



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 323 OF 2013

IN THE MATTER OF THE ESTATE OF RAEL NGUI MUGAMBI (DCD)

EUNICE MUTHONI KARIUKI.....1ST APPLICANT

V E R S U S

TABITHA WAMBUI NYAGA.....1ST RESPONDENT

JOSEPH MUGAMBI MWAI.....2ND RESPONDENT

JUDGMENT

1. This matter relates to the estate of Rael Ngui Mugambi, deceased who died intestate on 12/08/2009. A Grant of Letters of Administration was issued to the Petitioner Tabitha Wambui Nyaga and Joseph Mugambi Mwai and confirmed on 24/2/2016. The estate the deceased comprised in Land Parcel No. Ngariama/Kabare/370 was distributed to Tabitha Wambui Nyaga and Joseph Mugambi Mwai in equal shares.

2. The petitioners filed application dated 15/1/18 seeking an order for rectification of grant so that land Parcel No. Ngariama/Kabare/370 is shared jointly by:

- Tabitha Wambui Nyaga
- Joseph Mugambi Mwai
- Eunice Muthoni Kariuki
- Wakuthii Mugambi

3. Before the application could be heard, a summons for revocation was filed by Eunice Muthoni Kariuki under **Section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 44 of the Probate & Administration Rules.**

The application is based on the following grounds:-

- 1. That the proceedings to obtain the grant herein were defective in substance.***
- 2. That the grant was obtained fraudulently by making of false statement by concealment from court something material to the case.***
- 3. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.***
- 4. That the persons to whom the grant was made has failed to proceed diligently with the administration of the estate.***
- 5. That the grant is inoperative.***

4. The applicant is a daughter-in-law of the deceased. The applicants depones that the respondents concealed from court that the deceased had other children. The applicants failed to inform her when they filed the succession cause.

5. That she is the daughter-in-law of the deceased having married the son Kariuki Yusuf Macharia who passed away and was never informed when the succession cause was being filed. That the deceased had caused the estate to be registered in the joint names of Rael Ngui Mugambi, Linus Nyaga, Patrick Njogu Kariuki, Reuben Nyaga, James Gachoki to hold in trust for her on 07/06/2004. Therefore upon her death, she lost proprietary interest. Annexure MKI copy of Land Register for Land Parcel No. Ngariama/Kabare/370.

6. She further depones that she has been in occupation of the land and has extensively developed it. That the grant be revoked as the said land parcel does not form part of the estate of the deceased. The application is not opposed as the respondents did not file any replying affidavit to the application.

7. The court gave directions that the two applications be heard together. The application dated 15/1/2018 seeks rectification of grant.

Section 74 of the Law of Succession Act 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.

Rule 43(1) of the Probate and Administration Rules provides:

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 the 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, he shall apply by summons.

8. Rectification is a remedy which is available to correct errors which will not affect the substance of the grant. It is meant to correct error in names and descriptions or in setting out the time and place of deceased's death or purpose of a limited grant. In a persuasive decision **In the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR**

The court stated;

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 of 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.

9. I am persuaded by the decision as it has given a proper interpretation of the section dealing with rectification of grant. Rectification is limited to matters set out under **Section 74 of the Law of Succession Act**. It does not give the court general power to rectify the grant. An application to include names not included in the original grant must be done under other relevant provisions.

10. The applicant seeks an order that the confirmed of grant be rectified to include Eunice Muthoni Kariuki and Wakuthii Mugambi who they had omitted. That the four dependants be jointly registered in equal shares and the register of **Ngariama/Kabare/370** be rectified to read as per the rectified certificate of confirmation of grant. However, this cannot be termed as an error under **Section 74 of the Law of Succession Act** and the applicant should have applied for review of the certificate of confirmation of grant. The rectification would affect the grant in substance which is not what is intended by an order of rectification of grant.

11. I find that the intended rectification is not within the ambit of **Section 74** and cannot therefore be allowed.

Revocation of grant:

Section 76 of the Law of Succession Act Cap 160 states;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a) that the proceedings to obtain the grant were defective in substance

b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

12. The applicant has raised the issue that land parcel No. Ngariama/Kabare/370 does not belong to the estate of the deceased as she had lost

her proprietary interest in the parcel of land by operation of the law. She has deponed that the deceased Rael Ngui Mugambi was registered jointly with Linus Nyaga Kariuki, Partick Njogu Kariuki, Reuben Nyaga, James Gachoki Kariuki to hold in trust for her. That Joseph Mwai and John Mugambi were allocated land during land demarcation and her late husband Kariuki Jusuf was the only one who was not allocated land as he was too young.

13. The petitioners had annexed a certificate of official search dated 11th September 2012. It shows that the land parcel No. Ngariama/Kabare/370 was registered as follows:-

Name and address of the proprietor:

- Rael Ngui Mugambi
- Linus Nyaga Kariuki
- Patrick Njogu Nyaga Joint
- Reuben Nyaga Kariuki
- James Gachoki

As trustees for themselves and Eunice Muthoni Kariuki.

14. This is also shown on the copy of Green card. It is therefore clear that the deceased was a registered as joint own. The question what is the effect of her death over the property.

15. Joint ownership of land guarantees survivorship which means that upon the death of any of the owners the surviving ones become legal owners. **Section 60 of the Land Registration Act which deals with transmission on death of joint proprietor** it is provided:

“If any of the joint tenants of any land, lease or charge dies, the Registrar shall upon proof of the death delete the name of the deceased tenant from the register by registering the death certificate.”

16. This means that upon the death of a joint tenant to land he/she cease to own land and the Registrar is supposed to delete the name from the register by registering the death certificate as proof of death. The deceased proprietor loses the proprietary interest of the land by the fact of death and by operation of the law. The property automatically passes to the surviving joint tenant. This is the principle of survivorship which operates to remove jointly owned property from the operation of the Law of Succession upon the death of one of the joint tenants.

17. The deceased Rael Ngui Mugambi was a joint tenant. She is no longer a joint proprietor. The land no longer belongs to her nor does it form part of her estate. The proceedings to obtain the grant were defective in substance as the land parcel No. Ngariama/Kabare/370 did not form part of the estate of the deceased. The land is registered under joint ownership does not devolve to other persons through succession but through the principle of survivorship.

18. The applicant has filed an application seeking to revoke the said grant on the basis that the proceedings were defective in substance and the grant was obtained by making false statement or concealment of something material to the case. That the persons to whom the grant was made has failed to proceed diligently with the administration.

19. The applicant in the application for revocation of grant has demonstrated that the deceased was registered jointly on the land with names of Linus Nyaga Kariuki, Patrick Njogu Nyaga, Reuben Nyaga, James Gachoki to hold in trust for themselves and the applicant Eunice Muthoni Kariuki. The applicant is therefore entitled to a share of the land. The petitioners did not oppose the application but in the application for rectification of grant they had sought to include her name stating that her name was not included. It has come to light that the petitioners had concealed from court something material to the case. They had also made untrue allegations that they were the only beneficiaries. These are sufficient grounds upon which the court can order the grant to be revoked. In view of the foregoing I find that the application for revocation of grant has merits.

In Conclusion:-

- 1. The application for revocation of grant is allowed.**
- 2. The grant issued by this court on 24/2/2016 shall be revoked.**
- 3. The application for rectification of grant is without merits and is dismissed.**
- 4. Each party to bear its own costs.**

Dated at Kerugoya this 22nd Day of July 2019.

L. W. GITARI

JUDGE