



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1063 OF 1987
IN RE ESTATE OF MOKOSIO (DECEASED)

RULING

This ruling has come about as a result of several advocates coming to the Probate and Administration Court to apply for the rectification of their respective clients' grants. In each case I noted that they relied on rule 49 and rule 73 respectively namely rule 49-deals with applications not otherwise provided for

"a person desiring to make an application to the Court relating to the estate of the deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit."

Rule 73 - deals with "the saving of inherent powers of court" namely:

"nothing in these Rules shall limit or otherwise effect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

It was agreed amongst the said seven advocates that they would submit to this Court on a point of law, on how one should apply for the rectification of the grant, the law and the procedure of coming into Court. I outline the issues to be considered but not necessarily in the order raised:-

(A) Issues on Rectification of Grant

- 1) Can the inherent jurisdiction of the court be invoked under rule 49 and 73 where the orders sought are not specifically provided for in the Rules eg amendment of the certificate of grant?
- 2) Can the inherent jurisdiction of the court be invoked under rule 73 even where specific procedure has been provided for in the Rules?
- 3) What is the distinction between rules 43 and rule 14(1)?
- 4) What is the scope of rule 43 of P & A Rules in respect of rectification of an error in the certificate of confirmation of grant?
- 5) Is there any difference between rectification of the grant itself and the rectification of the certificate of confirmation of grant as far as the procedures for correction is concerned?
- 6) What is the scope of section 74?

(B) Definition

What is the meaning of rectification? According to the *Black's Law Dictionary*, 5th edition

Rectify means:-

"To correct or define something which is erroneous or doubtful. Thus, where the parties to an agreement have determined to embody its terms in the appropriate and conclusive form, but the instrument meant to effect this purpose (eg a conveyance settlement etc) is by mutual mistake so framed as not to express the real intention "of the parties, an action may be brought to have it rectified)"

Rectification means:-

"The act or process by which something is made right or by which a wrong is adjusted.

Alter:-

"To make a change in; to modify to...in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroy the identity of the thing effected. To change partially. To change in one or more respects, but without detracting of existence or identity of the thing changed; to increase or diminish.

Alteration:-

"Variation; changing, making different. A change of a thing from one form or state to another; making a thing different from what it was without destroying its identity..."

Amend:-

"To improve. To change for the better by removing defects or faults. To change, correct, revise."

Amendment:-

"To change or modify for the better. To alter by modification, deletion or addition.

(C) The Law

I Section 74

The main section that governs the application for the rectification of the grant is section 74.

It reads:-

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".

This section provides for rectification of errors contained in the grant before and after rectification of the grant.

The rules to be followed and applied as to how this is done is rule 43 and rule 14(1).

II Amendment of application for a grant rule 14 (1)

Before a grant is issued, rule 14 (1) becomes applicable. This rule deals with the amendment or

withdrawal of application for grant.

"R 14(1)

An applicant for a grant may amend his application before the making of the grant by notice in Form 62 to be filed in the registry in which his original application was filed and serving forthwith a copy of such notice upon every objector who has lodged an objection and a cross-application in the matter; and he shall pay to every such objector such costs (if any) as the Court may direct.

Provided that where the purposed amendment is of a minor nature the registration may permit the amendment to be made forthwith without notice to any party."

This rule therefore provides for the amendment of the application of grant and before such grant has been issued.

An applicant wishing to amend his application before the grant is issued must file form P & A 62.

Form 62 r 14 (1)

Notice of Amendment of

Application for Grant

(Heading as in Form 1)

Take notice that I, CD, of.....

.....

having applied to this honourable Court for a grant of representation of the above-named AB who died on the

.....19....., hereby amend such application in

the following manner.....(Here set out in paragraphs to be numbered

consecutively any matter requiring to be amended in the petition and

supporting affidavits by way of deletion, substitution or addition)

And I hereby make oath and say that what is stated in my original

application as so amended is true to the best of my knowledge, information

and belief.

Sworn etc (as in form 2)

Note:- This notice does not require a

"supporting affidavit"

Therefore a party who now wishes to amend his application before a grant is issued merely gives to the Registrar the notice in Form P & A 62. No affidavit is required. If it is a simple and minor amendment the Registrar amends without notice to parties. If it is a complicated matter notice to any party may be given.

If there are objectors to the proceeding they are required to be served with a copy of such notice.

III Rectification of an error after the grant has been issued rule 43 (1, 2 and 3).

Rule 43 of the Probate and Administration Rules provides for the rectification of grant and its procedure.

"43 (1)

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 description of any person or thing or as to the 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, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued.

Rule 43 must be read together with section 74. This section 74 has identical wording as those found in section 261 of the Indian Succession Act 1925.

I can therefore safely take its interpretation and the scope the rule and section has. I was referred to the commentary of

"*Sanjiva Row's Commentary*

The Indian Succession Act.

Act 39 of 1925.

4th Edition

1978

Page 786 para 261.

The major difference with section 74 and section 261 of the Indian succession Act 1925 is that the Kenyan section 74 allows for the grant of representation to be rectified.

"whether before or after confirmation"

This I believe is to just bring it in line with the Law of Succession Act cap 160 Laws of Kenya.

a) What sort of errors may be rectified?

1. The scope of the Rules.

Under section 261 of the Indian Succession Act, 1925, it provides for the rectification of the grant. This section is seen in complementary with their order 47 of the Civil Procedure Code (India) that applies to the Probate Court by reasons of section 141 of the Civil Procedure Code (India).

If we look at the Kenyan Act section 74 allows for the rectification of grant where there is an error. The procedure is laid out in rule 43. Under rule 63, it provides for the application of the Civil Procedure Rules and High Court (Practice and Procedure) was that both are applicable to the Act.

Order XLIV of the Civil Procedure Rules is one such order that deals with review which is also application to the Act.

The order 44 for review, as stated is complementary to rule 43 and should enable a party to seek rectification of a grant in situations not fully provided under rule 43. It deals with errors apparent on the

face of the record.

(a) The errors that may be rectified:

Under section 261 of the Indian Succession Act, the errors and mistakes are of various categories. The categories are based on the textbook of *Probate Practice* 23rd edition 1970 *Tristram and Coote's Probate Practice*.

These are:-

1) Error in the grant concerning the deceased

"1) The name of the deceased might have been misspelled.

2) The status of the deceased misstated.

3) The date of death or the place of death of the deceased."

In *Tristram and Coote's Probate and Practice* – if the amendment or error is in the surname then the grant should be revoked. If the surname involves a spelling amendment it may be allowed. If the first name or Christian name is wrong the grant should be revoked. Where the 1st name used is correct but the spelling incorrect then the amendment may be allowed. For example "Ann" and "Anne" "Sussanna" and "Sussannah"

ii) Errors in the grant

1. "Limited grants may have a misdescription of the property to be administered.

2. Misrecital of the power under which the will had been made or of a deed by which a trust has been created.

iii) Errors as to testators

1. Alteration and description in names can be made in regard to testators, executors and or administrators

iv) Others

1. Errors in the inclusion of execution settled land.

2. Official errors

3. Error in description or character in which a person applied for a grant.

(d) Procedure to Rectification of a Grant

I had earlier outlined the procedure of applying for an error to be rectified under rule 14(1). This is where no grant has been issued but there is a pending application for such grant. The procedure is administrative unless otherwise directed.

The procedure under rule 43 is covered in its sub-rule (1), (2) and (3)

The applicant will first apply by summons in Form 110.

"Form 110

rule 43(1)"

Summons for Rectification of Grant

(Heading as in Form 1)

Let all parties concerned (continue as in Form 104) on the hearing of the application on the part of CD the executor of the last will (and codicil) (or the administrator of the estate) of the above-named AB who died on the

.....

20for orders:-

1. That the grant of probate (or letters of administration) issued in the said CD in this matter on the 20....., be rectified in the following respects as provided for by rule 43 (1) of the Probate and Administration Rules.

(set out in full the desired rectification)

2. That the costs of this application shall be provided for, which application (continue as in Form 104)

Dated)

Issued)

Address of service (as in Form 2).

This summons must be filed with an affidavit in Form P&A 13. The Registrar may dispense with the filing of the affidavit. If he does not, the affidavit must contain such information as is necessary to enable the Court to deal with the matter. The affidavit is deponed by the applicant.

"From 13 rule 43(2)"

Affidavit in support of summons for rectification of grant (Heading as in Form 1)

I, CD, of (as in Form 2 (the executor of the last will dated the, 20.....(and the codicil thereto dated20.....) (or the administrator of the estate) of the above-named AB make oath and say as follows:-

1. A grant of probate of the said will (and codicil) (or of letters of administration (with the will (and codicil) annexed was made to me by this honorable Court on the, 20

2. The said grant contains errors as to (set out the errors capable of rectification under rule 43(1)

3. The said grant has not been confirmed (or was confirmed on the, 20

4. It is desirable that the above errors be rectified by Court.

5. The facts herein deponed (continue as in Form 2)

The Registrar is thereafter to cause the summons and the affidavit (if any) to be laid before the Court without delay.

The Court may either grant the application (without attendance of any person or direct that the application be set down for hearing on notice to the applicant and to such other persons (if any) as the Court shall think fit)"

This means that the applications for summons for rectification of grant is also dealt with administratively. The parties need not attend Court. Once the application is made the Registrar places the file before the Court. It is through the Court under its own discretion who would direct that the applicant attend before him and any persons on notice to them to appear and address the Court on such application.

(E) What is the difference between rectification of the grant itself and the rectification of the certificate of confirmation of grant?

"Grant" means a grant of representation, whether a grant of probate or of letter of administration with or without a will annexed to the estate of a deceased person (see rule 2).

Where a grant is directed to be confirmed under rule 41(5) as read under section 71 (2) a certificate of confirmation is issued. Form P & A 54 is then issued to be affixed to the grant.

The effect of this is that the documents constitute a confirmed grant. I would accept the argument that the provision in respect of rectification of the grant apply equally to whether the grant is issued and not confirmed and to where a grant is issued and is confirmed.

(F) Can the inherent jurisdiction of the court be invoked under rule 49 and 73 where orders sought are not specifically provided for in the Rules?

From the submissions so far, it is clear that there is provision under the Law of Succession Act cap 160 to rectify errors on a grant before or after the confirmation of grant.

These provisions we have seen are contained clearly in section 74 and rules 43. Before a grant is issued rule 14 (1) applies.

It has also been illustrated that order 44 of the Civil Procedure Rules dealing with the review of a grant is also applicable in instances where there is an error on the face of the record. *Sanjiva Rows Commentary on the Indian Succession Act* discusses this as being complimentary. Namely, the rule on section on rectification of grant is complimentary to order 44 of the Civil Procedure Rules. It is therefore not necessary to make application under rules 49 and 73 only. I believe that this has been done in the past without realizing that there are provisions available.

I would not accept the arguments and submissions put forward that it can be done. Rule 73 is a discretionary rule to the judge. It was allowed to be evoked in the case of *Rawal v Mombasa Hardware Ltd* [1968] EA 392 because the order made was for a dismissal of a case. The three years had expired. However, order 16 rule 6, the suit was dismissed without notice. In the interest of justice, as no notice was required to be given and dismissal made, the Court of Appeal allowed the setting aside of the orders.

In the application by summons for rectification of grant, it is imperative that the correct law is referred to namely, section 74 as read with rule 43 (1) depending on the type of application sort.

If the Rules do not specifically provide for it, order 44 of the Civil Procedure Rules can be invoked as read with rule 63. The other alternative is for the revocation of a grant.

May I thank the advocates who addressed me on the point of law. I am left with giving directions and orders to each file before me. These orders will be given in their respective files.

In conclusion and summary

Rectification of grant

Rule 14 (1)

(1) On application for a grant and before a grant is issued rule 14 (1) to apply.

Procedure

Notice under P & A 62 (no affidavit required) is filed in the original application file.

Where there are objectors, notice to be served on objector.

Where there are none or the amendment is minor, Registrar may permit the amendment without notice to any party.

(2) Where a grant has been issued with or without a confirmed grant. Section 74 and rule 43 apply.

Procedure

The applicant is to file Form P & A 110 summons for revocation of grant together with an affidavit or form P & A 13 (unless exempted by the Registrar.

The application is placed before the Court without delay. The Court makes orders as to the rectification of grant. However, the Court may direct that a notice to the parties including the applicant be issued that they attend before the Court on the said application. The procedure in both cases ie whether under rules 14(1) or 43(1) are administratively in the first instance.

Dated and Delivered at Nairobi this 29th day of January 2000.

M.A.ANG'AWA

JUDGE