REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 196 OF 2003

IN THE MATTER OF THE ESTATE OF DOREEN MARGARET ZAGORITIS (DECEASED)

RULING

1. The application dated 24th October 2016 seeks rectification of the certificate of confirmation of grant dated 1st March 2006 so as to alter the mode of distribution in the will of the deceased pursuant to a deed of family arrangement dated 1st April 2016. It is brought at the instance of the executors of the will of the deceased made on 14th June 1992.

2. It is founded on section 74 of the Law of Succession Act, Cap 160, Laws of Kenya, and rule 43(1) of the Probate and Administration Rules. The two provisions state as follows:

> *'74. Errors in names and descriptions, or in setting out 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.'*
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> *'43(1). 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 descriptions 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 in Form 110 for such rectification through the registry and in the cause in which the grant was issued.'*

3. From the two provisions quoted above, it is plain that rectification under section 74 is of grants of representation. What should be corrected ought to be errors in names and descriptions, settings of time and place of death of the deceased and the purpose of a limited grant. A person moving the court for rectification under section 74 should demonstrate that they are seeking to correct errors in a grant of representation, and should seek to correct the errors identified in the provision.

4. The application before me no doubt does not seek rectification of a grant of representation. It does not even seek to correct any of the errors identified in section 74 of the Act. What it seeks to do is to tinker with the certificate of confirmation of grant on record so as to alter the mode of distribution in the will of the deceased of 14th June 1992. Clearly therefore what the applicants seek cannot be done under the discretion given to the court under section 74 of the Act.

5. What the applicants are inviting the court to do is to revisit the orders it made at the confirmation of the grant so that instead of the estate of the deceased being distributed as per her will, it be distributed as per the settlement arrived at by the family and the encapsulated in the deed of family arrangement dated 1st April 2016. Clearly, that has nothing to do with any errors in the grant of probate that the court made on 4th April 2005. To my mind the court is being asked to review the orders it made at the confirmation of the grant. Review under the circumstances cannot be obtained under section 74 of the Act.

6. Orders and decrees made by a probate court are reviewable. Rule 63 of the Probate and Administration Rules has imported into probate practice the provisions of the Civil Procedure Rules governing review of court orders. The application before me ideally should have been brought under the Rule 63 of the Probate and Administration Rules and the relevant provisions in the Civil Procedure Rules.

7. Under the civil process, review is grantable on three general grounds. The first is error on the face of the record. The second general ground is discovery of important matter of evidence that was not available at the time the order sought to be reviewed was made. Lastly, is any other sufficient ground.

8. From the facts set out in the application and the affidavit in support, the applicants are not pointing to any error on the face of the record. They do not seek alteration of the earlier order of the court on the ground that there is a mistake or error on the record, instead they say that they family has agreed to move away from the mode of distribution approved by the court, which is that in the deceased's will, and instead invite the court to adopt the mode that the family has agreed upon. That has nothing to do with an error or mistake on the part of the court.

9. The applicants are neither talking about discovery of a new matter of evidence of sufficient importance as to alter the order sought to be reviewed. Nothing has been discovered. Discovery denotes existence of facts as at the date of the making of the court, but which facts were not within the knowledge of the parties at the time, hence their failure or inability to place them before the court at the time. What has happened is that the parties have shifted ground by agreement, that cannot be discovery of new facts. It is more towards creation of new facts.

10. Any other sufficient reason is all encompassing. It denotes any facts that justify review of the earlier orders. That would include change of the circumstances or agreement reached by the parties. In this particular case, the parties, the beneficiaries under the will of the deceased, have reached agreement to have the estate distributed in a manner other than that prescribed by the deceased in his will. That would constitute change of circumstances or facts, and can fall under the description of any other sufficient reason.

11. The application before me is incompetent to the extent that it is brought under section 74 of the Act, which provides for rectification of grants, yet what the applicants seek is not rectification of the grant on record but review of the earlier orders of the court. As it is clear to me that the parties are asking me to review the confirmation orders on record, I shall not strike the application out, instead I shall consider whether or not the orders of 1st March 2006 are available for review in the manner proposed.

12. The gist of the applicants case is that they would like to interfere with the deceased's wishes as expressed in her will of 14th June 1992 and replace them with theirs as set out in what they are calling the deed of family arrangement dated 1st April 2016. The question I ask myself is whether the wishes of the deceased as expressed in her will can be altered in that manner.

13. I ask the question because the law does provide for freedom of testation. In this case the deceased, exercised that freedom and disposed of her estate as per the will of 14th June 1992. It would appear that those wishes have to be complied with unless there is evidence that the deceased had revoked or altered them, the dispositive clauses have become meaningless for some reason, or have failed. There is also room for beneficiaries to renounce or waive their gifts under the will.

14. The will on record distributed the deceased's estate to her three children – Jane Chandler, Adrian Dimitri Andrew Zagoritis and Katrina Melissa Zagoritis. The orders of 1st March 2006 had confirmed the distribution in the will. By the deed dated 1st April 2016, the beneficiaries have agreed that Adrian Dimitri Andrew Zagoritis and Katrina Melissa Zagoritis shall take the landed property in Kenya absolutely in equal shares, and that Jane Chandler's 15% share was to be settled by other means out of the estate. According to the deed, the share to Jane has already been settled. That is the alteration that is proposed to the orders of 1st March 2006.

15. I note from the foregoing that Jane Chandler has neither renounced nor waived her interest. Instead the deed merely indicates that she has agreed to have her share settled in some way. I trust that within the discretion exercisable by a beneficiary to waive or renounce their interest is the power to have their interest settled in any way agreeable to them.

16. I shall according direct that the orders made herein be reviewed in the manner proposed in the application dated 24th October 2016. The certificate of confirmation of grant dated 1st March 2006 to be amended accordingly.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE