



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 86 OF 2016

IN THE MATTER OF THE ESTATE OF NJAGI RURIMA (DECEASED)

JOSEPHINE MARIGU NJURURI.....1ST APPLICANT

JAMES NDWIGA IRERI.....2ND APPLICANT

VERSUS

JIM MUTURI NDOGO

LUCY WANJA NDOGO.....ADMINSTRATORS/RESPONDENTS

PATRICK NJUE NDOGO

R U L I N G

A. Introduction

1. This ruling pertains to two applications, one dated 13th August 2019 by the applicants that sought an order authorizing the Deputy Registrar to sign all the necessary documents to facilitate the transmission of the applicants' portion of Land Parcel Nos. Mbeti/Gachuriri/3620 to them. The second undated application by the respondents filed on 30/10/2019 seeks for rectification of grant by way of altering the grant by re-allocating the shares of the 1st applicant to her children. It also purports to take away the share of the 2nd applicant.
2. In the first application, the applicants state that all the parties had agreed that the aforementioned parcel be registered in their names but the respondents have refused to sign the relevant documents to facilitate the transfer by way of transmission in their capacities as the administrators of the deceased's estate.
3. In rejoinder the respondents filed a replying affidavit stating that there was need to rectify the grant that was issued on the 5th March 2019 and confirmed on the 2nd April 2019 before transmission is effected.
4. The respondents in the second application seeks for orders for rectification of the apportionment of the suit land herein to read as follows;

“Land Parcel Number Mbeti/Gachuriri/3620 to go to Josephine Marigu Njuriri and Justin Ndwigah Njangah to hold in trust for themselves and for the other children of Josephine Marigu Njururi namely;

- i. Silvester Nyaga Kiura*
- ii. Martin Murithi Gicuku*
- iii. Lawrence Munene Nyaga and*
- iv. Fredrick Mugendi Nyaga”*

5. It is the respondents' case that the name James Ndwiga Ireri was erroneously included in the Certificate of Confirmation of Grant based on the wrong information provided by the 1st applicant and that the same ought to be replaced by that of Justin Ndwigah Njangah.
6. The respondents' also state that the Certificate of Confirmation of Grant also states that Land Parcel Nos. Mbeti/Gachuriri/ 3620 should

go to the applicants equally however that should be rectified to read that the same *should “go to Josephine Marigu Njururi and Justin Ndwigah Njangah to hold in trust for themselves and for the other children of Josephine Marigu Njururi.”*

7. The 1st applicant opposes the application for rectification on the grounds that she had exchanged her ½ acre share in land parcel no. Ngandori/Kirigi/544 which she had inherited from her late father with the deceased herein and as such she should inherit Land Parcel Nos. Mbeti/Gachuriri/3620 wholly. She further states she cannot be compelled to hold the suit land in trust for her children as she will pass it on to them out of her own will.

8. The 1st applicant thus seeks that the Certificate of Confirmation of Grant be rectified to read that land parcel No. Mbeti/ Gachuriri/3620 should be given to her wholly.

9. The 2nd applicant did not oppose the application for rectification, rather he did not file a replying affidavit.

B. Analysis & Determination

10. The issues for determination are whether the certificate of grant issued on the 5th March 2019 and confirmed on the 2nd April 2019 should be rectified and whether the 1st applicant is entitled to the orders that the Deputy Registrar execute the transmission documents in respect of Mbeti/Gachuriri/3620 in her favour.

11. **Section 74 of the Law of Succession Act** provides for the errors on grants of representation that may be rectified by the court. It provides: -

“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”.

12. The procedure for seeking the relief is set out in Rule 43 (1), which echoes **Section 74 of the Law of Succession Act. Rule 34(1)** says: -

“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 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.....”

13. A close reading of these two provisions will show that the provisions of **Section 74 and Rule 43** are extremely restricted. They permit rectification of grants in three clearly defined cases: -

- a) *errors in names and descriptions of persons or things;*
- b) *errors as to time or place of death of the deceased;*
- c) *in cases of a limited grant, the purpose for which such limited is made;*

14. The power to rectify a grant is limited to these three situations or circumstances.

15. The respondents avers that the inclusion of the name of James Ndwiga Ireri in the grant instead of that of Justin Ndwigah Njangah was erroneous and that the error was caused by the 1st applicant in giving the 2nd applicant's name being a person who is not a beneficiary in the estate James Ndwiga Ireri. The respondents also seek rectification to the effect that the land LR. Mbeti/Gachuriri/3620 be held in trust by the 1st applicant and Justin Ndwigah Njangah on behalf of the children of the 1st applicant. This is vehemently opposed by the 1st applicant who asserts that the suit land ought to be registered wholly in her name.

16. 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**.

17. In this case it is not correct to state that the name Justin Ndwigah Njangah was omitted by error or mistake as the administrators knew the said Ndwiga and the names of all the children of the 1st applicant at the time the grant was confirmed. The omission of the property is a matter that does not fall under the purview of **Section 74 of the Law of Succession Act**. This is an attempt to re-distribute the estate of the deceased aimed at taking away the shares of the applicants.

18. There is no provision in the Act that permits rectification by adding a new beneficiary in the grant or to redistribute the estate.

19. Dealing with a similar issue in **Re Estate of Musa Matu Runga Nyeri Succession Cause no. 139/2013** Justice Mumbua T. Matheka relied on the persuasive authority of Hon Justice Musyoka **In re estate of Charles Kibe Karanja (Deceased) [2015] eKLR**, where he interpreted Section 74 of the Act by demonstrating the difference between grant of representation and certificate of confirmation of grant:

“It goes without saying that the provisions in Section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a grant of representation. In probate practice, the term “confirmed grant” has gained currency and it is understood by some to mean the certificate of confirmation of grant. It is a misconception. The certificate issued upon a grant being confirmed does alter the grant of representation... It does not replace the grant of representation...it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed... it is the evidence of the confirmation of the grant. From the wording of Section 74, it is plain that the same was not tailored to for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not. (emphasis mine)”

20. The honourable judge went on to state, and in the circumstances of the provisions of the law that: -

“If ...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 for 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.”

21. I wholly agree with the above decisions that the addition of new beneficiaries cannot be said to be rectification of an error as envisaged by Section 74 of the Act.

22. The other matter of concern is that both the 1st applicant and the respondents are at a disagreement on the manner in which the suit property herein was to be shared. On her part the 1st applicant asserts that the land LR. Mbeti/Gachuriri/3620 ought to pass to her wholly whereas the respondents are adamant that the same ought to be held in trust for the 1st applicant’s children. This is also another attempt by the 1st applicant to take for herself the share of the 2nd applicant. I note that there was no prayer made by the 1st applicant to this effect in her application.

23. The 1st applicant is an adult beneficiary who has already been bequeathed her rightful share in the deceased’s estate. It is not for the administrators to manage for the 1st applicant her share by redistributing it to her children who are not direct beneficiaries. The 1st applicant has no legal basis to take away the share of the 2nd applicant in her favour.

24. It is my considered view that the correct approach for the respondents and the 1st applicant would have been to apply for review of the grant. Such an application will of course be considered on its merits.

25. The upshot of the above is that I find the undated application and filed on 30/10/2019 lacking merit and I hereby dismiss it with no order as to costs.

26. As regards the 2nd application to have the Deputy Registrar execute all the documents on behalf of the respondents, I will make some observations.

27. Firstly, the grant in this case was confirmed on 2/04/2019. This application was filed on 13/08/2019 which was about four (4) months after the confirmation of grant. The 1st applicant states that the respondents have refused to execute the grant in her favour in respect of Mbeti/Gachuriri/3620. This means that the other beneficiaries have no problem.

28. The application for rectification of grant herein brought by the respondents confirm the applicant’s fears that the respondents have since the confirmation of the grant changed their minds on the 1st applicant and one James Ndwiga Ileri sharing the land LR. Mbeti/Gachuriri/3620 equally as per the certificate of grant.

29. I have already said that the attempt to micro-manage the share of one of the beneficiary against her will is not supported by the law and must not be entertained. In any case, the application that sought rectification to that effect has been dismissed herein.

30. Before the respondents filed the application for rectification, the 1st applicant was already aggrieved and had filed her application based on the grounds that the respondents had refused to execute the documents in her favour and that of the 2nd applicant. The grant having been confirmed almost one year back and the pending application for rectification having been disposed of herein, it is my considered view that the applicants ought to be given their shares according to the certificate of confirmation of grant.

31. I find the application dated 13/08/2019 merited and is hereby allowed by authorizing the Deputy Registrar to execute the transmission of documents on behalf of the respondents and in favour of the applicants in regard to LR. Mbeti/Gachuriri/3620.

32. Each party to meet their own costs of this application.

33. It is hereby ordered in regard to the two applications.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

1st applicant

1st & 2nd respondent