



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 261 of 2008

IN THE MATTER OF THE ESTATE OF HASALON MWANGI KAHERO

RULING

The application by way of Summons for Rectification dated 4th April 2012 is brought by one of the administration of the estate of Hasalon Mwangi Kahero, deceased. He wants the certificate of confirmed grant issued on 28th July 2010 rectified to include a quarter ($\frac{1}{4}$) interest in a property – **Gakawa/Kahurura Block 2/115** and to have the property devolve upon Peterson Muriithi Ndungu who is described as a purchaser.

The applicant James Kariuki Mwangi, explains in his affidavit sworn on 4th April 2012, that he discovered the property – **Gakawa/Kahurura/Block 2/115** was partly owned by the deceased long after the confirmation of the grant. He also established that prior to his death, the deceased, jointly with the joint owners of the property, sold it to Peterson Muriithi Ndungu, but that he died before the transfer, could be effected to the buyer. It is in this respect that he would like the certificate of confirmed grant rectified to reflect this property. He attaches a copy of the title deed in respect **Gakawa/Kahurura/Block 2/115** to demonstrate that it was owned by the deceased and three others.

The application is premised on **Section 74** of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules. **Section 74** provides for the errors on grants of representation that may be rectified by the court. It provides:

“Errors in names and descriptions or in setting out 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), which echoes **Section 74** of the Law of Succession Act. Rule 34(1) says:-

“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 time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made.....”

A close reading of these two provisions will show that the provisions of the Law of Succession Act and the Probate and Administration Rules is not analogous to the provisions in the Civil Procedure Rules on amendment of pleadings. The amendment provisions in Order 8 of the Civil Procedure Rules are extremely broad, and are not at all comparable to what **Sections 74** and Rule 43 provide. The provisions in **Section 74** and Rule 43 are extremely restricted. They permit rectification of grants in three clearly defined cases:-

(a) errors in names and descriptions of persons or things;

(b) errors as to time or place of death of the deceased;

(c) in cases of a limited grant, the purpose for which such limited is made;

The power to rectify a grant is limited to these three situations or circumstances.

The matter in issue in this case is the omission of **Gakara/Kahurura/Block 2/115** from the grant. When the administrators filed the petition for grant of letters of administration intestate on 14th February 2008, they did not list this property in the schedule of assets. Similarly, when they sought confirmation of grant through their application dated 7th August 2009 and filed in court the same day; they did not include this property among the assets that were to be shared. The explanation given by the applicant in this application is that they were not aware of the existence of this property until after confirmation of the grant.

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.

The other matter of concern is that it is proposed that this property be allotted to a person who is not a survivor of the deceased, but an alleged purchaser. Whereas a copy of the title deed is attached to the affidavit of the applicant no evidence has been provided that the deceased sold his share in the property to justify the property being given to a non-member of the deceased's immediate family, contrary to **Sections 35** and **38** of the Law of Succession Act.

The other issue is the fact that the grant herein was made to two persons, the applicant and another. The application herein is brought by the applicant alone, rather than jointly with his co-administrator. This is not proper as the court committed the administration of the estate jointly to both of them. The two must always act together, as they ultimately will be required to account jointly of their administration of the estate. I have seen a consent to rectification of the grant, signed by several beneficiaries, including the co-administrator. This consent even if signed by the co-administrator is of no legal value as the law does not require it.

I find that this application is not meritorious and I dismiss it with costs. Where property is discovered after confirmation, the correct approach should be to have the certificate of confirmation cancelled so as to reopen the confirmation or in the alternative to commence a fresh succession case in respect of the said property.

W.M. Musyoka
Judge

DATED, SIGNED and DELIVERED at NAIROBI this 21st DAY OF FEBRUARY, 2013.