



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2875 OF 1995**

**IN THE MATTER OF THE ESTATE OF A K B (DECEASED)**

**ROGRUM LIMITED..... APPLICANT**

**VERSUS**

**E C B.....1<sup>ST</sup> RESPONDENT**

**E C .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased herein A K B died intestate on the 12<sup>th</sup> August, 1995 leaving behind a widow E C B and seven children namely E C (21 years), J C B (18 years), J C B (16 years), C C (13 years), M C (10 years), R C B (7 years) and C B (3 years).
2. Among the properties and or assets constituting the deceased's estate as listed in form P & A 5 is Plot No. [Particulars withheld] Muthangari Gardens which is the subject of the application herein.
3. Upon petitioning the court for a grant of letters of administration intestate by the widow E C B and Philip Kipchirchi Murgor as joint petitioners, a grant was issued on 2<sup>nd</sup> July, 1996 and subsequently confirmed on 23<sup>rd</sup> October, 1996. Having secured requisite consent from all beneficiaries, L.R. No. [Particulars withheld] was given to Rogrum Limited a company which laid claim on grounds of purchasers' beneficial interest having bought the same from the deceased who allegedly died before effecting transfer of the same. The rest of the assets save for motor vehicles which were given to the widow, were shared out equally amongst the children each getting 1/7 share with their mother (widow) having life interest thereof.
4. On 17<sup>th</sup> May, 2011, an order rectifying the grant was issued pursuant to summons dated 4<sup>th</sup> February, 2010 but filed on 23<sup>rd</sup> February 2010 supported by an affidavit deponed by Philip Murgor the 2<sup>nd</sup> administrator herein who sought for court's leave to resign from being a joint administrator on personal and professional grounds culminating to E C C B M brought on board as co-administrator with her mother in place of Murgor.
5. Following the said substitution, an amended certificate of confirmation of grant was issued with E C appearing as one of the administrators and all properties including L.R. No. [Particulars withheld] Muthangari Gardens shared out equally amongst all dependants with the widow having life interest.
6. On 21<sup>st</sup> March 2011, the applicants through the firm of Muturi and Co. Advocates filed summons dated 17/2/2011 under Section 74 of the Law of Succession Cap 160 and rule 43 of the Probate and Administration rules seeking to rectify the grant issued on 23<sup>rd</sup> October, 1996 and later amended on the 17<sup>th</sup> May, 2010 so as to remove the wording "...widow to have life interest" and be substituted with the expression "widow to have equal shares to all the dependants".
7. The application which was supported by an affidavit deponed on 17<sup>th</sup> February, 2011 by the two administrators, was allowed and a further amended certificate of confirmed grant issued on 11<sup>th</sup> April, 2011 thereby effectively allowing the widow to have equal share/shares with all the other dependants (children). Again property No. LR [Particulars withheld] Muthangari Garden was not listed as the property of Rogrum Company to which Philip Murgor as a director had beneficial interest from the beginning.
8. It is the removal of Rogrum Company Ltd. from being a beneficiary of the estate in respect of LR [Particulars withheld] by the two

administrators as reflected in the amended certificates of confirmation dated 17<sup>th</sup> May, 2010 and 11<sup>th</sup> April, 2011 without their knowledge or consent that prompted its director Philip Murgor to move the court through their application dated 23<sup>rd</sup> September, 2015 but filed in court on 24<sup>th</sup> September, 2015 under certificate of urgency seeking the following orders:

**(a) That application be certified urgent.**

**(b) That service in the first instance be dispensed with.**

**(c) That pending hearing and determination of application, the extracted orders of the amended and re-amended certificates of confirmation dated 17<sup>th</sup> May, 2010 and 11<sup>th</sup> April, 2011 stayed.**

**(d) That pending hearing and determination of the application, Mrs. E B and E B by themselves, their servants, agents, or any other persons claiming through them be restrained from dealing in, disposing, entering, occupying, alienating, transferring, charging, developing, fencing, depositing constructing materials and or in any other way interfering with Rogrum Ltd's quiet and peaceful possession, occupation and ownership of land reference No. [Particulars withheld].**

**(e) That the amended and further amended certificates of confirmation dated 17<sup>th</sup> May, 2010 and 11<sup>th</sup> April, 2011 respectively be rectified and corrected forthwith to reflect the orders granted by J. Kimaru and J. Maraga.**

**(f) That the court be pleased to order that the only valid schedule of distribution is the one attached to the certificate of confirmation of grant dated 23<sup>rd</sup> October, 1996 reflecting L.R. No. [Particulars withheld] Muthangari Gardens at item J as Rogrum Ltd's property.**

**(g) That Rogrum Ltd. applicant be at liberty to apply for such further or other orders and or directions as the honourable court may deem fit to grant in the instances.**

**(h) Costs of the application.**

9. Application which is filed pursuant to Article 31 and 40 of the Constitution of Kenya, Rules 43 (1) 49 and 73 of the Probate and Administration Rules is premised on the grounds on the face of it and supporting affidavit deposed by Philip Kipchirchir Murgor on 23<sup>rd</sup> September, 2015.

10. It is the applicant's case that, upon the death of the deceased, his widow approached him (applicant) and with the consent of the other adult beneficiaries (children) petitioned the court as joint administrators for grant of letters of administration intestate which was granted on 2/7/1996 and confirmed on 23<sup>rd</sup> October, 1996. That during confirmation, a company by the name of Rogrum to which he is a director was given L.R. No. [Particulars withheld] Muthangari Gardens.

11. In his endeavor to prove that the said company had beneficial interest being a purchaser, he attached a sale agreement marked (PKM-3), copy of payment cheques (PKM-4C), copy and assent of transfer effected by the deceased (PKM.5) and negotiable copies of certificates (PKM -2).

12. That his resignation from being an administrator of the estate was as a result of misunderstandings with the widow who despite having life interest over the estate given to the children in equal share and in trust for minors, wanted to sell the property in total disregard of the law a fact he resisted.

13. The applicant expressed dissatisfaction on how his company was removed from being a beneficiary of the estate after confirmation yet there was no formal application to that effect neither during the amendment of 17<sup>th</sup> May, 2010 nor further amendment of 11<sup>th</sup> April, 2011 in which the company's name disappeared.

14. Mr. Murgor submitted that the omission of the name of Rogrum from the list of beneficiaries on 17<sup>th</sup> May, 2010 amended grant and 11<sup>th</sup> April, 2017 further amended grant was an error which is curable by correcting the same hence reinstating the list of distribution as per the original certificate of confirmed grant of 23<sup>rd</sup> October, 1996.

15. Counsel attached two letters (PKM – 12 and 14) addressed to Kipkenda and company advocates and Muturi S.K. Advocates counsels for the respondent who in reply acknowledged that they never at any other one time applied for removal of the name of Rogrum from the list of beneficiaries.

16. In response, the respondent through the firm of Gachie and Co. Advocates filed a replying affidavit sworn by E C B on 24<sup>th</sup> April, 2017 in which she denied the claim by the applicant that the property in question was sold by the deceased to Rogrum Company Ltd and instead accused Philip Murgor of taking advantage of her ignorance and through acts of fraud allocated himself the property in question. She termed the reversion of the property concerned as an act of God.

17. In submission, Mr. Gachie relied entirely on the replying affidavit. He however admitted that although no application was done to specifically remove Rogrum Company as a beneficiary of the estate, the court should not shut its eyes from the irregular manner through

which Mr. Murgor acquired the original confirmed grant by forcefully grabbing the property in question thereby including his company as a beneficiary.

18. I have considered application herein, supporting affidavit, replying affidavit, annexures and submissions by both counsels. Issues for determination are:

**(a) Was Rogrum a beneficiary of the deceased's estate (property) L.R. [Particulars withheld] Muthangari during the original confirmation stage.**

**(b) If the answer to "a" above is positive, was the company's name regularly or lawfully removed from the distribution schedule both as reflected in the amended grant of 17<sup>th</sup> May, 2010 and further amended grant of 11<sup>th</sup> April, 2011.**

19. There is no dispute that on 23/10/1996 an original certificate of confirmed grant was issued jointly to E C B (widow) and Philip Murgor as joint administrators with property L.R. [Particulars withheld] given to Rogrum Company absolutely being a purchaser. All requisite consents were obtained from E C and her adult children JC Bore and E C B dated 10<sup>th</sup> October, 1996.

20. It is clear from the proceedings both before and after confirmation that nobody raised any objection as to the mode of distribution of the estate including sharing of L.R. [Particulars withheld] to Rogrum Company.

21. A perusal of the application dated 4<sup>th</sup> February, 2010 seeking to substitute Philip Murgor with E B culminating to the amended grant of 17<sup>th</sup> May, 2010 did not include any prayer for correction, rectification, review and or objection to the inclusion of Rogrum Company as a beneficiary of the estate in the manner reflected in the original confirmed grant nor did it seek to amend the distribution list of beneficiaries. The same applies to the application dated 17<sup>th</sup> February, 2010 giving rise to further amended certificate of confirmed grant issued on 11<sup>th</sup> April, 2011. In a nutshell, nobody has ever formally challenged the inclusion of Rogrum Company as beneficiary of the estate.

22. The key question begging for an answer is, who moved the court to remove Rogrum from the list of beneficiaries? Both parties are in agreement that no formal application was ever made to that effect and the court record is clear to that extent. How then did the name of Rogrum disappear? Obviously, there is no explanation besides the alleged act of God pleaded by the respondent.

23. Unfortunately, Acts of God by way of miracles have no role to play in these proceedings and the same is not applicable. The only logical conclusion is that any ordinary and reasonable jury would make in the circumstances is that, there was an omission and indeed an error on the part of the court when issuing the amended confirmed grant of 17<sup>th</sup> May, 2010 and further amended grant of 11<sup>th</sup> April, 2011 thereby omitting the name of Rogrum from the list of distribution against L.R. [Particulars withheld] Muthangari Gardens which is curable under Section 74 of the Law of Succession Act, rules 43 and 73 of the Probate and Administration rules for the ends of justice to be met.

24. If there was any objection by the respondents against the inclusion of Rogrum Company as beneficiary, they would have opposed the application for confirmation. Since they have never challenged the beneficial interest of Rogrum as a purchaser of the property in issue since the inception of the petition herein to date, they cannot hide behind an error committed on the side of the court by not checking correctly that the distribution list remained intact despite change of administrators and life interest status of the widow to being beneficiary in equal shares.

25. At this stage, this court is not dealing with the merits of ownership and or how the said property was acquired. I am dealing with the question whether an error occurred and that the same is curable under Section 74 of the Succession Act and rule 43 and 73 of the Probate and Administration rules.

26. Having held that an error occurred and that an Act of God is not applicable in this case, I am inclined to hold that the court made a mistake or an error in issuing an amended grant dated 17<sup>th</sup> May, 2011 and further amended grant dated 11<sup>th</sup> April, 2011 without the name of Rogrum as a beneficiary of L.R. [Particulars withheld] Muthangari Gardens as contained in the original confirmed grant of 23<sup>rd</sup> October, 1996 which has never been challenged.

27. Accordingly, application herein is allowed with orders that the amended confirmed grant dated and issued on 11<sup>th</sup> April, 2011 be and is hereby amended and or rectified so as to reflect and or include Rogrum Company as a beneficiary of LR [Particulars withheld] Muthangari Gardens in conformity with the distribution schedule of the certificate of confirmed grant issued on the 23/10/1996. Considering that the error was occasioned by the court, I will order that each party bears its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY, 2017.**

**J.N. ONYIEGO (JUDGE)**

In the presence of .

.....Counsel for the applicants

..... Counsel for the respondents