



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 45 OF 1988

IN THE MATTER OF THE ESTATES OF THE LATE PETER O.

OJILONGO, IKAPILI OJILONG'O & OMETE OJILONG DECEASED PERSONS

AND

SANTILINO OJILONG OMETE APPLICANT

VERSUS

MARGARET NASIMIYU RESPONDENT

RULING

1. This succession cause is in respect of the estates of Peter Omete Ojilong, Ikapili Ojilong and Omete Ojilong who died on 26th September, 1983, 8th August, 1969 and 26th August, 1984 respectively.

2. The background in a nutshell is that Santilino Ojilong Omete, the Applicant herein petitioned for a grant of letters of administration to the estates of the three deceased persons who shared L.R. No. SOUTH TESO/AMUKURA/717 measuring 10.0 hectares. Nicola Ekapel Ojilong and Omete Ojilong were also the registered owners of L.R. No. SOUTH TESO/AMUKURA/1404 measuring 13.8 hectares.

3. At the conclusion of the process in 1989 the estates of the deceased were distributed so that Kenneth Ojilong Omete, Leonard Ojilong, Francis Omete and Jesca Achom were to get L.R. No. SOUTH TESO/AMUKURA/1404. The property was to be held in trust for them by Margret Nasimiyu, the Respondent herein. The Applicant (Santilino Ojilong Omete), Stephen Etyang Omete, Alex Ekapel Omete, Joseph Ojilong Omete, Wilmina Okwara, Janerose Achom and Everlyn Ingira were each to get an equal share of L.R. No. SOUTH TESO/AMUKURA/717.

4. On 24th November, 2014 the Applicant who was also the administrator of the estates of the three deceased persons filed a summons for rectification of grant under Rule 43(1) of the Probate and Administration Rules seeking rectification of the grant issued and confirmed in 1989. The summons begs reproduction. It states:

“1) That certificate of grant issued to the said Santilino Ojilong Omete in this matter on 28.2.1989.

2) Be rectified in respects L.R. No. SOUTH TESO/AMUKURA/717 and 1404

1. Santilino Ojilong Omete

2. Stephen Etyang Omete

3. Alex Ekapel Omete

4. Joseph Ojilong Omete

5. Wilimina Okwara

To inherit No. 717. The share of Janerose Achom and Everlyne Ingira to be held by Santilino Ojilong.

Heirs for Parcel No. 1404

I. Kenneth Ojilong Omete)

II. Leonard Ojilong) all juveniles

III. Francis Omete)

IV. Jesca Acham)

The Whole parcel shall be registered in the names of Margaret Nasimiyu their mother who shall hold the land in trust of them.

3) That costs of this application be provided for.”

5. In an affidavit he swore on 24th November, 2014 in support of the application, the Applicant puts together the two parcels of land and indicates the shares he wants each heir to get. Again paragraph 4 of his evidence begs reproduction in this ruling. He avers:

“4. The said certificate of confirmation of grant contains errors as the share of the estate of the deceased which is supposed to be shared in respect of L.R. SOUTH TESO/AMUKURA/717 and SOUTH TESO/AMUKURA/1404 as follows:-

1) Santilino Ojilong Omete – South Teso/Amukura/717

South Teso/Amukura/1404

2) Margaret Nasimiyu - 3.8 ha

3) Leonard Ojilong - 1.0 ha

4) Francis Omete - 1.0 ha

5) Jesca Acham - 1.0 ha

6) Santilino Ojilong Omete - 2.0 ha

7) Stephen Etyang Omete – 1.0 ha

8) Alex Ekapel - 1.0 ha

9) Joseph Ojilong Omete - 1.0 ha

10) Janerose Achom - 1.0 ha

11) Everlyne Ingira - 1.0 ha.”

6. The Applicant wraps up the basis of his application by averring at paragraph 5 that:

“The said grant was confirmed on 8.2.1988 without clear shares each one was entitled.”

7. Without any prompting, the Applicant filed a supplementary affidavit on 20th May, 2015 in which he distributes L.R. No. SOUTH TESO/AMUKURA/717 between himself and his five brothers and sisters. He then proceeds to aver that L.R. No. South Teso/Amukura/1404 was registered in the names of the deceased Nicola Ekapili Ojilong and Chrispinus Omete Ojilong. Further, that Nicola Ekapili Ojilong died leaving no heir and his share of seventeen acres should be distributed between the children of the deceased Peter Omete Ojilong and the deceased Chrispinus Omete Ojilong. He then goes ahead to distribute the remaining seventeen acres between the children of the deceased Chrispinus Omete Ojilong.

8. In opposition to the application, the Respondent swore an affidavit on 13th September, 2016. Her response is that she is already the owner of the L.R. No. SOUTH TESO/AMUKURA/1404 as a result of this succession cause. Further, that L.R. No. SOUTH TESO/AMUKURA/717 was taken by the Applicant and his brothers and they have already sub-divided the same and sold part of the land to third parties.

9. At the time the application came up for arguments on 3rd October, 2016, Ms Nabalindo was acting for the Applicant. She told the court that the application for rectification was simply meant to bring L.R. SOUTH TESO/AMUKURA/1404 on board as it was not reflected on the certificate of confirmation of grant.

10. Further, that the distribution was generalized on L. R. No. SOUTH TESO/AMUKURA/717. She asserted that at the conclusion of the exercise L.R. No. SOUTH TESO/AMUKURA/1404 would be shared by the Applicant and his brothers and sisters and L.R. No. SOUTH

TESO/AMUKURA/717 would be held by the Respondent in trust for her children.

11. In response, the Respondent stated that she had no objection to the application as put across by the advocate of the Applicant. She, however, indicated that the Applicant had shown interest in encroaching into her parcel of land L. R. No. SOUTH TESO/AMUKURA/1404. At that juncture I asked that all the beneficiaries of the estates of the deceased persons to attend court on 31st October, 2016. On the appointed date the Applicant failed to turn up in Court. The Applicant's counsel was also not in Court. The Respondent was however in Court. The only other beneficiary who turned up in Court was Stephen Etyang Omete, a brother to the Applicant. I then put off the matter to 28th November, 2016 when the Applicant urged the Court to allow his application as prayed.

12. The Applicant's application on its face seeks nothing new as the rectification proposed therein does not in any way seek to change the distribution done in 2009. It is only in the supporting and the supplementary affidavits that the Applicant says what he exactly wants. He seeks to now take away part of the land allocated to the Respondent on the pretext that there are errors on the certificate of confirmation of grant. It is not correct that L.R. No. SOUTH TESO/AMUKURA/1404 was never included in the certificate of confirmation of grant. The fact is that the Applicant is the person who as the administrator of the estates of the three deceased persons transferred L. R. No. SOUTH TESO/AMUKURA/1404 to the Respondent.

13. What the Applicant seeks to achieve through this application is to upset the distribution he voluntarily carried out himself over 26 years ago. That cannot be said to be an application for rectification of the grant. It amounts to a protest or objection to a distribution that was agreed to by all the beneficiaries of the estates of the deceased persons.

14. Section 74 of the Law of Succession Act, Cap 16, upon which Rule 43(1) of the Probate and Administration Rules is premised, provides that:

“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 or amended accordingly.”

15. The rectifications envisaged by Section 74 of the Act and by extension Rule 43(1) are minor ones which do not go into the core of the grant. Rearranging the shares of the beneficiaries cannot be equated to rectification of a minor error. The Applicant cannot surface over 26 years later to claim that there was a problem in the manner in which he distributed the estates. The Respondent claims he has sold his land. He should know that land is not elastic. What he is trying to do is to eat into the share of the Respondent and her children. This cannot happen as the Respondent is entitled to enjoy her inheritance in peace.

16. Upon reflection, I find that this application falls into the category of applications that are only meant to abuse the court process and waste precious judicial time. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Busia this 8th day of December, 2016

W. KORIR,

JUSGE OF THE HIGH COURT