



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO 20 OF 2016**

**IN THE MATTER OF THE ESTATE OF GEORGE ASHFORD MUTHAMA MWENDA (DECEASED)**

**RULING**

1. This ruling disposes of two summons, dated 3<sup>rd</sup> September 2019 and 29<sup>th</sup> June 2020. In the summons dated 3<sup>rd</sup> September 2019, the first application, **Arthur Muongi Muthama** sought the removal of **Esther Wambui Gichungu** as co-administrator, while the other summons dated 29<sup>th</sup> June 2020, the second application, **Esther Wambui Gichungu** sought rectification of the certificate of confirmation dated 25<sup>th</sup> September 2018 on the mode of distribution of the estate.

**The first Application**

2. The first application was filed by **Arthur Muongi Muthama**, the 1<sup>st</sup> administrator. The reasons for the summons were contained in both the grounds on the face of the summons and the supporting affidavit of the applicant. The applicant and the respondent were appointed administrators of the deceased's estate on 14<sup>th</sup> October 2016 through a grant of representation intestate. They thereafter filed summons for confirmation of grant and the grant was subsequently confirmed on 25<sup>th</sup> September 2018.

3. The applicant stated that since confirmation of the grant, **Esther Wambui Gichungu**, the respondent in that application, had been evasive and had willfully failed to co-operate with him to distribute the estate.

4. In the supporting affidavit, he deposed that they are both son and daughter of the deceased respectively; that after the grant was issued to them, **Esther Wambui Gichungu**, the 2<sup>nd</sup> administratrix resorted to all manner of excuses, delays and eventually refused to join the summons for confirmation of grant, a fact that was stated in the affidavit filed on 2<sup>nd</sup> July 2018. She however later agreed to take part in the matter after a meeting with the advocates previously acting for the estate and consented to the mode of distribution.

5. The applicant stated that since the grant was confirmed, they had virtually been unable to make any progress due to the conduct of the 2<sup>nd</sup> administratrix who had been evasive and refused to communicate with him with a view to distributing the estate. He accused her of withholding original title documents for parcel Nos. **Ngong/Ngong 26276** and **26277**, the allotment letter for plot No 794 and share certificate for a share in Gema Holdings Ltd.

6. In this respect the applicant deposed, the respondent had been an impediment to the finalization of administration of the deceased's estate and should be removed. He stated that according to the family agreement which was the basis of the confirmation of grant, plot No 794 was to be sold and the proceeds distributed among the beneficiaries as provided for in the certificate of confirmation. He further stated that there were three potential purchasers for the plot but each time there was no progress after the respondent refused to produce the original letter of allotment without which a transfer could not be effected. This had frustrated the distribution of the estate.

7. **Esther Wambui Gichungu** opposed the application through a replying affidavit sworn and filed on 29<sup>th</sup> June 2020. She deposed that the applicant had kept her in the dark even at the time he applied for confirmation of grant; that counsel called and informed her about the summons and that was how she agreed to sign the documents and the process moved on.

8. On the applicant's claim that she had held on to the original title documents, she denied the claim and stated that the applicant had never called her or requested for the documents. She deposed that she had been willing to make the documents available for the process to move on. She further stated that she had been collecting rent from Plot No 794 which was being shared among the beneficiaries, paying for rates and rent and other family expenses. The applicant had however declined to receive his share saying the money was little. She contended that the applicant could not be trusted and he wanted to remove her for his own selfish reasons.

**The second application**

9. In the second application dated 29<sup>th</sup> June 2020, **Esther Wambui Gichungu**, the applicant, sought to have the certificate of confirmation dated 25<sup>th</sup> September 2018 reviewed or amended. The grounds upon which the summons was based were that there was an error in the schedule of distribution with regard to beneficiaries' shares over Plot No 794.

10. She stated that beneficiaries have now agreed to have the property developed instead of being sold; that some beneficiaries, namely; **Morgan Mukuria, Melody Nkirote Nteere and Bobnic Kanubi Nteere** were not involved in the confirmation of grant and did not sign the consent on the mode of distribution. She deposed that beneficiaries have agreed on the specific shares for purposes of amending or reviewing the certificate of confirmation.

11. The summons was also supported by her affidavit sworn on the same day 29<sup>th</sup> June 2020. She more or less reiterated her grounds on the face of the motion. She added that during the deceased's lifetime, **Arthur Muongi Muthama** and **Daniel Nganga** were given their shares in the land in Ngong. She stated that whereas **Daniel Nganga** got his share and sold it, **Arthur Muongi Muthama** declined but his wife requested the deceased to sell the land and give her the proceeds.

12. According to the applicant, during a family meeting, **Arthur Muongi Muthama** indicated that he was to get 50% of the proceeds from the sale of Plot No 794 since he had not got any property in Ngong. It however later came to their knowledge that the deceased had called him for his share but he sent his wife for it. The applicant stated that beneficiaries had now agreed that they all get equal shares on Plot No 794. That is; the plot be developed and rental income be shared equally.

13. **Arthur Muongi Muthama**, the respondent in the second application, filed a replying affidavit sworn on 19<sup>th</sup> October 2020. He admitted that the grant had been confirmed but reiterated that distribution of the estate had not been finalized due to the applicant's evasiveness; that the applicant was being dishonest to the court; that indeed the family had met and agreed that Plot No 794 be sold and the applicant was present in that meeting. He stated that although some of beneficiaries named by the applicant did not sign the consent, that did not mean they were not involved in the process since they were fully aware; got shares and, in any case, they had not complained themselves.

14. He denied the claim that deceased gave him land. He also stated that he was not aware of the contents of the affidavit by **Waiguru Kariuki** to the effect that he had been given land through his wife. He contended that he was to get 50% of the proceeds from sale plot no 794 because he did not get any share from the land in Ngong, while other beneficiaries, including the applicant, did. He was of the view that the application was unmerited and should be dismissed.

15. During the hearing of the two summons, Mr. Nairi moved the first application and urged the court to allow it. He submitted, relying on the affidavit in support, that the estate had not been distributed due to the evasiveness of the respondent who is in custody of the original documents relating to the properties; that she had not indicated to the applicant any difficulties she was in regarding distribution of the estate and that she was in breach of her obligation as a co- administrator. He submitted that the applicant's hands are tied when it came to distribution of the deceased's estate.

16. Regarding the second application, summons for rectification of the certificate of confirmation, counsel submitted relying on replying affidavit, that the process towards the confirmation of grant was above board, and that all beneficiaries were aware and consented to the mode of distribution. He submitted that beneficiaries were before court and could not now claim that they did not understand or know what they were signing; and that no protest was raised prior to the confirmation. Furthermore, none of the persons is complaining.

17. Counsel maintained that there was no error in the certificate of confirmation to be rectified. He argued that although **Esther Wambui Gichungu** stated in her affidavit that the plot should be developed, the **Arthur Muongi Muthama** had not received communication regarding its development and, even then, the respondent would have no problem with developing of the property as long as he got 50% of the rental income.

18. Counsel maintained that the deceased died intestate and there was no evidence that **Arthur Muongi Muthama** got a share on the Ngong property; that the estate was distributed on the basis of its value and that none of the beneficiaries was left out in the distribution. He urged that the summons be dismissed.

19. Miss Wanjiku, counsel for the **Esther Wambui Gichungu**, the respondent co-administratrix, submitted also replying on the replying affidavit by her client, that **Esther Wambui Gichungu** was not aware of any request from **Arthur Muongi Muthama** towards distribution of the estate; that she did not have original documents since they got lost and that she had published advertisement over the loss and was waiting for the Land Registry in Ngong to reopen so that she could start the replacement process.

20. Counsel submitted that her client had executed transmission documents for the properties that had no issue and was ready to give the co-administrator copies of the originals once duplicates were issued. She urged that the summons be dismissed with costs.

21. Regarding the second application dated 29<sup>th</sup> June 2020, counsel submitted also replying on the supporting affidavit, that with regard to the mode of distribution on Plot No 794, beneficiaries had initially agreed that the property be sold and proceeds be distributed as contained in the impugned certificate of confirmation. They had however changed their minds and wanted the plot developed and rental income shared equally.

22. She argued that although some of the beneficiaries signed the consent on the mode of distribution, they did not know what they were signing. She also argued that some beneficiaries were left out as had been stated in the affidavit in support.

23. As to why the property should be developed, she argued that it was the deceased's wish to have the property developed. She argued that **Arthur Muongi Muthama** the co-administrator should not get 50% of the proceeds because he and **David Nganga** had been given land in Ngong and that was why **Arthur Muongi Muthama** did not get a share on the land in Ngong. She urged that the certificate of confirmation be rectified as sought in the summons dated 29<sup>th</sup> June 2020.

24. I have considered the two applications, the responses and submissions by counsel for the parties. I have also perused the record and the certificate of confirmation issued on 25<sup>th</sup> September 2018.

25. The first summons sought removal of the co-administrator so that **Arthur Muongi Muthama** remains the sole administrator of the deceased's estate. The reason advanced to support this summons was that the co-administrator had been evasive and non-co-operative for purposes of distribution of the estate. According to the **Arthur Muongi Muthama**, the co-administratrix, **Esther Wambui Gichungu** is in custody of original title documents for the properties and she had not made them available for purposes of distribution of the estate. He contended that this had made it difficult for the process of distribution of the estate to move forward.
26. **Esther Wambui Gichungu** on her part denied any blame. She argued that **Arthur Muongi Muthama**, the co-administrator had never called on her to produce the documents. She stated that some documents got lost; that she had advertised the loss and that she was waiting for the Ngong Land Registry to reopen so that she could have the process of replacement of the documents concluded. She even stated that she had executed transmission documents for the properties not in dispute.
27. I have carefully considered this summons and the order sought vis a vis the response thereto. What is clear to this court is that both parties are not playing their role as required of administrators. The applicant blames the respondent of evasiveness and lack of co-operation which the respondent denies. There is no indication when last the two administrators held a meeting for purposes of distributing the estate. In fact, the respondent argued, which was not denied, that the co administrator had not communicated to her in this aspect.
28. What emerges is that the two have not acted in the best interest of the beneficiaries to the estate. The grant was confirmed on 25<sup>th</sup> September 2018, but one year later to the time of filing the first application, and almost two years to the filing of the second application, they had not concluded the administration of the estate. From both the summons and the responses thereto, no good reason was advanced to justify the stalemate.
29. The law places obligations on the administrators. One of such obligations requires administrators of an estate to complete administration once the grant has been confirmed without delay. In that regard, section 83(g) of the Law of Succession Act states:
- Within six months from the date of confirmation of grant, or such longer period as the court may allow, to complete administration of the estate in respect of all matters other than continuing trusts, and produce to the court a full accurate account of the completed administration.***
- Failure to complete administration is a violation of the law and is a ground for revoking a grant of administration.
30. None of the administrators moved the court to extend the period within which to complete administration. They have continued to hold the estate at ransom and failed to give the beneficiaries their respective shares.
31. From the materials placed before this court, I am not persuaded that there is good reason to remove the name of **Esther Wambui Gichungu** as a co-administrator. The two have an obligation to act in the best interest of the estate and the beneficiaries of the estate and not pursue their personal goals. If they fail, the court would not hesitate to revoke the grant and appoint persons who will act as the law requires.
32. Turning to the second application, the summons for rectification of the certificate of confirmation of grant dated 25<sup>th</sup> September 2018, the sole reason advanced in its support was that the beneficiaries had now changed their minds and decided to develop Plot No. 794 instead of selling it. According to **Esther Wambui Gichungu**, the deceased's wish was that the property be developed. She also argued that **Arthur Muongi Muthama**, the co-administrator, should not get 50% of the proceeds of the sale but the rental income from the developed property should be shared equally. She further contended that some beneficiaries did not sign the consent on the mode of distribution and those who signed, did not know what they were signing.
33. **Arthur Muongi Muthama** opposed the summons arguing that he was not aware of such a resolution. He contended that all beneficiaries were aware of the process leading to the confirmation of the grant and that no one was left out. He argued that even those that did not sign the consent, they were aware and got a share of the estate. He refuted the claim by the co-administrator that he had been given a share during the deceased's lifetime.
34. I have anxiously considered the summons for rectification of the certificate of confirmation. I have perused the record relating to the confirmation of grant. There is no doubt that the grant was confirmed with the consent of all beneficiaries. **Esther Wambui Gichungu** also confirmed this in her affidavit in support of the second application. This fact was further supported by her advocate, Miss Wanjiku, in her submissions. What appears to have happened is change of heart which is normal, but is not a ground for rectifying the certificate of confirmation of grant properly issued by the court.
35. Furthermore, if there be desire to change the mode of distribution which was done by consent of all the beneficiaries, it must also be done by consent of all and not at the instance of one or a few beneficiaries.
36. I have perused the summons for confirmation of grant dated 20<sup>th</sup> September 2018, the affidavit in support and the consent on the mode of distribution of the same date. **Esther Wambui Gichungu**, the applicant herein, signed that consent. So did the other beneficiaries except Melody Nkirote Nteere, Bobnic Kiambi Nteere and Morgan Mukuria. These three were however given shares in the estate. And as **Arthur Muongi Muthama** correctly argued, they had not complained and did not complain when the present application was filed. There was no evidence that they had instructed **Esther Wambui Gichungu** to complain on their behalf either.
37. A further perusal of the record reveals that on 20<sup>th</sup> September 2018, during the hearing of summons for confirmation of grant, all beneficiaries were in court, including Bobnic Kiambi Nteere. The only people absent were Melody and Morgan. **Esther Wambui Gichungu** confirmed to the court that the signature on the consent was hers.
38. In that regard, **Esther Wambui Gichungu** was aware of the agreed mode of distribution and there was no basis in law for seeking to

rectify the certificate of confirmation, issued following a lawful process. I see no error on that certificate either. This applicant filed the summons as a way of responding to the action her co-administrator had taken seeking to remove her as a co-administratrix. Nothing more. The long and short of it is that there is no merit in this application.

39. Having considered the twin applications, responses and submissions, I find no merit in both of them. They are dismissed. Each party to bear own costs.

**DATED SIGNED AND DELIVERED AT KAJIADO THIS 9TH APRIL 2021.**

**E C MWITA**

**JUDGE**