



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 2210 of 2001

IN THE MATTER OF THE ESTATE OF JOSEPH MUTHAMA NGARE (DECEASED)

RULING

In her Summons for Rectification of grant dated 28th August 2012, the applicant seeks several orders, namely:-

- (a) determination of trust
- (b) rectification of grant
- (c) removal of a restriction

The grant herein was confirmed on 10th March 2003. According to the confirmation certificate dated 10th March 2003 all the immovable assets were to be held in trust by the administrators for themselves and for all the dependants and minor children. The dependants and minors were listed as Agnes Wanja Ngare, Immaculate Wangui Muthama, Peter Ngare, Joyce Wangui and Christopher Ndaruacha. It is this trust that the applicants seek to have terminated to pave way for the distribution of the estate among the beneficiaries.

The application is premised on **Sections 76** and **101** of the Law of Succession Act, **Section 45** of the Trustee Act and Rules 43 and 73 of the Probate and Administration Rules.

Section 74 of the Law of Succession Act deals with the errors that may be rectified by the court. Rectification is, by this provision, limited to:-

- (a) errors in names and descriptions
- (b) errors in setting out the place and time of the deceased's death
- (c) errors in the setting out the purpose in a limited grant.

Rules 43 of the Probate and Administration Rules sets out the procedure to be followed in an application for rectification of a grant. Significantly, Rule 43 echoes the provisions of **Section 74**, by setting out what the rectification is about.

The applicants case is that they want the trust created on 10th March 2003 terminated. This termination would then require that the certificate of confirmed grant be altered to accommodate the termination. Would this call for a rectification of the grant under **Section 74** and Rule 43? Quite obviously not. The circumstances in this case do not amount to errors. The situation cannot be handled through **Section 74** and Rule 43. The circumstances of this case is not what is envisaged by **Section 74**

and Rule 43. The certificate of confirmed grant dated 10th March 2003 cannot be amended in the manner proposed to the application.

The application is also grounded on **Section 101** of the Law of Succession Act and **Section 45** of the Trustee Act. **Section 101** of the Law of Succession Act saves the provisions of the Trustee Act. The effect of this is that the coming into force of the Law of Succession Act does not affect the application of the Trustee Act to trusts created under the law of succession. **Section 45** of the Trustee Act deals with vesting orders of land. It addresses circumstances under which a court may make an order vesting land or other interest in a trustee.

It is not clear why these two provisions are cited in this application. However, since there is a prayer for determination of a trust, it is to be presumed that the provisions are cited in that respect. I have carefully read these provisions and I have been unable to see anything in them which empowers me to determine the trust created on 10th March 2003 in the manner proposed in the application. These provisions say nothing at all about determination of a trust.

The problem in this matter is that the grant was taken through a confirmation process, but the estate was not distributed. A trust was created over the compact estate without splitting into shares and then distributing the shares among the persons entitled. A determination of the trust will not lead to a distribution as the shares of the beneficiaries have not been determined. At confirmation, the estate ought to have been distributed and thereafter a trust created over the property; so that the distributed property is held in trust for the beneficiaries.

From the foregoing, the orders sought are not capable of being granted. The remedy to the administrators situation lies in cancelling the certificate of grant dated 10th March 2003, so as to reopen the estate for distribution. I hereby exercise the power saved in Rule 73 of the Probate and Administration Rules to order the cancellation of the said certificate. The administrators should thereafter apply for the confirmation of the grant made to them on 14th November 2001. The said certificate of 10th March 2003 is hereby cancelled. It is so ordered.

W. Musyoka
Judge

DATED, SIGNED and DELIVERED at NAIROBI this 26th DAY OF February, 2013.