subdivide the suit land so as to get the correct position on the ground in terms of the grant.**
6. **Costs, interest and any other relief.**

[2] In a nutshell, the Applicant who is the wife of the deceased claims that;

- (i) The dependants of the deceased have not been provided for;
- (ii) As no survey was carried out to establish the exact size of the estate property before the Grant was confirmed, the shares awarded to the beneficiaries did not match with what was on the ground;

(iii) Geoffrey Muthamia, Peter Mutua and Justus Murerwa who are purchasers, without consulting or informing the Applicant, engaged their own private surveyor and carried out an irregular subdivision and that they never informed her of the survey exercise and that she never participated.

(iv) By the said irregular survey the purchasers were allocated bigger portions of land and created unnecessary road markings in an area that is too small, thus, taking the entire land for themselves and leaving the Petitioner and her children with insufficient land

(v) As the land is not sufficient to provide for all the shares awarded in the confirmed grant, there is need for parties to agree on the surveyor who will carry out the subdivision of the land available on the ground and amicably distribute it to the beneficiaries without any causing problem. The purchasers named in the Grant had disregarded the Petitioner and her children and were doing survey work secretly and allocating themselves bigger shares and creating unnecessary road markings in an area that is too small.

[3] On the foregoing reasons, the Petitioner/Applicant seeks for the estate property to be resurveyed so that they could share what is available on the ground and the Grant to be amended accordingly.

Purchasers: we purchased specific portions

[4] The Application opposed the application through a Replying affidavit filed in court by Geoffrey Muthamia, one of the purchasers herein who deposed inter alia that they had bought portions of land from the deceased with his co-respondents as follows:

1. **Geoffrey Muthamia-0.50 Acres**
2. **Peter Mutua-0.25 Acres**
3. **Justus Murerwa-0.25 Acres**
4. **Phyllis Gakii-0.20 Acres**

He further contended that their respective shares were duly captured in the Certificate of Confirmation of Grant dated 3rd July 2013 and that the court record will confirm that the Petitioner has been unwilling to implement the Grant on the basis of which the court issued orders empowering the Deputy Registrar to execute all the necessary documents in place of the Petitioner to enable the implementation of the Grant. According to the Purchaser, it was not true that the land was not enough for sharing and that all the dependants had consented to the mode of distribution before the Grant was confirmed and that the application before court was not for rectification but rather sought to introduce a new mode of distribution altogether. The purchasers asserted that they bought specific portions of land from the deceased and their respective shares could not be altered to their detriment.

Directions

[5] On 15th November 2016, it was agreed that this application shall be canvassed by way of written submissions. Parties filed submissions in support of their respective positions

[6] The Purchasers submitted that the jurisdiction of the court to rectify a Grant under Section 74 of the Law of Succession Act was extremely restricted, for it permitted rectification in three clearly defined cases namely; (a) errors in names and descriptions; (b) errors as to time or place of death of the deceased; and (c) in cases of a limited grant, the purpose for which such limited grant was made. The purchasers contended that the rectification sought by the Applicant in this matter did not fit any of the above instances and the Applicant was merely attempting to introduce a new mode of distribution through the backdoor.

[7] More was submitted by the purchasers especially on inhibition. According to them, these orders are

intended to halt the process of implementation of the Grant. The orders would certainly aid the Applicant to frustrate the implementation of the Grant. They took the view that the suit land measured 1.1 Ha or 2.717 Acres and that the sharing ordered in the Confirmed Grant does not exceed the size of the land. Finally, they argued that, before the court confirmed the Grant it was satisfied that respondents were entitled to their respective portions and that their entitlement was not challenged at the time of confirmation. Consequently, the purchasers urged the court to dismiss the application.

[8] The Petitioner submitted that she had doubts in the manner confirmation and distribution of the estate was done as the 1st to 4th respondents purported to be purchasers for value, yet, they did not annex any agreement or document to prove the purported purchase of the estate property. She also urged that the respondents did not inform her that they had applied to the Deputy Registrar to sign the documents of transfer instead of herself. To her that was irregular.

DETERMINATION

[9] Upon careful consideration of this application and the rival submissions by the parties, I take this view of the matter. At this stage, I need not intrude into whether or not the Respondents purchased the land from the deceased. What is of paramount concern to the court is whether rectification herein should be allowed in the manner sought by the Petitioner. I agree with the Respondents that the jurisdiction of the court under section 74 of the Law of Succession Act is quite restricted. I also agree with the Respondents that the Petitioner is seeking for a re-distribution of the estate. But quite nascent issues have arisen in this application. The Respondents have argued that they are entitled to specific portions of land which they bought. Except, however, I am concerned about the following matters which have been raised by the Petitioner, to wit;-

- (a) That the land on the ground is not sufficient to satisfy the shares as set out in the grant.
- (b) Allegations that the Respondents allocated themselves bigger portions of land;
- (c) That the surveyor hired by and the Respondents created unnecessary roads in the land which is small as a result of which the land diminished.

These matters are not a trifle. They are serious matters, and when they are raised in succession proceedings, the court must seek specific reconciliation thereof in the interest of justice. As I fathom this, I have noted the indolent conduct of the Petitioner, thus, I will seek a path which guarantees expeditious disposal of these concerns and the sustentative request for re-distribution. Towards that end, I direct the district surveyor, within 21 days to visit the estate property, establish and file a report on the following matters;

- a. Whether the Respondents share on the ground is inconsistent with the confirmed grant;
- b. Whether there are unnecessary roads that were created by the surveyor who surveyed the land; and if so, the most prudent manner of surveying the land in accordance with cadastral and planning requirements;
- c. Whether the land is sufficient to accommodate the shares of beneficiaries as set out in the confirmed grant;
- d. The balance of land after deduction of the Respondents' portions as awarded in the confirmed grant.

[10] The cost of the survey shall be borne by the Petitioner. Upon receipt of the above report, I will decide on the substantive requests in the application herein. It is so ordered.

Dated, signed and delivered in open court at Meru this 18th day of May 2017

F. GIKONYO

JUDGE