



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 55 OF 1988

IN THE MATTER OF THE ESTATE OF THE LATE ELIAS NYAMU MAITHO (DECEASED)

NANCY WABUGO NYAMU.....1ST PETITIONER/DECEASED

CHRISTOPHER MWANGI NYAMU.....2ND PETITIONER

AND

TIMOTHY MAITHO NYAMU.....APPLICANT

RULING

By a summons dated 16th May, 2015 brought under **rule 73** of the **Probate and Administration Rules**, the applicant sought for orders to amend the certificate of confirmation of grant dated 6th July, 1999; he also sought to have the “further amended certificate of confirmation of grant” exhibited to the affidavit in support of the summons deemed as the certificate properly granted.

The application was made on the grounds that that the estate has not been ‘completely distributed’ and that one of the administrators is deceased. Some beneficiaries are also alleged to have died before the transmission of their shares to their names and that some assets comprising the deceased’s estate did not reflect the appropriate acreages.

In his affidavit in support of the application, the applicant deposed that prior to her demise, his mother, Nancy Wabugo Nyamu, was joint administrator of the deceased’s estate with his step brother, Christopher Mwangi Nyamu. The grant of letters of administration was made way back in 1996 and after it was confirmed it was rectified in 1998 to correct certain errors.

The applicant swore that the amended certificate of confirmation of grant needs further amendments which include the removal of the name of the late Nancy Wabugo Nyamu and the correction of the acreage of one of the assets in the estate which is land parcel **Magutu/Gaikuyu/170** said to measuring **9.7 acres** and not **4.8 acres** indicated in the amended certificate of confirmation of grant.

The applicant has also sworn that the deceased in respect of whom this succession cause was filed only held half a share of this particular land and that he held the other share in trust for one Benson Riri Rumba who is said to be deceased also. According to him, the family of the late Benson Riri Rumba has agreed how the estate should be distributed amongst his survivors or persons beneficially entitled to his estate.

Apart from land parcel **Magutu/Gaikuyu/170**, the applicant has also sought what appears to a redistribution of other assets in the deceased’s estate including plot no. 5 Gitimani, plot no. 17 Gaikuyu and plot no. 12 Ihwagi market.

Although the applicant has invoked the inherent powers of this court under **rule 73** of the **Probate and Administration Rules**, the nature of the orders sought suggest that the appropriate provision under which the summons ought to have been made is **section 74** of the **Law of Succession Act, cap. 160**; this provision provides for rectification of the grants to correct the names and descriptions, or in setting out the time and place of the deceased's death or the purpose of a limited grant.

The record shows that the initial grant in this cause was made in January, 1993 and confirmed in February, 1996. Thereafter the certificate was amended on 6th July, 1999. The applicant is seeking what he has referred to as a further amendment almost sixteen years later.

One of the grounds upon which the applicant seeks amendment of the grant is that a joint administratrix of the deceased's estate is herself deceased and there is need to substitute her name in the grant with that of the applicant. Of the several instances set out in **section 74** of the **Law of Succession Act** in which a grant may be rectified or altered, the substitution of an administrator or administratrix where there is joint administration is not among them. This omission is deliberate because under **section 81** of the Act, where a joint administrator or administratrix dies, their powers and duties vest in the surviving administrator or administratrix. That section states:-

81. Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him.

As the proviso to this section shows, it is only where a continuing trust exists that it may be necessary to make a further grant to one or more persons jointly with the surviving administrator or administratrix.

The second reason given for the need to amend the grant is a bit curious. The applicant says that his deceased father only held half a share in the land referred to as **Magutu/Gaikuyu/170** and that the other half was held in trust for one Benson Riri Rumba (deceased). He is now seeking to rectify the grant so that he can distribute Benson Riri Rumba's estate amongst his survivors or persons beneficially entitled to his estate.

As the applicant himself has admitted in his affidavit there is no evidence of an existing trust in respect of land parcel **Magutu/Gaikuyu/170** under which Benson Riri Rumba or his survivors are alleged to be beneficiaries. In the absence of such evidence, it would be legally inappropriate for this court to proceed and distribute land parcel **Magutu/Gaikuyu/170** amongst the alleged beneficiaries of Benson Riri Rumba as if a trust exists when in truth none exists.

And even if a trust did exist in favour of Benson Riri Rumba, his estate would not be administered and distributed in a succession cause of a different person. His estate is distinct from that of the deceased in this cause and therefore a petition for administration and distribution of his estate must necessarily be filed in a separate cause.

As far as the sharing out of plot numbers 5 Gitimani, 17 Gaikuyu and 12 Ihwagi market is concerned, the certificate of confirmation of grant shows that the distribution of these particular properties was in conformity with the application for confirmation of grant and there is no evidence of any particular error that would warrant rectification of grant under section 74 of the Act. In my view, the applicant appears to be seeking a redistribution of the deceased's estate, a move that I think, is inconsistent with the provisions of the Law of Succession Act.

I must mention here that this cause has been in court for close to 26 years and it is time that it came to an end; the confirmation of the grant should have settled it once and for all and unless there is a genuine

reason to activate it the surviving administrator must complete the administration of the estate and distribute in accordance with the schedule to the certificate of grant.

For the reasons I have given, I do not find any merit in the applicant's application and I hereby dismiss it with no orders as to costs.

Dated, signed and delivered in open court this 12th day of February, 2016

Ngaah Jairus

JUDGE