

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2010 OF 2001

IN THE MATTER OF THE ESTATE OF MAINA GATHUNGU – (DECEASED)

RULING

1. The application dated 22nd February 2010 seeks review and amendment of the certificate of confirmation of grant dated 20th May 2009 so as to reflect the intent of the ruling of the court of 20th May 2009. It also seeks that the administrators be directed to allocate and transfer to the applicant her share of the deceased's estate in equality with the other beneficiaries of the deceased's estate.
2. The applicant's case, as stated in her affidavit sworn on 22nd February 2010 is that Rawal J. had in the ruling of 20th May 2009 directed that the estate be distributed equally amongst the three houses of the deceased. In the applicant's view the distribution reflected in the certificate of confirmation of grant dated 20th May 2009 does not confirm with the ruling of 20th May 2009.
3. The 2nd administrator/respondent responded to the application through his affidavit sworn on 11th March 2010. In his affidavit, he concedes the unequal distribution of the estate, but goes on to explain the reasons for the seeming unequal distribution. He further concedes that the confirmation certificate should be amended to achieve equal distribution. He proposes a mode of distribution in paragraph 29 of his affidavit.
4. To this reply the applicant filed a further affidavit sworn on 30th April 2010. She opposes the conditions that the 2nd administrator sought to attach to the amendment of the certificate of confirmation of grant. The principal point made in the further affidavit is that the certificate of confirmation used in the subdivision was different from that issued by the court.
5. Two beneficiaries have filed affidavits to support the applicant's case. The two affidavits were sworn on 12th May 2010 by Peter Gathungu Maina and Newton Njenga Maina. Peter Gathungu Maina complains that he was not consulted over the subdivision and that the same was done secretly. He also avers that there were two certificates of confirmation in circulation dated 20th May 2009, copies of which he has attached to his affidavits. Newton Njenga Maina makes similar averments.
6. Another group of family members swore affidavits to support the respondent's position. This group includes Moses Ng'ang'a Maina, Peter Njoroge Maina, Joseph Karugi Maina, Karugi Maina Gathungu, George Muthanyi Maina, Mary Wathiga Kahiga, John Mungai Maina, Elizabeth Wambui Maina, Francis Mburu Maina, Clement Gathungu Maina, Kamau Maina Njoroge and Salome Waceke Maina. All these affidavits were sworn on 30th June 2010. They all talk about family meetings, the raising of money to pay surveyor's fees and confirm that some of the survivors sold their shares hence the unequal distribution of the estate.
7. When the matter came up on 13th May 2013 Mr. Gachimo appeared for the applicant. The respondents were not represented. Mr. Gachimo argued that the review application ought to be allowed since the respondents had conceded that the distribution had been unequal and proposed another mode of distribution which was acceptable to the applicant.
8. I note that the application dated 22nd February 2010 is premised on Rules 49 and 73 of the Probate and Administration Rules. This is an application for review it ought to have been founded on the review provisions set out in the Civil Procedure Rules, given that Rule 63 of the Probate and Administration

Rules has imported the review provisions in the Civil Procedure Rules into probate practice. This however should not preclude the court from determining the matter on the basis of the facts placed before it.

9. I have carefully gone through the record. I have taken note of the fact that there are two distinct of the certificates of confirmation of grant in use. One genuine, the other forged. The existence of two different copies of the what should be the same document is evidence of fraud and underhand dealings by those that are charged with the responsibilities of administration of the estate. I have noted that the administrators have not responded to the affidavit of Peter Gathungu Maina which displayed these two different copies of the certificate of confirmation of grant. The office of administrator is an office of trust, as administrators are entrusted with responsibility to manage property belonging to a dead person for the benefit of others. They must inspire trust and confidence. In this case, their conduct robs them of the requisite trust and confidence, and they are therefore clearly unfit to hold office as such.

10. The administrators concede that the distribution in the certificate of confirmation is not equal and concede to the proposed rectification of the certificate so as to bring out a fair and equitable distribution. I note that one of the administrators resorted to buying out the shares of some of the beneficiaries instead of finalizing administration. The said beneficiaries sold their shares before the vesting thereof into their names. Before the property vests in a beneficiary it cannot be sold. A beneficiary only acquires a valid title to the property or share allotted to them once the same has been vested and transferred to them. The shares allegedly sold to the 1st administrator had not been vested and transferred to the beneficiaries who allegedly sold the shares. They had no title to pass to the buyer. The ideal position should be that seller ought to have waited for their shares to vest in them before transferring them to the alleged buyer.

11. In view of everything that I have said above, I will make the following orders:

- a. That the certificate of confirmation of grant on record herein shall be amended to accord with the ruling of Rawal J. of 20th May 2009 so as to distribute the estate equally amongst all the survivors and beneficiaries without taking into account the purported sale of shares by some of the survivors to the 1st administrator.
- b. That the administrators have failed the trust and confidence test and do not merit being administrators, consequently the grant made to them is hereby revoked.
- c. That the family shall propose a fresh set of administrators.
- d. That the matter shall be mentioned after 30 days for appointment of new administrators.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE