



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Succession Cause 3218 of 2007

#### IN THE MATTER OF THE ESTATE OF LUCY WANJIRU NGUGI (DECEASED)

#### RULING

The application dated 8<sup>th</sup> October 2012, seeks rectification of the grant confirmed on 11<sup>th</sup> March 2008. The application seeks rectification in the following respects:

- 1) To redistribute the shares allotted to Hazel Wairimu Ngugi as the latter has since died;
- 2) To describe the assets represented as shares in Barclays Bank, Jubilee Insurance Company Limited and Kengen;

According to the certificate of confirmation of grant dated 11<sup>th</sup> March 2009, the estate is to be shared equally between five persons, being the surviving children of the deceased. This includes Hazel Wairimu Ngugi. She is now dead, having passed on on 10<sup>th</sup> March 2010 according to the certificate of death attached to the application. Representation to her estate was obtained by Eugene Ng'ang'a Ngugi and Leslie Alex Ngugi. The grant relating to her estate has been confirmed and her 1/5 share in the estate of Lucy Wanjiru Ngugi has been factored in the certificate of confirmation of grant dated 27<sup>th</sup> February 2012. This is the basis of the prayer for the redistribution of the shares allotted to her in this estate.

The other prayer touches on the shares owned by the deceased Lucy Wanjiru Ngugi in Barclays Bank, Jubilee Insurance Company Limited and Kengen. The amount of shares indicated in the certificate of 11<sup>th</sup> March 2011 has turned out not to be the actual figure of shares owned by the deceased, as there were bonus shares issued in her favour in respect of the three companies. The proposal is to correct the certificate to reflect to the bonus shares.

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 11<sup>th</sup> March 2009. No error has been demonstrated. It is the circumstances that have changed. A beneficiary has died. This development is not an error. The administrators have discovered that certain bonus shares were issued to the favour of the deceased by Barclays Bank, Jubilee Insurance Company Limited and Kengen. Similarly, this development is not an error, but a change in the circumstances as they relate to the assets. These are matters that cannot be corrected under **section 74** of the Law of Succession Act.

The circumstances referred to above can be handled through a review application. The provisions of the Civil Procedure Rules on review have been imported into probate practice by rule 63 of the Probate and Administration Rules. Review is governed by Order 44 (formerly XLIV) of the Civil Procedure Rules. Review is available in cases where a party has discovered new and important matter of evidence which was not available at the time the decision was made, where there has been some mistake or error apparent on the face of the record, and where there are sufficient reasons. The death of one of the beneficiary could be treated as a matter of new evidence which was not available at the time the decision was made or as a sufficient reason. Similarly, the matter of the bonus shares discovered after confirmation of the grant could be described as a new matter of importance or as a sufficient reason for seeking the review of the confirmation order of 11th March 2009. These two matters cannot be described as mistakes or errors apparent on the face of the record.

It would appear that **Section 74** of the Law of Succession Act and Rule 44 of the Civil Procedure Rules overlap. The overlap is however limited to mistakes or errors apparent on the face of the record. **Section 74** can be cited only in respect of mistakes or errors apparent on the face of the record. Where need arises for alteration of a grant or certificate confirmation of grant, but the circumstances necessitating it go beyond mere mistakes or errors apparent on the face of the record, the remedy available would not be found in **Section 74** of the Law of Succession Act but in rule 44 of the Civil Procedure Rules.

The position that I take in this matter is that the applicant ought to have moved the court under rule 44 of the Civil Procedure Rules for a review of the confirmation orders made on 11th March 2009, to effect the changes that they propose to the certificate of confirmation of grant of even date. Section 74 of the Law of Succession Act is of no application whatsoever to the circumstances of the case.

I will not dismiss the application dated 8<sup>th</sup> October 2012. The law has given me inherent power, saved, with respect to succession matters, by rule 73 of the Probate and Administration Rules, to do justice. I will do justice in this case by ordering a review of the order of 11<sup>th</sup> March 2009. The certificate of confirmation of grant issued on 11<sup>th</sup> March 2011 is hereby reviewed along the lines proposed in the application dated 8<sup>th</sup> October 2012.

**DATED, SIGNED and DELIVERED at NAIROBI this 7th DAY OF May, 2013.**

**W. M. MUSYOKA**

**JUDGE**