



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

SUCCESSION CAUSE NO.261 OF 2012

IN THE MATTER OF THE ESTATE OF BONARERI

NYAMIOBO alias CECELIA BONARERI MOTURI (DECEASED)

BETWEEN

CHARLES MOTURI NYAMIOBO.....APPLICANT

AND

PAUL MOKEBO NYAMIOBO.....RESPONDENT

RULING NO. 2

1. The applicant, **CHARLES MOTURI NYAMIOBO** (“Charles”) and the respondent, **PAUL MOKEBO NYAMIOBO** (“Paul”) are brother and the only sons of the deceased, **BONARERI NYAMIOBO alias CECELIA BONARERI MOTURI** (“Cecelia”). She was the owner of **MAJOGE/BOMBABA/7** (“Plot 7”). The grant of letters of administration issued in this matter was confirmed on 15th November 2013 and Plot 7 ordered to be held by Charles in trust for himself, Paul and their sister, Wilkister Kwamboka, who later renounced her claim.

2. In due course, Paul applied for revocation of the grant and after hearing the parties, I held that the issue that emerged was how to demarcate Plot 7 as the parties could not agree on how this should be done. By a ruling dated 13th June 2018, I made the following orders:

(1) The grant issued to Charles Moturi Nyamiobo and confirmed on 15th November 2013 is hereby revoked.

(2) A fresh grant shall now issue to Charles Moturi Nyamiobo and Paul Mokebo Nyamiobo.

(3) The grant is hereby confirmed on terms that both Charles Moturi Nyamiobo and Paul Mokebo Nyamiobo shall share MAJOGE/BOMBABA/7 equally.

(4) For the avoidance of doubt, the title issued to Charles Moturi Nyamiobo is hereby cancelled and shall be delivered to the County Land Registrar within the next fourteen (14) days.

(5) The County Land Registrar and County Surveyor (or their appointed subordinates) shall proceed to the said property; MAJOGE/BOMBABA/7 and demarcate the same in accordance with the grant taking into account the land occupied by each beneficiary.

(6) Either party be at liberty to apply.

(7) The costs of the survey and sub-division shall be borne equally by the beneficiaries.

3. What is before the court today is a summons for rectification dated 14th August 2018 seeking the following order:

[1] The Honourable Court be pleased to order that the confirmation of a grant of letters of administration issued to the applicant one CHARLES MOTURI NYAMIOBO on the 13th day of June, 2018 by the Judge of the High Court at KISII be rectified and the

applicant get 3.75 Acres and the said PAUL MOKEBI NYAMIBO to get 1.75 Acres respectively since part of Paul Mokebo Nyamiobo's portion measuring approximately 2.0 acres was sold through his consent and he used the money for his higher education.

4. I heard the testimony of both Charles and Paul and what emerged is that in 1966 or thereabout, Cecelia sold 2.0 acres before Plot 7 was registered. According to Charles, the land was sold by Cecelia and Paul to his detriment and to finance Paul's education. Charles disagreed he told the court that the 2 acres was sold by his mother to support their education. Both of them agreed that they were aged between 15 and 18 years at the time the property was sold.

5. As I understand the claim by Charles is that the 2.0 acres was an advancement or an inter vivos gift from the deceased for which Paul should be given credit when distributing Plot 7 so that he gets 3.75 acres while Paul gets 1.72 acres in the final distribution. I disagree and reject this contention.

6. First, Paul and Charles admit that they were children when Cecelia sold the two acres. They were incapable of consenting to such a sale or even selling the property. Second, the property belonged to Cecelia and during her lifetime she had a right to dispose of it as she deemed fit. As a mother, her obligation was to educate her children and none of the children should be penalised in the succession proceedings because their mother chose to educate one or other of the children at least in this case. I therefore do not consider the 2.0 acres an advancement of inter vivos gift.

7. The summons before me is one for rectification under **section 74** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the **LSA**") which provides that errors on grants of representation that may be rectified by the court in the following terms:

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. A close reading of these provisions will show that rectification of grants is provided in three clearly defined cases: *errors in names and descriptions of persons or things, errors as to time or place of death of the deceased and in cases of a limited grant, the purpose for which such limited is made.* It is clear that the applicant's case does not fall within the purview of rectification. Even if I were to consider the application one for revocation under **section 76** of the **LSA**, the applicant has not established the required grounds for this court to annul or revoke the grant.

9. For the reasons I have set out the summons for rectification dated 16th August 2018 is therefore dismissed but with no order as to costs.

DATED and DELIVERED at KISII this 12th day of February 2019.

D. S. MAJANJA

JUDGE

Mr Sagwe instructed by Sagwe and Company Advocates for the applicant.

Respondent in person.