



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 368 OF 2008

In the Matter of the Estate of Mariko Nyamu M'ibiri (Deceased)

JULIA GACHOGA NYAMU...PETITIONER/APPLICANT

VERSUS

DOREEN KAJUJU NYAMU.....INTERESTED PARTY

JUDGMENT

[1] The court has been called upon to consider the application dated 14th February, 2018- a summons expressed to be brought under Section 35 and 47 of the Law of Succession Act and Rule 73 Probate and Administration Rules. The significant orders sought therein are:

- 1. Rectification of an error in the face of the confirmed grant dated 13-7- 2017.**
- 2. An order directing the District Surveyor Meru Central to undertake an independent subdivision of the deceased's estate in accordance with the new grant as rectified herein vide these prayers.**
- 3. A review of the confirmed grant by providing for the widow of the deceased who has been left out as a person rightfully entitled to the estate of her husband.**
- 4. In the alternative, the court to revoke and annul the entire grant and distribution to enable the widow of the deceased to present her claim of entitlement.**
- 5. That the costs of this application be in the cause.**

[2] The application is premised upon grounds set out in the summons, the affidavit sworn by Julia Gachoga Nyamu on 14th February 2018 and arguments in her submissions in support of her application dated 29th May 2018. She confirmed that there is an error in the grant dated 13th July 2017 for she was only appointed as a trustee for her children without a specific share for herself. She is the only widow of the deceased and legally entitled to a share of the estate as a unit together with the children of the deceased. Her contention was that she was disinherited of her husband's estate. She stated further that most of the children save for BRENDA KINYA NYAMU are now adults and once they take their shares as per the current grant she shall be left landless and destitute without any property.

[3] She continued to argue that the grant dated 13th July 2017 has been altered without any court order and it differs with the original confirmed grant dated 6th May 2009. She took the view that the court in its ruling of 20th March 2017 only appointed the interested party as the co-administrator but did not in any way interfere with the original distribution except that the interested party was to get a distinct share of the estate. Thus, she saw the grant issued on 13th July 2017 to be an obvious and glaring error.

[4] She also brought in yet another twist; that the matrimonial home is on plot No. MAKUTANO NTIMA/IGOKI/4458 where she lives up to date and she is entitled to it. She claimed that the 2nd administrator has been threatening to evict her from it. Further, she stated that the rectified grant dated 13th July 2017 provided for David Mutuma Nyamu in all parcels of land whereas the original grant only provided a share of one parcel of land. The said David was entitled to a share of LR KIBIRICHIA/NTUMBURI/789 and not the other parcels of land for she was ordered to buy him (½) a half an acre and construct a house for him of which she has done. Therefore, there is an error on the rectified grant which has included the said David in all the other properties. Moreover, the 2nd administrator has engaged another surveyor to subdivide the deceased's estate without involvement of the applicant whereas she had already engaged another surveyor who made the subdivisions plan.

[5] This application was opposed vide the replying affidavit sworn by DOREEN KAJUJU NYAMU on 12th March 2018 and arguments in her submissions dated 14th June 2018. She affirmed that the application is marred with untruths and malice and the court cannot keep entertaining a circus of applications. The 1st administratrix/ applicant is simply not willing to transfer to the beneficiaries their rightful shares. That the administratrix was privy to the proceedings preceding confirmation of grant dated 29th April 2009 which she signed off. The administratrix was to hold the properties in trust, keep all the proceeds of money in the bank accounts, custody of all the motor vehicles, 5 Acre Farm in Subuiga and plots with rental houses in Kinoru and Makutano. After the administratrix refused to administer the estate revocation of the grant was sought but the court directed that her rightful share of the estate be determined. She rectified the grant but the only clerical error is that her step brother David Mutuma was included in **L.P NO. KIBIRICHIA/NTUMBURI/789; L.P NO. KIIRUA/NAARI/1674, L.P NO.NYAKI/KITHOKA/1375, PLOT AT MAKUTANO T/769 and PLOT NO MAKUTANO N/IGOKI/4458** yet he wasn't included in the initial grant issued on 5th April 2009. Her step brother as per the grant then was to get ½ acre land bought from the proceeds in Barclays Bank by the administratrix- a thing that is yet to happen. She stated that she is ok with the grant remaining as it is so that her step brother also partakes of the estate.

[6] According to her, as the ruling herein has not been appealed against or reviewed, in law this court remains *functus*. The administratrix filed a notice of appeal dated 23rd March 2017 and received by the deputy registrar and thus this court can no longer grant the administratrix audience. She alone has been benefitting from proceeds of the estate since 2009 and still wants to continue doing so. Additionally, she argued that, by dint of section 35 of CAP 160 a surviving spouse cannot get any property from the estate in her name but only gets the personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate all which the administratrix has. She relied on the case of **Tau Katungi vs. Margrethe Thorning Katungi & Another (2014) eKLR**. Her contention was that the life interest on the estate still subsists and the 1st administrator is at liberty to continue holding in trust for her other children including the minor till she exercises her power of appointment as is by the law under Section 35(2) (3).

[7] She refuted the allegation that LR NO. MAKUTANO/ NTIMA IGOKI/4458 is a matrimonial home. She claimed that allegation is totally unfounded and has not been proved. According to her, the said plot is a rental property with shops and eight rooms all of which generate income to the 1st administrator solely. Therefore, the court should not entertain connivance by the 1st administrator to continue collecting proceeds all to herself. The court should take cognizance of the fact the 1st administrator has solely enjoyed the proceeds of the estate to the exclusion of the 2nd administrator for a wholesome nine years your lordship.

DETERMINATION

[8] Three distinct matters have been raised by this application. One; rectification of grant. Two; revocation of grant. And three; redistribution of the estate. I will begin with the request for rectification of grant.

Rectification of grant

[9] Should this court rectify the grant issued on 13th July 2017? The court has said time without number that the scope of rectification of grant under section 74 of the Law of Succession Act is quite limited to minor errors which do not require much explanation or introduce substantial questions. See Section 74 of the Law of Succession Act which provides that:

“Errors in names and descriptions, or in setting fourth 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.”

The Applicant stated that the error in the grant is that David Mutuma has been provided for in L.P NO. KIBIRICHIA/NTUMBURI/789; L.P NO. KIIRUA/NAARI/1674, L.P NO.NYAKI/KITHOKA/1375, PLOT AT MAKUTANO T/769 and PLOT NO MAKUTANO N/IGOKI/4458 while it was for the Applicant to buy him ½ of land from the proceeds in Barclays Account. The Respondent agreed to the error and she was of the opinion that the inclusion of, is beneficial for David as she will also enjoy his share of the estate taking into consideration that children are entitled to equal distribution.

[9] The certificate of confirmation is issued by the court upon specific terms on distribution of the estate. It must therefore be consistent with the specific terms stated by the court. Any certificate of confirmation at variance with the order of the court should be set aside and another one drawn in accordance with the order of the court. Applying this test, inclusion of David Mutuma without a court order was not only erroneous but also a violation of the law. It is immaterial that the parties agree with an erroneous addition or that the addition is beneficial to a particular beneficiary. The error warrants action. I therefore set aside the certificate of confirmation of grant dated 13th July 2017. I also direct that a proper certificate be issued in accordance with the orders of the court. Orders accordingly.

Of revocation and re-distribution

[10] Arguments around Section 35 of CAP 160 are interesting especially on life interest. I suppose the submissions by the 2nd Administratrix may not have had the benefit of the recent decisions of the Court of Appeal that in so far as the extinguishment of widow’s life interest is based on gender bias, it is unconstitutional. I will add that, time has come for courts to pay deference to section 7 of the Sixth Schedule of the Constitution and align the Law of Succession Act with the constitutional principles of equality of gender as well as to recognize the rights of the surviving spouse in the properties acquired during marriage regardless of the gender. It is unpardonable to fathom that rights of surviving spouse- especially women- in the property of marriage vanishes with the death of the husband. Mere life interest provided in section 35 of the Law of Succession Act is an affront of these elegant constitutional provisions. The Applicant averred that she is entitled to a distinctive share of the estate. I am alive of the finding of the Court of Appeal in the case of **Stephen Gitonga M’murithi v Faith Ngira Murithi [2015] eKLR** where it was held that:

“As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow Naomi a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased’s estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow Naomi as opposed to a life interest.”

[10] The arguments by the widow of the deceased may be plausible. But, the Applicant has lodged an appeal and those arguments should profit her appeal in the Court of Appeal. She is the one who made the proposals for distribution and her conduct as administrator has been questioned in these proceedings. In addition, this court is *functus officio* in relation to matters of distribution of the estate. I thus, find the application to be an ominous invitation for this court to sit on appeal over its decision.

[11] For the reasons I have given above, the Applicant should pursue her appeal. Except the rectification of grant I have specifically ordered, the application dated 14th February 2018 is dismissed. Costs be paid by the Applicant. It is so ordered.

Dated, signed and delivered in open court at Meru this 10th day of July 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Mutuma advocate for 2nd administrator

Mr. Gikunda advocate for petitioner

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F. GIKONYO

JUDGE