



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 288 OF 2013**

**FORMERLY RUNYENJES SUCCESSION CAUSE NO. 87 OF 2009**

**IN THE MATTER OF THE ESTATE OF NTHAKANIO M'NGUNGU (DECEASED)**

MARY ROSE NAMU.....1<sup>ST</sup> APPLICANT

ELIZABETH CIUNGU.....2<sup>ND</sup> APPLICANT

VERSUS

KITHAKA NTHAKANIO.....RESPONDENT

**RULING**

**A. Introduction**

1. This ruling pertains to the chamber summons dated 6/03/2019 in which the applicants seek amongst others orders that the title deed of **LR. No. Kagaari/Weru/505** registered in the name of the respondents be cancelled and reinstated in the name of the deceased to enable transmission by registration in the name of the applicants who are beneficiaries of the deceased and that the Deputy Registrar be authorized to sign all necessary documents to enable the transmission.
2. The applicants also seek for orders that the Land registrar Embu do provide the original title over the suit property registered in the name of the deceased.
3. The applicants further seek that the grant issued be amended and the portions issued to the deceased persons be replaced as per the attached schedule.
4. It is the applicant's case that the suit property is registered in the name of the respondent who is the administrator to the deceased's estate who has always been adamant to avail himself in execution of various documents to transfer the suit property to the applicants and other beneficiaries.
5. The applicants also state that some of the beneficiaries have died and the remaining survivors have agreed on who is to get their shares.
6. In rejoinder, it is the respondent's case that the application is an abuse of court process as he has not refused to implement the grant but rather he has been frustrated by his siblings. He further states that he is willing to proceed with the subdivision to the applicants if they foot the costs on their own. The respondent further submits that for the name of the deceased to be substituted, the proposed beneficiaries ought to take out the letters of administration for that purpose.

## **B. Analysis & Determination**

7. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein.

8. The applicants herein seek this court's intervention in having the title over the suit property issued to the respondent revoked and revert to the deceased to facilitate the transmission to themselves as per the certificate of confirmed grant issued on the 23/02/2017 as the respondent has failed or is adamant to transfer the suit property to the applicants and other beneficiaries. The applicants also seek that the grant be amended so that their deceased siblings be replaced by other individuals. It is noteworthy that the applicants state that they are not against the mode of distribution as per certificate of confirmed grant issued on the 23/02/2017.

9. The respondent on his part insists that his siblings are the ones frustrating his efforts to transfer the suit property to the beneficiaries and that he is willing to carry out the transmission as long as the applicants bear part of the costs of the transfer. The respondent further insists that the portion of his deceased siblings can only be transferred to the proposed individuals after they obtained letters of administration.

10. As for the amendment of the certificate of confirmation of grant, I am of the considered opinion that such an amendment would bring substantial changes to the grant as it would reflect individuals on the grant who were not in the petition and their inclusion at the behest of the applicants which would be unilateral rather than by consent of the parties.

11. In a similar application which was before Justice Musyoka **In re estate of Charles Kibe Karanja (deceased) [2015] eKLR** stated as follows: -

*“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant.”*

12. I am in agreement with this finding as an application for review would provide opportunity to include the beneficiaries of the deceased siblings. As previously noted, I am cognizant of the fact that the applicants have expressed their satisfaction with the grant issued by this court. The bone of contention in this matter is that of transmission of the respective shares to the respective beneficiaries.

13. The applicants have not established before this court that the administrator has failed in his official duties of distributing the land to the beneficiaries. He says he has always been ready to do so but the beneficiaries have refused/failed to meet the costs of transmission. This is an obligation that the beneficiaries must fulfil in respect of their respective shares.

14. It is noted that this is the 2<sup>nd</sup> application the respondents have filed against the administrator. The first application was for revocation of grant but was dismissed for lack of merit.

15. The applicant did not serve the Chairman of the Land Control Board and the County Land Registrar. No evidence has been adduced that the said officers have violated any law or committed any wrong. I therefore decline to make any orders sought against them.

16. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. I am alive to provisions of **Section 73 of the Probate and Administration Rules** which provides that:

***“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

**17. Consequently, I make the following orders: -**

***a) That any caution placed on the land L.R. No. Kagaari/ Weru/505 by any of the respondents is hereby lifted to facilitate the distribution of the estate.***

***b) That the respondent is hereby directed to sign all transmission documents to facilitate the transfer of the suit property failure to which the Deputy Registrar is authorised to sign as earlier ordered.***

***c) That the shares of the deceased siblings shall be held in trust by the administrator and another beneficiary who shall surrender the properties to the respective beneficiaries upon their attainment of the age of majority.***

***d) That all parties to bear their own costs in this matter.***

**18. It is hereby so ordered.**

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**in the presence of: -**

**Ms. Gathua for Ms. Muthoni for Petitioner/Applicant**

**All parties present**