



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1533 of 2007

IN THE MATTER OF THE ESTATE OF JOYFRED MUTHI KAMINZA (DECEASED)

RULING

The application dated 4th September 2012, which seeks rectification of the grant made on 8th April 2007 to Judith Muthina Muithi and Davis Mulambaya Kaminza, and confirmed on 15th July 2008. The application seeks the following:

- 1) The termination of the trust created at the confirmation of the grant to pave way for the redistribution of the estate;
- 2) The substitution of Davis Mulambaya Kaminza as co-administrator with Dan Kyalo Muithi;
- 3) The redistribution of the estate in the manner proposed in the application.

In the affidavit sworn on 11th September 2012, in support of the application, the applicant at paragraph 1 seeks to have the grant rectified to make changes to the mode of distribution contained in the certificate of confirmation of grant dated 15th July 2007. She says at paragraph 2 that there are errors in the certificate of grant but the said errors are not identified. The affidavit does not have any material to support prayers 1 and 2 of the application. It says nothing about the termination of the trust and the substitution of the co-administrator.

The law governing rectification or alteration of grants is **Section 74 of the Law of Succession Act**. The procedure for obtaining rectification is set out in **Rule 43 of the Probate and Administration Rules**. Errors may be rectified by the court where they relate to names or descriptions, or setting out of the time or place of the deceased's death. The court can only order rectifications in the situations envisaged in **section 74**. The power of the court to order rectification is not general; it is restricted to the situations stated in that provision. **Section 74** provides:

'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...'

Rule 43(1) of the Probate and Administration Rules:

'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...'

There are no errors in the certificate of grant issued on 15th July 2007. Under that certificate the estate was to be held by the administrators in trust for the children of the deceased. This is not an error. This is in keeping with **Section 35 of the Law of Succession Act**, which provides that a surviving spouse is entitled to a life interest over the estate which ultimately devolves upon the children in equal shares. No error has been demonstrated. It would appear that the 1st administrator is proposing to change this position and redistribute the estate in a manner which would see her award herself five properties absolutely. This proposal is not supported by the law, and it runs counter to **Section 35 of the Law of Succession Act**, which deals with how an estate ought to be distributed in the event of a deceased person being survived by a spouse and children. The proposal cannot be dealt with under **Section 74 of the Law of Succession Act** and **Rule 43 of the Probate and Administration Rules**. The certificate of confirmation the grant of letters of administration intestate herein cannot be rectified in the manner that contravenes section 35 of the Law of Succession Act. This is really an application for the redistribution of the estate disguised as a rectification application.

Koome J held in ***In the Matter of the Estate of Muniu Karugo (Deceased) Nairobi High Court succession cause number 2668 of 1997*** that rectification only deals with obvious errors and it cannot be used to fundamentally change the character of the grant. I agree entirely with that position. The proposed changes are far reaching and will result in fundamental changes to the confirmed grant. Where an administrator desires to have such fundamental changes effected, then the best solution should be cancellation of the certificate issued upon the confirmation of the grant to pave way for a redistribution of the estate where the proposed changes can be accommodated. In any event, the circumstances of this case do not require cancellation of the certificate as what the 1st administrator is proposing is contrary to **Section 35 of the Law of Succession Act**.

Regarding the substitution of the co-administrator, no reason has been given for the removal or substitution of the current co-administrator. No allegations of misconduct or incapacity have been advanced. The co-administrator has not himself sworn an affidavit to say that he is not willing to continue acting for whatever reason. The mere fact that a child of the deceased has come of age is not reason enough for substitution. Appointment of administrators is the function of the court, and **Section 66 of the Law of Succession Act** grants the court final discretion over the matter. If an administrator has to be removed good reasons must be given, and where no justification has been given then the administrator sought to be removed must be heard.

Furthermore, a grant is a certificate. It is issued to a particular person or persons. It cannot be transferred to another person. If it was made to two persons, it cannot be amended to remove the name of one person in order to insert the name of another, unless the name to be replaced had been inserted by error by the court. The remedy lies in revoking the grant, if there are good grounds for doing so as set out in **Section 76 of the Law of Succession Act**, and making a fresh grant in the name of the person proposed as substitute to the person whose name is being removed.

For the reasons that I have given above, I find that the application dated 4th September 2012 is without merit and I hereby dismiss it with costs.

W. MUSYOKA
JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF APRIL, 2013.