



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
SUCCESSION CAUSE NO. 4 OF 2015
(FORMERLY MERU H.C SUCCESSION CAUSE NO. 132 OF 2014)
IN THE MATTER OF THE ESTATE OF JOSEPH NYAGA KARIMA (DECEASED)
AND
DORCAS KATHOMI GITONGA.....APPLICANT
VERSUS
ASHFORD NJERU KANAMPIU.....RESPONDENT
R U L I N G

1. This cause relates to the estate of the late **JOSEPH NYAGA KARIMA** (deceased) who died on 5th April 1980 at Kyeni Hospital resident at Meru South. The petition for letters of administration filed in this cause show that the deceased died and left the following dependants surviving him namely:-

- (i) Joseph Rugendo Njeru
- (ii) Elias Mwenda
- (iii) Dorothy Karimi Gitonga
- (iv) Grace Nyaruai Ngigi &
- (v) Jedidah Ciagitari Rwaria

2. The only asset listed as comprising the estate is that property known as Karingani/Mugirirwa/189. Njeru Kanampiu, was appointed the administrator of the estate of the deceased herein on 9th October, 2017 after the earlier grant issued to Joseph Rugendo Njeru was revoked by this court for non disclosure of material facts and for want of jurisdiction given that the grant had been issued in the lower court whose mandatory jurisdiction then was capped at Kshs.100,000/-

3. The administrator, Ashford Njeru Kanampiu vide Summons for Confirmation of Grant dated 12th April, 2018 applied for confirmation of grant and proposed to have the estate distributed as follows;

- (i) Elias Mwenda - 0.35 acres
- (ii) Joseph Rugendo Njeru - 0.35 acres
- (iii) Doreen Kathomi - 0.35 acres to hold in trust for Antony Mukundi Gitonga
- (iv) Ashford Njeru Kanampiu - 0.68 acres

4. The above proposal was adopted by this court when no one turned up in court on 12th June, 2018 when the grant was confirmed.

5. Dorcas Kathomi Gitonga, has now through summons for review dated 1st October, 2018 moved this court for the following orders:-

(i) That this court be pleased to review the certificate of Confirmation of Grant issued on 12th June, 2018 to correct the errors on the grant as follows:-

(a) The name of the administrator, Ashford Njeru Kanampiu be removed from the list of beneficiaries as he is not one of them.

(b) That the name Doreen Kathomi be corrected to read Dorcas Kathomi Gitonga.

(c) That the list of beneficiaries and their shares be corrected to read as follows:-

- (i) Elias Mwenda - 0.5 acres
- (ii) Edward Mutembei Mbaka - 0.5 acres
- (iii) Joseph Rugendo Njeru - 0.5 acres
- (iv) Dorcas Kathomi Gitonga - 0.5 acres to hold in trust for herself and Antony Mukundi Gitonga.

6. The grounds upon which the application has been brought is that the estate was meant to be shared only among the grandchildren of the deceased but Ashford Njeru Kanampiu is not a grandson but a son of the deceased. It is further alleged that the administrator did not obtain consent from other beneficiaries when seeking confirmation of grant.

7. In her Supporting Affidavit sworn on 3rd September, 2018, the applicant has deposed that the beneficiaries of the estate were only grandsons named after the deceased and that the administrator's own son Joseph Rugendo was to benefit as such. She has further deposed that the fact that the Respondent is the administrator *per se* does not make him a benefactor in the distribution of the estate of the deceased.

8. The applicant's learned counsel urged this court to review the grant in order to correct apparent errors on record. For starters, he contended that the name Dorcas was incorrectly reflected as Doreen and that the distribution left out 0.27 acres undistributed as the estate measures approximately 2 acres. He further contended that the administrator wrongly inserted his name as one of the beneficiaries when the estate was meant for grandsons named after the deceased and submitted that the administrator's son is a beneficiary and therefore no one would suffer prejudice.

9. The respondent save for correction of the name of Doreen to Dorcas, opposed to this application. He contended that the application does not meet the threshold under **Order 45 Rule 3(1)** of the **Civil Procedure Rules**. It is contended that there is no evidence tendered to show that there is a discovery of a new matter. In his Replying Affidavit sworn on 6th November, 2018 the respondent has deposed that the applicant declined to execute the consent when the was presented to them. According to him he occupies a larger portion of the estate and is entitled to it by virtue of being a son to the deceased.

10. Mr. Murithi, learned counsel for the respondent submitted that the respondent cannot be removed as a beneficiary without evidence be tabled through oral evidence and that it was improper to remove the administrator as a beneficiary through an application for review. According to him if the applicant was aggrieved with the distribution of the estate of the deceased herein, the best forum was to either appeal or apply for revocation of grant under **Section 76 of Law of Succession Act**.

11. Issues for Determination

The issues that arise in this application can be framed as follows:-

- (i) Whether the reliefs sought by the applicant are available via a review application.
- (ii) What is the correct mode of distribution.

12. It is quite clear from purposive construction of **Rule 63 Probate and Administration Rules** that the provisions of **Order 45 Civil Procedure Rule** do apply in succession proceedings. **Order 45 Rule 1 (a) Civil Procedure Rules** gives any person aggrieved by an order or decree from which no appeal has been preferred to apply for review upon ***“discovery of a new and important matter which after exercise of due diligence was not within his knowledge, or on account of some mistake or error apparent on the face of record, or for any sufficient reasons.....”***

The use of the conjunctive word **“or”** means that the existence of any of circumstances described under the rule suffices for an applicant to properly move a court for a review.

13. The above in my view is the correct position of the law and looking at the facts or grounds presented before me, it is quite clear that there are some errors which are conceded even by the by the respondent. The name of Dorcas was misdescribed as Doreen and so the same should be corrected to read Dorcas. There is also the fact that the proposed mode appeared to have inadvertently left out 0.27 acres and it appears the respondent did not mind benefitting from such inadvertence as he claims that he should be left to occupy a larger share of estate but that is not the point. An estate of a deceased should be distributed fully with each beneficiary getting a share of what they are entitled to.

14. The elephant in the room however is not the extra acreage left out undistributed in this cause. The main contest is whether Ashford Njeru Kanampiu, the administrator was supposed to benefit and if not whether the issue can be addressed via this review application. In the case of **PANCRAS T. SWAI –VS- KENYA BREWERIES LTD [2014] eKLR** the Court of Appeal sitting in Nairobi held as follows:-

“ A review can be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

Going by the above decision, this court does review the confirmed grant in order to rectify the name of Doreen to reflect the correct name that is Dorcas and to distribute the acreage of the estate left out during distribution.

15. To address the main application for determination, is that this court perhaps with the benefit of hindsight (in this cause same issues cropped up at some stage during the hearing of Summons for Revocation of Grant dated 19th November, 2013). This court is aware that the deceased in this cause had 3 sons namely; M’Ritha Kanampiu (deceased), Njeru Kanampiu (Administrator) and Mbaka Kanampiu. Evidence was led to effect that the deceased prior to his demise, the deceased had gifted his sons parcels of land and only remained with parcel No. Karingani/ Mugirirwa/189 which he categorically indicated that only his grandsons named after him would benefit. This is an issue that all the beneficiaries agreed upon including the Respondent herein because this court upon hearing the parties issued summons to him to come to court and shed some light which he did on 14th March, 2017 as per the proceedings in this cause.

16. The respondent has contended that the application cannot seek that remove him as beneficiary vide an application for review. It is his contention that the applicant should have sought for nullification of grant is well grounded procedurally. However I am minded to address my mind on the main issue before me without really giving too much weight on how it has landed on the table of justice and I believe that is the spirit of **Article 159(d)** of the **Constitution**. In this cause evidence have been tabled through another application and from that evidence this court is squarely on the picture about the main dispute. The respondent himself willingly came to this court and stated that he is one of the sons of the deceased and that;

“Joseph Rugendo Njeru is my son. The deceased left behind his parcel (Karingani/Mugirirwa/189) for the benefit of Njeru Rugendo, Gitonga Nduru, Mutembei Mbaka, and Mwenda (born out of wedlock).....our father gave us (sons) our parcels and left behind one parcel.”

That is what the respondent told this court and if that is the evidence that he wishes to table in the event that I was to order that the grant be revoked to enable this court determine who should benefit from distribution of the estate. Now the question is what will change the position of the respondent or better still this court given the evidence that was earlier tendered and which clearly show that the only grandsons named after the deceased were to benefit? There is absolutely no need to go back for hearing in order to reconsider the facts. The administrator concedes that his own son was to benefit by virtue of being a grandson of the deceased and in accordance to the wishes of the deceased. In any event the fact that the respondent like the rest of the sons having benefitted from gifts *inter vivos*, and going by the provisions of **Section 42 of Law of Succession Act**, none of them would get a share given the size of the estate and the sizes of the respective shares they got from the deceased.

17. In answer to the question as to whether the applicant can get the relief of removing the respondent from the list of beneficiaries in an application for review, this court given the circumstances of this cause would not hesitate to answer in the affirmative. In doing so I find useful guidance from the decision in the case of **Tokesi Mambili & Others –vs- Simion Litsanga** (Nairobi **Civil Appeal No, 90 of 2001**) where the Court of Appeal held as follows:-

“In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.” (Emphasis added).

18. The above decision in my view shows that the applicant is properly before me even without resorting to the oxygen rule under **Article 159(d)** which I have observed above really demands that we dispense justice without undue regard to technicalities. In my view looking at the nature of the objection mounted by the respondent, his opposition is substantially hinged on the question of technicalities. He contends that the applicant should either appeal or apply for revocation of grant and to do either of the above, the court will have to go back to the same question which is basically whether the respondent was entitled in the first place to get a share in the estate. As I have found above, by his own account, through a statement made on oath he indicated that he was not entitled. So what changed? The fact that he was appointed an administrator may have given him delusion that he should get something or even a larger share which obviously is not the case.

19. This court also finds that the applicant and other beneficiaries may not have been properly notified when the matter came up for confirmation hence the confirmation of grant as proposed by the respondent may have been due to some inadvertence. Having considered the evidence or undisputed facts in this cause it is clear that the respondent was not supposed to benefit from a share directly. His own son Rugendo Njeru was supposed to benefit and incidentally all the children of the deceased appear to be benefiting through their own children. So really no one can claim to be prejudiced in any way.

In the premises, this court finds merit in the application dated 1st October, 2018, the same is allowed. The certificate of grant is hereby rectified as per prayer C of the said application. I shall make no order as to costs because this is a family matter.

Dated, signed and delivered at Chuka this 5th day of February, 2019.

R. K. LIMO

JUDGE

5/2/2019

Ruling dated signed and delivered in the open court in presence of Murithi for Petitioner/Respondent and Kungu holding brief for Riungu for Applicant.

R.K. LIMO

JUDGE

5/2/2019