

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 214 OF 1992

IN THE MATTER OF THE ESTATE OF JULIUS WACHIRA (DECEASED)

RULING

1. For determination is a Summons dated 26th August 2014, taken out under Rules 49 and 73 of the Probate & Administration Rules. It seeks that the order of rectification of the grant made on 15th July 2009 be set aside.
2. The application is supported by the affidavit of Hanastacia Waithera Wachira, sworn on 26th August 2014. It is averred that a grant with respect to the estate was made on 3rd June 1992 to Njoroge F.A. Wachira and Alois Mwangi Wachira and was conformed on 29th September 2004, wherein the applicant was to get a parcel of land known as Loc 9/Kanyenyaini/574 measuring 0.25 acres. She consented to the said distribution. She avers that she recently heard that there was an application for rectification of the certificate of grant, which will result in her name not appearing as a beneficiary.
3. She avers that her advocate had informed her, after perusing the court file, that there had been another application for rectification of the grant made on 27th June 2008 in which the acreage due to the beneficiaries was reviewed. In the said application, Anne Muthoni was to hold her 0.25 acre share for the applicant as her trustee. It was alleged that she consented to the said Anne Muthoni holding the said share in her name. She denies having any discussions with the said Anne Muthoni to act as her trustee or to hold any property in trust for her, nor did she consent for her to hold the said portion in her name.
4. It is averred that one of the beneficiaries, Ernest Macharia Wachira was to inherit 1.83 acres in the initial distribution dated 29th September, 2004, but this was scaled down to 1.33 acres, 0.5 acre being hived off to accommodate Grace Nduta Maina, a purchaser who was to get 1.5 acres. Ernest Macharia Wachira disposed of 1 acre of his inheritance to his siblings and was to be apportioned 0.33 acre. One of the beneficiaries, Philip Gachigua Wachira, agreed to purchase Ernest Macharia's 0.33 acre for Kshs. 250,000.00 but only paid a sum of Kshs. 100,000.00 leaving a balance of Kshs. 150,000.00.
5. She avers that the said money remains unpaid and hence the rectification of the grant of 15th July 2009 ought to be set aside.
6. The application is unopposed, although the record reveals that service was effected on the administrators of the said estate, according to the affidavit of service filed by Hanastacia Waithera Wachira on 18th November, 2014. According to her, the administrators declined to sign the hearing notice, but gave her a letter, confirming that the applicant and three other beneficiaries would receive 0.255 acre to be held in trust by Hannah Muthoni Wachira.
7. The applicant has asked this court to set aside the orders made on 15th July 2009. The applicant has invoked the inherent powers of this court saved in Rule 73 of the Probate and Administration Rules, which enjoins this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

8. What this court has been asked to do is to exercise its discretion and set aside the said orders in question. The exercise of such discretion is to ensure that justice is done to the parties. In the case of *Patel vs. E. A. Cargo Handling Services Ltd (1974) E.A. 75* the court stated that

“... The discretion is free and the main concern of the court is to do justice to the parties before it. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice...”

9. In the case of *Nuh Nassir Abdi vs. Ali Wario & 2 others (2013) e KLR, G.V. Odunga J.*, stated that:-

“A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose...”

10. I find the attitude of the administrators, upon being served with a hearing notice, disturbing. They chose not to respond to the allegations as proffered by the applicant, but instead wrote a letter whose purpose no one knows except them.

11. I am of the view that by exercising discretion to allow the application would serve a useful purpose, which is to ensure that all the beneficiaries, including the applicant herein get their rightful share. I hereby allow the application dated 26th August 2014. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31ST DAY OF JULY, 2015.

W. MUSYOKA

JUDGE