



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO 1 OF 2007

IN THE MATTER OF THE ESTATE OF SAMUEL CHERUIYOT CHESIRE

SOPHIA SOTE CHEPKONGA.....1ST APPLICANT

IRENE JEPKEMOI CHESIRE.....2ND APPLICANT

VERSUS

STELLA SOTE TURERE.....1ST RESPONDENT

MILKA SOTE BOIYWO.....2ND RESPONDENT

RULING

1. This ruling is on application dated 28th November 2019 seeking to rectify grant issued in respect to the estate of the late Samuel Cheruiyot Chesire, 28th November 2019 and confirmed on 16th March 2011. The confirmed grant was rectified on 1st September 2016 and a further rectification on 3rd November 2017. The application is brought under section 74, S. 83(e) and (g), S.95 (a) and (b) of the law of succession act and rule 14 of the Probate and Administration Rules.

2. Grounds in support of the application is that the parcel known as **Baringo/ Kapropita/561 Kasoyo farm** forms part of the deceased estate pursuant to the order of the court dated 30th September 2019; that the estate of the deceased now comprises of the following properties:-

1) Plot 93 Kabarnet known as **I.R 3982 L.R. 9038/ 138 measuring 0.0464 Ha**

2) **LR No. Baringo/ Kapropita/561 Kasoyo Farm** measuring **4.2542 Ha**

3. The Applicant seek to have the property is to be shared among the beneficiaries as per the minutes of the family meeting held on 23rd June 2012.

4. The application is supported by the affidavit of Irene Jepkemoi Chesire the 2nd Applicant. She proposed the mode of the distribution of the properties as follows:-

a. plot 93 Kabarnet, I.R 3982 L.R. 9038/ 138, 0.0464 Ha

- to be shared equally between Jopkemboi Chesire and Joseph Tuitoek Chepkonga

b. Baringo/ Kapropita/561 Kasoyo Farm 4.2542 Ha

— Rachael S. Chesire -1.2 acres

- Milka Sote Boiywo— 0.5 acres

- Sophia Sote chepkonga- 0.5 acres

- Winnie Kemei – 0.5 acres

- Irene Jepkemboi chesire -1.2 acres
- Stella Sote Turere -0.5 acres
- John Chesire – 1.2 acres
- Kennedy Chesire – 1.2 acres
- Kiprono Chesire – 1.2 acres
- Silas Kiptum – 1.2 acres.
- 2 acres have been sold to cater for hospital bills.

5. In response to the application, the 2nd Respondent **Milka Sote Boiywo** filed a replying affidavit dated 12th October 2021, in response to the application she deponed that the family held a meeting on 23rd June 2012, and agreed that Baringo/Kaprotia/560, Kasoyo be included as part of the estate of the deceased and the same was to be shared between herself and Stella Sote.

6. She is opposed to the property being distributed to Sophia and Joseph Tuitoek Chepkonga. She avers that Joseph Tuitoek Chepkonga is not a child of the deceased but a husband of the 1st Applicant and thus not entitled as a beneficiary.

7. Counsels relied on the application and the Replying Affidavit filed

ANALYSIS AND DETERMINATION

8. From the averments of parties, the prayer seeking to rectify the grant to include Baringo/ Kapropita/561 Kasoyo Farm 4.2542 Ha is not opposed by the respondents. What is in issue is the mode of distribution. The respondent is opposed to Joseph Tuitoek Chepkonga being allocated property. Her reason being that he is a husband to 1st applicant, not a beneficiary and should not be allocated the deceased's property.

9. The law relating to 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:

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."

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."

10. **Section 74** of the Law of **Succession Act and Rule 43(1)** of the Probate and Administration Rules, provides for limited rectification as 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.

11. In the instant case, the applicants are seeking to rectify the grant to include property that was omitted by the administrators and has been discovered as forming part of the estate of the deceased after the certificate has been confirmed. The applicants have raised issue with proposed mode of distribution and instead wish to have the same distributed to the respondents in equal shares.

12. The rectification as sought in the instant case will bring substantial changes to the certificate of confirmation of grant as it would reflect properties on the grant which were not in the petition and the distribution has not been consented to by parties.

13. I am guided by the case of ***In re Estate of CHARLES KIBE KARANJA (DECEASED) [2015] eKLR*** the court held as follows:-

"If a party wishes to have the assets of the estate redistributed or there is the discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of the grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules....."

‘Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....’

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

14. Further the same position was reiterated in the case of JOHN MUNDIA NJOROGE & 9 OTHERS V CECILIA MUTHONI NJOROGE & ANOTHER [2016] eKLR the Court held:-

“...the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time.

Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.

15. From the foregoing, it is clear that **Section 74** of the Succession Act which deals with rectification is meant to deal with errors which the court may order without changing the substance of the Grant. Errors which occur on the face of the Grant like typing errors in the names of persons or assets or dates.

16. In the instant case, the applicants have brought in an asset which was not initially listed among assets of the deceased. There is no consensus as to how the asset is to be distributed. In my view, the applicants should file an application for review adding the new asset and proposed mode of distribution. The court will then give directions on how the matter will proceed.

17. From the foregoing, I am inclined to decline orders sought.

FINAL ORDERS

1) Application dated 28th November 2019 is hereby dismissed.

2) Each party to bear its own costs.

RULING DATED and DELIVERED virtually at KIAMBU this 10th day of FEBRUARY, 2022.

RACHEL NGETICH

JUDGE

Coram:

Court Assistant :

For Applicants :-

For Respondents :- Present

Ruling delivered virtually.

RACHEL NGETICH

JUDGE