



In re Estate of the Late Kahumbura Njihia (Decesaed) (Succession Cause 360 of 1986) [2024] KEHC 13109 (KLR) (Family) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 360 OF 1986
HK CHEMITEI, J
OCTOBER 31, 2024
IN THE MATTER OF THE ESTATE OF THE LATE KAHUMBURA NJIHIA (DECEASED)**

BETWEEN

PETER KAHUMBURA APPLICANT

AND

JAMES MUIRURI KAHUMBURA RESPONDENT

RULING

1. The Applicant filed the application dated 7th August 2023 seeking inter alia to rectify the grant issued on 28th October 1988 to incorporate some of the left-out assets as well as some beneficiaries.
2. The Respondent on the other hand filed a preliminary objection dated 28th June 2024 arguing that the said application was contrary to the provisions of Rule 43 (1) of the *Probate and Administration Rules* and Section 74 of *Cap 160*. That the issues raised therein are merit based which cannot be addressed by way of rectification and the court to that extent was functus officio.
3. The court directed the parties to file their written submissions which they have complied. Both submissions are in relation to the application as well as the preliminary objection.
4. Having looked at the said objection I think it is worthwhile to begin with the same as the outcome will have an impact on the application.
5. The Respondent argued strongly in his submissions in regard to the preliminary objection that the issues raised by the Applicant cannot be determined simply in the application. The same offends the Provisions of the *Act* namely Section 74 and Rule 43(1). The said portions of the law deal majorly with minor issues in the grant like typographical errors or such like and not the fundamental issues relating to distribution.



6. The Respondent /Applicant on the other hand submitted that all that he was raising were issues concerning error rectification left out when the grant was confirmed in 1988. That some of the properties left out have to be distributed and cannot be assumed. He therefore urged the court to disallow the objection and proceed to determine the application.

Analysis and Determination

7. I think to begin with, it is necessary to cite the two portions of the law the parties are arguing about. Section 74 of cap 160 states as follows:

“Errors may be rectified by court

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.”

8. Whereas Rule 43 (1) states as hereunder:-

“Rectification of grant

(1) 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 in Form 110 for such rectification through the registry and in the cause in which the grant was issued.”

9. Does the application in question seeks to rectify errors described above whether names, date, time and purposes of the grant?
10. On the contrary I have perused it extensively and other than additional names under paragraph (b) thereof the prayer under (c) in particular of reverting the interest of the late Tabitha Wanjiku Kahumbura to the estate is a weighty issue and not one of those contemplated above unless done by the consent of all the beneficiaries.
11. Secondly the properties under prayer (d) thereof are wide and extensive and I think beyond the scope of Section 74. For instance, the parties seemed not to have agreed on how to share out those left out like the Nairobi Grogan/Racecourse ¼ share in LR No 209/136/17. On this alone the net effect is that a substantive application ought to be made and not rectification.
12. The same goes to the tabulation of the distribution under prayer (e). That list is such that to the extent that the same is contentious I think a proper application by way of fresh distribution ought to be considered by the parties. Were the court to proceed in the manner suggested by the Applicant then it shall be running foul the simple requirements anticipated under the above cited Sections of Cap 160 which did not anticipate such drastic amendment or rectification of the grant.
13. I have also perused the court records and it appears to me that there was another rectification or amendment to the grant dated 10th November 2010 by Justice Kimaru (as he then was.) If this is the case then what the application ought to be referring is the latter amendment and not the one of 1988.



14. The sum total of my finding is that the preliminary objection is meritorious and the same is allowed. The Applicant has to file a proper application as the one before court deals with fresh issues which must be exhaustively be dealt with on merit.
15. More importantly all the parties ought to be brought to a consensus and in the absence the court will have to make a fresh determination.
16. The preliminary objection is allowed, the application dated 7th August 2024 is dismissed with no order as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 31ST DAY OF OCTOBER 2024.

H K CHEMITEI

JUDGE

