



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 364 OF 1998**

**IN THE MATTER OF THE ESTATE OF OO – ‘DECEASED’**

**AND**

**IN THE MATTER OF**

**SGOO.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**HON.....2<sup>ND</sup> RESPONDENT**

**MKO..... 3<sup>RD</sup> RESPONDENT**

**VERSUS**

**ZOO..... OBJECTOR/APPLICANT**

**RULING**

**1.** The applicant filed Summons for amendment and rectification of grant dated 19<sup>th</sup> June 2019 seeking the following orders:

- a. THAT this Honorable Court be pleased to revoke, amend and/or rectify the grant of letters of administration confirmed on the 31<sup>st</sup> March, 2009.
- b. THAT this Honorable Court be pleased to grant an order for cancellation and rectification of the register in respect of all subdivisions out of LR. No. SOUTH MUGIRANGO/NYATAARO/xxx & xxx being LR. Nos. SOUTH MUGIRANGO/NYATAARO/ xxxx, xxxx & xxxx by restoring the original numbers in the names of the deceased herein, as the legally registered owner, in respect of the subject land pending the determination of this application and re-confirmation of the grant for equal distribution of the estate.
- c. THAT this court be pleased to amend and rectify the confirmed grant as per the attached affidavit on the mode of distribution.
- d. THAT this Honorable Court be pleased to make such other and/or further Orders as may be just and expedient in the circumstances.
- e. THAT cost of this Application be paid out of the Estate of the Deceased.

**2.** The applicant swore an affidavit in support of his application on 19<sup>th</sup> June 2019. He deposed that when the petitioner applied to amend the grant, he omitted other beneficiaries including him and one of the daughters of the deceased who was not married. Consequently, the confirmed grant dated 31<sup>st</sup> March 2009 was erroneous and had to be amended to accommodate all beneficiaries. The court was thus urged to adopt the following mode of distribution:

- a. LR. No. South Mugirango/ Nyataaro/xxx
  - i. SOO - 0.563 Ha.
  - ii. ZOO - 0.563 Ha.
  - iii. HNO - 0.563 Ha.

- iv. MKO - 0.2 Ha.
- v. WMO - 0.34 Ha.
- vi. MOO - 0.34 Ha.
- vii. GOO – 0.34 Ha.
- viii. JOO – 0.34 Ha.
- ix. JRO – 0.34 Ha.
- x. RTO – 1.89 Ha.

b. LR. No. South Mugirango/ Nyataaro/xxx

- i. SOO - 0.3 Ha.
- ii. ZOO - 0.3 Ha.
- iii. HNO - 0.3 Ha.
- iv. MKO - 0.12 Ha.
- v. WMO- 0.20 Ha.
- vi. MOO - 0.20 Ha.
- vii. GOO- 0.20 Ha.
- viii. JOO - 0.20 Ha.
- ix. JRO- 0.20 Ha.

3. The 1<sup>st</sup> respondent, SGOO, responded to the application vide an affidavit sworn on 20<sup>th</sup> September 2019. He insisted that due process was followed in obtaining title deeds for the respondents. He deposed that the portion for their sister, PKO had been donated by each brother when they realized that she was unmarried due to her mental condition.

4. He further averred that the applicant had ample time to seek a change of the mode of distribution when his parents gave him his portion during their life time and his application was therefore malicious and an afterthought. The 1<sup>st</sup> respondent also stated that the applicant had enjoyed the use of his land without any interference from his brothers since 1986 and that other than the applicant all the beneficiaries of the estate were content.

5. The 1<sup>st</sup> respondent made his own proposition for distribution of the estate if the court was inclined to allow the application. He proposed that estate be subdivided as follows:

a. LR. No. South Mugirango/ Nyataaro/xxx, xxxx, xxxx and xxxx

- i. SGOO - 0.563 Ha.
- ii. ZOO - 0.563 Ha.
- iii. HNO - 0.563 Ha.
- iv. MKO - 0.20 Ha.
- v. WMO - 0.34 Ha.
- vi. MOO - 0.34 Ha.
- vii. GOO - 0.34 Ha.
- viii. JRO - 0.34 Ha.

ix. JOO - 0.34 Ha.

x. RTO- 1.89 Ha.

b. LR. No. South Mugirango/ Nyataaro/xxx

i. SOO - 0.3 Ha.

ii. ZOO - 0.3 Ha.

iii. HNO - 0.3 Ha.

iv. MKO - 0.20 Ha.

v. WMO - 0.20 Ha.

vi. MOO- 0.20 Ha.

vii. G O O - 0.20 Ha.

viii. JRO - 0.20 Ha.

ix. JOO - 0.20 Ha.

6. The 2<sup>nd</sup> respondent, HON, also swore an affidavit in opposition to the application on 19<sup>th</sup> September 2019 on his behalf and on behalf of his sister, the 3<sup>rd</sup> respondent. He averred that each beneficiary of the estate had been given his or her share of the estate and the matter finalized. According to him, the manner in which the sub-divisions had been done was in accordance with the way their late father had shared his two parcels of land before he passed away and no beneficiary had been left out as alleged by the applicant. He also accused the applicant of failing to give a portion of land to their mentally ill sister for her utilization.

7. On 13<sup>th</sup> October 2020, the applicant filed the following proposed mode of distribution after attempts had been made to settle the matter out of court:

a. LR. No. South Mugirango/ Nyataaro/xxx

i. ZOO- 0.32 Ha.

ii. HNO - 0.86 Ha.

iii. MKO - 0.20 Ha.

iv. SGOO - 0.61 Ha.

b. LR. No. South Mugirango/ Nyataaro/xxx

i. ZOO - 0.52 Ha.

ii. MKO *alias* P- 0.20 Ha.

iii. SGOO - 0.26 Ha.

8. The 2<sup>nd</sup> respondent swore a further affidavit on 13<sup>th</sup> November 2020 opposing the above mode of distribution on the basis that it disadvantaged him and his sister who was mentally ill. He averred that the administrator had given him a rocky area of land where he could not cultivate, while the deceased had distributed the land in such a way that they shared the rocky area and the fertile area. He suggested that the 1<sup>st</sup> house's portion of estate of the deceased be distributed as per a sketch he had attached to his affidavit.

9. The parties filed submissions in support of their respective modes of distribution which I have duly considered.

10. The deceased, OO, died intestate on 7<sup>th</sup> March 1998. The 1<sup>st</sup> respondent and ABO, the deceased's widow petitioned and were issued with grant of letters of administration which was later confirmed on 6<sup>th</sup> June 2006. The confirmed grant distributed the deceased's property being LR. No. South Mugirango/ Nyataaro/xxx measuring 5.67 Ha. and LR. No. South Mugirango/ Nyataaro/xxx measuring 2.02 Ha. among the deceased's three houses.

11. On 25<sup>th</sup> August 2008, the 2<sup>nd</sup> respondent filed an application seeking to rectify the confirmed grant with respect to the share of the 1<sup>st</sup>

house. That application was compromised by consent and a confirmed grant issued on 31<sup>st</sup> March 2009 in the following terms:

a. LR. No. South Mugirango/ Nyataaro/xxx

i. SOO - 0.86 Ha.

ii. HNO - 0.86 Ha.

iii. PKO - 0.15 Ha.

b. LR. No. South Mugirango/ Nyataaro/xxx

i. ZOO - 0.86 Ha.

ii. PKO - 0.16 Ha.

12. The applicant filed the instant application seeking a redistribution of the entire estate among all beneficiaries but narrowed down his application to the distribution of the deceased's estate among the 4 members of the 1<sup>st</sup> house as the members of the 2<sup>nd</sup> and 3<sup>rd</sup> houses were content with their portions.

13. Counsel for the applicant urged the court to adopt the mode of distribution proposed by the applicant on 13<sup>th</sup> October 2020 which he claimed had been agreed on after negotiations by the 4 contesting beneficiaries. He argued that the proposition took into account the interests of all beneficiaries, particularly those of the 2<sup>nd</sup> respondent who did not wish to benefit from Parcel No. xxx.

14. The applicant and the 1<sup>st</sup> respondent who was also in support of the mode of distribution dated 13<sup>th</sup> October 2020 were perturbed by the 2<sup>nd</sup> respondent's affidavit in protest to the proposal since his views had been taken into account during the negotiations leading up to the proposal.

15. For his part, counsel for the 2<sup>nd</sup> respondent contended that Parcel No. xxx should be shared horizontally with the 2<sup>nd</sup> respondent getting his full share from that parcel of land as he was not getting any share from Parcel No. xxx. He submitted that the main issue the 2<sup>nd</sup> respondent had with the proposal by the applicant, was the distribution of the land horizontally as opposed to vertically which was how elders had distributed the land initially.

16. The applicant sought to invoke this court's discretion to revoke the grant under **Section 76** of the **Succession Act** which provides as follows:

*76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*

*(a) that the proceedings to obtain the grant were defective in substance;*

*(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*

*(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

*(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*

*(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*

*(ii) to proceed diligently with the administration of the estate; or*

*(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*

*(e) that the grant has become useless and inoperative through subsequent circumstances.*

17. He also sought to rectify the grant which is provided for under **Section 74** of the **Law of Succession Act** thus:

*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.*

18. Having analysed the application, I find that no reasons have been advanced to warrant the revocation or rectification of the grant as provided for under Sections 76 and 74 above. The application focuses on the parties' preferred physical location of their shares of the deceased's estate on the ground.

19. The applicant has not demonstrated that the confirmed grant dated 31<sup>st</sup> March 2009 was unlawful nor has he given a satisfactory reason for why it should be rectified more than a decade after it was issued. The parties who are members of the 1<sup>st</sup> house were all catered for in the confirmed grant dated 31<sup>st</sup> March 2009.

20. Any claim based on a parties view of its nature and extent of entitlement to the estate, and specifically any claim over what particular portion or size of land a party is entitled to in distribution are matters to be dealt with at the confirmation stage. This cannot be a matter under the perview of S 76 of the **Law of Succession Act** and neither under **Section 74**.

21. In the case of in *Estate of Reuben Mugesani Bulimu (Deceased) Succession Cause No. 847 of 2013 [2020] eKLR* Musyoka J. 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 concur with the foregoing authority that the transmission of the deceased property following the confirmation of grant is not within the scope of this court's mandate. The application dated 19<sup>th</sup> June 2019 has no merit and is hereby dismissed.

23. Since this is a family matter, each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF APRIL, 2021.**

**A. K. NDUNG'U**

**JUDGE**