

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 6 OF 1999

CATHERINE NYAGUTHII MBAUNI.....PETITIONER/RESPONDENT

VERSUS

GREGORY MAINA MBAUNI.....OBJECTOR/APPLICANT

RULING

The subject matter of this ruling is the Summons for Rectification of Grant dated 30th March 2010. The summons is taken out by **Gregory Maina Mbauni**, the Objector/Applicant herein. It is opposed by Catherina Nyaguthii Mbauni, the Petitioner/Respondent, who filed a replying affidavit. When the Summons came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the same disposed of by written submissions. At the time of writing this ruling the Objector/Applicant was the only party who had filed his submissions.

I have considered the grounds set out on the face of the Summons for rectification of grant plus the facts deponed in the affidavit filed for and against the Summons. I have also taken into account the written submissions filed before this court. The history of this dispute appears to be short and straightforward. The Petitioner/Respondent applied for Letters of Administration in respect of the Estate of Peter Mbauni Maina, deceased. The objector/Applicant filed an objection, answer to petition and cross-petition. The duo were appointed as joint administrators of the deceased's Estate. The assets of the deceased's Estate were identified to be **L.R. NO. NYERI GATARAKWA/866** and cash in an account held with Barclays Bank of Kenya Ltd., Nyeri Branch. The dispute was heard and the grant was finally confirmed on the basis that the Estate would be shared equally between the rivals because each represented a house. The Petitioner/Respondent felt aggrieved hence she preferred an appeal to challenge this court's decision in the Court of Appeal. The Court of Appeal heard the Appeal and in its judgment delivered on 10th July 2009, in which it varied the judgment of this court by substituting it with an order directing the sharing of the Estate between the Objector/Applicant and Petitioner/Respondent in the ration of 5:3. In other words the Applicant was to get 3/8 and the Respondent 5/8 of the Estate.

The Objector/Applicant is now before this Court under *rules 43 and 73* of the Probate and Administration Rules seeking to have the confirmed grant rectified to accommodate the variations in sharing of the Estate introduced by the Court of Appeal. The Objector/Applicant basically asked this Court to exercise its inherent power to rectify the grant. The Petitioner/Respondent opposed the Summons on the basis that the court's discretion to rectify the grant under *Section 74* of the Law of Succession Act is limited to correcting errors in names descriptions and not to determine substantive property rights. She also pointed out that the Summons is premature in view of the pendency of **Nyeri H.C.C.C. No. 133 of 2009 (O.S.)**. Let me start by stating that there is no dispute that the Court of Appeal expressed itself in clear terms the deceased's Estate be shared in the following ratio:

Catherine Nyaguthii Mbauni – 5/8.

Gregory Maina Mbauni – 3/8.

With respect, I do not think that is the correct exposition of the law. If the Respondent wanted to stop this process then she should have appealed against this Court's ruling of 17th March 2010 in which this Court dismissed the application for stay of proceedings in this cause. She failed to obtain an order for stay from the Court of Appeal hence it cannot be said that the application is premature.

The other point argued against the Summons is to the effect that the that the Court cannot grant the orders because its discretion under *Section 74* of the Law of Succession Act is limited to correcting errors in names, descriptions, time, places or the purposes of the grant in limited grants. With respect, I agree with the Respondent's arguments on this point. However, it must be stated that *Section 74* cannot be read in isolation. It must be read in conjunction with other sections and the rules. On the face of the Summons the applicant has cited *rule 73* of the Probate and Administration Rules. The aforesaid rule clearly states that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as necessary for the ends of justice or to prevent abuse of the process of court. The ends of justice in this cause enjoins this court to give effect to the judgment of the Court of Appeal by making an order for the confirmed grant to be rectified. This Court can even issue the order sought under *Section 47* of the Law of succession Act. In the end I find the Summons for Rectification of Grant to be well founded. It is allowed as prayed with each party bearing his or her own costs.

Dated and delivered at Nyeri this 29th day of July 2011.

**J. K. SERGON
JUDGE**