



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE NO. 456 OF 1995**

**IN THE MATTER OF THE ESTATE OF NYAMORINGO OKINYI (DECEASED)**

**EVANS NYAMORINGO OKINYI.....APPLICANT**

**VERSUS**

**JOEL MOSE NYAMORINGO .....1<sup>ST</sup>RESPONDENT**

**JOHN OKARI NYAMORINGO .....2<sup>ND</sup>RESPONDENT**

**RULING**

1. The applicant, Evans Nyamoringo Okinyi, filed Summons dated 28<sup>th</sup> June 2019 pursuant to **Section 74 and 47** of the **Laws of Succession Act** and **Rules 49 and 73** of the **Probate and Administration Rules** seeking orders that:

1) Spent

2) *This Honourable court be pleased to declare that the subdivision of L.R. Nyaribari Chache/B/B/Boburia/1450 into L.R. Nyaribari Chache/B/B/Boburia/9635,9636,9637, 9638 and L.R. Nyaribari Chache/B/B/Boburia/3377 into L.R. Nyaribari Chache/B/B/Boburia/9639,9640 and 9641 were illegal, null and void;*

3) *Upon granting prayer 2 above, this Honourable court do issue an order revoking all the resultant subdivisions being **L.R. Nyaribari Chache/B/B/Boburia/9635,9636,9637,9638** and **L.R. Nyaribari Chache/B/B/Boburia/9639,9640 &9641** to revert back to original parcels **L.R. Nyaribari Chache/B/B/Boburia/1450 & 3377** respectively in the name of the deceased for proper subdivision;*

4) *An order do issue to the county land surveyor to carry out proper subdivisions in the presence of all parties herein and to amend the area map accordingly;*

5) *That the certificate of confirmation of grant dated 30/5/2001 be rectified to include **L.R. Nyaribari Chache/B/B/Boburia/3377** to be distributed in equal shares to the beneficiaries;*

6) *Costs of this application be borne by the respondents.*

2. The applicant swore an affidavit in support of his application claiming that the respondents had secretly subdivided parcel no. Nyaribari Chache/B/B/Boburia/1450 into various portions on the basis of a mutation which was unsigned and bore an identity card number that did not belong to him. He also claimed that the respondents had created a road of access that passed through his homestead which had created tension with immediate neighbours demanding to use the road by force.

3. Regarding L.R. Nyaribari Chache/B/B/Boburia/3377, the applicant claimed that the parcel of land was not distributed by the court but had been subdivided by the Respondents into various parcels of land. He averred that there were no beacons on the ground to distinguish each beneficiary's portion from the other and the Respondents were carrying out developments haphazardly.

4. The 1<sup>st</sup> respondent swore an affidavit in response to the application on 19<sup>th</sup> August 2019. He averred that when they filed the succession cause, they had only listed L.R. Nyaribari Chache/B/B/Boburia/3377 as part of the estate and that L.R. Nyaribari Chache/B/B/Boburia/ 1450 was included after the applicant raised an objection. The 1<sup>st</sup> respondent claimed that all beneficiaries had appeared before an advocate and signed a transfer by transmission together. Upon execution of the necessary documents, they approached the land survey office through the office of the chief and the District Commissioner who issued summons for them to attend the survey and demarcation of the estate.

5. The 1<sup>st</sup> respondent contended that the grant having been confirmed and the estate distributed, this court lacked jurisdiction to entertain the matter and the issues raised by the applicant ought to be determined by the Environment and Land Court. The applicant was described as litigious person who had been inciting people to challenge the grant despite being an administrator. The court was thus urged to dismiss the application with costs.

6. The application was canvassed by way of written submissions which I have duly considered.

7. The applicant's contention is that he was not involved in the subdivision of the estate as a co-administrator. He argued that in the Certificate of Confirmation of Grant, it was indicated that each beneficiary was to get 0.71 Ha. of L.R. Nyaribari Chache/B/B/Boburia/ 1450. Contrarily, the land was subdivided into parcels no. 9635, 9636, 9637 and 9638 and a road in contravention of the Certificate of Confirmation of Grant and without his involvement. Additionally, the mutation forms were not signed and the applicant's national identification number was not captured correctly.

8. In support of her submissions that the subdivision of the land should not stand, the applicant's counsel relied on the case of the ***Estate of Njoroge Kamuru (deceased) [eKLR]2018*** where the court had held;

*“Back to the question on whether the subdivision should be upheld, I am of the opinion that it should not be upheld as the beneficiaries went ahead and divided the land without one of the administrator's authority. The names on the title are also not as per the certificate of confirmation of grant ...”*

9. Counsel abandoned the issue of the subdivision of Parcel No. 3377 as the respondent had annexed a copy of the Certificate of Confirmation of Grant which included the parcel of land.

10. The respondents on the other hand submitted that the applicant had ignored summons issued by the county surveyor to attend the demarcation exercise on three occasions as he was not contented with the manner in which the grant had been confirmed. It was argued that the applicant had colluded with one Teresa Mwangi to challenge the grant which application was dismissed on 4<sup>th</sup> April 2011. He then registered a caution claiming beneficial interest and proceeded to file the instant application. The respondents stated that they were contented with the mode of distribution as it was in line with the manner in which they were settled on the ground where each party occupied an equal share. The respondents were not opposed to prayer 5 of the application being granted, if there was an error on the confirmed grant. Otherwise, they urged, the estate had already been carried out and there remained nothing capable of being addressed by the court.

#### **ANALYSIS AND DETERMINATION**

11. On considering the application, the parties' affidavits and the submissions, I find that the issues arising for determination are twofold. The first is whether the subdivision of L.R. Nyaribari Chache / B / B / Boburia / 1450 and L.R. Nyaribari Chache/B/B/Boburia/3377 should be revoked for being illegal and the second is whether the Certificate of Confirmation of Grant dated 30<sup>th</sup> May 2001 should be rectified to include L.R. Nyaribari Chache / B / B / Boburia / 3377.

12. It is common ground that the estate of the deceased consisted of L.R. Nyaribari Chache / B / B / Boburia / 1450 and L.R. Nyaribari Chache/B/B/Boburia/3377 and the parties herein namely, Joel Mose Nyamoringo, Evans Nyamoringo Okinyi and John Okari Nyamoringo are the legitimate beneficiaries of the deceased's estate.

13. The applicant and the respondent have attached to their affidavits two contrasting Certificates of Confirmation of Grant. In the copy annexed to the applicant's affidavit (which is the copy I have found on record) the court ordered the distribution of L.R. Nyaribari Chache / B / B / Boburia / 1450 into equal portions of 0.71 Ha to the beneficiaries. The copy of the Certificate of Grant attached to the respondents' affidavit contains both L.R. Nyaribari Chache / B / B / Boburia / 1450 and L.R. Nyaribari Chache / B / B / Boburia / 3377 and similarly subdivides both parcels of land to the beneficiaries into equal portions of 0.71 Ha.

14. The applicant has attached a copy of a green card which shows that the acreage of L.R. Nyaribari Chache / B / B / Boburia / 3377 is 2.14 Ha. He has also annexed a copy of the mutation form for the subdivision of L.R. Nyaribari Chache / B / B / Boburia / 1450 which indicates that the land measures 0.736 Ha. It is evident that the copies of the Certificate of Confirmation of Grant produced by both the applicant and the respondents are erroneous as they depict incorrect measurements for the subject parcels of land.

15. On 30<sup>th</sup> May 2001, this court, differently constituted, confirmed the grant in the estate of the deceased in the following terms:

*“Court: The Grant is confirmed as sought in the names of Joel Mose Nyamoringo and Evans Nyamoringo Okinyi.*

*The administrators shall give full accounts of the completed administration within 6 months from today.”*

16. The above orders were made pursuant to an application for confirmation of grant dated 18<sup>th</sup> September 2000 which had been made by the 1<sup>st</sup> respondent for subdivision of L.R. Nyaribari Chache / B / B / Boburia / 3377 into equal portions of 0.71 Ha to the three beneficiaries herein. The applicant then filed an affidavit contesting the application for confirmation of grant for *inter alia* the failure to include L.R. Nyaribari Chache / B / B / Boburia / 1450 as part of the deceased's estate. The application for confirmation of grant came up for hearing on 30<sup>th</sup> May 2001 when the court made the orders I have reproduced above.

17. There is no indication that the administrators gave a full account of the completed administration as directed by the court. However, the applicant and the respondents are in agreement that the deceased's estate which comprised of L.R. Nyaribari Chache / B / B / Boburia / 3377 and L.R. Nyaribari Chache / B / B / Boburia / 1450 should have been distributed equally among them; which is the correct position in

law.

18. The applicant claims that L.R. Nyaribari Chache / B / B / Boburia / 3377 was subdivided into L.R. Nyaribari Chache / B / B / Boburia / 9639, 9640 and 9641. He has annexed copies of certificates of official search for those subdivisions, which show that Parcel 3377 was subdivided into equal portions of 0.713 Ha and the beneficiaries registered as owners of their respective portions of the land.

19. He has also annexed a copy of mutation form for L.R. Nyaribari Chache / B / B / Boburia / 1450 which shows that the land was subdivided into parcel 9635 measuring 0.10 Ha, parcel 9636 measuring 0.14 Ha, parcel 9637 measuring 0.24 Ha, parcel 9638 measuring 0.24 Ha and a road measuring 0.06 Ha. The applicant has attached copies of certificates of official search which show that he is the registered proprietor of parcel 9635 and parcel 9636. He has also demonstrated that the 1<sup>st</sup> respondent is the owner of parcel 9637 and the 2<sup>nd</sup> respondent is the owner of parcel 9638. Each beneficiary has acquired 0.24 Ha of the original parcel 1450.

20. **Section 38** of the **Law of Succession Act** provides that where an intestate has left surviving children but no spouse, the net intestate estate is to be divided equally among the surviving children. The documents presented by the applicant demonstrate that the deceased's estate has been subdivided equally among the beneficiaries as provided by the law. The various concerns raised by the applicant contesting the manner in which the estate was subdivided including; the failure to sign mutation forms; the indication of an incorrect National Identity number in the mutation form; the failure to place beacons and disputes arising from the creation of an access road are not issues within the purview of this court.

21. I concur with the finding by Musyoka J. in *Estate of Reuben Mugesani Bulimu (Deceased) Succession Cause No. 847 of 2013 [2020]Eklr* that issues arising from transmission of the deceased's estate fall outside the jurisdiction of the probate court. The learned Judge held:

*7. After a grant is confirmed, and a certificate of confirmation of grant issued, the process that follows is known as transmission, of the property from the name of the deceased to that of the beneficiaries named in the certificate of confirmation of grant. That would involve, where the property has to be shared amongst many persons, the subdivision of the property, before the resultant subtitles are registered in the names of the beneficiaries. Transmission is not provided for under the Law of Succession Act, nor under the Probate and Administration Rules. It has nothing to do with the probate court, and it is carried out at the lands registry. It is, therefore, a process under land legislation. The principal legislation is the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Registration Act and the Land Act carry complementary provisions on transmission of property upon the death of an owner after the grant has been confirmed.*

22. I therefore decline to grant prayers **2,3 and 4** of the application dated **28<sup>th</sup> June 2019**.

23. The second issue is whether the Certificate of Confirmation of Grant dated 30<sup>th</sup> May 2001 should be rectified to include L.R. Nyaribari Chache / B / B / Boburia / 3377. Rectification of grants is provided for under **Section 74** of the **Law of Succession Act** and **Rule 43 (1)** the **Probate and Administration Rules** which stipulate:

*“74. 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.”*

*“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 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.”*

24. As already observed, the parties produced two conflicting copies of Certificates of Grant both of which have inaccurate measurements of the shares of the estate to be bequeathed by the beneficiaries. This error can be corrected without affecting the substance of the grant or upsetting the distribution of the estate which has already taken place. For purposes of setting the record straight, the Certificate of Confirmation of Grant dated 30<sup>th</sup> May 2001 is hereby rectified to read as follows

NAME	DESCRIPTION OF PROPERTY	SHARE OF HEIRS
Joel Mose Nyamoringo	L.R. Nyaribari Chache / B / B / Boburia / 3377	Equal share
Evans Nyamoringo Okinyi		Equal share
John Okari Nyamoringo		Equal share
Joel Mose Nyamoringo	L.R. Nyaribari Chache/B/B/Boburia/1450	Equal share
Evans Nyamoringo Okinyi		Equal share
John Okari Nyamoringo		Equal share

25. As this is a family matter, there shall be no order as to costs.

**Dated, signed and delivered** at KISII this **4<sup>th</sup>** day of **March 2021**.

**R.E.OUGO**

**JUDGE**

**In the presence of:**

**Mr. Nyambati      For the Respondent**

**M/S Sagwa        For the Applicant**