



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**SUCCESSION CAUSE NO. 13 OF 2003**

**IN THE MATTER OF THE ESTATE OF THE LATE KUBUTA**

**KAMARA NGUURO alias PHARIS NJEGEGU (DECEASED)**

LUCAS NJAGI NJEGEGU.....1<sup>ST</sup> APPLICANT

MICHELINA WAMBUI KAMARA.....2<sup>ND</sup> APPLICANT

NAHASON NYAGA PHARIS.....3<sup>RD</sup> APPLICANT

MARY NJERI NJEGEGU.....4<sup>TH</sup> APPLICANT

JAMES KANG'ERI NJEGEGU.....5<sup>TH</sup> APPLICANT

PHOEBE WAWIRA NJEGEGU.....6<sup>TH</sup> APPLICANT

POLINE WANJIRU NJEGEGU.....7<sup>TH</sup> APPLICANT

**VERSUS**

JERUSHA WAMBUI MUSA.....RESPONDENT

**RULING**

**A. Introduction**

1. Before me is an ex-parte notice of motion dated 14/08/2020 and which was filed under certificate of urgency. The same is brought under section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules. The applicants seeks the rectification of the certificate of confirmation of grant issued on 25/11/2019. The rectification being sought relates to the names of the Land Parcels and names of the beneficiaries as they appear on the said certificate of confirmation of grant and further the mode of distribution of Land Parcel Wang'uru PT B146 as it appears on the said certificate of confirmation of grant. The applicants further sought orders that the court do authorize the Executive Officer/Deputy Registrar to sign all documents to facilitate the distribution of the deceased's estate on behalf of the Administrator herein Jerusha Wambui Musa (respondent) and further for the costs of the application.

2. The application is premised on the grounds on its face and further supported by the supporting affidavit sworn by the 1<sup>st</sup> applicant herein with authority from the other applicants. In a nutshell, the applicants' case is that the Certificate of Confirmation of Grant issued on 25/11/2019 had errors as the land parcels were described as "Ngarima" instead of "Ngarinama" and the names of the beneficiaries did not correspond with their National Identity Card names. Further that Wang'uru PT B146 was to be shared equally by all beneficiaries but it is very small and cannot be sub-divided and it is uneconomical to subdivide it so the beneficiaries wishes the same to be sold and the proceeds be shared. Further that the administrator (the respondent herein) is very uncooperative and has refused to sign transmission forms and is opposed to the sale of LR. Wang'uru PT B146 and thus the beneficiaries are not able to enjoy and benefit from the estate for the last eight (8) years and that the respondent won't suffer any prejudice if the rectification is allowed as prayed.

3. The respondent opposed the application herein vide a replying affidavit sworn on 8/11/2020 and filed in court on 9/11/2020 wherein she deposed that she was not opposed to rectification as prayed in prayer three (3) of the application but however she is opposed to the other proposed rectifications/ amendments. Further that the issue of selling the estate as to changing the mode of shares is frivolous and abuse of the court process and irregular as it is not consented to. Further that she had undertaken her duties as an administrator of the estate in

accordance with the law and thus not failed in administering the estate herein. She deposed that the estate is in debt to a (third) party.

4. The applicants filed a further affidavit wherein it was deposed that the issue of the estate being in debt is res judicata as it was decided in an earlier application dated 30/04/2019 and which claim was dismissed. The applicants maintained their position that the plot is not divisible between the eight beneficiaries and further that the respondent herein has failed to distribute the estate to the beneficiaries since the grant was confirmed.

5. The parties herein proceeded to file their respective written submissions in support of their rival positions.

### **B. Issues for determination**

6. I have considered the application herein, the response thereto and the rival written submissions by the parties. As I have already noted, the applicants substantively seek rectification of the Certificate of Confirmation of grant which was issued by this court in relation to the names of the resultant land parcels, the mode of distribution of Land Parcel Wang'uru PT B146 and further that the Executive Officer/Deputy Registrar of this Court to be authorized to sign all documents to facilitate the distribution of the deceased's estate on behalf of the respondent herein who is the administrator.

### **C. Analysis of the law and determination**

7. Rectification of grants and powers of a court to rectify a grant is provided for under section 74 of the Law of Succession Act, Cap 160, Laws of Kenya and Rule 43(1) of the Probate and Administration Rules. Under section 74, *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) on the other hand is to the effect that it's **the holder of a grant** who ought to approach court for rectification.

8. What comes out of Section 74 of the law of Succession Act is that the power of a court to order rectification of a grant is not general but only limited to where the errors which are sought to be rectified relates to names or descriptions, or setting out of the time or place of the deceased's death. {See **in the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR** and also **in re Estate of Kathuita Kavira (Deceased) [2019] eKLR**}. Further, from the reading of section 74, it is clear that the powers to order for rectification in relation to the above instances is only limited to the grant itself and cannot extend to rectification of certificate of confirmation of grant. Further under Rule 43 of the Probate and Administration Rules (which is relevant to rectification), an application for rectification of grant can only be sought by **the holder of the grant sought to be rectified**. (See **In re Estate of Oloo Omolo Lumasai (Deceased) [2020] eKLR**).

9. In the instant case however, I note that what the applicants seek to rectify is not a grant issued to the respondent herein but rather the certificate of confirmation of grant so as to rectify their names and the names of the land parcels forming part of the estate subject to distribution and further the manner of distribution of Wang'uru PT B146. As I have already held, certificate of confirmation of grant is not liable for rectification. The applicants herein ought to have made an application for review of the certificate of confirmation of grant under Order 45 of the Civil Procedure Rules which is one of the provisions of the Civil Procedure Rules imported into succession practice through Rule 63 of the Probate and Administration Rules. (See **In the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR**). **Further the applicants are not the administrators of the estate herein and thus are not the right parties to move this court.**

10. However, the applicants herein seek to rectify, amongst other things, the names of the land parcels as they appear on the certificate of confirmation of grant. I have perused the court records and I note that the green cards attached to the petition for letters of administration intestate in this cause are in relation to land parcels being "Ngariama/Lower Ngariama/1989 up to Ngariama/Lower Ngariama/1997. The certificate of confirmation of grant dated 30.01.2007 indicates the land parcels in the above names but, it appears that after the determination of the application dated 30/04/2019 filed by the respondent and seeking the rectification of the said grant to include "LR Wang'uru P.T.B 146", an amended certificate of confirmation of grant was issued on 19/12/2019. The same has the names of the land parcels indicated as "Ngarima" instead of "Ngariama". Further the Wang'uru Plot is indicated as "Wang'uru PTB 146" and which is different from the annexures to the application of 30.04.2019 (which indicates the same to be "PT B146").

11. Despite having already found that a certificate of confirmation of grant cannot be rectified under section 74 of the Act, I nonetheless appreciate that Rule 73 of the Probate and Administration Rules provides for the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Section 47 of the Law of Succession Act further bestows this court with jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. Further, this court has a duty to assist in administration of the estate of a deceased person and in doing so, it has the role of removing impediments which might prevent full administration of the estate and where such impediments are not detrimental to the rights of other beneficiaries.

12. In the instant case, despite the respondent's opposition to the rectification of the land reference names and praying that the status quo be maintained, she did not explain the prejudice which she is exposed to in the event that the said names are rectified. The names have all along been well spelt until when the amended certificate of confirmation of grant was issued and the names changed to "Ngarima" instead of "Ngariama" and the error affect even the respondent's share as well. Further it is clear that it's the respondent who earlier indicated the Wang'uru plot (in her earlier application) as "Wang'uru PTB 146 (where letters "PT" and "B" are together)" instead of "Wang'uru PT. B146" (where letters "PT" are spaced from letter "B" and letter "B" being together with numbers "146") and hence misguided this court.

13. I am alive to the strict verification procedures in the land offices all over Kenya and wherein registration of titles is always declined where there is a variance between either land reference number on a title document and the certificate of confirmation of grant and/or name(s) of a beneficiary(ies) as they appear on their national identity cards and the certificate of confirmation of grant and which has led to many estates being not administered and be distributed to the beneficiaries. As such, where such errors are brought to the attention of the court, the court ought to invoke its inherent powers and rectify such errors so long as they do not substantially alter the said certificate of

confirmation of grant so as to prejudice any party.

14. In my view, rectifying the land reference numbers to match what appears in the land records will not alter the mode of distribution and the share of each of the beneficiaries will remain intact. The same will facilitate the administration of the estate herein. In fact, it will make the respondent's work of administration easier. As such, I grant prayer 2 of the application.

15. As for the rectification of the names of the beneficiaries, I note that the said prayer was conceded by the respondent. As I have already stated, impediments to the administration of an estate ought to be removed by a court in furtherance of its duties in ensuring distribution of the estate so long as the said removal does not substantially alter the share of the estate or the mode of distribution. Rectification of the names of the applicants herein won't in any way alter the share of any of them or even the respondent but will ease the transmission of the estate and the same ought to be allowed.

16. I have carefully perused the application herein, the supporting affidavit thereto and the court records in general and I note that in the "amended certificate of confirmation of grant", the 2<sup>nd</sup> applicant's names are indicated as "Mikielina Wambui Kamara". In the application herein, it is prayed (prayer 3) that the certificate of confirmation of grant be rectified for the names of the beneficiaries "to read as demonstrated herein below". The 2<sup>nd</sup> respondent's name is indicated to read "Mikielina Wambui Kamara instead of "Michelina Wambui Kamara". Further amongst the names which the applicants seek to have amended on the certificate of confirmation of grant are "Pharis Murimi" instead of 'Pharis Murimi Kamara", "Grady Wakuthii" instead of "Gladys Wakuthii Kamara", "Symon Ndambiri" instead of "Symon Ndambiri Kamara" and "Eunice Wambura" instead of "Eunice Wambura Gachoki".

17. These proposed new names are the ones which appear on both the certificate of confirmation of grant and the amended certificate of confirmation of grant both issued by this court. As such, it is not clear what the applicants seek to have rectified to that extent. Court orders ought not to be ambiguous and unenforceable. In my view, prayer 3 (a)- 3(e) is frivolous and vexatious and the same ought to be disallowed. However, it is clear that the names proposed to be rectified in prayer 3(f) to 3(i) are indeed different from what is indicated in the certificate of confirmation of grant and the amended certificate of confirmation of grant. Such rectifications ought to be allowed so as to enable smooth and faster administration of the estate herein.

18. As for the rectification of the certificate of confirmation of the grant to the extent that LR Wang'uru PT B146 to allow the beneficiaries to sell the same and share the proceeds equally as opposed to sharing the same equally amongst themselves, the applicants averred that the said plot is too small to be sub-divided equally between the beneficiaries and further it would be uneconomical to sub-divide the same equally. They deposed that the same is 50 by 100ft. The respondent on her part deposed that the grant ought to be implemented as it was confirmed by the court and that she was not consulted by the applicants herein.

19. I note that all the beneficiaries other than the respondent are in support of the said proposal. Further the size of the said plot is not disputed. The only reason the respondent is opposed to the proposed rectification as to the mode of distribution of the plot is because one Karonzo is owed by the estate for the developments he made on the said plot. Taking into account the size of the plot in issue and comparing the same with the number of beneficiaries, I agree with the applicants that the sub-division of the same into 8 pieces will be uneconomical and not productive at all. In my view, the most prudent thing is to dispose the said plot and have the proceeds shared equally amongst all the 8 beneficiaries.

20. In my understanding, when the court ordered that the plot be shared equally by all beneficiaries, that did not strictly mean that the plot ought to be physically shared amongst the beneficiaries. The disposal of the same and sharing of the proceeds as amongst the beneficiaries equally is also a way of sharing the plot equally. As such, it is my view that the order by Muchemi, J. as to the mode of distribution of the said plot was proper and does not necessarily need review. Prayer 4 of the application is allowed.

21. As for the prayer that the Executive Officer/Deputy Registrar do sign all the documents on behalf of the respondent, the applicants deposed that the respondent herein is uncooperative and has refused to sign transmission forms and thus the beneficiaries have been unable to benefit from the estate. The respondent on her part deposed that she has executed the duties conferred to her by the law.

22. The duties of personal representatives are fiduciary in nature and Section 83 of the Law of Succession Act provides that the same includes the duty to **(subject to Section 55) to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be {section 83 (f)}; within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration; {Section 83 (g)}; and to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration {Section 83 (i)}.**

23. I note that the grant was initially confirmed in the year 2007 and that one of the beneficiaries had to get court orders so as to have her share transferred to her. As such, it is clear that the respondent herein has failed in the administration of the estate. There is no explanation as to why she has not yet transmitted the various land parcels to the beneficiaries herein despite the deceased having sub-divided the land into various land parcels. Even after having the Wanguru Plot included in the certificate of confirmation of grant herein, she has not yet administered the estate herein ten months later. As such, it cannot be said that she has complied with the legal requirements in regards to her duties as an administrator of the estate herein. The beneficiaries are therefore caught up in an unenviable position; the person responsible for distributing the estate is herself pursuing a challenge to the determined distribution, which challenge seems adverse to the beneficiaries' present interests.

24. This state of affairs is not healthy and should not be countenanced by the court. The applicants prayed that the Executive Officer/Deputy Registrar do sign all the documents on behalf of the respondent. In Rose Wanjiku Kuria -vs- Nganga Mugwe [2003] eKLR and which decision I agree with, the court held that by virtue of **Section 79 of the Law of Succession Act**, the administrator gets all the property of the

deceased vested in him/her and the court further stated that *the Court's Registrar or his deputy or any other officer of the court not having been granted Probate or letters of administration and therefore having had no property of the deceased vest in him and no powers and duties in accordance with provisions of the Law of succession Act, cannot become an executor or administrator and as such cannot administer the estate of the deceased person and the court to order him or authorize him to administer by signing any of those documents as requested in this summons, is to make an order which is not supportable under the Law of Succession Act.*

25. However, this court being a succession court has ample powers donated to it by Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to resort to, in order to meet the ends of justice. The task of administering the estate is still on the shoulders of the respondent (administrator). As I have already noted, despite the grant having been confirmed in the year 2007 and even after the subsequent amendment by Muchemi J (which included the Wang'uru Plot in the certificate), the respondent has nonetheless failed to administer the estate. I believe that court orders ought not to be issued in vain but must be complied with. Further, the office of administrator of estate of a deceased person is an office which is built on the foundation of trust and goodwill. Where such is seen to be lacking, then the court ought to invoke its powers to ensure that justice is done to the beneficiaries more so where the administrator puts the beneficiaries in an unenviable position.

26. In the instant case, the administrator having failed to distribute the estate and without any valid reason, the Deputy Registrar of this court ought to be ordered to sign all the relevant documents to effect the transfer of the properties to the beneficiaries. As such I allow prayer 5 of the application.

27. This being a succession cause and which involves family members, each of the parties ought to bear their own costs.

28. Orders accordingly.

**Delivered, dated and signed at Embu this 10<sup>th</sup> day of February, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for Applicants

.....for Respondents