

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2287 OF 2012

IN THE MATTER OF THE ESTATE OF WILFRED KOINANGE KARUGA ALIAS WILFRED
KOINANGE (DECEASED)

RULING

A grant of probate in respect of the estate of the late Wilfred Koinange (deceased) was made and issued to Rosemary Bagenda Koinange his surviving wife who is also the sole executrix on the 19/7/2013. Subsequently, the said grant was confirmed on the 28/1/2014.

However, during the confirmation stage, some properties were left out and or omitted and therefore excluded from the list whereof they were not distributed. Pursuant to the said exclusion and or omission, the executrix/applicant herein filed an application dated 29/3/2016 under rule 63 of the probate and administration rules, section 63 Law of Succession and order 45 rule 1 (1) (2) of the Civil Procedure Rules seeking for orders directing that the certificate of confirmation of grant herein above mentioned be reviewed so as to include the property that was erroneously left out during the confirmation stage.

The applicant listed the affected property as Murita L.R. Nos – 5999/64, 5999/93, 5999/96, 5999/97 and 5999/100.

Application is supported by an affidavit deposed by the applicant herein on 29/12/2016. It is the applicant's contention that, by the time the grant was being confirmed, she had not known nor was she aware of the existence of the property in issue. She therefore alleged that she discovered the existence of the said plots later. She attached copies of certificate of title reflecting that the property belonged to the deceased and that at the time of confirmation of grant, they were held as security in favour of a loan of 6,000,000/= advanced by Co-operative Bank to the deceased.

I have considered the application herein, supporting affidavit and submissions by counsel for the applicant. Application herein is brought under rule 63 of the Law of Succession which has enumerated a number of provisions in the Civil Procedure Rules rules that are applicable in Law of Succession. Among such rules of the Civil Procedure that are recognized by rule 63 is Order 45. Order 45 of the Civil Procedure Rules provides circumstances under which a court can review its orders. One such ground is revision of an order on the basis of existence of an error on the face of the record or discovery of material facts that were or was not available or known at the time of making the orders sought to be reviewed. A court can also review an order of the court for any other sufficient cause meaning that a court has the discretion to judiciously exercise its inherent power under rule 73 of the Probate and Administration rules to make such review orders.

The orders sought being substantive orders in nature given its impact in the

general redistribution of the estate, the appropriate remedy applicable in law is review of the grant and not correction nor rectification as most applicants quite often do. This position is clearly captured and expounded in the case of the **Charles Kibe Karanja (Deceased) (2015) eKLR** in which the court held that "a grant can only be amended by way of applying for review orders".

Equally in Josiah Mwangi Mutero and another versus Rachel Wagithi Mutero (2016) eKLR the court had this to say "clearly, Order 45 relating to review is one of the Civil Procedure rules imported into succession practice by rule 63 of the probate and administration rules. To that extent the application before me is premised on the correct provisions. However, the application

must meet the substantive requirements of an application brought for review set out in orders 45 of the Civil Procedure Rules. Thus the crucial issue that falls for determination is whether or not the application meets the threshold held to warrant this court to allow it. This necessitates a close examination of order 45 rule 1 of the Civil Procedure Rules, 2010 which provides as follows. The above rule in my view restricts the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds:

- (a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could be produced by him at the time when the decree was passed or the order made or**
- (b) on account of some mistake or error apparent on the face of the record or**
- (b) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay”.**

In the instant case the applicant has sufficiently demonstrated that she was not aware of the existence of the property omitted from the list of distribution and the discovery of their existence later is good ground to warrant review of the orders brought under rule 63 of the Probate and Administration Rules. There being no objection from any quarters, application is merited and same is allowed as prayed.

Accordingly, the grant of probate confirmed and issued on 24/1/2014 be and is hereby amended and or reviewed so as to include the omitted property and that the same be held by the applicant 100%.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH, 2017.

J.N. ONYIEGO (JUDGE)