



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 360 OF 2000

IN THE MATTER OF THE ESTATE OF JOHN JOSEPH OGOLA (DECEASED)

RULING

1. The deceased herein whose estate these proceedings relate died on 10th October 1995 leaving behind a widow Mildred Adhiambo Ogola and three children namely; Mildred Adhiambo Obuya (daughter), John Joseph Ogola Junior (son) and, Tom Joseph Ogola (son). Among the properties listed in form P & A 5 as comprising the estate are:

- (1) Kisumu/Kadero Got Nyabondo/508**
- (2) Kisumu/Kadero Got Nyabondo/453**
- (3) Kisumu/Nyangeta/7478/3**
- (4) Kisumu/Kadero Got Nyabondo/435**
- (5) Ford Tractor 1980 Model**

2. With the consent of all beneficiaries, a limited grant of letters of administration intestate was made and issued to the widow as the sole Administratrix. The same was subsequently confirmed on 19th July 2007. The estate was then distributed as follows:

- (i) Kisumu/Kadero Got Nyabondo/508 (0.5 ha) to John Joseph Ogola Junior absolutely.**
- (ii) Kisumu/Kadero Got Nyabondo/453 (0.6 ha) to John Joseph Ogola and Thomas Ochieng Ogola as joint tenants.**
- (iii) Kisumu/Nyangeta/7478/2 (81.5) acres, to Mildred Adhiambo Ogola absolutely.**
- (iv) Kisumu Kadero Got Nyabondo/435 (approximately 1.5 ha) to Thomas Ochieng Ogola absolutely and**
- (v) Ford Tractor 1980 model to Mildred Adhiambo.**

3. On 8th May 2019, the petitioner moved to this court vide summons for rectification of grant dated 30th January 2019. The application which is brought pursuant to Section 74 of the Law of Succession and rule 43 (1) of the Probate and Administration rules sought for the following orders:

- (1) That the certificate of confirmation of grant issued herein to MILDRED ADHIAMBO OGOLA on 4th July 2000 and confirmed on 19th July 2017 be rectified in the following respects as provided for by Rule 43 (1) of the Probate and Administration rules.**
- (2) That the description of the property wrongly indicated in the certificate of confirmation of grant as Kisumu/Nyangeta/7478/2 be amended to read correctly as Land Reference Number 7478/2 (Certificate of Title No. I.R. 16993).**
- (3) That the portions of the said Land Reference Number 7478/2 (Certificate of Title No. I.R. 16993) enumerated below be allocated to the following individuals:**
 - (i) L.R. No. 7478/6 – Walter Juma Absalom – 3.984 Ha**

(ii) L.R. No. 7478/7 – John Absalom Okumu – 3.984 Ha

(iii) L.R. No. 7478/8 – John Absalom Apunda – 3.984 Ha

(iv) L.R. No. 7478/9 – Malachi Absalom Ooro – 3.984 Ha

(4) That the remainder of Land Reference Number 7478/2 after sub-division as aforesaid, known as L.R. No. 7478/5 and comprising 12.64 Ha, be distributed to the beneficiaries of the deceased as follows:

(i) Mildred Adhiambo Ogola – 1.5 Acres

(ii) Mildred Adhiambo Obuya – 10 Acres

(iii) John Joseph Ogola – 10 Acres

(iv) Thomas Ochieng Ogola – 10 Acres

(5) That the costs of this application be paid out of the estate.

4. The application is premised on grounds set out on the face of it an affidavit in support sworn on 30th January 2019 by Mildred the petitioner herein. It is the applicant's case that the property indicated in the certificate of confirmation of grant as Kisumu/Nyangeta/7478/2 should be corrected to read L.R. 7478/2 Certificate Title No. I.R. 16993.

5. That the properties that were omitted from the schedule of assets be indicated and that the same be shared out to various people who bought the same as beneficiaries. A copy of the sub-division map was annexed to support the proposition that L.R. 7478/2 Title No. I.R. 16993 has since been sub-divided and that the balance being L.R. 7478/5 be shared amongst the children as proposed in prayer 4 herein above.

6. I have considered the application herein and the affidavit in support. The application herein is allegedly filed under Section 74 of the Law of Succession which provides:

“Error 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 of the Probate and Administration rules further 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”.

7. It is clear from the above provisions that rectification of a grant is only limited or confined to errors that relate to names, descriptions or setting out of time or place of the deceased's death. The court cannot therefore stretch the application of this law generally and generously so as to cover every omission or wrong committed in the course of filing a succession case.

8. According to the petitioner, the property referred to as Kisumu/Nyangeta/7478/2 in the certificate of confirmation should read LR 7478/2 Title I.R. 16993. Although a copy of the title deed was not attached to show the actual description of the property, I am convinced that the error referred herein touching on misdescription of the property can be corrected under Section 74 of the Law of Succession.

9. Accordingly, prayer 2 of the application is allowed with orders that the property reflected in the grant as Kisumu/Nyangeta/7478/2 be rectified to read L.R. 7478/2 Title No. I.R. 16993.

10. Regarding the omission of some properties from the list of assets comprising the estate and addition of other 3rd parties as beneficiaries in the name of purchasers, the same cannot apply under Section 74 of the Law of Succession nor rule 43 of the Probate and Administration rules as it is not an error. In arriving at this conclusion, I am guided by the decision In the matter of the estate of Geoffrey Kinuthia Nyamwinda (deceased) (2013) eKLR where the court stated that:

“The certificate of confirmation of grant is said to omit a Property belonging to the deceased, Karai/Gikambura/3836. The omission relating to this property cannot be dealt with under Section 74 of the Law of Succession Act and rule 43 of the Probate and Administration rules as it is not an error in names of persons or places nor to descriptions of persons, things or places. It cannot be handled under these two provisions”.

11. What the applicant is indirectly seeking is an amendment or review of the grant which ordinarily should be brought through a review filed under Order 45 of the Civil Procedures rules pursuant to rule 63 of the Probate and Administration rules. This can be filed strictly in compliance with the rules governing review proceedings under Order 45 of the Civil Procedure rules.

12. It is unfortunate that the applicant did not attach any ownership documents to prove existence of the properties alleged to have been

omitted from the schedule of assets. It would appear from the attached sketch of a proposed sub-division of the land that the applicant wants to circumvent the process of the beneficiaries sharing the properties and thereafter transfer to the could be purchasers. The application herein is a short cut with the intention of doing direct transfer to purchasers after confirmation to avoid further transfers from the original beneficiaries to the purchasers. One would even wonder why at the inception of the suit there was no indication of any liability or creditors against the estate. The allegation that there were unknown creditors before this suit was filed is not true

13. Unfortunately, the application is improperly before the court and the same is disallowed save for the rectification in terms of proper description of the property. The distribution shall remain as per the certificate issued on 19th January 2019.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER, 2019.

J.N. ONYIEGO

(JUDGE)