



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION CAUSE NO. 506 OF 2006.

IN THE MATTER OF ESTATE OF PHILIP OPUKA ::::::::::: DECEASED.

AND

JAVAN ODINGA OPUKA ::::::::::: PETITIONER.

R U L I N G.

1. The application before me is a summons for rectification of grant of probate (intestate) dated 19/5/2015 brought under the provisions of section 74 of the Law of Succession Act and Rule 43 of the law of Succession rules (sic). The application is supported by the affidavit of Wellington Otopi Opuka. (**as substituted**), the petitioner in the above matter.
2. The application seeks orders that:-
 - i. ***L.R. Kisa/Wambulishe/715 be included in the assets of the deceased;***
 - ii. ***That the costs of this application be in the course (sic).***

The application is premised on the ground that at the time of filing the application for grant, the above property belonging to the deceased was not included amongst his assets.

3. The deponent deposed in paragraphs 2 and 3 of his affidavit that the grant herein was amended on 11th December, 2014 and that they inadvertently omitted to include L.R. Kisa/Wambulishe/715 as part of the deceased's estate. A copy of the official search certificate was attached to the said affidavit.
4. The deponent deposed in paragraph 4 of his affidavit that the late Philip Opuka Oponyo was also known as Opuka s/o Opuka and that it was in the interest of justice that the said asset be included.

Determination of the application

5. This court notes that this cause commenced in the year 2006. All along in the pleadings, the deceased has been referred to as Philip Opuka Oponyo. His death certificate bears the said name. Nowhere in the pleadings has the deceased been referred to Opuka s/o Opuka. Form P & A. 5 has a provision which requires a petitioner to fill in the name of the deceased person and any other names that he was known by. Form P & A 5 in this instance reads as follows:-

“The full name of the deceased to whose estate the proceedings herein relate is Philip Opuka (also known as)”

The space provided for the deceased's other names was never filled in.

6. A gazette Notice in respect to the deceased's estate was published on 6th October, 2006, bearing the name Philip Opuka Oponyo, since then no application was filed to show that the deceased was also known as Opuka s/o Opuka. A rectified grant was issued on 20th January, 2015 after the substitution of the original petitioner, Javan Ondinga Opuka.

7. Rule 11 of the Probate & Administration rules provides that:-

“Where it is desired to describe the deceased in a grant by more names than one, the applicant shall state in the application the usual name or names of the deceased and shall state the reason for the inclusion of the other name or names in the grant.”

8. As earlier indicated in this ruling, the petitioner never disclosed at any time before issuance of the rectified grant of letters of administration issued on 20th January, 2015 that the deceased was also known as Opuka s/o Opuka. The search certificate attached to the applicant's affidavit bears the name Opuka s/o Opuka.

9. Secondly, section 74 of the Law of Succession Act upon which this application is grounded states as follows:-

“Errors in names and descriptions, or in setting fourth (sic) 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.”

The procedure for seeking the relief is set out in rule 43 (1) of the Probate and Administration rules. It states that:-

“Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time and place of the deceased or in the case of a limited grant, the purpose for which the grant was made”

The above provisions show that rectification of grants are restricted to the following instances:-

- i. **errors in names and descriptions of persons or things;**
- ii. **errors as to the time or place of death of the deceased; and**
- iii. **in cases of a limited grant, the purpose for which such limited grant is made.**

10. In the present case, it cannot be said that the property in issue was omitted by error or mistake as envisaged by the provisions of section 74 of the Law of Succession Act and rule 43 of the Probate and Administration Rules. The petitioner was not aware that the property existed as at the time they sought the grant of letters of administration. The omission of the property herein does not fall under the provisions of section 74 of the Law of Succession Act.

11. There is no error in the names of the deceased, what the court has been told is that there was an omission to include the deceased's *alias* name.

12. In the **High Court at Nairobi Succession Cause 261 of 2008 [2013] e KLR** in the **Matter of the Estate of Hasalon Mwangi Kahero**, Musyoka J held as follows:-

“An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased's death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if say a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where

the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word “error” too far to say that that would amount to the error or mistake envisaged in section 74 and Rule 43. In this case it cannot be said that the property was omitted by error or mistake as the administrators did not know of the property at the time they sought letters and confirmation thereof. The omission of the property is a matter that does not fall under the purview of Section 74 of the Law of Succession Act.”

13. I find that the application herein is without merit as it has not complied with the relevant provisions of the law. I decline to issue the orders sought.

14. Costs in the cause.

DELIVERED, DATED and SIGNED at **KAKAMEGA** on this18TH day ofDECEMBER,....., 2015.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Petitioner.**

..... **Court Assistant.**