



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 460 OF 2008

In the Matter of the Estate of Kwaria Marete (Deceased)

KAMUNDI JOHN M' MUGIRA.....PETITIONER

-Versus-

DIOCESE OF MERU TRUSTEES REGISTERED

(ST. DOMINIC NYAGENE CATHOLIC CHURCH.....INTRESTED PARTY

RULING

Church had no title to pass

[1] This case presents a rather difficult scenario as you will find out later. The Summons for Rectification of Grant dated 18th January 2016, seeks Rectification of Grant dated 4th October 2011 in the following terms;

...that the names of the 2nd beneficiary St Domenic Nyagene Catholic Church [hereafter the church] be removed from the list of beneficiaries.

[2] The reason given for applying is that the Petitioner was duped and or hoodwinked by the church into transferring ½ acre of estate land to the church on a false promise that could not be enforced. The Petitioner contended that the church had promised to exchange land measuring 32 feet by 72 feet- to be extracted from land allegedly owned by St. Domenic Gaceero alias St Domenic Nyagene Catholic Church- with the deceased's land parcel. But, the Petitioner subsequently discovered that the land promised to be given by the church in exchange was actually public land and could not be transferred to an individual. This is what the Petitioner says constitutes an error in the Grant which should be rectified accordingly.

Church: We will give the land

[3] In the Replying Affidavit filed in court on 7th December 2017, the Church contended that, it was common knowledge that all the parcels of land occupied by church-sponsored private schools were registered in the name of County Council of Meru as a trustee for obvious reasons. Further, they had agreed with the Petitioner herein to exchange land upon which the Petitioner gave the church ½ acre of land for purposes of building a church. The land provided by the Petitioner was near the road and more convenient to church goers. Immediate possessions of the exchanged pieces of land was given and the Petitioner even rents the portion given to him to a tenant who cultivates it.

Submissions

[4] Parties filed written submissions to reinforce their respective stand points. It was submitted for the Petitioner that he was the registered owner of Land Parcel No. Nkuene /Nkumari/208 having acquired the same through transmission from his late father and that on diverse dates in the year 2011, the Petitioner had a gentleman's agreements with the Church representatives wherein he agreed to exchange a portion of land measuring ½ acre with land allegedly held by the Interested Party. But, he later discovered that the land was public land owned by the defunct County Council of Meru and that it could not be alienated by or to an individual. The Petitioner had allowed the church to build a temporary church in the deceased's parcel of land as the agreement was that they will build a permanent church after the transfer. On the basis of the above, the Petitioner urged the court to allow his application especially because the church was not a beneficiary of the estate and did not give any land in exchange for land in the estate of the deceased as had been agreed in unwritten agreement.

[5] The church also submitted in support of its avowed standpoint. They gave their reasons; that, after Confirmation of Grant by Lesiit J on

4th October 2011, parties applied for and obtained consent of subdivision of land from the Land Control Board. The church also went ahead and constructed a church building on the plot and had spent over Kshs 3 million of the estimated costs of Kshs 5 million. According to the church, the application is not tenable as the rectification sought cannot be allowed under Section 74 of the Law of Succession Act. They relied on the case book on the Law of Succession by W.M Musyoka at pages 434-435 to support this proposition.

DETERMINATION

[6] As I have stated, this case presents quite disturbing circumstances. The application seeks Rectification of the Grant by removing the name of the church, for it is not a beneficiary of the deceased estate. This application had been allowed in the absence of the church after the church failed to appear despite having been served. The said order of 18th April 2016 was, however, set aside, paving way for inter partes hearing of the application. During the pendency of the application, the church made promises that it will cause title of the land in question to be issued to the Petitioner. It has continued to make similar promises. See the affidavit of Fr. Basilio Njagi sworn on 1st December, 2017 where he averred that the subdivision of the school land so that the exchange can be effected has been approved by the National Land Commission. The transfer in favour of the Petitioner has not been done. Nonetheless, let me consider the merits or otherwise of the application before me.

Limited scope of section 74

[7] The church has argued that the type of rectification being sought by the Petitioner cannot be done under Section 74 of the Law of Succession Act CAP 160 of the Laws of Kenya. The section provides as follows:

Alteration and Revocation of Grants

74. 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."

[8] Rule 43 of the Probate and Administration Rules [8] provides for the manner in which application for rectification of grants are to be made. It provides at Rule 43 (1) that:-

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 description 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"

[9] The scope of Section 74 of the Law of Succession Act is quite limited and is not intended to re-open the cause as would an application for annulment or revocation of grant. In my understanding thereof, the section does not cover matters which are contentious, say, removal or addition of a beneficiary from or to a confirmed grant or addition of estate property or re-distribution of the estate. On this, see the decision by Musyoka J **IN THE MATTER OF THE ESTATE OF HASALON MWANGI KAHERO [2013] eKLR NBI HC SUCCESSION CAUSE NO.261 OF 2008** that:

"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.

[10] Applying the test of law, removal of a beneficiary or beneficiaries from a Grant that has already been confirmed is not an error in the sense of section 74 of the Law of Succession Act. Again, section 74 of the Law of Succession Act is not intended to re-open closed proceedings as is being sought in this case. The natural consequence of what the Petitioner is asking the court to do include ascertainment of the rightful beneficiary entitled to and re-distribution of the estate property in question. Such matters cannot be dealt with under the realm of rectification of grant; they are contentious matters which will require re-opening of these proceedings. It bears repeating that, Section 74 was never meant and cannot be used to re-open proceedings the same way application for annulment or revocation of grant would under section 76 of the Law of Succession Act. And, this court has not been invited to consider any such application that would enable the court to exercise full jurisdiction.

[11] The foregoing notwithstanding, the information available show that the Petitioner has a genuine and justiciable complaint; and in law, no one will suffer wrong without a remedy. Fathom for a moment that the exchange herein was of land and the land is estate property. The exchange was done before confirmation and was verbal. These are pertinent issues. In addition, it is quite eminent an argument by the Petitioner that the land purported to be given in exchange by the church is school property and is registered in the name of the county government. I only hope the church will be able to complete the transaction as it has been promising. All these matters are disturbing, especially when the Petitioner says that the church duped him into believing that it was in a position to give him the particular land in question. I hope it is not true. The only dilemma in this matter is the method invoked in seeking remedy. It bears repeating that, rectification of grant under section 74 of the Law of Succession Act is quite limited and may not be able to resolve matters in controversy herein, for, to say the least, it relates to ascertainment of rightful beneficiaries of the estate as well as redistribution of the land in question should the quest by the Petitioner succeed. On the basis of the reasons I have given, albeit with much trepidation, I decline the invitation to mere rectification of grant. The application is therefore denied with no orders as to costs.

Dated, signed and delivered in open court at Meru

this 3rd day of May 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kithinji advocate for Petitioner

Igweta advocate for Otieno advocate for Petitioner

Mutuma E. Advocate for Rimita Advocate for Interested Party

F. GIKONYO

JUDGE