



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 385 OF 2007**

**(FORMERELY EMBU PM'S SUCCESSION NO. 240 OF 1997)**

**IN THE MATTER OF THE ESTATE OF KIURA KATHAGANA - (DECEASED)**

**SAMWEL NDWIGA KIURA.....1<sup>ST</sup> APPLICANT**

**MOSES NYAGA KIURA.....2<sup>ND</sup> APPLICANT**

**JOSHUA NJUE KIURA.....3<sup>RD</sup> APPLICANT**

**SALESIO MUNYI KIURA.....4<sup>TH</sup> APPLICANT**

**JEMIMA MUTHONI KIURA.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**HARUN NJERU KIURA.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. The applicants moved the court on the 2<sup>nd</sup> October, 2018 seeking for orders: -

**a. That the honourable court be pleased to review and or set aside the orders for rectification of Grant that were made on 15<sup>th</sup> April 2014 to the respondent herein.**

**b. That costs of the application be provided for.**

2. The application was supported by the grounds cited on the face of the application as well as the supporting affidavit of the 1<sup>st</sup> applicant who swore the same on behalf of the rest of the applicants.

3. These are as follows: -

**a. The respondent had moved court without their knowledge and obtained an amended certificate of grant.**

**b. The respondent distributed the remaining properties of the deceased namely land parcels Nos. KAGAARI/ KIGAA/1374, KAGAA/WERU/514 and NTHAWA/ RIANDU/ 995 only in his favour.**

**c. The respondent has further registered new subsequent resultant parcels and he is in the process of disposing without our knowledge.**

**d. The applicants herein stand to suffer immense and irreparable loss should the respondent proceed with his actions.**

4. This court on the 2<sup>nd</sup> day of October 2018 granted the following orders: -

**That an order for PROHIBITION be and is hereby issued to be registered against land parcel numbers KAGAARI/KIGAA/1374, KAGAA/WERU/514, and NTHAWA/RIANDU/995 and their subsequent resultant numbers pending hearing inter parties.**

5. When the matter came up for directions on the 23<sup>rd</sup> October 2018, the parties agreed that the court uses their supporting affidavit and replying affidavit respectively, to prepare the ruling.

#### **B. Applicant's Case**

6. The 1<sup>st</sup> applicant swore his supporting affidavit to the application dated 2<sup>nd</sup> October 2018 on the same on his behalf and on behalf of the other applicants having been duly authorised to do so by his fellow applicants.

7. The 1<sup>st</sup> applicant attached a certificate of confirmation of grant and deponed that their late mother, **Sarah Njoka Kiura** had been issued with a certificate of confirmation of grant showing how the deceased estate was to be distributed but unfortunately she passed on before land parcels Nos. **KAGAARI/KIGAA/1374, KAGAARI/WERU/514** and **NTHAWA/RIANDU/995** had been distributed as provided in the grant to his mother.

8. The 1<sup>st</sup> applicant further deponed that the applicants later realized that after their mother died, the respondent made an application to substitute their mother as grant holder without the applicants' knowledge or consent and further that the letter purportedly showing that the applicants were in agreement with the application was false.

9. The 1<sup>st</sup> applicant further deponed that it was only just for their prayers to be allowed as the respondent had gone ahead with sub-division of the deceased's estate and was even disposing off some of the parcels having obtained new numbers for them and as such was depriving off the applicant's ownership of their shares.

#### **C. Respondents Case**

10. In response, the respondent filed his replying affidavit on the 16<sup>th</sup> October 2018 and acknowledged that the late **Sarah Njoka Kiura** was the first administratrix of the deceased's estate and had, by the time of her death, distributed all the estate of the deceased save for land parcels numbers **KAGAARI/KIGAA/1374, KAGAARI/ WERU/514** and **NTHAWA/RIANDU/995**.

11. The respondent further deponed that the applicants were being untruthful before court as they had each taken possession of their respective parcels and sold them to third parties and were thus in court to attempt to increase their share in the deceased's estate.

12. The respondent further deponed that all the applicants were before this court when the summons for substitution as well as rectification of grant came up before Justice Majanja, and as such cannot turn around and say they were not present.

13. The Respondent further deponed that this court cannot be invited to review the order it had earlier made as the subject matter had been radically interfered with as there were 3<sup>rd</sup> parties who had acquired titles for land sold by the 4<sup>th</sup> Applicant herein and that if the court were to review its order in such instances, it would be acting in futility. He proceeded to annex a mutation showing the aforementioned sub divisions.

14. The Respondent further stated that there was a distribution agreement dated 24/2/2014, signed by the parties acknowledging the mode of rectification of grant. The respondent urged the court to dismiss the application.

#### **D. The Law Applicable**

15. The law applicable in this situation is **Order 45(1) of the Civil Procedure Act** and **Section 74 and 45(1) of the Law of Succession Act**.

Order 45(1) of CPA provides: -

**No person in executing any process under this Act directing or authorizing seizure of movable property shall enter any dwelling-house after sunset and before sunrise.**

Section 74 of the Law of Succession Act provide: -

**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.**

16. The respondent successfully applied to be substituted as the administrator after his mother Sarah Njoka Kiura the original administrator died. According to the applicants then obtained an amended grant and redistributed the deceased's estate.

17. I have perused the original and the amended grant and noted that there is a whole world of difference. The respondent rectified the grant with the following changes: -

**1. L.R. Kagaari/Kigaa/1374**

- a. Respondent disinherited a minor namely Joyce Wambura Kiura and took her share of one (1) acre
- b. Respondent took the share of his deceased mother one (1) acre alone.
- c. The two acres of Joyce and Sarah were lumped up together and granted to the respondent.
- d. The respondent was not a beneficiary in respect of this parcel of land in the original grant.

**2. L.R. Kagaari/Weru/514**

- a. Respondent took his deceased mother's share of one (1) acre all to himself.
- b. He disinherited one Joseph Kariuki Kiura of his share of four (4) acres.
- c. The five (5) acres were added to the respondent's original four (4) share increasing it to nine (9) acres.

**3. L.R. Nthawa/Riandu/995**

- a. Respondent disinherited all the other eight (8) beneficiaries and took their shares totalling to fourteen (14) acres including that of the minor Joyce Nyambura Kiura. Added to his original share of two (2) acres, the respondent ended up taking the whole parcel measuring sixteen (16) acres.
- b. He also took his mother's share of one (1) acre which is inclusive of the fourteen (14) acres loot of disinheritance.

18. The total acreage from the three parcels above named which the respondent gave himself over and above his shares was twenty one (21) acres. The estate of the deceased has over ten (10) beneficiaries who were all given shares in the original grant at the time their mother was the administrator.

19. The respondent in his amended grant, appears to have left out the following parcels which were in the original grant and been accordingly distributed: -

- i. L.R. Nthawa/Riandu/356
- ii. L.R. Gaturi/Githimu/1787
- iii. L.R. Gaturi/Githimu/2667
- iv. L.R. Gaturi/Githimu/2668
- v. L.R. Gaturi/Githimu/1790
- vi. ½ Share of Plot No. 3 Kigumo

20. Of interest is the fact that the deceased administratrix Sarah Njoka Kiura had shares distributed to her either solely or with the respondent in the parcels the respondent left out in the amended grant. The shares are reflected as follows in the original grant: -

- i. L.R. Gaturi/Githimu/2667
- ii. L.R. Gaturi/Githimu/2668
- iii. ½ Share of Plot No. 3 Kigumo
- iv. L.R. Gaturi/Githimu/1790

21. The question that arises is what the respondent intended to do with the shares of his deceased mother solely knowing very well that the mother had several other children who are by law entitled to inherit her property upon her demise. Given the facts of this application, it can be concluded without doubt that the respondent intended to take upon himself all the assets distributed to his late mother in the original grant in exclusion of all other beneficiaries.

22. LR. Gaturi/Githimu/2668 was to go to one John Ndungu Njenga who also stands the risk of losing his share in the event that the land had not been transmitted to him during the life time of the deceased administratrix.

23. The issue for determination in this application is whether there were any orders issued by the court for rectification of grant. If the court

finds, such orders were issued, whether they ought to be reviewed.

**24. Rule 45(1) of the Civil Procedure Rules** which governs review of application is one of the orders imported by Rule 63 of the Probate and Administration Rules for application in succession matters.

It provides: -

**“(1) Any person considering himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.**

25. The applicants have no issue with the respondent having substituted their late mother for the purpose of implementing the grant which was confirmed on 20/08/1998. The substitution was not an issue in the application but rather the act of redistribution by the respondent without involving the applicants and the other beneficiaries.

26. I have perused the proceedings of the court for hearing of the application for substitution which I reproduce as follows: -

**28/04/2014**

*Coram: D. S. Majanja, J.*

Njue, CC

Haron Njeru Kiura – present

*Samwel Ndwiga Kiura – present*

Joshua Njue Kiura – present

Salesio Munyi Kiura – present

Margaret Thaara Samwel – present

Jemimah Kiura – present

*Haron Njeru Kiura – Sarah Kiura is deceased, Joyce Kiura is deceased. She was a child. Joseph Kiura is also deceased. He had no wife or children.*

**D.S. MAJANJA – JUDGE**

**28/04/2014**

**COURT**

Summons for substitution dated 14<sup>th</sup> April 2014 is allowed and summons for rectification dated 14/04/2014 is allowed as prayed.

**D.S. MAJANJA – JUDGE**

**28/04/2014**

27. There were six beneficiaries present in court on that day some of whom are the applicants herein.

28. The orders of the court allowed the respondent’s application for substitution dated 14/04/2014. In addition to that order the court stated:

**.....and summons for rectification dated 14/04/2014 is allowed as prayed.**

29. On perusal of the court record, I do not find any application for rectification of grant. The record of the registry made on 15/04/2014 fixed only the application for substitution dated 14/04/2014 for hearing on 28/04/2014. The record reads: -

15/04/2014

In the High Court Registry

Applicant present in person

**Order**

Application dated 14/04/2014 fixed for hearing on 28/04/2014.

30. This leads me to the conclusion that Majanja, J. only heard and granted the application for substitution dated 14/04/2014. His reference to "rectification" in the context must be construed to mean that the amendment of the grant was to be amended to reflect the name of the respondent as the administrator.

31. The record of the court is clear that no other application was filed or heard by the court in regard to rectification of the grant.

32. Surprisingly, the amended grant dated 28/04/2014 was allegedly signed by Majanja, J. and it is the document the respondent relies on.

33. I am not a handwriting expert but the signature of Majanja, J. in this file conspicuously differs with the signature of the judge on the amended grant. This is a signal that the amended grant may have been forged with an intention to defraud the other beneficiaries of their rightful inheritance.

34. I say this because, the honourable judge could not have signed an amended grant which was not backed by any court orders made by a competent court. The judge could not have signed an amended grant which completely overhauled or changed the contents of the original grant without a review of the grant having been applied for and allowed by the court. Again the judge could not have signed an amended grant where one beneficiary has given himself all the shares of his deceased mother and deprived eleven (11) beneficiaries of their rightful inheritance including a minor.

35. I reach a conclusion that there was no application for rectification of grant that was ever filed or heard by the court in this succession cause. In my view, the amended grant dated 28/04/2014 is therefore a forgery for all intents and purposes.

36. Even assuming that an application for rectification had been brought by the respondent, the court would not have allowed it because Section 74 of the Act is very clear and that the original grant should not be substantially altered by such an application. This was held in the estate of **CHARLES KIBE KARANJA (DECEASED) [2015] eKLR** Justice Musyoka he 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 if 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. The remedy of review of Court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules....."**

37. The respondent alleges that the applicants have sold some of their shares in the grant to 3<sup>rd</sup> parties. He also stated that he has sub-divided the shares he got and has sold the parcels to other people. He says that in particular, he has sold **LR. Number Nthawa/ Riandu/995** to pay school fees for his children.

38. The act of the respondent to grab the inheritance of his siblings through forged documents to dispose of the land is nothing less than intermeddling with the estate of the deceased as described under Section 45 of the Act. This conduct requires to be addressed as provided by the law.

39. The respondent submitted that since the affected parcels of land are in the hands of 3<sup>rd</sup> parties, this court cannot undo what has already been concluded. I wish to state that this court has unlimited jurisdiction to grant the orders sought in this application if it is found to be merited. This court would be committing travesty of justice if it were to allow the respondent to benefit from his acts of fraud.

40. It is my considered view that if there are any ownership documents obtained through acts of fraud or in contravention of the law, this court has no obligation to involve the unknown 3<sup>rd</sup> parties in this matter.

41. I come to a conclusion that the order of Majanja, J. issued on 28/04/2014 were in order at that time but require to be reviewed for purposes of this application with the purpose of implementing the 20 year old grant.

42. In my considered opinion the applicants have satisfied the court that they are entitled review of the orders issued on 28/04/2018.

43. However, this court is satisfied that the respondent has intermeddled with the estate of the deceased and had fraudulently deprived the several beneficiaries of their rightful inheritance. He is therefore not qualified to exercise the powers of an administrator in this cause.

44. In the interests of justice, I grant the following orders: -

1. That the orders issued on 28/04/2014 by Majanja, J. are hereby set aside.
2. That the grant in the name of the respondent as administrator and which includes only four (4) properties of the deceased is hereby declared null and void for all intents and purposes.
3. That the grant issued and confirmed in favour of Sarah Njoka Kiura is hereby rectified to substitute the 1<sup>st</sup> applicant Samwel Ndwiga Kiura and the 2<sup>nd</sup> Applicant Moses Nyaga Kiura as co-administrators in place of the deceased administrator Sarah Njoka Kiura.
4. That the co-administrators have 60 days to implement the grant.
5. That any transmission/transfer of any land or part thereof of the deceased using the said void grant is hereby declared a nullity and any titles issued thereof are hereby cancelled and the respective assets to revert to the name of the deceased Kiura Kathagana.
6. That the respondent Haron Njeru Kiura be investigated with a view of being prosecuted should he be found to have committed any forgery, fraud and intermeddled with the estate of the deceased.
7. That each party meets its own costs.

45. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2018.**

**F. MUCHEMI**

**J U D G E**

**In the presence of: -**

**All 5 Applicants**

**Respondent present**