REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 339 OF 2001

IN THE MATTER OF THE ESTATE OF CHARLES KIBE KARANJA (DECEASED)

RULING

1. The matter concerns the estate of Charles Kibe Karanja, who died on 23rd November 2000 at Ruiru.

2. Representation to the estate was sought by Philomena Ndanga Karanja, Lawrence Karanja Kibe, Thomas Kiarie Karanja and Stephen King'ara Ng'ang'a by a petition lodged in court on 16th February 2001 in their capacity as executors named in the will of the deceased. A grant of probate of the written will made by the deceased on 3rd June 1999 was made to Philomena Ndanga Karanja, Lawrence Karanja Kibe, Thomas Kiarie Kibe and Stephen Kingara Ng'ang'a on 2nd May 2001. The grant was confirmed on 7th November 2006. The estate was to be distributed as per the terms of the will dated 3rd June 1999. A certificate of confirmation of grant was duly issued on even date.
3. On 27th August 2012, the widow and first executor of will moved the court by a summons dated 2nd August 2012, seeking rectification of the certificate of grant of probate issued on 7th November 2006. She sought inclusion in the scheduled assets of properties that she claimed had been left out of the process. She sought to have them vest in her name to be shared equally amongst all the survivors of the deceased.

4. There is nothing on record to indicate a response to the said application was filed by the other executors or survivors of the deceased. But there is on record an order by Mugo J. directing the first executor applicant to procure the signature of the other executors in support of the rectification application failing which she should file an application for the revocation of their appointment as personal representatives of the deceased. The order by Mugo J. was made on 23rd October 2012.

5. Taking the cue from the orders of 23rd October 2012, the first executor filed another application on 7th November dated 6th November 2012. She sought revocation of the appointment of the other executors as personal representatives of the deceased under the grant of 2nd May 2001 on the grounds that they had failed to work with her in the management of the estate, and in particular in failing to sign the rectification application of 2nd August 2012. She sought to be appointed sole administrator of the estate, and she sought too restraining orders to stop the other executors, upon revocation of their appointment as personal representatives, from interfering with her duties as administrator.

6. The other executors responded to that application through an affidavit sworn by one of them, Lawrence Karanja Kibe, on 20th November 2012. They denied the allegation of non-cooperation

with the applicant. They argued that the application for revocation of their appointment did not meet the criteria set out in Sections 74, 75, 75A and 76 of the Law of Succession Act, Cap. 160, Laws of Kenya.

7. While the two applications were still pending, the first executor filed another application in court on 13th May 2013, dated 10th May 2013. She sought reinstatement of the monthly emoluments of Kshs. 420,000.00 from a trust fund set up by the deceased under his will. She conceded to signing off the deduction of that money, but alleged that the other executors were involved in the affair in order intimidate and defraud her. She alleged that after the deceased's burial, she was appointed by a Benson Muigai and others with an offer to assist her trace some of the deceased's assets. Thirteen (13) years later the said Benson Muigai surfaced to claim that she owed them Kshs. 17,680,000.00 for the services they had rendered to her. Police officers arrested her and took her to CID Headquarters at Mazingira House, where she agreed to have Kshs. 300,000.00 deducted from her monthly emoluments to settle the alleged debt.

8. I have carefully perused the court file. I have not come across a reply to the said application. I have though seen copy of an affidavit attached to another application of the first executor, dated 29th May 2013, allegedly sworn by one of the other executors, Thomas Kiarie Karanja, on 22nd May 2013 in reply to the application of 10th May 2013, where he stated that the first executor of her own volition asked that Kshs. 300,000.00 be deducted from her monthly salary to meet the debt of Kshs. 17,680,000.00. He was of the view that if she needed to have her full salary reinstated all she needed to do was to instruct her co-executors to do so.

9. The application of 29th May 2013 is related to that of 10th May 2013. The first executor seeks to be paid Kshs. 600,000.00 in arrears being a refund of the sum of Kshs. 300,000.00 for the months of April and May 2013 deducted from her monthly allowance from the trust fund. The effect of the application is to vary her earlier instructions authorizing her co-executors to pay the said money to Benson Mungai. She claimed that the said money did not reach the said Mr. Muigai.

10. There is nothing on record to indicate that the other executors of the will of the deceased responded to the application of 29th May 2013.

11. The said other executors filed their own application dated 30th October 2014 seeking to have the applications dated 27th August 2012 and 10th May 2013 dismissed for want of prosecution. The affidavit in support of the application was sworn by one of the executors, Lawrence Karanja Kibe. Their case was that the matter was last in court on 27th May 2013 and no steps had been taken thereafter to prosecute the same.

12. There is no reply to the application by the first executor.

13. On 14th January 2015, I directed that all the applications be disposed of by way of written submissions.

14. On 27th April 2015, counsel for the first executor lodged a letter at the registry, dated 23rd April 2015, withdrawing the applications dated 10th May 2013 and 29th May 2013, with no orders as to costs. They at the same time lodged their written submissions on the applications dated 2nd August 2012 and 6th November 2012. The 2nd and 3rd executors written submissions were lodged in court on 13th July 2015.

15. On 22nd July 2015, the advocates for the first executor lodged a letter at the registry, dated 8th July 2015, asking to be allowed to file a rejoinder to the other executors' submissions. The matter was mentioned on 16th September 2015 in that behalf, where the first executor was granted seven (7) days to do so. Matter was fixed for mention on 28th September 2015, on which date it transpired that no further submissions had been filed by the widow first executor.

16. In her submissions dated 24th April 2015, the first executor argues that the grant of probate on record had been useless and inoperative on account of the failure by the other executors to append their signatures to her application dated 2nd August 2012. She cited decisions in *In the Matter of the Estate of Samuel Wainaina* **HCSC No. 651 of 2012** (unreported) and *In Re the Estate of Joseph Kiama Rumen (Deceased)* (2010) eKLR, where grants were revoked for having become useless and inoperative and where certificates of confirmation were rectified upon discovery of assets not disclosed in the petition.

17. The other executors in their written submissions argued that in the first place that the assets the subject of the rectification application had not been disposed of in the will of the deceased and therefore they did not vest in them as executors and trustees, and that if the applicant first executor intended to bring them within that bracket then she first had to move the court under Section 53 of the Law of Succession Act, and it would only be after that that the court can be invited to consider the assets and the mode of their distribution. They further argued that the first executor applicant has not even provided evidence that the assets she sought to be included in the schedule of assets for distribution existed. Furthermore, she purported to propose distribution of the alleged assets even before she obtained concurrence of the heirs of the deceased. On the revocation of the grant appointing them, the respondents argued that the orders sought were not available for the said grant had been confirmed and the executors had since become trustees who could not be removed through the revocation of grant process. In any event, they argued, the executors should not be removed solely because they declined to support the rectification application.

18. The application dated 2nd August 2012, which seeks rectification of the certificate of confirmation of grant does not state the provisions of the law under which it is premised.

19. The provisions in the Law of Succession Act relating to rectification are in Section 74. The provisions set out the errors that may be rectified by the court. For avoidance of doubt, the said Section 74 states as follows:-

> **"Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose of in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered or amended accordingly."**

20. It goes without saying that the provisions in Section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a grant of representation. In probate practice, the term "confirmed grant" has gained currency and it is understood by some to mean the certificate of confirmation of grant. It is a misconception. The certificate issued upon a grant being confirmed does alter the grant of representation made in the matter. It does not replace the grant of representation, and it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed. In short it is the evidence of the confirmation of the grant. From the wording of Section 74, it is plain that the same was not tailored to for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not.

21. A party wishing to have rectified or altered or amended a certificates of confirmation of grant, need not approach the court through Section 74 of the Law of Succession Act, for the reasons that I have given above; rather they ought to apply for review of the orders made upon the application for confirmation of grant, where the alterations sought are fundamental; or for amendment of the certificate under Rule 73 of the Probate and Administration Rules to address minor errors or mistakes in the body of the certificate.

22. A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. 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. They go to the core of the distribution. They cannot be effected without touching the orders made by the court at the distribution of the estate. Consequently, such changes cannot and should be effected through a mere amendment of the certificate of confirmation of grant.

23. 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. Among the imported procedures is the device of review under the Civil Procedure Rules. In the relevant rules on review under the Civil Procedure Rules, an order of the court can be revised on the grounds of an error on the face or the record or discovery of new and important evidence that was not available at the time of the making of the order sought to be reviewed or for any other sufficient reason.

24. Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommondate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the court has confirmed the grant or a heir or survivor of the deceased who had previously been previously unheard of materializes after distribution, the court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.

25. The matters referred to above may require that the court interferes with its earlier orders on distribution of the assets. They may require a disturbance of the earlier orders. The court would be invited to revise its earlier orders so as to deal with the new situation occasioned by omission of assets or heirs, or by discovery of new assets or heirs. The accommodation of such assets or heirs cannot be effected by merely altering the certificate of confirmation of grant, for the certificate of confirmation of grant has no life of itself without the orders of the court confirming the grant. The alteration of the certificate of confirmation of grant has to find genesis in the review of the orders of the court upon which the certificate is grounded.

26. The only time when a certificate of confirmation of grant may be altered without affecting the orders upon which the certificate is derived from is where there are superficial errors, such as misspelling of names or misdescription of property or persons, or mistakes arising from the transcription or extraction of the certificate from original order of the court. This does not call for review of the original order of the court, but rather for correction of the superficial errors and mistakes. For such the court can be moved under Rule 73 of the Probate and Administration Rules, which saves the inherent powers of the court.

27. The application dated 2nd August 2012 sought rectification of the certificate of confirmation of grant by adding to the schedule assets that had been left out because they were unknown at the time of confirmation of grant. In the same application the applicant proposed how the said assets were to be distributed. For all purposes, the application dated 2nd August 2012 invited the court to distribute the newly discovered assets.

28. In view of what I have stated in the proceeding paragraphs, the said application was misconceived. The changes sought to be effected on the certificate of confirmation of grant cannot be made without reviewing the orders made on 7th November 2006 confirming the grant and distributing the estate as per the terms of the will of the deceased. New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November 2006 so as to include the discovered

assets and to distribute them. It is only after the review or revision of the said orders that an altered certificate of confirmation of grant can issue.

29. The deceased died testate. The assets that were placed before the court on 7th November 2006 for distribution were those the subject of the will made on 3rd June 1999. The assets the subject of the application dated 2nd August 2012 were not distributed in the will of 3rd June 1999, and for that reason they were not before the court on 7th November 2006. Since they were not the subject of the will which is the basis of the current proceedings, they cannot be introduced into the cause by the mere rectification of the certificate of confirmation of grant. There is no foundation upon which they can be brought into this cause, and least of all by a rectification of the certificate of confirmation of grant.

30. If the said were in the will, and the will could be interpreted to include them then it would mean that the deceased died intestate with respect to them. I note from the application that the applicant first executor had not endeavoured to demonstrate that although the will did not specifically refer to them by its wording it was still capable of disposing of them.

31. I have carefully perused the will of 3rd June 1999. I have noted that the same does not specifically dispose of the assets. It does not identify any of the assets the subject of the will. My opinion is that by its wording the said will does not exclude the property the subject of the application dated 2nd August 2012. If new assets are discovered that were not placed before the court on 7th November 2006, such assets are capable of disposal under the terms of the will of 3rd June 1999. However, the executors have to apply for review of the orders of 7th November 2006 so as to admit the said assets and to have them dealt with as per the terms of the will. Thereafter the certificate of confirmation of grant can be altered to conform with the orders to be made by the court upon review.

32. As for the application dated 6th November 2012, I did note that the same was principally an application for revocation of the grant on record. It was not indicated that it was founded on Section 76 of the Law of Succession Act, which provides for revocation of grants. It is clear, however, that it was grounded on the allegation that the grant had become useless and inoperative. The reason for that appears to be on account of the respondents failing to sign the rectification application dated 2nd August 2012.

33. I have already found that the application dated 2nd August 2012 is misconceived. It cannot therefore be a ground for revoking the grant. It has not been demonstrated that the respondents have not cooperated with the applicant in any other manner. There is also no evidence that the applicant had consulted with the respondents before embarking on making the ill-fated application dated 2nd August 2012.

34. In the end, I do not find any merit in the applications dated 2nd August 2012 and 6th September 2012. The same are hereby dismissed. The applicant is an elderly woman and the mother of two of the respondents; it would not be just to condemn her to costs. There shall therefore be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE