



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A. K. NDUNG'U

SUCCESSION CAUSE NO. 189 OF 2002

IN THE MATTER OF THE ESTATE OF MWANDAGANI ONGAKI (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR AMENDMENT OF THE GRANT OF REPRESENTATION ISSUED TO THE PETITIONER

ELIMELITA NYAKOBOKE MWARANIA.....PETITIONER/APPLICANT

RULING

1. By summons dated 24th June 2020, the applicant sought to be heard on an application for ORDERS that;

a. This honourable court be pleased to amend and/or rectify the Grant dated 4th April 2008 by deleting the words “L.R. No. Nyaribari Masaba/Bomobea/1387” and substituting thereof the words “L.R. No. Nyaribari Masaba/Bomobea/828”

b. Costs be in the cause.

2. The application is brought under Section 74 and 75 of the Law of Succession Act and Rules 49, 59 and 63 of the Probate & Administration Rules. It is supported by the grounds set out at the foot thereof and the affidavit of Elimelita Nyakobo Mwarania sworn on 24th June 2020.

3. The gist of the grounds and the affidavit on record is that after the confirmation of the grant, the applicant discovered that her description of the deceased's land parcel as L.R. No. Nyaribari Masaba/Bomobea/1387 was erroneous. She claims that she realized that the deceased's brother/ her brother-in-law fraudulently caused the title of the land to be co-registered in his name and that of the deceased. She averred that when he died, the deceased owned L.R. No. Nyaribari Masaba/Bomobea/828 and the grant ought to be amended to reflect that.

4. According to the petitioner's application for grant, the deceased died intestate on 27th December 2000 and was survived by the petitioner and three sons. The petitioner listed L.R. No. Nyaribari Masaba/Bomobea/1387 as the deceased's sole property in the affidavit in support of her petition for grant. The petitioner was issued with the grant on 17th June 2003 which was subsequently amended to rectify her name. The rectified grant dated 4th April 2008 was confirmed on the same day and a Certificate of Confirmation subdividing Land Parcel No. 1387 among the deceased's beneficiaries was issued.

5. The petitioner claims that the erroneous inclusion of L.R. No. Nyaribari Masaba/Bomobea/1387 in the grant was caused by the fraudulent acts of the deceased's brother Samwel Momanyi Ongaki. She attached an affidavit sworn on 7th May 2015 by Momanyi Ongaki who avers that he and the deceased were registered as co-owners of L.R. No. Nyaribari Masaba/Bomobea/828. Momanyi Ongaki states that Land Parcel No. 828 was later on subdivided into L.R. No. Nyaribari Masaba/Bomobea/1272 and 1273 without the consent of the deceased. He deposes that he was registered as co-owner of Land Parcel No. 828 by mistake and he has decided to permanently relinquish his interest in the land as he has his own parcel of ancestral land. He urged that the fraudulent subdivision of Land Parcel No. 828 be cancelled and the land be given to the petitioner.

6. The petitioner's application is for the rectification of the grant dated 4th April 2008 to delete the words L.R. No. Nyaribari Masaba/Bomobea/1387 and substitute the words with L.R. No. Nyaribari Masaba/Bomobea/828.

7. The rectification of grants is governed by **section 74** of the **Law of Succession Act** which reads as follows;

74. 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.

8. From the copy of green card annexed to the petitioner's supporting affidavit, the title to Land Parcel No. 828 was closed way back in September 1979 and new titles, to wit Land Parcel No. 1272 and 1273, issued. There is also on record a certificate of official search dated 8th July 2002 which shows that Land Parcel No. 1378 was excised from Land Parcel No. 1272 and was registered in the names of both the deceased and Momanyi Ongaki as at the time the certificate of official search was issued.

9. The deductions to be made from the foregoing facts are that; firstly the deceased was not the sole proprietor of Land Parcel No. 1378 at the time of his death as stated in the petition for grant. The certificate of official search dated 8th July 2002 shows that Land Parcel No. 1378 was jointly owned by the deceased and Momanyi Ongaki at the time of the deceased's demise. Secondly, Land Parcel No. 828 did not belong to the deceased at the time of his death.

10. A probate court is only concerned with the distribution of the deceased's free property which is defined under **section 3** of the **Law of Succession Act** thus;

“free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death”

11. The petitioner has not placed any proof before this court to demonstrate that Land Parcel No. 828 belonged to the deceased at the time of his death. This court has no jurisdiction to adjudicate over whether Land Parcel No. 828 was fraudulently acquired by the deceased's brother, Momanyi Ongaki, as claimed by the petitioner. Furthermore, the deceased's brother cannot purport to transfer property to the estate of the deceased or the petitioner through affidavit evidence before this court.

12. All things considered, I find that the application for rectification of grant brought through the summons dated 24th June 2020 is unmerited. It is hereby dismissed with no orders as to costs.

Dated and Delivered at Kisii this 14th day of October, 2020.

A. K. NDUNG'U

JUDGE