



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 887 OF 2013

IN THE MATTER OF THE ESTATE OF NJOGU BURI Alias NJOGU RURI DECEASED

MARY WANJIRA NJOGU.....PETITIONER

V E R S U S

WALLACE M. NJAGUA.....1ST RESPONDENT

JOSEPH MURIITHI KABENYA2ND RESPONDENT

RULING

1. The grant of representation to the estate of the late Njogu Buri alias Njogu Ruri was issued to Mary Wanjira Njogu and confirmed on 16/06/2016 whereby the deceased's estate **Baragwe/Thumaita/967** was shared out among his dependants.
2. The applicant has now filed an application dated 08/10/2018 seeking to rectify and/or review the grant by deleting her name and her portion measuring 0.20 Ha be shared to Veronica Muthoni Macharia. The application was based on the ground that she sold her portion to the said Veronica Muthoni Macharia on 21/11/2016 who is of old age and sickly.
3. The respondents in response stated that the application is fatally defective and an abuse of the court process. That the said Veronica Muthoni Macharia is a purchaser who bought from a beneficiary and not from the deceased hence she should wait until the grant is registered for her to get her share. That the petitioner had sold to them a portion of land which is the same one sold to the said Veronica Muthoni Macharia hence the application is only meant to defeat their interest.
4. That the petitioner and family members approached them for finance to commence the succession cause and payment of medical bills. In exchange the family agreed to sell a portion of the land measuring 0.30 Ha as per the agreement dated 16/09/2009. That during pendency of the succession proceedings, they entered into further agreements for additional portions of land which they occupy. That at the commencement of the proceedings, their name was included as creditors but to their surprise upon confirmation, they were left out.
5. I have considered the application.

Issues arising;

1. Rectification of grant

Section 74 of the Law of Succession Act 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, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

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

“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.”

6. The Law on rectification is clear from these provisions. The rectification is a remedy to correct errors which do not effect the substance of the grant. It is limited to correction of errors in names and descriptions of a person or thing, or as to time and place of death of deceased or

the purpose for which a Limited Grant was made. Rectification maybe made to correct a name which is misspelt or correction in the description of the property and so on as provided in the above provisions. Rectification is not available to amend the Grant and a party wishing to amend the Grant ought to approach the court by way of review under **Order 45 of the Civil Procedure Act** if the party is able to prove the conditions for review.

7. The applicant is seeking that she removes herself as a beneficiary of the estate and bring in a Veronica Macharia who is not a beneficiary entitled to the estate of the deceased. The reason the applicant gives is that she sold her share to the said Veronica Muthoni Muchira.

8. The respondents are stating that Veronica Muthoni Muchira is a purchaser who bought from a beneficiary of the estate and not from the deceased. She therefore has to wait until her share is registered in her name.

9. The respondents are stating that the Petitioner herein Mary Wanjiru Njogu sold to them a portion of land which on the ground is the same land sold to Veronica Muthoni Muchira and the application is meant to defeat their interest. This leads to the second issue.

2. Sale of Land before the Confirmation of Grant.

Section 45 of the Law of Succession Act provides:-

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

The provision prohibits the intermeddling with the estate of a deceased person. It makes it an offence to intermeddle with the estate of a deceased person. Further the Law of Succession Act prohibits dealings by way of sale any immovable property of the deceased before the grant is confirmed.

Section 82 of the Law of Succession Act provides:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that

(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

10. Any sale of immovable property before the confirmation of the Grant is null and void. It does not give a party any proprietary rights on the immovable property. Though under **Section 79 of the Law of Succession Act**, all property of the deceased shall vest in the executor or the administrator as the personal representative, there is a limitation as to what extent he/she can deal with the properties and especially immovable property. By didn't of **Section 79 of the Law of Succession Act** since the respondents bought the land before the grant was confirmed in which case the property had not vested in her. As the personal representative of the deceased, she had no power to deal with the free property of the deceased. The property involved was immovable property and as provided under **Section 82(b)(ii)** she could not disposed of the property by way of sale before the grant was confirmed. The provisos to **Section 45 of 82** which I have quoted above couched in mandatory terms. It means the administrator is supposed to comply with the provision and can only deal with the estate after the grant is confirmed. The applicant has no option but to comply.

11. In the circumstances the application is without merits, the applicant cannot seek to rectify the grant to bring in a person who is not beneficiary entitled to the estate of the deceased. As for the respondents, they entered the agreements before the grant was confirmed. The agreement was entered between year 2009 & 2011. The grant was confirmed on 16/2/2016. The agreement was null and void as the administrator had no capacity to deal in the estate before the grant was confirmed. I find that the application for rectification of grant is without merits. I dismiss the application.

Dated at Kerugoya this 18th Day of June 2019.

L. W. GITARI

JUDGE