



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 880 OF 2007**

**IN THE MATTER OF THE ESTATE OF EPHRAIM MAHILA IMBUGWA (DECEASED)**

**RULING**

1. The application that I was invited to determine is a summons dated 24<sup>th</sup> May 2019. The same is headed summons for rectification of grant, on account of the disappearance of one of the administrators, but I note that the same also seeks confirmation of the grant after rectification. Principally, therefore, the application is for confirmation of grant.

2. The certificate of death on record, serial number 961844, dated 11<sup>th</sup> October 2006, reflects that Ephraim Mahila Imbugwa, the deceased person to whom these proceedings relate, died on 20<sup>th</sup> April 1984. A letter from the Chief of Izava Location, dated 3<sup>rd</sup> March 2006, indicates that he was survived by three sons, being Jonathan Imbugwa Mahila, Francis Chore Mahila and Raphael Mudaki Mahila. Some other four individuals and a church are listed as interested parties, that is to say Antony Musinga Mugove, Charles Ndalo Ishera, John Adaka Ayiego, Beatrice Kalegi Murumbutsa and Bukidanyi PET Church.

3. Representation to the estate was sought by Francis Mahili Chole, Jonathan Imbugwa Mahila and Raphael Mudaki Mahila, in their alleged capacities as sons of the deceased. They listed the three of themselves as the sole survivors of the deceased. They expressed the deceased to have died possessed of a property known as North Maragoli/Bukulunya/246. Antony Musigwa Mugove, Charles Ndalo Ishera, John Adaka Ayiego and Beatrice Kalegi Murumbutsa are listed as liabilities. Letters of administration intestate were made to the three on 28<sup>th</sup> September 2011, and a grant was issued, dated 3<sup>rd</sup> October 2011. I shall refer to the three of them as administrators.

4. As indicated in paragraph 1, the application for determination seeks two prayers, rectification of the grant to remove the name of the second administrator, Jonathan Imbugwa Mahila, as administrator and confirmation of the grant thereafter. Let me start with the prayer for rectification of the grant, for the prayer for confirmation should follow after the rectification of the grant.

5. Rectification of grants is provided for by section 73 of the Law of Succession Act, Cap 160, Laws of Kenya. It states as follows:

*“74. Errors may be rectified by court Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”*

6. It would be seen from the above provision that rectification of grant would be sought to correct errors in the names and descriptions, or setting forth of the time and place of the deceased’s death or purpose of a limited grant. The process is for correction of mistakes with respect to such matters. Is there an error or mistake herein? None has been alleged. It is said that the second administrator disappeared never to be found. The disappearance of a person does not create the circumstance of an error or mistake. It cannot be said that there is an error or mistake that would justify the grant being rectified.

7. Perhaps what the applicants have in mind is section 81 of the Law of Succession Act, which caters for what should happen where one of many personal representatives has died. The provision states as follows:

*“81. Powers and duties of personal representatives to vest in survivor on death of one of them*

*Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:*

*Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”*

8. Under section 81, once one of several administrators dies, there would not need to replace or substitute him. The surviving personal representative merely take over from him. All what the court should do is to confirm the surviving personal representatives as administrator.

In a sense, a grant maybe rectified or amended to reflect the changed circumstances.

9. Is there justification for me to confirm the two surviving administrators and to order amendment of their grant? For me to exercise that discretion, I have to be satisfied that the administrator who disappeared has never to be found. In law where that happens it is required that such a person be presumed to have died if he has not been heard of for over seven years. Is there proof that the second administrator herein disappeared for over seven years? It is merely averred that the second administrator disappeared and all efforts to trace him had borne no fruit. It is not stated when he disappeared and where he disappeared from. It is not averred what efforts were made to trace him. Conventionally, when a person disappears a report is matter to the authorities, specifically to the police. The disappearance of a human being has security connotations and security authorities must be involved in the matter. A person alleging another disappeared must provide proof that they reported the disappearance to the relevant authorities, and must provide proof of that report. They must also provide proof that the authorities made efforts to trace the person to no avail. They must have evidence of the efforts by the authority to trace the person without success. A letter from the police would suffice. In any event, there is provision under the Probate and Administration Rules for the making of such an application. See Rule 8(10) of the Probate and Administration Rules. That application ought to be made first before the administrators can move under section 81 for the court to approve them to proceed without the second administrator.

10. Ideally, I should not proceed to deal with confirmation before the issue of the disappearance of the second administrator has been dealt with and until he is presumed and decision by the court dead. Then and only then can the administrators move for confirm of their grant.

11. I could though make some comments on the application for confirmation of grant to aid the administrators improve their application even as they seek an order of the court presuming the second administrator dead. Firstly, there is no disclosure as to whether the deceased had been survived by daughters. If he was then they must be disclosed and involved in the process. If they are not and the court gets to learn that they exist then the grant would be liable to revocation, or the court would not confirm the administrators as such for misleading the court.

12. Secondly, the administrators have listed persons that they claim were liabilities. It has not been indicated whether these people transacted with the deceased. If they had transacted with the deceased, they would be liabilities of the estate, and would be entitled to a share in the estate provided that they provided evidence of the transactions they had with the deceased. I did not see any annexures to the affidavit of the administrators as evidence of such transactions. Section 3(3) of the Law of Contract Act, Cap 23, Laws of Kenya, requires that sales of land must be evidenced by some memorandum in writing. If the individuals bought land from the survivors of the deceased, whether during the lifetime of the deceased or after his death, they would not be liabilities of the estate, and would not be entitled to a share of the estate. Such persons have a claim, not against the estate but, against the persons they transacted with. Legally, they should wait for the estate to be distributed and then get those who sold property to them to transfer their share to them once the property vests in them after distribution. It must be emphasized that section 82(b) (ii) of the Law of Succession Act, says that immovable property shall not be sold before the grant has been confirmed. For avoidance of doubt here is the provision:

*“82. Powers of personal representatives*

*Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*

*(a) ...*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—*

*(i) ...*

*(ii) no immovable property shall be sold before confirmation of the grant ...”*

13. Lastly, if is shown that the second administrator died or is presumed dead, it must be disclosed whether he was survived by a family or not. The name or names of his spouse or spouses must be disclosed, and so should the names of any children that might have survived him.

14. In the end, the final orders that I shall make in this matter are as follows:

**(a) That I shall not grant the orders sought on rectification of the grant, instead I shall order the administrators to apply to have the second administrator declared or presumed dead;**

**(b) That the application dated 24<sup>th</sup> May 2019 is hereby postponed under section 71 of the Law of Succession Act to facilitate (a) above;**

**(c) That I grant leave to the administrators to file a supplementary or further affidavit to address the matter that have discussed in paragraphs 12 and 13 here above;**

**(d) That each party shall bear their own costs; and**

**(e) That any party aggrieved by the orders that I have made herein has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1<sup>st</sup> DAY OF November 2019**

**W. MUSYOKA**

**JUDGE**