



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

P&A NO. 45 OF 1996

IN THE MATTER OF ESTATE OF HEBRON AMUNZE AYUKA (DECEASED)

AND

BARASA G.E AMUNZEADMINISTRATOR/APPLICANT

RULING

1. The deceased in this succession cause *Hebron Amunze Ayuka* died on 7th April, 1994. Representation to his estate was made to *Mark Akhonya Amunze*, *Barasa G.E Amunze* and *Esther Ivane Amunze* on 8th September, 1996.
2. In their petition for grant of letters of administration to the Estate, the three administrators described themselves as sons and widow of the deceased. The grant was confirmed on 7th February 2014. A certificate of confirmation of grant was duly issued on 19th February 2014.
3. What is before me for determination is the summons for rectification of grant dated 11th August, 2015. The summons was taken out by *Barasa G. E . Amunze* one of the administrators of the Estate seeking that the Certificate of Confirmation of grant be rectified to include land parcel No. South Kabras/Chesero/227 (the subject land) which had allegedly been left out in the distribution of the Estate and that the said land be allocated to him. The application is supported by an affidavit sworn by the applicant on 11th August 2015.
4. In his affidavit, the applicant deposed that the deceased owned a share of the subject land which was 0.43 hectares and that the deceased's share should be registered in his name so that he could later distribute it to the other beneficiaries.
5. I have considered the application and the supporting affidavit. It is not clear why the applicant lodged the application alone without the other administrators and whether the application was presented with the knowledge and consent of the other administrators. The applicant has not sought to explain this anomaly either on the body of the summons or in the supporting affidavit. I have however noted from the court record that on 5th March 2015, the applicant informed the court that the 1st administrator *Mark Akhonya Amunze* is now deceased. That claim has not been substantiated to date.
6. In my view, where there are two or more administrators, applications such as the one before the court ought ideally to be presented by all the administrators or surviving administrators jointly as opposed to one of them but nevertheless, in the interest of administering substantive justice, I will proceed to determine the application on its merits.
7. As stated earlier, the applicant seeks to have the Certificate of Confirmation of grant amended to

include the subject property on grounds that the deceased owned a share of the property which was inadvertently left out during the Estate's distribution. To support his claim, the applicant annexed to his affidavit a copy of a certificate of official search dated 6th August 2015 marked as exhibit 1. He did not avail to the court a copy of the title document itself.

8. I have perused the court record. I have noted that the subject property was not listed among the assets belonging to the deceased's Estate in the petition for grant of Letters of Administration. This means that the applicant may not have been candid in his claim before the court that the subject property was omitted by mistake during the Estate's distribution on 7th February 2014.

9. Having said that, the question that this court must now answer is whether the subject property or any part thereof forms part of the deceased's Estate so that if it does, the court can thereafter consider whether or not it should exercise its discretion in allowing the rectification of the grant as sought.

10. I have looked at the certificate of official search dated 6th August 2015 which is the only document relating to ownership of the subject property which was availed to the court. It shows that title to the said property was registered in the names of three persons : *Hebron Amunze* (the deceased); *Elijah Nandi* and *Jayantilal Gopal Patel* as absolute proprietors. This was done on 4th June, 1987.

11. The certificate of search in its proprietorship section does not indicate whether the ownership was in the nature of a tenancy in common or a joint tenancy (joint proprietorship) which presupposes joint ownership as opposed to ownership in common more so because the respective shares of each proprietor are not stated. This leads me to the conclusion that the three proprietors including the deceased owned the subject property jointly as an indivisible whole which was not severable into separate portions as opposed to if they held it as tenants in common where their individual shares would be identifiable and severable from the whole. I so find.

12. I am fortified in this finding by the recent decision of the Court of Appeal in *Mukazitoni Josephine v Attorney General Republic of Kenya [2015]eKLR* where the court held *inter alia* that;

“When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.

A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in latin as totum tenet et nihil tenet, a joint tenant holds everything and nothing...

13. The law is that where land is held jointly as is the case with the subject property in this cause and one of the proprietors die, his interest unites with the interests of the surviving proprietors who now become entitled to be registered as the sole proprietors thereof. This in effect means that the Estate of the deceased proprietor cannot claim any interest in the said land as the same does not become part of his estate. But where ownership is held in common, upon the demise of one of the proprietors, his share of the land automatically becomes part of his estate which would devolve to his beneficiaries.

14. The above position is stipulated under **Section 118** and **Section 119** of the **Registered Land Act** Chapter 300 of the Laws of Kenya now repealed which is the legal regime under which title to the subject property was registered. **Section 118** is in the following terms:-

“If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register”.

Section 119 (1) states:

“ If as sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in place of the deceased with the addition after his name of the words “as executor of the will of.... Deceased” or “as administrator of the estate of the deceased as the case may be.”

The **Registered Land Act** was repealed by the **Land Registration Act 2012**. **Section 60** and **61** of the latter Act and **Section 49** and **50** of the **Land Act 2012** have similar provisions as those in **Section 118** and **119** of the **Registered Land Act**.

15. Having found that the subject property was held under joint ownership by the deceased and two other people, in view of the provisions of **Section 118** and **119** of the **Registered Land Act** and the relevant provisions of the **Land Registration Act 2012** and the **Land Act 2012**, it logically follows that the subject property did not form part of the deceased’s Estate and was thus not available for distribution to his heirs in the first place.

16. The application to rectify the certificate of confirmation of grant to include the subject property as part of the deceased’s Estate is for the above reasons unmerited and must be dismissed. This is besides the fact that it did not fall within the parameters allowed for rectification of grants under **Section 74** of the **Law of Succession Act** Chapter 160 of the Laws of Kenya.

17. The application is consequently dismissed with no orders as to costs.

C . W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 16th day of February 2016.

In the presence of:-

The applicant

Ms. Naomi Chonde Court Assistant.