



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERUGOYA

HIGH COURT SUCCESSION CAUSE NO. 572 OF 2013

IN THE MATTER OF ESTATE OF THE LATE KIMOTHO GACHAU.....(DECEASED)

AND

PETER MURIUKI KIMOTHO.....PETITIONER

VERSUS

REGINA WANJIKU KIMOTHO.....OBJECTOR

RULING

1. This matter relates to the estate of Kimotho Gachau deceased who died intestate on 16.6.1992.
2. The grant of representation of the estate of the late Kimotho Gachau was issued to Peter Muriuki Kimotho and confirmed on 6th/11/2002 whereby the deceased's estate Ngariama/Ngiriambu/971 was shared out equally among the following dependants;
 - a. Peter Muriuki Kimotho
 - b. Ejidio Kimani Kimotho
 - c. John Njiru Kimotho
 - d. Francis Murage Kimotho
 - e. Felista Wambura Njanja
 - f. Rigina Wanjiku Kimotho
 - g. James Kariuki Kimotho
 - h. Duncan Kimani Kimotho
 - i. Chomba Kimotho
 - j. Murage Kimotho
3. The petitioner has now filed an application dated 01/03/2017 seeking to rectify the grant and the names of Felista Wambura Njanja, Chomba Kimotho and Murage Kimotho be removed from the grant. That Felista Wambura Njanja is not a beneficiary and she is a total stranger to the estate. That CK and MK then minor sons of the deceased are also now deceased having died in 2012.
4. The respondent in response stated that Felista Wambura Njanja is the wife of Peter Gichobi Kimotho deceased who was a son of the deceased and a brother of the administrator.
5. That CK and MK are his late brothers and stepbrother of the administrator. That the portion of CK should be inherited by the 2nd house.

6. The petitioner filed a further affidavit stating that Felista Wambura Njanja failed to prove that she was legally married to Peter Gichobi Kimotho and no dowry was taken to her parents.

7. The parties agreed to proceed by way of written submissions. For the applicant submissions were filed by Kahuthu & Co. Advocates. It is submitted that Felista Wambura Nyanja was not a beneficiary while CK and MK were minors who are now deceased and their names were included with ulterior motive. That the estate should be distributed to the children of the deceased in accordance with his wishes or as provided under the Law of Succession Act.

8. That the grant should be rectified as it was obtained irregularly and fraudulently without the knowledge of the applicant or beneficiaries but through counsel then acting on his own motion. That the court has powers to rectify the grant if there are abnormalities or it does not conform to the Law of Succession or to the wish of petitioner and other beneficiaries.

9. For the respondents, submissions were filed by Muthoni Ndeke & Co. Advocates. It is submitted that Felista Wambura Njanja is not a stranger to the estate as she is the wife of Peter Kimotho, a son of the deceased and the brother to the administrator. That her name should not be removed.

10. That the two sons who are deceased are from the administrator's step-mother.

11. That Esther Muringo Gichobi who is a daughter of the deceased was not given any land by the administrator and should get a share of Francis Murage Kimotho.

12. That the 1st house to which the administrator belong sold one acre to Stephen Ndegwa Mwangi on 30.11.2005 and therefore the land which was to be inherited by CK ought to be distributed to the second house. That the deceased died intestate and the distribution should be as provided under **Section 38 of the Law of Succession Act** which provides:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

They submit that the application lacks merits.

13. I have considered the application. The issue which arises is rectification of grant.

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.

14. Rectification of grant is meant to correct errors in names and descriptions, setting out the time and place of death of the deceased's death, or the purpose of a limited grant. It is clear that rectification is meant to correct minor errors which the court can make without changing the substance of the grant.

15. The section limits the matters which the court can correct, it does not give the court a general power to rectify a grant. The application for rectification of grant under **Section 74 of the Act** must relate to correction of errors and mistakes.

16. Other matters which do not amount to correction or errors in names and descriptions must be brought under other relevant provisions of the Law of Succession as dealing with them would be stretching the purpose for rectification of grant too far.

17. This has been states in various decisions of the high court. I refer to some here.

In the matter of the estate of Hasalon Mwangi Kahero [2013] eKLR

The court stated;

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 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.

18. In this application the applicant is stating that the grant was obtained irregularly and fraudulently without the knowledge of the petitioner and the beneficiaries. It is also stated that some beneficiaries have died. There are proposals on how their shares should be distributed. It means that the grant has become useless and in-operative through subsequent circumstances.

19. These are matters which cannot be dealt with under an application to rectify the grant.

20. These are matters which must be dealt with under other relevant provisions of the Law of Succession Act.

In conclusion:

21. The application by the applicant to remove the names of Felista Wambura who he says is not a beneficiary and CK and MK who are deceased cannot be termed as errors under *Section 74* of the Law of Succession.

22. They cannot be dealt with under an application for rectification of grant. The application is without merits and is dismissed with costs.

Dated at Kerugoya this 15th day of July 2019.

L. W. GITARI

JUDGE