



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 442 OF 2010

IN THE MATTER OF THE ESTATE OF JOLLY JIMMY GITHIEYA DECEASED

RULING

The administrator of the estate of the deceased seeks amendment of the certificate of confirmation issued on 17th May 2001. Her application is dated 9th November 2007.

The relevant law does not provide for amendment of the certificate of confirmation of grant, but for rectification and review. Rectification would be sought to correct errors on the face of the grant or certificate of confirmation. This is provided for in **Section 74** of the Law of Succession Act. Review is sought under Order 45 of the Civil Procedure Rules, which is imported into probate practice by Rule 63 of the Probate and Administration Rules. Rectification captures the first head of Order 45 rule 1, that is with respect to correction of errors. This would then mean that where the changes sought to be made to the certificate are not errors on the face of the record, the administrator ought to apply for review rather than rectification.

The changes sought in this application are not for correction of errors. It would appear that certain circumstances have emerged which are forcing the administrator to have the substance of the certificate changed. When the grant was confirmed on 17th May 2001, it was ordered that the administrator, as surviving spouse of the deceased, was to enjoy life interest and upon determination thereof, whether through death or remarriage, the estate was to be divided equally between the children. She now complains that the life interest created has generated hatred and bad blood between her and her children, who appear to be eager to have the property passed to them. She would like to have the trust created by the life interest to be terminated so that the survivors of the deceased can each have an asset.

The circumstances that have arisen are not in the nature of an error apparent on the face of the record, and therefore they cannot be dealt with under the first head of Order 45 of the Civil Procedure Rules and therefore **Section 74** of the Law of Succession Act. It is not even new material that was not available at the time of the hearing, and which has just been discovered. It appears to me to fall under the head of 'any other sufficient reason.' The Court of Appeal in *Kimita vs. Wakibiru* (1985) KLR 317 held that 'any other sufficient reason' need not be analogous to the kind of reasons stated in the other two heads. It is my considered view that the application ought to have been brought under Order 45 of the Civil Procedure Rules instead of Rule 73 of the Probate and Administration Rules.

The applicant says that the children are not happy with the issue of life interest, and have become abusive and that they are now hostile towards her. She says the life interest has generated hatred by the children towards her. This is pretty strong language. If that is the case, then the children are clearly in the wrong. Life interest is not a matter of choice by the surviving spouse; it is an imposition by the law. It is in fact supposed to safeguard both the children and the surviving spouse. The ultimate destination of the property

estate should be to the children. However, if everything passes to the children, there is a real possibility that the surviving spouse could be left destitute. To safeguard his or their position, he or she is given life interest in the estate. This means a right to enjoy the property during her life time. It entitles them to utilize it. The right does not give them absolute right over the property. It only gives them a right of user. It is in that respect that the children are safeguarded. The surviving spouse is only entitled to user, the property does not belong to them and they can only enjoy the same during lifetime. They cannot dispose of it at will, except in compliance with the provisions of 37 of the Law of Succession Act.

The children need not hate their mother over the life interest. It is given to her by the law. It is her right. **Section 35** of the Law of Succession Act is very clear on this, it provides –

‘(1) subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

- a. ***The personal and household effects of the deceased absolutely;***
- b. ***A life interest in the whole of the residue of the net intestate estate:***

Provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.’

This provision is very clear. The estate is not to be divided amongst the children while the surviving spouse is still alive. Distribution among the children should only happen upon her remarriage or death. Neither of that has happened in this case and therefore the surviving spouse is entitled to continue enjoying life interest.

Life interest creates a trust in favour of the children. That is why during life interest the surviving spouse cannot deal with the property as if it belongs to them. However, the law does allow the surviving spouse to tinker with the life interest. Under **Section 35(2)** of the Law of Succession Act, they may pass all or any part of the net estate by way of gift among any surviving child or children. In such case the gift would take effect immediately. This is called a power of appointment. It is a power exercisable by the surviving spouse at their discretion. The exercise of the power of appointment is not a right available to the children. Under **Section 37** of the Act the surviving spouse has power during life interest to sell any property subject to that interest for their maintenance. The exercise of this power is subject to the consent of co-trustees, the adult children of the deceased and the court. Quite clearly the children are not justified in any way to hate their mother over her right to a life interest now the net intestate estate.

It is about time that children understood that whatever they are entitled to from the estate of their deceased parents is just a token. It should not be a matter of life and death. Parents are not beasts of burden. It is not the parent’s duty to accumulate wealth for their children to inherit. The law does not impose such a duty on the parents. Parents are only burdened with caring and providing for their children during their minority. Upon attaining majority, the children are pretty much on their own. As adults it is not the responsibility of their parents to provide them with food, shelter, clothing, education and health care. They should not expect anything of the sort from their parents after they become majors. They should cease looking up to their parents for these things. They should work for their own sustenance and to accumulate their own wealth. That way whatever their parents die possessed of would be just a bonus. There are no provisions in the Constitution of Kenya, the marriage statutes, customary law, Islamic law and the legislation relating to children which imposes a duty on parents to care for their adult children.

I appreciate the applicant’s predicament. She should have taken advantage of **Section 35((2))** of the Law of Succession Act and exercised her power of appointment. Perhaps she is seeking to do so through this application. I note that the children that the applicant has accused of showing hostility to her have not filed their replies. Her contention that there is bad blood and hatred there remains uncontroverted.

I will treat the application as the applicant’s exercise of her power of appointment and allow the application dated 9th November 2007 by the applicant. The certificate of confirmation of grant dated 17th May 2001 shall be rectified to accord with the proposal in paragraph 14 of the supporting affidavit sworn

on 9th November 2007. Any child who is aggrieved of the exercise of the said power is at liberty to apply under *Section 35(3) (4) of the Law of Succession Act. There shall be no order as to costs.*

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

W.M. Musyoka

Judge