



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 559 "A" OF 2013

IN THE MATTER OF THE ESTATE OF M'MUTHURI M'RIUBA ALIAS MUTHURI RIUBA (DECEASED)

MOSES KIAUTHA M'MUTHURI.....PETITIONER

SAMWEL CHABARI.....PETITIONER

VERSUS

ISABELA KAJATHI M' MUTHURI.....PROTESTOR

AND

JANE IGOKI WARUTERE.....APPLICANT

RULING

1. The application dated 8th February 2019 seeks for two orders: (1) an inhibition on the suit premises that form the estate of the deceased; and (2) setting aside of the Court Orders dated 21st November 2018 and certificate of confirmation of grant dated 20th December 2018.

2. The application is supported by the affidavit of **Jane Igoki Warutere** and other grounds, inter alia; that (a) the applicant did not consent to the confirmation of the grant issued herein; (b) the applicant is not agreeable to the mode of distribution of the estate of the deceased contained in the consent dated 21st November 2018; (c) the applicant was not aware that this cause was coming up for hearing on 21st November 2018, when the grant of the letters of administration was confirmed. She only became aware of the confirmation of grant when **Isabella Kajathi M' Muthuri** informed her that they wanted to contribute money for the surveyors fees to cater for subdivision of the estate of the deceased.

3. The applicant argued further that the estate of the deceased was unfairly distributed as other beneficiaries of the estate got a larger share of the estate of the deceased than the applicant herein. The applicant herein was only given 0.5 acres of land parcel no. **Abothuguchi/Gaitu/1469** which land has a quarry whose stones were fully excavated by **Moses Kiatha M'Muthuri** one of the beneficiaries herein. As a result, the parcel of land allocated to the applicant cannot be put into any useful purpose.

4. The application was opposed by the petitioner herein **Moses Kiautha M'Muthuri** and the 1st Protestor, **Isabella Kajathi M'Muthuri** through affidavits dated 30th April 2019 & 28th May 2019 respectively. Moses Kiautha M' Muthuri averred that the allegation that he excavated stones in the applicants parcel is false since the same belongs to the applicant and her brother **Japheth Murerwa M' Muturi** and thus if any stones were excavated then they were excavated by either of the two. He stated that the share of the applicant is actually more than most of the share the other daughters are getting which is less than 0.5 acres. That on 21st November they involved all family members and all the houses including the 3rd House (to which the applicant belongs) in talks and what was agreed upon was a negotiated settlement.

5. **Isabella Kajathi M'Muthuri** averred that it is not true that the applicant was not aware that the cause was coming up for hearing on 21st November 2018. That the applicant has always been kept abreast of the progress of the case. The distribution of the estate of the deceased cannot be any fairer than has been adopted. They however took a surveyor to the ground who established that **L.r.Abothuguchi/Ruiga/904** exceeds the acreage of the land. The parcel measures 6.7 Acres.

Analysis and Determination

(i) Setting aside the consent and grant issued

6. Although the prayers herein are styled "Setting aside the consent and confirmation of grant", the application is essentially for revocation of grant under **Section 76 of the Law of Succession Act**. The section provides;

“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;

(d)

7. The deceased herein was polygamous during his lifetime and left behind two widows and 11 children. He also left behind the following properties i.e. **L.r. Abothuguchi/Ruiga/904, L.r. Abothuguchi/L-Kaongo/574, L.r. Abothuguchi/Gaiti/1329, L.r. Abothuguchi/Gaitu/791, L.r. Abothuguchi/Gaitu/1449, Kaguma Market Plot No. 4, Kaguma Market Plot 47B, Kaguma Market Plot 53 A, Plot No. 176 Majengo Mapya Kisauni Mombasa North, ½ acre Nkando Cofee Society.** The Property in Abothuguchi/Ruiga/904 has been marked as ancestral land whereas the other properties were purchased by the deceased during his lifetime.

8. The beneficiaries herein recorded a consent dated 21st November 2018 which was signed by seven (7) of the dependants of the estate, being a representation of the three (3) houses of the deceased.

9. The consent distributed the estate amongst the beneficiaries of the estate of the deceased. The consent was adopted by this honourable court and a certificate of Confirmation of grant issued on 20th December 2018.

10. A keen look at the proceedings reveals that the applicant herein was involved in these proceedings. She signed the initial consent for confirmation of grant dated 25th July 2014. She was therefore familiar and well aware of the happening in these proceedings.

11. **Part 4** of the consent adopted by this honourable court was to the effect that the share out of L.r. Abothuguchi/Gaitu/1469 due to Japheth Murerwa M’ Muthuri to be aligned to the area he has excavated quarry stones. This parcel has been divided equally between the applicant and Japheth Murerwa M’ Muthuri each being granted 0.50 acres. This part of the consent supports the petitioner’s averment that he did not excavate stones from the premises to be owned by the applicant. The consent was clear that Japheth’s share was to be aligned to the area he has excavated stones. The part that was excavated quarry stones belongs to and must be assigned to Japheth Murerwa M’ Muthuri and not the applicant. This must be the case on the ground and not otherwise. If the applicant has been assigned the part that was excavated, the anomaly should be rectified immediately by the surveyor. I therefore order the district surveyor to visit LR NO Abothuguchi/Gaitu/1469 and establish the layout of the said land. The report be filed in 45 days of today.

12. I do not however find any sufficient material to set aside the consent herein and I decline the invitation to that effect. More specifically, it was not demonstrated that the grant in this matter was obtained in a manner that rendered the grant defective in substance, or fraudulently by the making of a false statement, or concealed from the court something material to the case, or made an untrue allegation of a fact essential in point of fact to the case. I dismiss the application.

13. Although in passing the protestor stated that they will apply for rectification of grant because LR NO 904 is smaller than the shares indicated in the certificate of confirmation. To this I warn that such anomaly cannot be carried through in the simple and summary procedure for rectification of grant provided in section 74 of the Law of Succession Act. I have stated that such affects the whole distribution and the correct path to follow is to ask for a review and re-distribution of the estate again. On the sections and decisions below:

Rectification of the 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.

14. In **Re Estate of Kanyingi Gatwe (Deceased) [2018] eKLR** the Court held;

“The issue of discovery of assets which were not included in the grant is not a matter of amendment and distribution, it calls for an overhaul of the grant to give an opportunity to consider all the assets of the deceased and distribution of the estate afresh to include the discovered assets. This can best be done in an application for review and not rectification which is very specific as to what the Court can rectify, that is to say “errors in names, description or in setting out the time and place of deceased’s death or the purpose of limited grant”

15. In The Matter of the estate of Hasalon Mwangi Kahero [2013] Eklr Musyoka J. held;

“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. In this case it cannot be said that the property was omitted by error or mistake as the administrators did not know of the property at the time they sought letters and confirmation thereof. The omission of the property is a matter that does not fall under the purview of Section 74 of the Law of Succession Act.”

16. This being a succession cause involving close family members, I make no order as to costs.

Dated, signed and delivered in open court this 18th day of July, 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

Isabella – present

Jane Igoki – Present

Catherine Sabera – present

Joseph Murerwa – present

Mutuma for petitioner

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F. GIKONYO

JUDGE