



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 67 OF 2016**

**IN THE MATTER OF THE ESTATE OF THE LATE MUGIRA NGARUNI (DECEASED)**

**NKANATA MUGIRA ..... ADMINISTRATOR/APPLICANT**

**RULING**

1. This cause is in respect of the estate of the deceased, the late Mugira Ngaruni, who died on 26<sup>th</sup> December 1998. The deceased was survived by two sons namely Nkanata Mugira (the Administrator herein) and Peter Murungi Mugira.
2. Before this court is the Administrator's summons application for rectification of grant dated 4<sup>th</sup> September 2020. The application seeks for orders THAT:
  - a. This Honourable Court be pleased to rectify and amend the grant of letters of Administration issued on 13<sup>th</sup> July 2020.
  - b. This Honourable Court be pleased to include parcel no. Mwimbi/Central Magutuni/847 in the distribution schedule.
  - c. The Estate of the deceased be distributed as per paragraph 4 of the Administrator's affidavit annexed thereto.
  - d. Costs of the application be provided for.
3. The application is supported by the affidavit sworn by Nkanata Nugira on 29/09/2020 in which he deposes that:
  - a. This court delivered judgment on 8<sup>th</sup> July 2020 which confirmed the grant issued to the Administrator on 9<sup>th</sup> January 2014.
  - b. Land Parcel number Mwimbi/Central Magutuni/847 was erroneously not included in the distribution schedule of the estate yet it belongs to the deceased.
  - c. The grant should be rectified as follows:
    - i. **L.R. No. Mwimbi/Central Magutuni/309**
      - a. Nkatana Mugira – Whole
    - ii. **L.R. No. Mwimbi/Central Magutuni/847**
      - a. Nkatana Mugira – Whole
4. On 2<sup>nd</sup> November 2020, this Court ordered the Applicant to avail evidence that land parcel number Mwimbi/Central Magutuni/847 belonged to the estate and an explanation as to why it was not included in the earlier application for confirmation of the grant.
5. The application is not opposed.

**Analysis**

6. This application is stated to be brought under **Section 74 Rule 43 of the Law of Succession Act (Cap 160)** and all other enabling provisions of the law. **Section 74 of the Law of Succession Act** provides as follows:

**“Errors in names and descriptions, or in setting fourth 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.”**

7. **Rule 43 of the Probate and Administration Rules** provide as follows:

**“(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.**

**(2) Unless at the time of issue of the summons the registrar otherwise directs there shall be filed with the summons an affidavit in Form 13 by the applicant containing such information as is necessary to enable the court to deal with the matter.**

**(3) The summons, together with the affidavit (if any), shall without delay be laid by the registrar before the court which may either grant the application without the attendance of any person or direct that it be set down for hearing on notice to the applicant and to such other persons (if any) as the court shall think fit”**

8. On 20<sup>th</sup> January 2021, the Administrator swore a supplementary affidavit sworn in support of the present application. Annexed to the said affidavit and marked “**NM 02**” is a copy of the official search of land parcel no. Mwimbi/Central Magutuni/847. It is evident from the aforementioned annexure that since 22.09.1977, the deceased, Mugira Ngaruni, had been the proprietor of the subject land which measures 0.33Ha.

9. According to prayer no. 3 of the present summons application, the Applicant seeks that the land be distributed as per the affidavit annexed thereto. I note that he inadvertently stated that the estate should be distributed as per paragraph 4 instead of paragraph 5 of the said affidavit. In my view, this error is merely technical and not substantive and therefore curable by invocation of Article 159(2)(d) of the Constitution which provides that in exercise of judicial authority, this court should be guided by the principle that justice should be administered without undue regard to procedural technicalities.

10. That notwithstanding, it is worth examining what errors can be rectified under Section 74 of the Act and Rule 43 of the Rules. In *In re estate of Charles Kibe Karanja (deceased) [2015] eKLR* Justice Musyoka stated as follows:

*“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules.....”*

*Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....”*

*New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7<sup>th</sup> November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”*

11. It follows that the issue of inclusion of a property that was inadvertently left out of the confirmation application is not a matter of rectification. It calls for overhaul of the grant to give an opportunity to consider all the assets of the deceased and distribution of the estate afresh to include the discovered assets. This can best be done in an application for review and not rectification which is very specific as to what the Court can rectify, that is to say “errors in names, description or in setting out the time and place of deceased’s death or the purpose of limited grant ...” as provided under **Section 74** of the **Law of Succession Act**.

12. I am of the view that the proper approach is to move the Court with an application for review to include the discovered property in the estate of the deceased and to include them in the distribution of the estate after the grant is reviewed and set aside. In the circumstances, I opine that the present application to rectify the grant is without merits and is dismissed.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 22ND DAY OF JULY 2021.**

**L.W. GITARI**

**JUDGE**