



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 739B OF 2013

IN THE MATTER OF THE ESTATE OF MICHAEL MUNYENI MACHARIA (DECEASED)

FRANCIS KIHORI MUNYENI.....APPLICANT/ADMINISTRATOR

-VERSUS-

NAHASHON MACHARIA.....1ST RESPONDENT

GEORGE SAMBA OGUTU.....2ND RESPONDENT

RULING

1. This is a ruling on two applications which were consolidated. The first one is dated 8th January 2020 filed by Francis Kihori Munyeni one of the administrators referred to as the applicant while the application dated 10th February 2020 was filed by Nahashon Macharia and George Samba Ogutu who are purchasers of two parcels in the estate of the deceased and named as beneficiaries in the certificate of confirmation of grant.
2. The application dated 8th January 2020 is a summons for rectification of grant in which the applicant administrator seeks for substitution of beneficiaries/purchasers George Ogutu Samba and Nahashon Macharia in the grant with Isaac Jannah Ndiritu Githinji. He also seeks for orders that the 4th administrator, Paul Macharia Munyeni be ordered to sign transmission documents with regard to the sale and transfer of LR No. 10846/33 in Nanyuki.
3. In opposition to the said application, George Samba Ogutu and Nahashon Macharia referred herein as the respondents filed a replying affidavit on 7th February 2020
4. The application of the respondents dated 10th February 2020 seeks for orders that Nicholas Macharia Munyeni and Francis Kihori Munyeni be compelled to surrender the original Title Deed, Deed Plan and all the completion documents of Land Parcel Nos. L.R. No. 10846/32 and L.R. No. 10846/33 to the Land Registrar, Nyeri County to facilitate transmission of the said parcels to the respondents respectively. Further the respondents seek for orders that the Deputy Registrar be authorized to sign the necessary transmission documents in favour of the respondents shares in the grant.
5. In opposition to the said application, Nicholas Macharia Munyeni and Francis Kihori Munyeni both filed Replying Affidavits dated 4th March 2020 and Francis Kihori Munyeni filed a Supplementary Affidavit sworn on 4th March 2020.
6. Subsequently the 1st respondent filed a further affidavit sworn on 10th March 2020.

The Applicant's Case

7. In regard to the application dated 8th January 2020, it is the applicant's case that the grant of letters of administration intestate was issued on 7/1/2014 and confirmed on 10/7/2014.
8. The applicant's main contention is that George Ogutu Samba and Nahashon Macharia have been named in the schedule in the grant as purchasers of value for land parcel Nos. L.R. No. 10846/32 and L.R. No. 10846/33, have not completed payment in respect of the said parcels of land and consequently they ought to be substituted with one Isaac Jannah Ndiritu Githinji.
9. The applicant states that the administrators decided to sell and transfer Land Parcel No. L.R. Nos. 10846/32 and 10846/33 to one Isaac Jannah Ndiritu Githinji however, the 4th administrator, Paul Macharia Munyeni refused to sign the transfer without giving any reasons and as such they cannot proceed with the said transaction.

10. In that respect, the applicant seeks the court's indulgence to rectify the grant to reflect that Land Parcel Nos. 10846/32 and 10846/33 to be issued to Isaac Jannah Ndiritu Githinji.

The Respondents' Case

11. In regard to the application dated 8th January 2020, the respondents contend that the application is improper as the applicant Francis Kihori Macharia does not have the authority and/or consent of his co-administrators to make the instant application and neither has he deponed to have such authority.

12. The respondents state that they are the beneficiaries of Land Parcel Nos. L.R No. 10846/32 and 10846/33 as provided in the confirmed grant in the schedule of properties.

13. The respondents entered into sale agreements with the deceased on 23rd November 2011 and 11th November 2012 respectively, prior to his death. At the same time of drafting the sale agreements, the deceased had apportioned Land Parcel No. L.R No. 10846/R to his children out of which a sub division process was undertaken on the said piece of land. This exercise was to necessitate the selling of some of the portions of the land in the instances where some of the children had no intention of taking possession of their allocated shares of the land. The respondents add that they actively participated in the sub division process and made payments as well to facilitate the same.

14. The respondents contend that there are two sale agreements; one is dated 23rd November 2011 between Nicholas Munyeni and George Samba Ogutu (the 2nd respondent) in which George Samba Ogutu is to purchase 5 acres of L.R No. 10846/32 which portion was allotted to Nicholas Munyeni. The other sale agreement is dated 11th November 2012 between Francis Kihori Munyeni and Nahashon M. Macharia (the 1st respondent) in which Nahashon M. Macharia is to purchase 10 acres of L.R. No. 10846/33 allotted to Francis Kihori Munyeni. Both sale agreements have been executed by the aforementioned parties and the 4th administrator who is the duly constituted attorney of the deceased.

15. Before the properties could be transferred to the respondents, the deceased died hence necessitating the respondents' participation in the succession proceedings to secure their interests. Pursuant to the succession proceedings, the respondents were recognized as beneficiaries and named in the confirmed grant. The respondents asserted that though the applicants fully participated in the proceedings leading up to the issuance of the grant, they have failed to disclose the same in an attempt to mislead the Honourable court.

16. The respondents contend that they have each paid Kshs. 500,000/- respectively leaving a balance of Kshs. 2,000,000/- and Kshs. 3,825,000/- which was to be paid upon receipt of the signed transfer documents and the completion documents. As such, after making the deposit payments, the respondents state that they took immediate possession of the subject parcels and began developing the said parcels. The 1st respondent contends that he has spent over Kshs. 20,000,000/- undertaking various developments upon the subject parcel of land, which the applicant is aware of and has neither objected to the same nor tried to stop me from proceeding with the developments.

17. The respondents further add that they have never being issued with any notices to rescind the respective sale agreements hence they remain legally enforceable and should be adhered to.

18. Furthermore, the respondents state that the instant application for rectification is entirely incompetent, as it does not meet the conditions set out in Section 74 of the Law of Succession Act. Moreover, substitution of names does not fall under the category of rectification of grant asset set out in section 74 of the Law of Succession Act.

19. It is the respondents' case that the applicants want to breach the sale agreements as is evident by the fact that the 4th administrator, Paul Macharia Munyeni having refused to execute the transfer documents to a third party, Isaac Ndiritu. The applicants herein are attempting to redistribute the estate without the other 11 beneficiaries' consent.

20. The respondent contend that the applicants have not brought forth any evidence justifying the granting of orders herein and pray that the summons dated 8th January 2020 be dismissed with costs.

21. The applicant filed a Supplementary Affidavit which reiterates their supporting affidavit and adds that they are willing to pay back the monies paid to them by the respondents to avoid further hardship.

22. The applicants further add that it is not true that the 1st respondent has spent over Kshs. 20,000,000/- in developing the said suit property and further that by virtue of the respondent erecting a structure is not justification enough to allow them to trump on the applicant's rights.

23. The applicant further states that the respondents are attempting to steal from the applicants as they are not dependants of the deceased yet they seek to benefit at the expense of the beneficiaries.

The Respondents' Case in respect of application dated 10th February 2020

24. The respondents contend that though there was intended to be an agreement of sale between them and the applicants herein; the same was invalid for non adherence to the Law of Contract, the Stamp Duty Act and the Law of Society Conditions of Sale. Further, the said sale agreements have lapsed; they are in breach of the said laws and they were terminated by a letter done by Muthui Kimani Advocate. As such, the said sale agreements are void *ab initio*.

25. The respondents further aver that the applicants have not made any attempts to finalize the completion of the transactions. The grant was

made 6 years ago and the applicants have being missing in action.

26. The respondents further add that they filed an application for rectification because the applicants in respect of this application are not beneficiaries of the deceased and that the grant currently offends the respondents' proprietary interest as it creates a problem yet the property is not owned by the applicants.

27. The respondents aver that the applicants are stifling their application for rectification of grant and the same ought to be dismissed.

28. The applicants subsequently filed a Further Affidavit dated 10th March 2020 which reiterates their supporting affidavit and adds that the letter done by Muthui Kimani Advocate purporting to terminate the said sale agreements, was dated 13th August 2014 which is barely a month after the court herein issued a grant. Further, the respondents did not bring before this court the said letter during the proceedings leading to the issuance of the rectified grant dated 27th November 2018. It is the applicants' case that the said letters purporting to terminate the sale agreement indicated that the respondents were to refund the deposits on the respective purchase prices to which they have never done.

29. The applicants further aver that they are ready and willing to deposit the respective balances of the purchase price to the Honourable Court.

30. It is the applicants' case that the respondents herein have the intention to sell the two suit properties to the highest bidder as the said suit properties have substantively increased in value because of the improvements made by the applicants.

The Applicants' Case in respect of the application dated 10th February 2020

31. The applicants reiterate what they stated in their Replying Affidavits in respect of the application dated 8th January 2020 and add that despite having paid the deposit of the purchase price, the respondents in respect of this application have refused to avail the required documents to complete the transaction. As such they pray that this Honourable court compels the respondents to release the original Title Deeds of land parcel No.s L.R. No. 10846/32 and 10846/33, the respective deed plans to the Land Registrar of Nyeri County to facilitate the transfer of the said suit properties. Further that the Deputy Registrar be authorized to execute the two transfer documents to complete the transfer.

The applicants' submissions in respect of the application dated 8th January 2020 and that dated 10th February 2020.

32. The applicants submit that the sale agreements are void under Section 6 of the Land Control Act which envisages that where consent of the land control board has not been sought for the last 6 months after the sale agreement are rendered void unless the High Court under application grants special purposes for the same. Such an application has not been made from the year 2012 when the last payment was made. Further section 22 of the Act makes it a criminal offence for any party to attempt to do any acts in furtherance of the void transactions. As such, the applicants submit that the application envisaged by section 6 as read together with section 8 of the Land Control Act has not been made and the court cannot extend time under the Act.

33. The applicant further submit that the sale agreements are in further contravention of the Stamp Duty Act particularly section 6 which provides that where stamp duty has not being assessed and paid for an agreement, such an agreement becomes void for all purposes and cannot be enforced. Section 19 of the Act further provides that such an instrument shall not be used in evidence in any proceedings unless it is duly stamped. In saying so, the applicants rely on the cases of **Wamukota vs Donati 1987 KLR 280 at page 291, Kariuki vs Kariuki (1983) KLR 225 at page 227 and Simiyu vs Watambala (1988) KLR 882.**

34. In respect to the application dated 10th February 2020, the respondents in this case, submit that the application is an abuse of the court process, is bad in law and is intended to delay their application for rectification. The respondents reiterate what they swore in their affidavits as summarised above.

The respondents' submissions in respect of the application dated 8th January 2020 and that dated 10th February 2020

35. The respondents submit that there are no errors in the confirmed grant to warrant an application for rectification of grant. In saying so, they are guided by **Section 74 of the Law of Succession Act**, in the **Matter of the Estate of Hasalon Mwangi Kahero [2013] eKLR and Re Estate of Kwaria Marete (Deceased) [2018] eKLR** and further add that removal or replacement of a beneficiary does not fall under rectification of grant as per section 74 of the Law of Succession Act. The applicants ought to make an application for revocation of the grant.

36. On the application dated 10th February 2020, the applicants in this case, submit that the sale agreements dated 23rd November 2011 and 11th November 2012 are valid and enforceable. In saying so, they are guided by **Section 3(3) of the Law of Contract Act, the case of Alton Homes Limited & Another vs Davis Nathan Chelogoi & 2 Others [2018] eKLR** where the court was guided by the case of **Nelson Kivuvani vs Yuda Komora & Another, Nairobi HCCC No. 956 of 1991** which sets out the conditions to be made for a sale agreement to be valid. Looking to the subject sale agreements herein, the applicants submit that they are valid because they satisfy the conditions set out i.e. they are in writing, signed by the parties, the signatures have been attested by a witness and a Commissioner of Oaths, indicates all the names of the various parties and the parcel numbers and all the conditions and obligations under the sale are noted.

37. The applicants further contend that the respondents have breached the said sale agreements particularly clause 6 and 7 which provide for the availing of the completion documents by the vendor. The onus is now upon the administrators of the estate to provide the said documents to have the transaction completed. The applicants further add that since the administrators, having received monies from the applicants cannot rescind the sale agreements as they claim to have done so.

38. The applicants argue that in making their case to warrant the granting of their application, they have shown that there is a validly issued grant recognizing the applicants as the beneficial owners of their respective parcels of land; that they have made substantial payments towards the purchase prices for the respective parcels; they have developed the said parcels of land thus substantially increasing their value, being in actual possession of the same and lastly that the applicants are ready and willing to deposit the balance on the respective purchase prices. As such, there is nothing impeding the completion of the two transactions. Therefore, the applicants submit that the application dated 10th February 2020 ought to be allowed.

Issues for determination

39. After careful analysis, we humbly submit that the main issue for determination is:

- a) Whether the application dated 8th January 2020 is merited.
- b) Whether the application dated 10th February 2020 is merited

The Law

40. I will begin with the application dated 8th January 2020.

Rectification of grant is provided for in **Section 74 of the Law of Succession Act, Cap 160 Laws of Kenya and Rule 43(1) of the Probate & Administration Rules. Section 74** provides as follows:-

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.

41. **Rule 43(1)** provides:-

Where the holder of the 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 and 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.

42. Thus, rectification of grant of letters of administration is limited to matters set out in section 74 of the Law of Succession Act. These matters specifically refer to corrections of error which the court may order without changing the substance of the grant. These include errors in names, description of any person or thing or an error as to the time or place of death of the deceased or the purpose for which a limited grant was issued. An error which is envisaged under the section is a mistake which may occur on the face of the grant like typing errors in names of persons or things.

43. The issue of rectification of grant has been addressed in various decisions in the High Court which I have considered here as persuasive authorities.

44. Similarly in **In the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased) [2013] eKLR:-**

“The law on rectification or alteration of grants is Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules....What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out the time or place of the deceased's death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general....

45. The applicant seeks to have the grant rectified to substitute two of the beneficiaries, namely George Ogutu Samba and Nahashon Macharia with that of Isaac Jannah Ndiritu Githinji. Notably, the language of section 74 of the Law of Succession Act depicts that the scope of rectification is limited 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. Any substantial issues ought to be addressed through an application for review of the grant. Thus, adding a new beneficiary to replace the already stated beneficiaries which also affects the redistribution of the estate will greatly affect the substance and the content of the grant. Thus, an application for rectification cannot suffice to cater for such substantial changes. It is also worth noting that no consents by the other beneficiaries have been attached to the application for rectification.

46. It is also notable that the applicant herein seems to be walking this journey alone leaving out the other three administrators. He did not attach any authority or affidavit in support from any of the administrators.

47. For the above mentioned reasons the application dated 8th January 2020 lacks merit and it is hereby dismissed.

Whether the application dated 10th February 2020 is merited

48. The grant herein was confirmed on 10th July 2014 and subsequently after an application for rectification was made by the administrators. The confirmed grant was rectified and a rectified certificate of confirmation of grant was issued on 28th November 2018. This was in regard to mistakes of names of some beneficiaries and of reference numbers of the assets of the deceased.

49. Notably, the duties of personal representatives are fiduciary in nature and they have being laid out in **Section 83 of the Law of Succession Act**. Under **Section 83(f)** the administrator (s) of a deceased's estate has a duty to distribute the estate to the beneficiaries and **section 83(g)**, provides for administrators' duty to render the accounts. This was elaborated in the case of **Kerugoya Succession Cause No. 36 of 2013 Re Estate of Wilfred Munene Ngumi (Deceased) [2020] eKLR** where the learned Judge stated:-

“Section 83(g) of the Act mandates administrators of an estate to, within six months of the confirmation of grant or longer period as the court may allow, complete the administration of the estate, and to produce to the court a full and accurate account of the completed transaction. “

50. The four (4) administrators have failed to execute the grant from 28th November 2018 and without any reasons. It was not denied that the administrators searched for another purchase for value instead of honouring the grant to which they had all consented to. the administrator has now moved to court to have the names of two beneficiaries deleted and substituted with that of the new purchaser. The administrator justify his actions by claiming that the said sale agreements are void and they were terminated vide a letter drawn by Muthui Kariuki advocate.

51. It is the four(4) administrators together with the other beneficiaries who included the initial purchasers in the grant and gave them the respective parcels they had bought from the deceased during his lifetime. The two purchasers who are the applicants in this application dated 10th February 2020 also bought shares of some of the beneficiaries in this estate which was not disputed by the 2nd administrator. It is absurd for the same administrators to come to court two years after the grant was confirmed and claim that the agreements relied by the two purchasers are null and void.

52. The dispute of whether the respondents bought the land should not be dragged to this court being private contracts between the deceased and purchasers or between the purchasers and the beneficiaries. The grant confirmed on 10/07/2014 and rectified on 28/11/2018 is still valid and ought to be executed. There is no pending application for revocation of grant before this court. I have already said that the administrators cannot use Section 74 of the Act to take away shares of beneficiaries or even purchasers and give them to other people or even to themselves.

53. The two purchasers have deposed that they have paid the purchase prices leaving meagre balances which they are ready to deposit in court if directed to do so. They have explained that the reason for withholding the balance is a clause in the agreements that they will exchange the funds with the administrators with the duly executed transfers or transmission documents. This explains satisfactorily the reason for the unpaid balances. It is the administrators who are causing the stalemate by failing to execute the grant. The administrators have failed to perform their fiduciary duty in regard to the estate of the deceased.

54. Rule 73 of the probate and administration Rules empowers this court to make orders as may be necessary to meet the ends of justice or to prevent the abuse of the due process of the court.

55. It is my finding that the application dated 10th February 2020 is merited and it is hereby allowed in the following terms:-

- a) That the Deputy Registrar of this court is hereby authorized to execute all the necessary documents required to execute the grant in this cause
- b) That the Land Registrars do dispense with the production of the original title deeds for the land parcels in the grant if not surrendered by the administrators voluntarily to the relevant Land offices.
- c) That the respondents herein do deposit the balances of the purchase price in regard to LR. No. 10846/32 and LR 10846/33 in court within 30 days ending the execution of the grant.
- d) That upon execution of the grant the funds deposited in court shall be released to the administrators for their management/distribution in favour of the beneficiaries of the estate.
- e) That the application dated 8th January 2020 is hereby dismissed.
- f) That each party do meet their own costs.

56. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 10TH DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 10th day of JUNE 2021.