



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION 339 OF 2005**

**IN THE MATTER OF THE ESTATE OF NJIRO MURATHI ALIAS NJIRU MURATHI**

**ANNAH KABUCHA NJIRU.....APPLICANT**

**RULING**

This is an application by the petitioner (Administrix) of the estate of the late Njiro Murathi titled summons for rectification of the grant dated 15<sup>th</sup> October, 2007 and 28<sup>th</sup> October 2010. The petitioner seeks an order of this court to amend the grant in respect of land parcel No. Ngandori/Ngovio/4217 to be determined and shared as follows:

1. Annah Kabucha Njiru to get 1.25 acre
2. Jacinta Wambugi to get 1 acre
3. Mary Wanjira to get 1 acre.

In support of her application, the petitioner has annexed an affidavit. According to her, she is not comfortable with the distribution of her share of the land parcel in issue. She has also stated she is “illiterate and of old age and was therefore unaware about the way the estate was distributed although was a party, and was present during all proceedings.” In her affidavit evidence she has stated that she was misled by the beneficiaries when she was issued with another certificate of confirmation of grant dated 28<sup>th</sup> October 2010. Furthermore she has also stated that both the certificates of confirmation of grant have no differences in terms of the names, descriptions of the beneficiaries and their respective shares. Finally she has stated that she not comfortable with the mode of distribution of the estate as indicated in the two certificates of confirmation especially her share in land parcel No. Ngandori/Ngovio/4217. The latter parcel was carved from land parcel No. Ngandori/Ngovio/241.

It is important at this stage to point out that the rectification sought arises from the ruling of the High Court (Khaminwa J.) dated 15<sup>th</sup> October, 2007. According to that ruling, the share of the land in issue was to be held on trust for the two beneficiaries and for the use of the petitioner during her lifetime. The relevant part of that ruling reads as follows:

*“I therefore find that his intention was to leave the 3.25 acres for use by his surviving wife during her lifetime. She will hold the land therefore for herself and interest of two females Jacinta and Mary who shall take equal shares on her death on termination of interest”.*

It is clear from that ruling that the petitioner was to have interest in the parcel of land during her lifetime.

Additionally, she was to hold the land as a trustee for the two beneficiaries Jacinta Wambugi and Mary Wanjira, who were to take equal shares upon her death. It is equally clear that this parcel of land is trust property created by a court order. And for that reason, the petitioner as an administratrix is under an obligation to administer the property in terms of the order of the court that created it. This is special property. It is not freehold property nor is it leasehold property of the petitioner.

The petitioner in her summons for rectification of the grant has stated that she is illiterate and of old age and was therefore not aware how the estate was being distributed although she was a party. Her counsel has submitted that she is aged 95 years and it is for that reason that she has sought a rectification of the grant in the manner indicated in the foregoing paragraphs. It is to be remembered that the order of the court that created the trust and gave her a life interest in that parcel of land was not appealed against nor was any review sought from the time of its confirmation.

The petitioner's application is opposed by the respondent/protestor (Jacinta Wambugi). According to her further affidavit, the petitioner is her stepmother and is of an advanced age of about 95 years old. According to her, she was to hold the parcel of land as a trustee both in her favour and her daughter, Mary Wanjira. She has also stated that the grant of letters of administration to the estate of the deceased were issued to the petitioner and re-confirmed on 15th October, 2007. It is also her affidavit evidence that she has learned that her stepmother is disposing of the land to a third party. If this were permitted the respondent stands to suffer loss unless the petitioner is stopped from doing so. She has also stated that if her application is granted, it will be against the court order which created the trust. If the intended sale were to go through, it will amount to disinheriting the respondent, who is her step daughter. Finally, the respondent has stated that she be appointed a trustee for part of the said parcel of land to protect her interest as a legal beneficiary of her father's estate. Interestingly, she has stated that the petitioner is being misled in view of her advanced age.

During the hearing of this application, counsel for the petitioner submitted that his client had the right to terminate the trust and re-distribute the same. According to her counsel, the petitioner as trustee has power to terminate the trust at any time.

Mr Eddy Njiru, with the permission of the court, did address the court as an *amicus curiae* on a voluntary basis, on the role of a trustee in respect of trust property. He submitted that a trustee such as the petitioner herein has the right to terminate the trust only on the terms that created it. He further submitted that a number of trusts are created by an instrument called a Trust Deed. A trustee must operate within the terms of the Trust Deed and if a trustee acts outside the Trust Deed, he may be committing an illegality. In the instant case, the terms and conditions of the trust were created by a court order, which in his view is the equivalent of a Trust Deed. Furthermore, he submitted that a trustee does not have the power to do anything that is detrimental to the interests of the beneficiaries. He also submitted that the trustee cannot change the terms and conditions of the trust.

I have considered the rival affidavit evidence and the rival submissions of both counsel. I have also considered the submissions of the *amicus curiae*. I find that the trustee holds the instant parcel of land for her use during her lifetime. This is in accordance with the order of the court. I also find that she holds the instant property as a trustee on behalf of the two female beneficiaries namely Jacinta Wambugi and Mary Wanjira. Furthermore, I also find that these two female beneficiaries are to share the parcel of land in equal shares upon the death of the petitioner. The office of the trustee is one of trust. The trustee does not stand in the position of a freeholder of land. Furthermore, the trustee does not also stand in the position of a holder of a lease. A trustee does not own the parcel of land as does a freeholder or a leaseholder. The reason being that the trustee holds the land for the benefit of the beneficiaries.

In the instant case, the petitioner had a life interest in the parcel of land and upon her death, the two beneficiaries were to share the parcel of land in equal shares. I find that she does not have the power to terminate the trust as urged by her counsel. Any change in the terms and conditions of the trust must be with the approval of the court. It seems to me that the petitioner is bent on altering the terms of the trust in the guise of rectifying the confirmed grant. I find that this is not acceptable in law. In this regard, I accept as good law the submission of the *amicus curiae* that a trustee can only terminate the trust on the

terms that created that trust. The trustee cannot act outside the terms and conditions of the court order. Furthermore, the trustee does not have the power to do anything that is detrimental to the interest of the beneficiaries. Similarly, I accept as good law that even the beneficiaries cannot change the terms and conditions of the trust.

In the light of the foregoing, I find that the application is without merit and is hereby dismissed. There will be no orders to cost as the parties involved are the mother and her two daughters.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22<sup>nd</sup> day of OCTOBER 2015.**

In the presence of Mr. Mutahi for the petitioner and MR. Mungai holding brief for Mr. Githinji

Court clerk Mr R Njue

**J.M. BWONWONGA**

**JUDGE**

**22.10.15**