



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 788A OF 2011

IN THE MATTER OF THE ESTATE OF DAMARIS NDUKU MUSYIMI (DECEASED)

JOSHUA MULINGE ITUMO.....PETITIONER

VERSUS

JOSEPH MBITHI MUSYIMI.....OBJECTOR

RULING

The Application

The Objector herein, Joseph Mbithi Musyimi is seeking rectification of grant by way of summons dated 17th September 2013 to include properties he alleges were inadvertently left out when the summons for confirmation of grant were made. The grant of representation with respect to the estate of Damaris Nduke Musyimi (the Deceased) was in this regard issued to Joshua Mulinge Itumo, the Petitioner herein on 19th September 2011, and confirmed on 24th October 2012. The Petitioner was the husband of the deceased, while the Objector was the deceased's father.

The Objector lists the omitted properties as follows:

- (i) Mwalimu Sacco Funds
- (ii) Madison Insurance Funds
- (iii) Plot at Athi-river jointly owned
Plot at Mumbuni/Kithayoni area Plot at Kaani.
- (v) Money in the bank-Kshs. 26,000/= at Co-operative Bank.
- (vi) Money at Equity

The hearing of the summons proceeded by way of viva voce evidence and the Objector gave evidence as did the Objector's wife who was also the deceased mother, Anastacia Mueni Mbithi. They claimed that their daughter had bought some plots with the Petitioner, and that she had money in the Mwalimu Sacco and Equity Bank which were not included in the list of her assets. The Objector conceded that the deceased's property during confirmation was distributed at a ratio of 60: 40 between him and the Petitioner.

B.M. Mungata & Company Advocates, the learned counsel for the Objector filed submissions on 16th May 2016, wherein the foregoing averments were reiterated, and reliance was placed on the decision in **Fatuma Rama Mwalvinda and Anor vs Kusi Mukami Mwalvinda (2015) e KLR** for the position that the remedy for omitted and wrongly included assets is summons for rectification and not for revocation. It was also contended that the Respondent had not annexed sale agreements to prove his allegations that he bought the Plot at Athi River as personal property, and the purchase of the plots at Mumbuni and Kaani.

The Response

The Respondent filed a replying affidavit sworn on 24th May 2016 in opposition to the application. He stated therein that none of the properties sought to be included in the grant were ever available for distribution as part of the estate of the deceased. He further detailed out the status of each of these properties as follows: -

- a) The deceased had named the Petitioner as her next of kin in her SACCO account, and the sum of Kshs. 450,000/ which was paid to him by the SACCO.
- b) Madison Insurance paid him a sum of Kshs. 64,000/- in respect of an education policy for his late daughter Joy Mumbua Mulinge and which had nothing to do with the deceased or the Applicant.
- c) Athi River Plot No. 194 was his personal property, for which he had taken a loan of Kshs. 700,000/- from Mwalimu SACCO to purchase, and that he sold this plot while the deceased was still alive, and used the proceeds to purchase the Mumbuni plot.
- d) The Mumbuni plot was purchased with proceeds from the sale of the Athi River Plot and the Petitioner topped up his SACCO loan to develop the same, and at the time the deceased passed away his outstanding loan balance was Kshs. 913,000/-. Further, that he sold off the property to repay the loan as the proceeds from rent were insufficient to cover the monthly repayments.
- e) The plot in Kaani is the Petitioner's current residential home, and he purchased the same after selling his ancestral land at Mbuuni. The deceased did not contribute in any way towards purchase of the same and is the place where his late wife and children were laid to rest.
- f) That there was a sum of Kshs 26,000/= in the deceased's Cooperative Bank account which was used to clear her **HEL**B loan so that the TSC could process her gratuity payments.
- g) The deceased's account at Equity Bank had a nil balance as at the time of her demise .

The Petitioner's learned counsel, Kalinga & Company Advocates, filed submissions dated 7th September 2016, wherein it was urged that the Objector's application is not supported by any facts or documentation , and that the Objector has not availed to the court any proof that any of the properties mentioned belonged to the deceased in whole or in part. That the Respondent has on the other hand explained the status of each of the assets listed by the Objector, and has shown that none of them formed part of the estate of the deceased. Further, that the onus is and was always on the part of the objector to show that the assets in question belonged to the deceased.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issue raised is whether the confirmed grant herein can be rectified so as to include the properties listed by the Objector. Section 74 of the Law of Succession Act provides for rectification of grants as follows:

“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, may be rectified by the court, and the grant of

representation, whether before or after confirmation, may be altered and amended accordingly.”

Therefore rectification is meant for minor errors. And fundamental errors such as the omission of assets of a deceased from the distribution process will require a different procedure, which is essentially the revocation of the confirmed grant and fresh distribution under a new summons for confirmation of grant. The remedy of rectification is therefore unavailable to the Objector in the circumstances. In addition I agree with the Petitioner that the Objector has not provide any proof that the properties he listed exist, and if so that they belonged to the deceased at the time of her death.

I accordingly decline to grant the prayers sought in the Summons for Rectification of Grant dated 17th September 2013 for the foregoing reasons, and each party shall meet their respective costs of the said summons.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 15th day of December 2016.

P. NYAMWEYA

JUDGE