



**In re Estate of James Muriithi Githua (Deceased) (Succession Cause
1245 of 2013) [2023] KEHC 3240 (KLR) (Family) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 3240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1245 OF 2013
EKO OGOLA, J
FEBRUARY 2, 2023
IN THE MATTER OF THE ESTATE OF JAMES MURIITHI
GITHUA (DECEASED)**

BETWEEN

FILOMENA KINANU APPLICANT

AND

ANN WANJIRU MURIITHI RESPONDENT

JUDGMENT

1. The Applicant Filomena Kinanu filed Summons dated April 19, 2021 for Rectification of the Confirmed Grant issued and confirmed on May 27, 2014 to Ann Wanjiru Muriithi and Sanra Njeri Muriithi. She prays for the confirmed grant to be amended to include her children, Prince Junior Githua Muriithi and Precious Joy Njeri Muriithi; for a motor vehicle and bank account to be included as assets that belonged to the deceased; and for the deceased property to be shared equally in line with the testator's mode of distribution.
2. The Summons was supported by the Affidavits of the Applicant. She averred that Prince Junior Githua Muriithi and Precious Joy Njeri are the biological children of the deceased as confirmed by the DNA test conducted after the Order of this court dated October 19, 2019. Despite this, they were not included in the list of beneficiaries of the estate. According to the Applicant, the Respondent has been collecting rent from plot No 72 Tassia Embakasi which is part of the deceased estate without including her two children.
3. In addition to this, she states that the list of assets of the deceased omitted to include the motor vehicle and the bank account. She has also listed her own version of how the estate of the deceased should be distributed.



4. In response, Ann Wanjiru Muriithi filed her Replying Affidavit. She deposed that the Summons are incompetent and bad in law, in collision with the provision of the law, gross abuse of the court's process, brought in bad faith and unmeritorious. She further deposed that Sandra Njeri Muriithi (deceased) and a co-administratrix of the estate of Githua were issued with letters of administration intestate on August 6, 2013 and confirmed on May 27, 2014.
5. She further stated that the Applicant had filed Summons for revocation/annulment of grant and a judgment was delivered on October 19, 2017 where the Applicant was ordered to facilitate a DNA test to be conducted on her two children to confirm if the deceased is their biological father and if so, for them to be included in the list of survivors of the deceased and be provided for out of the estate.
6. She deposed that the Applicant has no locus standi to file Summons for Rectification of a confirmed grant as she is not an administratrix of the estate. According to the Respondent, a co-administrator should be appointed to hold the children's share in trust till they reach the age of majority.
7. According to the Respondent, the Applicant has not provided proof that the Motor vehicle and the Equity bank account belonged to the deceased. Therefore, her mode of distribution cannot be allowed for it flies in the face of the judgment delivered on October 19, 2017.

Submissions

8. The Court directed parties to canvass the Application by way of written submissions.
9. Mr. Morara learned counsel for the Applicant filed two sets of written submissions. He argued that the confirmed grants should be rectified to include the Applicant's children as it was proved by DNA that they are the biological children of the deceased. Counsel further submitted that the Judgment of this Court dated October 19, 2017 directed that after DNA tests confirm the paternity, the children were to be included in the list of the deceased survivors and be provided for by the estate.
10. Counsel submitted that the Motor Vehicle and Equity bank account should also be included in the estate of the deceased as the Respondent testified that she was in possession of the motor vehicle and in control of the bank account belonging to the deceased.
11. Counsel further argued that the confirmed grant can be rectified to redistribute the deceased estate in line with the Applicant's mode of distribution because her children are beneficiaries of the deceased estate.
12. In his Supplementary submission, counsel submitted that the Applicant has locus standi to bring this kind of Application because she is the mother of the deceased biological children and further that the Respondent should give statements of accounts of the rent proceedings generated from plot 72 Tassia Embakasi so that the Applicant's children could also benefit from the estate.
13. Mr Ndegwa learned counsel for the Respondent submitted that the Applicant has not shown whether she has locus standi to bring an Application for Rectification of Grant. He argued that according to the judgment of this court dated October 19, 2017, the court stated that the Applicant did not prove that she was a spouse of the deceased and therefore not entitled to share in the estate.
14. Counsel further submitted that the Applicant has not tendered any documentary evidence showing that the Motor vehicle and the bank account belonged to the deceased. Therefore, they can't be said to be assets allegedly left out of the deceased estate.

Determination



15. I have considered the pleadings and the rival submissions of counsel. Rectification of grants is provided for in section 74 of the Law of Succession Act, Cap 160, Laws of Kenya and Rule 43(1) of the Probate and Administration Rules. Section 74 provides as follows:-

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“74. Errors may be rectified by court:

Errors in names and descriptions, or in setting forth 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.”

16. Rule 43(1) provides as follows:

“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.”

17. From the language of section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, the scope of rectification of grants of representation is limited to errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant. I may add that such other minor errors in that genre could also be rectified.

18. The judgment of this court dated October 19, 2017 directed as follows:-

“(b) That on account of the findings in (a) above, it would be necessary to determine whether the Applicant’s children were children for succession purposes, I hereby, in the circumstances, direct that a DNA test be carried out within forty-five days of date hereof using samples to be supplied by Toiny Muthoni Muriithi, Prince Junior Githua Muriithi, and Precious Joy Njeri Muriithi.

(c) That should it turn out that Prince Junior Githua Muriithi and Precious Joy Njeri Muriithi are children of the deceased they shall be entered into the list of the survivors of the deceased and be provided for out of the estate of the deceased.

(d) That to facilitate (c) above, I hereby direct stay of implementation of the certificate of confirmation of grant dated May 27, 2014 for a period of six months to accommodate the conduct of the test in (b) above.”

19. From the record of the court, conducting the DNA test proved not to be as straightforward as the norm. On December 17, 2018 and April 8, 2019, this Court directed that the body of the deceased be exhumed for purposes of extracting the DNA samples. On September 18, 2019, this Court Ordered that two paternal uncles of the minors submit themselves to the Government Chemist for extraction of DNA samples. On October 18, 2019, a report was filed confirming the paternity of the minors.



20. With regards to the Applicant's allegation of the properties left out of the deceased estate, the onus is upon the Applicant to prove that the motor vehicle and the bank account belonged to the deceased. This has not been done.
21. In the upshot, the Summons dated April 19, 2021 is determined as follows:-
 - a. That the confirmed grant dated May 27, 2014 is hereby rectified to include Prince Junior Githua Muriithi and Precious Joy Njeri Muriithi as survivors of the deceased.
 - b. That the deceased estate be divided equally amongst his survivors.
 - c. That costs shall be in the cause.

It is so Ordered.

DATED and DELIVERED at NAIROBI this 2nd day of February 2023

E.K. OGOLA

JUDGE

In the presence of:

Ms Morara for the Applicant

Mr. Ndegwa for the Respondent

Gisiele Muthoni Court Assistant.

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