In re Estate of the Philip Arap Tarus (Deceased) (Succession Cause 179 of 2013) [2024] KEHC 8263 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 179 OF 2013

JRA WANANDA, J

JULY 5, 2024

IN THE MATTER OF THE ESTATE OF THE LATE PHILIP ARAP TARUS

BETWEEN

LENA TARUS ..... PETITIONER

AND

MARY ANNE JEPKOECH ..... 1ST APPLICANT

VERONICA CHEROBON MAIYO ..... 2ND APPLICANT

PAMELA JERUTO SANGA ..... 3RD APPLICANT

SUSAN JEPKEMBOI CHERUIYOT ..... 4TH APPLICANT

MERCY JEPCHICHIR SONGOK ..... 5TH APPLICANT

CAROLINA JEBET TARUS ..... 6TH APPLICANT

RULING

1. The Applicants herein are sons and daughters of the Petitioner-Administratrix (their mother).

2. The background of the matter is that the deceased, Philip Arap Tarus, died intestate on 215/04/2009 at the age of 59 years. On 4/07/2013, his widow petitioned for Letters of Administration over the estate. According to the Petition, the deceased was survived by the widow, 6 daughters and 1 son. All survivors signed consents supporting the Petition. The deceased was said to have also left behind assets, including the parcel of land known as Kapsaret/Kapsaret Block 6 (Kapsaret)/38 (hereinafter referred to as "the land"). The Grant was then issued by the Court on 4/11/2013 and the same was confirmed on 2/08/2018.

3. Now before the Court for determination is the Summons dated 4/03/2022 filed by the 6 Applicants (all being daughters to the deceased). The same is filed through Messrs Isiaho Sawe & Co. Advocates and the prayers sought are as follows:

    i. That this Honourable Court be pleased to amend the Certificate of Confirmation of Grant issued on 3rd August 2018 by terminating the trust in favour of the Petitioner and subsequently apportioning the entitlements for the Applicants.

    ii. That the cost of this Application be in the Cause.

4. The Application is expressed to be brought pursuant to Rule 63 of the *Probate and Administration Rules*, Section 47 of the *Law of Succession Act* and "all other enabling provisions of the law". It is then premised on the grounds stated on the face thereof and is supported by the Affidavit jointly sworn by the 1st - 5th Applicants.

5. In the Affidavit, the Applicants deponed that as a family, they had agreed by consent that their share in the said land measuring approximately 27 acres be registered in the name of their mother (the Petitioner-Administratrix) in trust for them, and that their mother and their only brother, John Kirwa Tarus, have been utilizing the land to the Applicants' exclusion hence rendering the rectification of the Grant necessary. The Applicants deponed further that all pleas to their mother to be allowed to utilize the land have been futile, that they now desire to have their individual shares identified for their own use and/or benefit and that of their children, and that they propose that the land be shared equally amongst all the beneficiaries, with their mother be deemed to be a unit.

Replying Affidavit

6. The Summons is opposed vide the Replying Affidavit sworn by the Petitioner-Administratrix and filed on 31/10/2022 through Messrs Rotuk & Co. Advocates. According to the Administratrix, it is not true that her son, John Kirwa Tarus and herself have been utilizing the land without the participation of the Applicants.

7. Regarding the 1st Applicant, Maryanne Jepkoech, the Administratrix deponed that the 1st Applicant had been to Vietnam and Qatar courtesy of the Administratrix' support from the estate until she came back to Kenya, that she got stranded in Asia, Vietnam and the Administratrix had to source for over Kshs 150,000/- to bring the 1st Applicant back following the corona pandemic in December 2020, that the 1st Applicant is currently living with the Administratrix who, together with her last born daughter, the 5th Applicant, is taking care of the 1st Applicant considering her health condition and that the 1st Applicant requires constant medical attention and has been to various hospitalists and herbalists.

8. Regarding the 2nd Applicant, Pamela Jeruto, the Administratrix deponed that she has been married away but has direct enjoyment of 1.8 acres of the land which portion she has been leasing out to a 3rd party and receiving proceeds thereof. Regarding the 4th Applicant, Susan Jepkemboi, the Administratrix deponed that she too, has been married away and left Kenya around the years 2017-2019 for Lebanon and later went to Qatar before returning to Kenya to work in Turkana and that the 4th Applicant has not approached the Administratrix to ask for land to till or to work on. Regarding the 2nd Applicant, Veronicah Jerop, the Administratrix deponed that she is married within the neighbourhood and has also not approached the Administratrix for land. Regarding the 5th Applicant, Mercy Chepchichir, the Administratrix deponed that she too, was married but the marriage did not work thus forcing her to come back home, that it is the Administratrix who takes care of her needs and that she is not part of the team that is demanding equal distribution as alleged in the Application. As for the 6th Applicant, Caroline Jebet, the Administratrix deponed that she is deceased

having passed on sometime in September 2013, that she had a heart condition and had to be airlifted to India for treatment and that towards this urgent need, the family had to dispose of 3 acres of the land and proceeds thereof utilized for the treatment.

9. The Administratrix submitted further that she also purchased a motor vehicle to keep the family errands running and which motor vehicle is available to all family members.

10. As regards the son, John Kirwa Tarus, the Administratrix deponed that he is assisting the Administratrix to till the land and is consistently challenging and encouraging his sisters to take seriously the Administratrix' offer of 2 acres each to utilize and cater for their needs.

11. The Administratrix then deponed that the Applicants have not shown any credible reason to warrant rectification of the Grant, that the Application does meet the threshold envisaged, and that there is no error apparent on the record to be rectified. She added that the Application is defective in form and substance in that the procedure adopted is under the *Civil Procedure Rules*, that the Grant was procedurally obtained and that the Court has no jurisdiction to hear and determine the Application as it is *functus officio*. The Administratrix contended further that the Applicants have shown in the past that they are only keen on disposing the estate and wasting it away, that she had been instructed by the deceased that the estate should be enjoyed *in situ* and only under exceptional circumstances should it be sold, and that she has been encouraging the Applicants to invest in the land. In conclusion, she reiterated that her daughter, Mercy Jepchirchir, purportedly included herein as the 5th Applicant, is not in support of the Application and in fact, opposes it, together with the son, John Tarus.

Hearing of the Application

12. The Application was canvassed by way of written Submissions. Pursuant thereto, the Applicants filed their Submissions on 27/10/2023 while the Administratrix filed hers on 2/11/2023.

Applicants' Submissions

13. The Applicant's Counsel submitted that there is no dispute that the Applicants are beneficiaries of the deceased by virtue of being his children, that when holding property as a trustee, the property cannot be dealt with by the trustee without the consent of the other beneficiaries for whose benefit the trust is created, that the Applicants are dissatisfied with the manner in which the estate are being dealt with by their mother, and that all their efforts for the matter to be resolved amicably have been futile. She cited Section 35(3) and (4) of the *Law of Succession Act* and added that the Applicants are adults hence capable of holding their own shares.

Administratrix' Submissions

14. On his part, Counsel for the Administratrix submitted that although a Grant can be reviewed and/or amended, that however for either the two, the law provides for different procedures, that therefore the procedure under Rule 63 of the *Probate and Administration Rules* is alien to the procedure in Order 45 of the *Civil Procedure Rules*, yet in this case the Applicants are seeking rectification of the Grant and at the same time are also seeking amendment of the Grant. According to Counsel, in any event, the Application does not meet the threshold for grant of either for the two remedies.

15. Counsel contended further that the Court rendered itself *functus officio* the day it confirmed the Grant and cannot reopen the matter, that regarding review, no new evidence or error or mistakes on the face of the record has been demonstrated, and that it is 4 years since the Grant was confirmed and there is no reason given for the delay to move the Court. Regarding rectification, Counsel submitted that the latitude given to the Court to rectify a Grant is limited to "errors" yet no error has been demonstrated

herein. He cited the cases of *National Bank of Kenya Ltd versus Njau* [1995-1998] 2EA 249 (CAK), the case of *Evans Kamau aka Evans Boro Kamau*, Succession Cause No. 134 of 1984 and the case of *Geoffrey Kinuthia Nyamwinga (Deceased)* 2013 eKLR.

16. On whether the Court can invoke Rules 49 and 73 of the *Probate and Administration Rules* to infuse life into the Application, Counsel submitted that those provisions are only available where there is no clear provision under the law. He contended further that allowing the Application will open the pandora's box and there will be no end to litigation. According to Counsel, the Applicants' only option is to appeal or seek a review of the decision confirming the Grant.

Determination

17. The issue that arises for determination herein is

> "whether the Grant issued and confirmed in this Cause should be rectified or amended to terminate the holding of the estate property the subject herein by the Administratrix (widow) in trust for the other beneficiaries (her children)".

18. As aforesaid, the Application is brought under Rule 63 of the *Probate and Administration Rules* and Section 47 of the *Law of Succession Act*.

19. Rule 63(1) of the *Probate and Administration Rules* provides as follows:

> "63. Application of *Civil Procedure Rules* and *High Court (Practice and Procedure) Rules*
>
> (1) Save as is in the *Act* or in these *Rules* otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the *High Court (Practice and Procedure) Rules* (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these *Rules*."

20. It is not clear why Rule 63 aforesaid has been invoked since there is no reference whatsoever to that provision in the body of the Application or in the Affidavit in support thereto or even in the Applicant's Submissions. The Administratrix has, on her part, speculated that the Applicants may have invoked Rule 63 because they may have wished to also find refuge in the remedy of Review available under Order 45 of the *Civil Procedure Rules* which by dint of Rule 63 above is one of the provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act*. On my part, I will not enter into such speculation since the Applicants have themselves not expressly stated so.

21. Regarding Section 47 of the *Law of Succession Act*, it provides as follows:

> "The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

22. As correctly submitted by Counsel for the Administratrix, Section 47 aforesaid may only be invoked where there is no express provision in the *Law of Succession Act* or in the *Probate & Administration Rules* that specifically deals with the relief or remedy sought. Section 47, as read with Rule 49 and also

Rule 73, therefore clothes a Succession Court with the inherent powers to make orders that would be necessary for the ends of justice. Rule 49 and 73, respectively, provide as follows:

Rule 49

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

Rule 73

> " Nothing in these *Rules* shall limit or otherwise affect 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."

23. Counsel for the Administratrix has submitted that since the Application bears the title "Summons for Rectification of Grant" and since what is sought in the prayers is "to amend the Certificate of Confirmation of Grant", then they ought to have come under Rules 43 (Rectification under Section 76 of the *Act*) and Rule 41(1) (amendment) of the *Probate and Administration Rules*. Those provisions stipulate as follows:

Rule 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 descriptions of any person or thing or as to the time or place of 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 made."

Rule 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."

24. It is therefore immediately evident that by reason of the portions underlined above, the above provisions may not be expressly available to the Applicants. This is because Rule 43(1) is only expressly available where the matter sought to be amended arose as a result of "an error", which is not the case herein and Rule 14(1) on amendment is also only expressly available where the amendment is sought to be made "before the Grant is issued", which again, is not the case herein.

25. What the Applicants are seeking, although for some reason, the drafter of the Application, either by some difficulty or by design, has not brought out in the prayers is that although the Grant has already been confirmed, first, the trust adopted under the Certificate of Confirmation and under which their mother (Administratrix) has been holding the residue of the parcel of land known as Kapsaret/ Kapsaret Block 6 (Kapsaret)/38 be terminated and that secondly, the said land be now distributed in equal shares among the beneficiaries.

26. According to Counsel for the Administratrix, this Court has no jurisdiction to grant the said prayers because having already confirmed the Grant, the Court is now *functus officio* and that the only option

available to the Applicants is to appeal. On my part, I disagree. Insofar as in the said Certificate of Confirmation, the shares of the beneficiaries were not identified or stated, and insofar as the trust was not pegged on the occurrence of any event nor were any timelines set, the presumption is that the distribution was not complete and that the parties would therefore still be at liberty to return to this Court at some point for the Court to adopt the beneficiaries' shares agreement and in the absence of such agreement, to apportion and distribute such shares. I do not therefore agree that this Court is *functus officio*.

27. In this case, a perusal of the Administratrix' Replying Affidavit reveals that although the Grant has already been confirmed, she is still operating under the misconception that she is entitled to deal with the estate single-handedly to the exclusion of her children, who happen to be the other beneficiaries. Granted, she is the widow of the deceased, the mother to all the Applicants and the family matriarch and by reason thereof, she may honestly believe that she remains the final authority over all matters concerning the estate. She is no doubt well intentioned and her fear, which is merited, is that the children are likely to sell off their portions once they lay their hands thereon. The fact that she argues that she has been using proceeds from the estate to take care and cater for the needs of the Applicants is sufficient evidence of how she views her role over the estate. She even reveals that she purchased a motor vehicle out of the proceeds of the estate. She does not state that she consulted or was authorized by any of the beneficiaries or sought the Court's sanction before incurring expenses out of the estate these actions. Yes, the beneficiaries are all her children and she is the one who brought them up. However, the so-called "children" are now adults, the oldest being about 50 years now and the youngest about 30 years. They are therefore fully and legally capable of holding their own shares. As difficult as it may be for her to accept, the mother has to now let go.

28. In any case, save for the said residue of the land aforesaid, all the other assets of the estate, namely, motor vehicle, tractor, 15 dairy cows, two row maize planter, harrow and two dics plough were all transmitted to the Administratrix and her son, John Kirwa.

29. Since I have ruled that in the circumstances of this case, this Court is not *functus officio* and since the *Law of Succession of Act* does not expressly provide for termination of a trust adopted in an already confirmed Grant and for distribution amongst the beneficiaries of the asset held under such trust, I find that this Court is entitled to invoke its inherent powers under Section 47 of the *Law of Succession Act*, and Rules 49 and 73 of the *Probate and Administration Rules* as already cited above.

30. Faced with an almost similar scenario as the one herein, W. Musyoka J, in the case of In the matter of the estate of *Joseph Muthama Ngare (Deceased)* [2013] eKLR took the option of "cancelling" the Certificate of Confirmation of Grant and reopened the estate for distribution. This is how he pronounced himself:

> "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."

31. On his part, while dealing with an Application for revocation of a Grant, regarding a Succession Court's power to rectify a confirmed Grant on grounds other on account of "errors", Mativo J (as he

then was), in the case of *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR, stated as follows:

> "Under Section 76, the court has discretionary power when faced with an application for revocation.[19] It can make such orders as it considers fit in the circumstances.[20] The court is not bound to issue revocation even where the case has been set out under Section 76. In *Kipkurgat arap Chepsiror and Others vs Kisugut arap Chepsior*,[21] the court declined to grant the prayer for revocation, but instead entered the names of the applicants in the grant as beneficiaries. In the matter of the estate of Jonathan Mutua Misi-deceased[22]the applicant sought revocation on grounds that it had been obtained on false statements. He was a son of the deceased and his name had been omitted from the list of survivors and instead of ordering a revocation, the court directed that his name be included in the list.
>
> I take the view that the applicants can on application and upon satisfying the court that they were indeed bona fide beneficiaries, be accommodated by way of rectification of the grant and within their respective houses as per the court judgement or in such manner as the court may deem just without necessarily revoking the grant.
>
> A grant can only be revoked on the grounds enumerated under Section 76 of the Act, and the grounds relied upon must be proved, and even then, the court has the discretion as observed above. This is a matter that has been in court for long and litigation must be brought to a close. I find nothing in this application to demonstrate that the applicants have established any of the grounds stated in section 76 of the *Act*."

32. The view that a Succession Court faced with an application for revocation of grant may, even where grounds for revocation have been established, instead of revoking the grant, make such orders as it deems fit and just given the circumstances of the case has been reiterated in many cases including for instance, in the case of *In the Matter of the Estate of Esther Wanjiru Mucheru (deceased)* Nairobi HCSC No. 1417 of 1992 (Rawal J) the case of *In the Matter of the Estate of Thareki Wangunyu also known as Thareka Wangunyo* Nairobi HCSC No. 1996 of 1999 (Khamoni J), in the case of *In the Matter of the Estate of Gathima Chege (deceased)* Nairobi HCSC No. 1955 of 1996 (Kamau J), and the case of *In the Matter of the Estate of Thareki Wangunyu also known as Thareka Wangunyo* Nairobi HCSC No. 1996 of 1999 (Khamoni J).

33. In light of the views above, I find that although the Court may revoke a grant of probate if it were obtained on the basis of false statement or concealment of material facts or an untrue allegation of fact essential in point of law, where there is a remedy conferring rights to the beneficiaries, the Court may, instead of revoking the Grant, opt to make any orders that ensures and protects the rights of the beneficiaries. I will not therefore fully follow Musyoka J's option of cancelling the confirmed Grant in its entirety as he did in the case of In the matter of the estate of *Joseph Muthama Ngare* (*supra*) but will instead, order that the residue of the parcel of land known as Kapsaret/Kapsaret Block 6(Kapsaret)/38 held in trust by the mother (Administratrix) be now distributed.

34. I have used the description "residue of the parcel of land" because the record reflects that one Prof. Grace Kipkemboi had purchased 3 acres of the said land and this was indeed, duly recognized and reflected in the Certificate of Confirmation. Considering that from the Certificate of Search on record, the initial size of the said land was 12.10 hectares (approximately 30 acres) out of which the said Prof. Grace Kipkemboi purchased 3 acres, it follows that the acreage remaining is about 27 acres as also reflected in the Certificate of Confirmation.

Final Orders

35. In the premises, the Applicants' Summons dated 4/03/2022 succeeds and I order as follows:

    i. The trust reflected in the Certificate of Confirmation of Grant issued herein on 2/08/2018 and under which the Petitioner/Administratrix – Lena Tarus – has been holding 27 acres of the parcel of land known as Kapsaret/Kapsaret Block 6(Kapsaret)/38 in trust for the beneficiaries of the estate herein is now hereby terminated and the said parcel of land shall now be distributed amongst the beneficiaries.

    ii. This matter is now referred to Court Annexed Mediation for the purposes of giving the parties the opportunity to discuss and attempt to reach an amicable settlement on the respective shares that each beneficiary shall get out of the parcel of land. A date shall now be fixed when this matter shall be mentioned before this Court to review the progress of the Mediation.

    iii. Should the parties be unable or fail to agree on sharing out or distribution of the parcel of land, then this Court shall proceed to determine the same upon giving the parties the opportunity to address it

    iv. This being a family matter, each party shall bear his/her own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 5TH DAY OF JULY 2024

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Ms. Isiaho for Applicants

N/A for Petitioner

Court Assistant: Brian Kimathi