



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 598 of 1985

IN THE MATTER OF THE ESTATE OF EDWARD KANYIRI KUNYIHA (DECEASED)

RULING

The applicant has come to court by an application dated 1st November 2012, which seeks rectification of the grant made on 18th March 1986 and confirmed on 18th March 1987. The application seeks to achieve three objectives:

- a) To have included certain properties that were omitted from the grant;
- b) The removal of the name of the co-administrator and beneficiary who has died and to have her share allocated to someone else;
- c) The shares previously taken up by James Mugo Kanyiri to be allocated to his widow Catherine Mukami Mugo.

In the affidavit in support of the application, the applicant avers that at the time the grant was confirmed on 18th March 1987, the following properties were charged with the Kenya Commercial Bank Ltd, Murang'a branch, and therefore they were omitted from the confirmation. The debts have since been paid and the property is not available for distribution. The property in question is Loc. 10/Gatheru/T. 39, 105, 106 and 107. He now seeks that the certificate be rectified to distribute these assets. The co-administrator has also died and he would like the grant rectified to remove her name and to reallocate the property allotted to her. He also avers that his brother, James Mugo Kanyiri has died and that his share should pass to his widow.

The law on rectification or alteration of grants is **section 74 of the Law of Succession Act**. The procedure for obtaining rectification is to be found 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 to order rectification is limited to those situations. The power given by that section is not general. **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...'

I find that there was no error in this matter. The assets that are sought to be inserted were not omitted by the court but by the applicant. It was a deliberate omission because the property was not available at the time of confirmation for distribution. Its omission was not by mistake or error. Consequently, the issue of rectifying an error does not arise. The deaths of the co-administrator and the beneficiary have not led to an error. It is circumstances that have changed that have changed. The circumstances that have arisen cannot be dealt with under **section 74 of the Law of Succession Act** and **Rule 43 of the Probate and Administration Rules**. The grant of letters of administration intestate cannot be rectified in the manner proposed to accommodate the changed circumstances.

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 will fundamentally change the confirmed grant. Where such fundamental changes are contemplated, then the certificate issued upon the confirmation of the grant ought to be cancelled to pave way for a fresh confirmation application where the proposed changes can be accommodated.

Regarding the death of the co-administrator, the position is that the grant made on 18th March 1986 has become inoperative. The grant was made jointly to the applicant and his mother, who has now died. It was intended that the two act together in the administration of the estate. A grant is a certificate. It is issued to a particular person or persons. If the holder of the grant dies the grant becomes useless, as it cannot be transferred to another person. If it was made to two persons and one dies it becomes inoperative. Under section 76 of the Law of Succession Act such grant is liable to revocation. It should be revoked and another grant made.

Where a beneficiary dies, his share cannot be reallocated. It should pass to his estate. In this case it is proposed that the shares that had been allocated to the dead beneficiaries be reallocated. That is not the correct procedure. The property allotted to the estate of the widow of the deceased who has died should be allotted to her estate. Regarding the shares to James Mugo Kanyiri, his shares cannot be passed to his widow, unless she is the administrator of the estate of her deceased husband and the shares are allotted to her in that capacity.

The remedy available to the administrator in this matter is to move the court for the revocation of the grant made jointly made to him and his deceased mother, and his appointment as the sole administrator of the estate or jointly with someone else. Thereafter he should apply for the cancellation of the certificate of grant dated 16th March 1988, so that he can apply for confirmation of the grant made to him, in which he would distribute the property which was not distributed in the certificate of 16th March 1988.

The application dated 1st November 2012 is dismissed with costs.

W MUSYOKA
JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 10th DAY OF May, 2013.