



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 564 OF 2006

IN THE MATTER OF THE ESTATE OF KING'ONG'O GACHUA (DECEASED)

JACOB MWANGI MUTURI.....APPLICANT

VERSUS

DAVID GACHAGUA KINGONG'O.....RESPONDENT

RULING

1. This application dated 26th November 2019 is brought under **Section 47 of the Law of Succession Act** and **Rule 73 of the Probate and Administration Rules** seeking for orders for rectification of names of beneficiaries and Land parcel numbers in the grant. The name JOB MWANGI MUTURI to read as JACOB MWANGI MUTURI; that of LUCIA GATHIGIA KING'ONG'O to read as LUCIAH GATHIGIA KING'ONG'O and the names of the applicant's ten children to be rectified as per their identity cards; property Nyeri/Waraza/13 to read Nyeri/Waraza/877 and Nyeri/Waraza/878 and that the said parcels of land be allocated to Lucia Gathigia King'ong'o and her children. The applicant also seeks to remove the names CHARLES GATERE MWENDA and AGNES WAIRIMU KING'ONG'O from the confirmed grant as they are deceased and to include Margaret Wanjiru King'ong'o who was erroneously left out of the grant.

2. In opposition to the said application, one of the beneficiaries, DAVID GACHAGUA KING'ONG'O filed a Replying Affidavit dated 17th December 2019.

The Applicant's Case

3. It is the applicant's case that Charles Gatere Mwenda and Agnes Wairimu King'ong'o passed away on 19/7/2012 and 19/8/2018 respectively. Further that the grant ought to be rectified in respect of Job Mwangi Muturi whose name was mistakenly captured as Jacob Mwangi Muturi.

4. The applicant contends that land parcel Nyeri/Waraza/13 was sub divided into Nyeri/Waraza/877 measuring 17.5 hectares and Nyeri/Waraza/878 measuring 4 hectares and the said changes ought to be reflected in the grant. The applicant further states that the said parcels ought to be allocated to her and her ten children and that such allocation shall not prejudice any person as the first house have their own land.

The Respondent's Case

5. The respondent contends that the application is bad in law frivolous and an abuse of the court process because the applicant seeks to rectify the grant which would amount to amending the will. Further that the properties Nyeri/Waraza/877 and Nyeri/Waraza/878 were not included in the said will and can only be dealt with intestate and that the applicant has failed to produce any evidence showing that parcel Nyeri/Waraza/877 and 878 were a sub division of Nyeri/Waraza/13.

6. The respondent states that his mother's name Agnes Wairimu King'ong'o cannot be removed from the grant without going through proper substitution.

7. The applicant subsequently filed a Supplementary Affidavit dated 19th December 2019 which reiterates his supporting affidavit and adds that the respondent has no claim as he has his own land Nyeri/Waraza/106. Further that the objector herein, Agnes Wairimu King'ong'o, one of the administrators, filed a Notice of Appeal dated 26/5/2014 but the same was abandoned as nothing was pursued.

8. The applicant further states that the deceased was unable to give the full names of his children and thus it is only fair that the said names be rectified for the will to take effect.

The Applicant's Submissions

9. The applicant submits that temporary letters of administration were issued to him, Charles Gatere Mwenda and Agnes Wairimu King'ong'o but the two administrators have passed away leaving the applicant as the sole administrator. The applicant further states that the death of his co-administrators does not affect the administration because there is an existing administrator. He relies on **Section 81 of the Law of Succession Act** and the cases of **In the Matter of the Estate of Hannah Njuki (Deceased) Nairobi High Court Succession Cause No. 463 of 1997**, **In the Matter of the Estate of Tuaruduu Marete High Court Succession Cause No. 82 of 1989 Meru** and **In the Matter of the Estate of Ndungura Kariuki (unreported) Nairobi Succession Cause No. 1086 of 1995**. He submits that only he as the surviving executor can proceed with the grant as he is not a beneficiary of the deceased estate and that no one letters of administration have been issued to replace the deceased executors.

10. The applicant contends that the sought rectifications as per the application are within the purview of Section 74 of the Law of Succession Act and as such they ought to be allowed

The Respondent's Submissions

11. The respondent reiterates what he stated in his Replying Affidavit and relies on **Section 81 of the Law of Succession Act** to submit that the co-administrators names cannot be removed without affording a substitution.

12. The respondent further submits that the applicant is not being candid with the court as Lucia Gathigia King'ong'o has passed away.

13. Further, being guided by **Section 74 of the Law of Succession Act**, the respondent submits that rectification on mis-description of property is allowed but not substitution of property. Hence land parcel Nyeri/Waraza/13 cannot be rectified to read Nyeri/Waraza/877 and 878. Further since the applicant has failed to produce any evidence showing that land parcel Nyeri/Waraza/877 and 878 are a sub division of Nyeri/Waraza/13. Thus, the two parcels of land can only be distributed through intestacy, as they are not included in the will as provided by **Section 34 of the Law of Succession Act**. The respondent thus prays that the application be dismissed with costs.

Issues for determination

14. After careful analysis, the main issue for determination is whether the application dated 26th November 2019 is merited and thus worth of the grant of the reliefs sought.

The Law

15. 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.

16. **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.

17. 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.

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

19. **In the matter of the Estate of Hasalon Mwangi Kahero [2013] eKLR**

"An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased's death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if say, a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word "error" too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43."

20. 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....

Where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the Law of Succession Act, the applicant ought to approach the court under order 44 of the Civil Procedure Rules. A review under Order 44 of the Civil Procedure Rules may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision-Order 44 of the Civil Procedure Rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant.”

21. The applicant seeks to have his name rectified from Job to Jacob. On keenly perusing the court record and the will dated 17th January 2006, the name Jacob Mwangi Muturi is reflected as one of the executors of the will and an administrator in the Summons for Confirmation of Grant dated 10th April 2008. In this regard, it is evident that the name Job was a typographical error and such rectification falls under errors that may be rectified under **Section 74 of the Law of Succession Act**. On the issue of rectification of the ten children’s names in the grant to read their names as indicated in their respective identity cards, I am of the view that it is in order to do such rectification to facilitate the implementation of the grant. To avoid further mistakes, the applicant shall provide copies of the identify cards of the said children before the rectified grant can issue.

22. Similarly, the applicant seeks to rectify the name of Lucia Gathigia King’ong’o to read Luciah Gathigia King’ong’o. The respondent on the other hand has disputed the said rectification on the basis that the said Lucia is deceased. Notably, the respondent has not availed to the court any proof of death of his Lucia. However, the applicant merely wants to correct the spelling of the name in the grant for purpose of implantation but not to interfere with the distribution of the will. I find no valid reason to oppose this prayer.

23. One of the beneficiaries, Margaret Wanjiru was left out of the grant. From the court record, the advocate on record for the applicant wrote to the Deputy Registrar on 9/3/2017 stating that they had omitted one beneficiary Margaret Wanjiru. Looking at the will and the summons for confirmation of grant dated 10th April 2008, it is evident that the beneficiary Margaret Wanjiru was left out. As such, I opine that this is an error that falls within the purview of **section 74 of the Act** and ought to be rectified accordingly.

24. Further, the applicant seeks to have land parcel Nyeri/Waraza/13 to be rectified to Nyeri/Waraza/877 and 878. He contends that the said parcels emanated from a sub division of Nyeri/Waraza/13. The applicant has annexed official searches which show that land parcel Nyeri/Waraza/13 was sub divided to land parcel Nyeri/Waraza 877 and 878. The said sub division was done and new titles issued on 11/5/2004. This is also clearly indicated in the official searches in respect of Nyeri/Waraza/877 and 878. It is therefore, not correct as argued by the respondent that the two subdivision parcels should be distributed under intestacy succession. the two parcels resulted from subdivision of L.R Nyeri/Warazo/13 which was distributed in the will of the deceased. That fact that the deceased cited the number of the mother title does not change his intention in the will.

25. The applicant contends that his co-administrators, Charles Gatere Mwenda and Agnes Wairimu King’ong’o are deceased and that their names ought to be removed from the confirmed grant. To support this claim, he attached death certificates in respect of the two. **Section 81 of the Law of Succession Act** is instructive in this. It provides as follows:-

Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him.

26. Pursuant to Section 81 of the Act, the provisions allow one administrator/executor of a will to proceed in executing the grant in order to have the property of the deceased distributed. It follows that the name of the deceased executor Charles Gatere Mwenda ought to be removed.

27. The removal of Agnes Wairimu King’ong’o, the respondents mother who is a beneficiary ought to be done by way of substitution. She is survived by her children who can be substituted as by the law established. I therefore decline to grant prayer(b) as far as it relates to Agnes Wairimu King’ong’o

28. I find that this application is merited and is hereby allowed in terms of prayers (a) (c) (d) (e) (f) of the application. Prayer (b) is allowed only to the extent of the removal of the name of the late Charles Gatere Mwenda.

29. Each party to meet their own costs.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 14TH DAY OF OCTOBER, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 14th day of October 2021