REPUBLIC OF KENYA

High Court at Eldoret

Succession Cause 115 of 2006

IN THE MATTER OF THE ESTATE OF NJOROGE KIRIRI (DECEASED)

RULING

The application is brought by way of Notice of Motion dated 3rd February, 2012 brought under Rule 63 (1) of the Probate and Administration Rules and Order 45 Rule 1 of the Civil Procedure Rules. It is filed by William Mwangi karanja the co-administrator of the estate of the late Njoroge Kiriri, who prays for the following orders:-

1. That the Court reviews its orders issued on the 11th July, 2007.

2. That the Court do rectify the confirmed grant issued on 21st August, 2007 at paragraph (a) thereof.

3. That costs of this application be provided for.

The application is premised on the following grounds:-

1. That the grant confirmed bears an error apparent on the record.

2. That in the said confirmed grant, the property known as Eldoret Municipality Block 16 (Kamukunji) 519 was vested on Simon Njuguna Njoroge, Sammy Njoroge, Samuel Njoroge and Samuel Njoroge Njuguna wholly.

3. That the family meeting held on the 6th July, 2007 had resolved that the aforesaid property be jointly owned by the six principal beneficiaries with the intention that each of them shall pass ownership to a child born by them and named in honour of the deceased as per Kikuyu Customary Law.

4. That the application for grant as well as the certificate of confirmation of grant as presently drafted does not reflect the wishes of all the beneficiaries and would obviously be cumbersome to effect.

5. That the application for grant as well as the certificate of grant issued there from are characterized by mistake that ought to be rectified.

6. That this application is brought timeously and in the interest of justice.

7. That no prejudice shall be suffered by any party to this transaction.

It is further supported by the affidavits of the Applicant William Mwangi Njoroge and daughters of the deceased namely, Zipporah Wambui Njoroge, Ruth Wanjiru Njoroge and Beatrice Wambui Njoroge, all sworn on the 3rd February, 2012. The main affidavit herein is that to which is attached the supporting documents. The other three deponents only affirm that they support the averments contained in the

affidavit of William Mwangi Njoroge.

There are two Replying Affidavits filed in opposition to the application. One is sworn by Susan Muthoni Njoroge, a daughter of the deceased on 8th March, 2013. The main one is sworn by Simon Njuguna Njoroge, the co-administrator and brother to the Applicant also on 8th March, 2012.

When the application came up for hearing on 10th December, 2012, it was first mentioned at about 9.00 a.m. for purposes of confirming that it would proceed. At the time, Mr. Mutei Advocate appeared for the Applicant while Mr. Barasa was holding brief for Miyienda for the Respondent. Both counsel confirmed they were ready to proceed with the application and court allocated time for hearing at 12.40 p.m. At the time, only Mr. Mutei was present and ready to proceed. Neither Mr. Barasa nor Mr. Miyienda appeared on behalf of the Respondent. Accordingly the hearing proceeded in the absence of both the Respondent and his counsel.

In submissions counsel for the Applicant stated that the Respondent and Co-administrator of the deceased's estate had taken over the ancestral home on **PLOT NO. 519** against an agreement made by the family members on 6th July, 2007. He submitted that, according to the agreement, the property was to be registered in the joint names of the grand children named after the deceased. That unfortunately the deceased and other three deponents who have sworn the supporting affidavits have no children named after the deceased and so they have been disinherited. He further submitted that the Applicant is currently collecting rent from the premises and is not distributing the proceeds to the other beneficiaries.

In the Replying Affidavit of Simon Njuguna Njoroge, it is deposed that the grant was confirmed in accordance with the agreement made by the family members on 6th July, 2007. That on the date the grant was confirmed in court, the Applicant and the three others supporting the application, namely Zipporah Wambui Njoroge, Ruth Wanjiru Njoroge and Beatrice Wambui Njoroge, were all present and none raised an objection.

I have appraised myself with the application, the supporting affidavits, submissions made by counsel for the Applicant and the two Replying Affidavits (albeit in the absence of counsel for the Respondent) and take the following view.

The application is brought both under Rule 63 (1) of the Probate and Administration rules and Order 45 Rule 1 of the Civil Procedure Rules. Rule 63 (1) of the Probate and Administration rules refers to how the court shall deal with terms of a will that are ambiguous in respect of vesting, contingency or divesting of a gift. Order 45 (1) of the Civil Procedure Rules on the other hand deals with application for review of decree or order in civil proceedings.

The main prayer in this application is for review of the orders issued on 11th July, 2007 and for rectification of the grant confirmed on 21st August, 2008. The two prayers are sought on account that the confirmed grant bears an error apparent on the face of the record. When I go through the record of proceedings, I see no order that was issued on 11th July, 2007. On this date, there is only an entry of what transpired in the registry. It is on this date that the matter was fixed for confirmation of the grant; the said date given as 30th July, 2007.

It is on 30th July, 2007 that the court confirmed the grant and ordered the distribution of the estate's assets in terms of the affidavits set out in Form 9 sworn on 11th July, 2007. At look of the Certificate of Confirmation of a Grant shows that indeed the grant was confirmed on 30th July, 2007 but is dated 21st August, 2007.

Accordingly, there is a mistake in the drafting of the application as no orders were issued on 11th July, 2007 and the grant was confirmed on 30th July, 2007 and **NOT** 21st August, 2007. Having drawn to the attention of the parties of this error, I rule that the error is an inadvertent one that does not go into the root of issues brought for determination by the court. It is apparent that the Applicant is seeking the variation of the orders that confirmed the grant, and these orders were issued on the same date that the grant was confirmed, which is 30th July, 2007. This error is on a technicality and cannot be used to the disadvantage

of any party to this cause. See – Article 159 of the Constitution. The same deals with judicial authority and legal system. Sub-Article (2) (d) provides that:-

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

(d) Justice shall be administered without undue regard to procedural technicalities."

I bear in mind that the purpose of equity is do justice for all so as to fulfil the objective stipulated in our supreme law.

Having observed this it is also apparent that the Applicant used the wrong provisions of the law. The applicable provision is Section 74 of the Law of Succession Act, Cap 160, Laws of Kenya with Rule 43, Part VIII of Probate and Administration Rules providing for the procedure and forms to be used in such an application. Again I hold that the failure to cite the correct provisions of the law – cannot invalidate the application as the same amounts to a technicality.

For our purposes, Section 74 of Cap 160 applies. It sets out the grounds upon which a court may rectify a grant. If the grant herein is rectified, it will automatically vary the orders of 30th July, 2007 that confirmed the grant.

Under this provision a grant may be rectified on any of the following grounds:-

(i) errors in names and descriptions

(ii) errors in setting out the time and place of the deceased's death

(iii) errors in the purpose of a limited grant.

The grant herein has already been confirmed and so only grounds (i) or (ii) would apply. The rectification sought does not in any way relate to errors of names and descriptions or the time of the death of the deceased as contemplated by Sections 74.

The deceased left behind several assets but the only one in dispute is **ELDORET MUNICIPALITY BLOCK 16 (KAMUKUNJI) 51**9. In the Certificate of Confirmation, the grant is confirmed in the following manner:-

"To be registered in the joint names of (1) Simon Njuguna Njoroge (2) Sammy Njoroge (3) Samuel Njoroge and (4) Samuel Njoroge Njuguna"

It is noted that Simon Njuguna Njoroge, also the Respondent herein is the first (No. 1) beneficiary to this plot. The agreement which the Respondent is said to have broken and is annexed to the supporting affidavit reads:-

"..... have agreed that the above premises (in dispute) and any structure thereof remain our home and reserve as children of the late Mrs. and Mr. Njoroge Keriri. The houses thereof will also be inherited to grand children named Samuel Njoroge after the deceased the late Samuel Njoroge by the deceased six children."

The same is signed by Simon Njuguna, Ruth Wanjiru, Zipporah Wambui Njoroge, Beatrice Wambui Njoroge, Susan Muthoni Njoroge and William Mwangi. My interpretation of the second part of the agreement is that the property (apart from the main house), was to be distributed to all grand children named after the deceased and are born by the six children of the deceased. I further understand it to mean that the children of the deceased who do not have children named after the deceased are not provided for in respect of that Plot. Indeed Ruth Wanjiru, Zipporah Wambui and Beatrice Wambui who support this application were signatories to this family agreement.

If indeed they feel that they were not adequately provided for in that respect, they can seek redress by other means other than by the grant being rectified. This is in view of the fact that if the grant were to be rectified in the manner sought it would totally alter the manner and angle in which the distribution of this property would take place. The effect of it would not be to rectify the grant but to revoke the already existing one and substituting it with one bearing a fresh ode of distribution of the assets.

In any event, it is noted that no party raised an objection at the time of the confirmation of the grant. It is now over five years since the grant was confirmed. So much has transpired on the land since. Any orders given would adversely affect the result of the confirmed grant and cannot therefore be given in the absence of all the beneficiaries and parties to the family agreement of 6th July, 2007.

See what the court ruled in the matter of the **ESTATE OF SILVESTER THUO NJAU, SUCCESSION CAUSE NO. 1702 OF 2007**. It was contended that the administrators and beneficiaries had agreed to rectify the confirmed grant so as to include the children of the beneficiaries in the Certificate of the Confirmation in order to reflect the deceased's wish – to have the assets of the estate held in trust for the grandchildren. The court held that providing for trusts for the descendants of the beneficiaries is not within the purview of Section 74 of the Law of Succession Act and so dismissed the application.

In the same vein, I hold that the orders sought do not fall under the provisions of the said (S.74) Section and I accordingly dismiss the application with costs to the Respondent.

DATED and **DELIVERED** at **ELDORET** this 27th day of February, 2013.

G. W. NGENYE – MACHARIA

JUDGE

No appearance for the Applicant
No appearance for the Respondent
Court:

Notice of delivery of ruling duly served upon Counsel for the parties.

G. W. NGENYE – MACHARIA

JUDGE