



**In re Estate of Tabitha Kalondu Ngove (Deceased) (Succession Cause  
2712 of 2003) [2023] KEHC 470 (KLR) (Family) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 470 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2712 OF 2003  
MA ODERO, J  
JANUARY 27, 2023**

**BETWEEN**

**PETRONILLA MUTUKU MAKILYA ALIAS PETRONILLA MUTUKU  
NGOVE ..... 1<sup>ST</sup> APPLICANT**

**WINFRED KATUNGWA NGOVE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CAROLYNE MBINYA KATHENDU ..... 1<sup>ST</sup> ADMINISTRATOR**

**KENNEDY THYAKA NGOVE ..... 2<sup>ND</sup> ADMINISTRATOR**

**PAUL MATULAI NGOVE ALIAS EDWARD KALA NGOVE .... 3<sup>RD</sup>  
ADMINISTRATOR**

**RULING**

1. Before this court for determination is the summons dated September 30, 2021 by which the applicants Petronilla Mutuku Makilya alias Petronilla Mutuku Ngove (1<sup>st</sup> Applicant) and Winfred Katungwa Ngove (2<sup>nd</sup> applicant) seek the following orders:-
  1. That the certificate of confirmation of grant dated July 25, 2005 and issued to Petronilla Mutuku Makilya, Kennedy Thyaka Ngove, Jacqueline Mumba Ngove (now deceased) and Winfred Katungwa Ngove be amended and/or rectified in the schedule of properties to that the schedule will read as proposed in the schedule of properties attached to this application and marked Appendix 6.
  2. That Petronilla Mutuku Makilya alias Petronilla Mutuku Ngove be appointed as administrator de bonis non to the estate of Tabitha Kaloundu Ngove (deceased) who died on 1<sup>st</sup> February 2003 in the place of Jacqueline Mumba Ngove.



3. That Paul Matulai Ngovealias Edward Kala Ngovebe removed as an administrator to the estate of Tabitha Kalondu Ngove(deceased) who died on February 1, 2003and be replaced by Winfred Katungwa Ngove
4. That the costs of this application be in the cause.”
2. The summons which was premised upon sections 74 of the Law of Succession Act Cap 160 Laws of Kenya and rule 43 (1) of the Probate and Administration Rules and all enabling provisions of the Law was supported by the affidavit of even date and supplementary affidavit sworn by the applicants.
3. The summons was opposed by the respondent/administrators Carolyne Mbinya Kathendu, Kennedy Thyaka Ngoveand Paul Matulai Ngovealias Edward Kala Ngovewho filed Grounds of opposition dated January 13, 2022.
4. The matter was initially referred to Court Annexed Mediation. However, the parties were unable to reach any agreement. The court then directed that the application be canvassed by way of written submissions. The applicants filed the written submission dated August 27, 2022whilst the Respondents relied upon their written submissions dated August 22, 2022.

## **Background**

5. This Succession Cause relates to the estate of the late Tabitha Kalondu Ngove(hereinafter ‘the Deceased’) who died intestate on February 1, 2003. A copy of the death certificate serial number 724474 is in the court file.
6. The Deceased was survived by eleven (11) children as follows:-
  - i. Alice Mumo Ngove – Daughter
  - ii. George Nyamasyo Kathendu – son
  - iii. Georgina Sengya Ngove – Daughter
  - iv. Petronilla Mutuku Ngove – Daughter
  - v. Mbinya Kathendu Ngove – Daughter
  - vi. Mildred Mbuya Ngove – Daughter
  - vii. Winfred Katungwa Ngove – Daughter
  - viii. Kennedy Nthyaka Ngove – son
  - ix. Jacqueline Mumbe Ngove – son
  - x. Edward Kala Ngove – son
  - xi. Nathaniel Kyalo Ngove – son
7. The husband (widower) of the Deceased Joel Ngove Kathenduhad died on December 25, 1968thereby predeceasing his wife.
8. Following the demise of the Deceased Grant of letters of Administration were on April 16, 2004issued to Petronilla Mutuku Ngove, Kennedy Nthyaka Ngove, Jacqueline Mumbe Ngove and Winfred Katungwa Ngove. The Grant was subsequently confirmed on 25<sup>th</sup> July 2005. The certificate of confirmed Grant was later amended and an Amended Grant was on July 26, 2016 issued to Carolyne



Mbinya Kathendu, Paul Matulai Ngove, Kennedy Thyaka Ngove and Jacqueline Mumba Ngove as Administrators of the estate.

9. By this summons the Applicants seek to have the Amended Grant rectified to remove Paul Matulai Ngove as an Administrator and have him replaced by the 2<sup>nd</sup> applicant Winfred Katungwa Ngove, and to have Jacqueline Mumba Ngove (now deceased) replaced by the 1<sup>st</sup> applicant Petronilla Mutuku Ngove.
10. The applicants further wish to have the schedule of properties in the confirmed grant dated July 25, 2005 rectified to read as per the appendix which is annexed to the summons.
11. The applicants aver that they are the daughters of the Deceased and beneficiaries of her estate. They allege that Paul Matulai Ngove has mismanaged the estate and has intermeddled with the same by selling off land belonging to the estate without the knowledge and/or consent of the other beneficiaries. The Applicants further claim that the current Administrators have failed to render true and genuine accounts of all income generated from the estate, that the Administrators have denied the other beneficiaries access to the estate and that the current Administrators have failed to complete the administrations of the estate.
12. The applicants therefore apply to be appointed as Administrators 'de bonis non' to the estate of their late mother. They allege that several properties/assets were omitted in the schedule of Distribution supplied by the current Administrators. They pray that the said assets be included in the Grant and the same be distributed according to their annexed schedule of distribution (Appendix 'b').
13. As stated earlier the summons was opposed. The respondents who are the current administrators of the estate filed grounds of opposition dated January 13, 2022 which was premised on the following grounds:-
  1. That section 74 of the *Law of Succession Act* and rule 43 of the *Probate and Administration Rules*, under which provisions the instant application has been brought, are limited in scope and only for rectification of errors. Substitution and appointment of administrators and changes in the mode of distribution cannot be entertained under the premised sections of the law.
  2. That a grant of representation is made in personam, is specific to the person appointed and cannot be transferred and or substituted from one person to another. The issue of substitution of an administrator with another person does not therefore arise.
  3. That the appointment of fresh administrators to take the place of previous ones following their death is subject to the provisions of sections 51 through 66 of the *Law of Succession Act* and not through summons application.
  4. That changes and variations as to the mode of distribution of an Estate as sought by the applicants is fundamental issue requiring consent of all the beneficiaries. None has been heard and the applicants are on a journey of their own.
  5. That the certificate of confirmation of grant dated 25<sup>th</sup> July 2005 has already been amended and does not therefore exist for amendment and or rectification as sought by the Applicants.
  6. That the applicants lack locus standi to bring the instant application. An application for amendment and or rectification of grant can only be made by the Administrators.
  7. That the application dated 30<sup>th</sup> September 2021 is legally and procedurally unsound and incompetent and not properly before court.



8. That the summons is vexatious, frivolous, an abuse of court process and judicial time.”

### **Analysis and Determination**

14. I have carefully considered the summons before this court, the grounds of opposition filed by the respondents as well as the written submission filed by both parties. The two issues which arise for determination are –
- (i) Whether the current Administrators should be substituted/removed.
  - (ii) Whether the confirmed Grant dated July 25, 2005 should be rectified
- (i) Removal and/or substitution of the administrators
15. The applicants seek to have one of the administrators Jacqueline Mumbe Ngove (now deceased) replaced by the 1<sup>st</sup> Applicant Petronilla Mutuku Makilya.
16. It is not in dispute that one of the administrators of the estate Jacqueline Mumbe Ngove died on December 26, 2019 at South B Hospital. A copy of the burial permit Serial No. 1382198 for the said Administrator is annexed to the supporting affidavit dated September 30, 2021 (Appendix 2).
17. Section 81 of the *Law of Succession Act* provides for what should happen where the Administrator of an estate passes away. Section 81 provides as follows:-
- “Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them: Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.” (own emphasis)
18. *In the Re Estate of Joel Rukwaro Thuku (Deceased)* [2018] eKLR the court observed as follows:-
5. The law regarding the status of a grant where deceased administrators or executors have died is well settled under Section 81 of the Law of Succession in case one or more of several executors or administrators dies. For clarity purposes, I wish to reproduce Section 81 which provides as follows:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them”.
  6. From the wording of this section, there is nothing like substitution unless there is a continuing trust and there is only one surviving executor or administrator in which case the court shall appoint additional executor or administrator.” (Own emphasis)
19. Based on the above it is only in cases where there is only one sole administrator of an estate that the issue of substitution will arise where that sole administrator passes away.



20. This is a case where the estate had more than one (infact four (4)) Administrators. Upon the death of the said Jacqueline Mumbe Ngove, the remaining three (3) Administrators are authorized by law and are competent to proceed with the Administration of the estate. There is no need to replace the Deceased Administrator. Accordingly, I find no merit in prayer (2) of the summons. This prayer is hereby dismissed.
21. The Applicant also seek the removal and replacement of Paul Matulai Ngove as an administrator on grounds that he had intermeddled with the estate by selling off assets/properties without the consent of the other beneficiaries. The applicants also allege that the said Paul Matulai Ngove has mismanaged the estate.
22. It is trite law that he who alleges must prove. The Applicants have annexed to their Supporting Affidavit a schedule of the assets allegedly sold and/or mismanaged (Appendix '3'). However, this schedule alone is not enough.
23. The Applicants needed to tender evidence to satisfy the court that the said properties were indeed sold off. No Sale Agreements have been annexed. There is no indication of when said properties were sold, to whom or for how much. To merely allege sale of estate assets will not suffice without concrete evidence of such sale.
24. In order to warrant the removal of an Administrator cogent evidence must be placed before the court. Mere innuendos will not suffice. I find no evidence to support the allegations of intermeddling by this Administrator and I dismiss prayer (3) of the summons.

### **Rectification of the Grant**

25. The applicants have prayed that the grant issued to the respondent/administrators be rectified. They allege that several properties belonging to the Deceased were not included in the confirmed Grant. They now wish to have the confirmed Grant rectified in order to include said omitted properties and to amend the schedule of distribution to take into account the distribution of the allegedly omitted assets. Rectification of grants is provided for in section 74 of the *Law of Succession Act*, Cap 160, Laws of Kenya and Rule 43(1) of the *Probate and Administration Rules*. Section 74 provides as follows: -
 

“74. Errors in names and descriptions, or in setting fourth 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.”
26. Rule 43(1) provides as follows:-
 

“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 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 made.”
27. From the language of section 74 of the *Law of Succession Act* and Rule 43(1) of the *Probate and Administration Rules*, the scope of ‘rectification’ of Grants of representation is limited to errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited Grant. Such other minor errors in that genre can also be rectified through a Summons for rectification of Grant.



28. The Applicants have prayed to have the Grant rectified in order to correct the mode of distribution as set out in the confirmed Grant. Alteration /Amendment of the mode of distribution of an estate cannot be described as a mere 'error' requiring rectification under section 74.
29. The changes being proposed by the Applicant are substantial and far reaching. They materially alter/affect the confirmed Grant issued by the court. In no way can the proposed amendments be described as minor errors in names and descriptions. This is not a matter which can be dealt with under a summons for review/variation of the confirmed Grant.
30. The question of when a Grant may be rectified has been addressed severally by the courts in Kenya.
31. Similarly in the matter of the estate of *Geoffrey Kinuthia Nyamwinga (deceased)* [2013] eKLR the court held that:-

“The law on rectification or alteration of grants is section 74 of the *Law of Succession Act* and rule 43 of the *Probate and Administration Rules*.....What these provisions mean is that 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 effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general.....

Where a proposed amendment of a grant cannot be dealt with under the provisions of section 74 of the *Law of Succession Act*, the applicant ought to approach the court under order 44 of the *Civil Procedure Rules*. A review under order 44 of the *Civil procedure Rules* may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the fact of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision – order 44 of the *Civil Procedure rules* on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of grant. (own emphasis)

32. I do agree with the Administrator that the changes being proposed by the Applicants cannot be achieved by an application to 'review'/vary' the Grant. I note that by prayer (6) the Applicant seeks the removal of the Administrator whom she alleges that he has failed to diligently administer the estate.
33. The Removal of an administrator cannot be said to fall under cover of 'review' of grant. the applicant must file a substantial summons seeking to revoke the grant issued to that administrator and to set aside the mode of distribution. it amounts to an abuse of court process to file an application for review when in essence what the applicant is seeking is to overhaul the entire confirmed Grant.
34. I therefore find that the amendments being proposed suggested by the Applicants are substantial and far reaching as they would affect the mode of distribution of the estate. Such changes cannot be accommodated under a summons seeking rectification of the Grant.
35. In the estate of *Charles Kibe Karanja (Deceased)* [2015] eKLR Hon Justice Musyoka held as follows:

“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the court at the distribution of the estate. Consequently, such changes cannot and should not be



effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of court orders is not directly provided for in the *Law of Succession Act* and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the *Civil Procedure Rules*.....

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7<sup>th</sup> November 2006 so as not include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.” (Own emphasis)

36. The discovery of new assets following a confirmation of the Grant and the re-distribution of such new assets is not a matter for rectification. This can only be done by seeking to have the entire Grant revoked and an application made for issuance of a fresh Grant to include the omitted assets. The new proposed mode of distribution of the estate would have to then be sanctioned by all the beneficiaries.
37. The upshot is that I find no merit in this summons dated September 30, 2021. The same is dismissed in its entirety. This being a family matter each side shall bear its own costs.

**DATED IN NAIROBI THIS 27TH DAY OF JANUARY, 2023.**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

