



REPUBLIC OF KENYA



**In re Estate of Joseph Mukhwana Lutta (Deceased) (Succession Cause 483 of 2002) [2023] KEHC 1463 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1463 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 483 OF 2002  
RE ABURILI, J  
FEBRUARY 27, 2023  
IN THE MATTER OF THE ESTATE OF JOSEPH MUKHWANA LUTTA-  
DECEASED**

**BETWEEN**

**JACKSON LUTTA ..... 1<sup>ST</sup> PETITIONER**

**ROBERT M LUTTA ..... 2<sup>ND</sup> PETITIONER**

**CHARLES K LUTTA ..... 3<sup>RD</sup> PETITIONER**

**ZIPPORAH K LUTTA ..... 4<sup>TH</sup> PETITIONER**

**AND**

**GEORGE KALERWA LUTTA ..... APPLICANT**

**RULING**

1. The application dated November 18, 2021 by George Kalerwa Lutta seeks the following prayers:
  - a. That the certificate of confirmation of grant issued on September 22, 2005 in respect of the estate of the late Joseph Mukhwana Lutta be rectified in respect of sharing of Mumias town plot No 8056/8 between the 1<sup>st</sup> petitioner and the applicant.
  - b. That the rent due from the development in Mumias town plot No 8056/8 be shared equally between the 1<sup>st</sup> petitioner and the applicant.
  - c. That in the alternative; Mumias town plot No 8056/8 and the developments therein be sold and the proceeds be shared equally between the 1<sup>st</sup> petitioner and the applicant.
  - d. Costs of the application.



2. The application is supported by an affidavit sworn by the applicant deposing that he is the deceased's son. That the grant was issued to them in the year 2005 and that since then, the 1<sup>st</sup> petitioner has refused to share out the proceeds from the property despite the fact that he is to share out the developed property equally between himself and the 1<sup>st</sup> petitioner. He asserts that he has made efforts to no avail and he is being disadvantaged.
3. The 1<sup>st</sup> petitioner opposed the application through his replying affidavit sworn on July 12, 2022. He disputes the jurisdiction of the court on the basis that this is a dispute relating to land after registration of the owners of respective shares. He deposes that subject parcel of land has been shared out save that the applicant had not paid out his share of the stamp duty to effect transfer and registration of the parcel into his name.
4. The 3<sup>rd</sup> petitioner equally filed his reply in opposition to the application deposing *inter alia* that once the grant was issued, he was discharged from any obligation. He disputes the jurisdiction of this court stating that only the environment and land court can entertain the matter since it is a land sharing issue. He further deposes that the land has an outstanding stamp duty arrears which must be paid before registration can take place.
5. This court directed the parties to file their written submissions to canvass the application. None of the parties complied and the court therefore proceeds to determine the matter based on the affidavits already on record, even where it could have dismissed the application.

### **Analysis And Determination**

6. The application relates to the deceased's parcel of land known as Mumias town plot number 8056/8. A certificate of confirmation of grant was issued by this court on September 22, 2005.
7. According to the petitioners, this court has no jurisdiction to hear the matter. They contend in their depositions that once the court confirmed the grant, it became *functus officio* as it is a cardinal principle of law that jurisdiction is a creature of both the Constitution and the statute. Further, that the dispute herein lies within the province of the Environment and Land Court as opposed to this court since the issue involved relates to transmission of an estate.
8. My examination of the application and the responses reveals that the process of distributing the estate of the deceased is incomplete. The applicant seeks a rectification of the grant issued by the court on the grounds stated therein. There is no evidence that the process of transmission has been put in motion so that the estate has completely devolved to the deceased's beneficiaries. What we have is a certificate of confirmation of grant which is sought to be amended after being left idle for a very long period of time.
9. From my assessment, I am of the view that this court is properly seized of the matter the grant having been issued by this very court. The question is whether there is merit in the prayers sought for rectification of grant issued by this court.
10. 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:

“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, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”



11. Rule 43(1) of the [Probate and Administration Rules](#) on the other hand provides that:

“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.”
12. The above provisions have been subjected to numerous judicial interpretations. In [In the matter of the estate of Hasalon Mwangi Kahero](#) (2013) eKLR, it was held that:

“An error is essentially a mistake. For the purposes of section 74 and rule 43, it must relate to a name or description or time and place of the deceased death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error” It would be an error if say a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word “error” too far to say that that would amount to the error or mistake envisaged in section 74 and rule 43.”
13. A glimpse at the application shows that the same is brought under the provisions of section 49 of cap 160, order 45 of the [Civil Procedure Rules](#) and the overriding objectives of the [Civil Procedure Act](#).
14. Having considered the nature of the prayers sought, the law on the subject and my analysis of the issues, I am inclined to find that the supporting law is off-the mark. This is because for a prayer of rectification of a grant to be given, the errors sought to be rectified should fall within the scope of those permitted by rule 43. The rectification sought in the application, regrettably, goes as far as seeking to amend a certificate of confirmation of grant to reconsider how the estate of the deceased ought to have been distributed between beneficiaries, which is beyond the scope set out in the law.
15. There also is a prayer that the rental proceeds from the property which was distributed be shared out equally between the applicant and the 1<sup>st</sup> petitioner. From the evidence on record, none of the parties have enlightened the court on the progress of distribution of the estate. It is not clear as to who is collecting what amount of money in contrast with what is being collected. The petitioners contended that the applicant had not made renovations to his side of the building. Further, that he had not paid stamp duty for the transfer of his share to be effected. Not much was said of this and the court cannot make such a conclusive determination with the evidence availed.
16. The duties and responsibilities of administrators are found in section 83 of the [Law of Succession Act](#). More specifically, section 83(d-i) which provide that:
  - (d) to ascertain and pay, out of the estate of the deceased, all his debts;
  - (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
  - (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;



- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
  - (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
  - (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.” [Emphasis added]
17. The above legal excerpt answers the allegation by the 1<sup>st</sup> and 3<sup>rd</sup> petitioners that they have been discharged once the grant was issued. This assertion is incorrect and misplaced because for instance, the petitioners/administrators have not filed in court the accounts contemplated by section 83 of the Act [Law of Succession Act](#) and cannot therefore be heard to say that they have completed the task bestowed on them by law. Their duty is hanging awaiting conclusion.
18. By this alone, a considerable period of time has lapsed since the grant was confirmed way back in 2005. It is approximately over 17 years and the process of distribution of the estate is yet to be concluded. Taken properly, this could as well be a ground to seek nullification of grant under section 76 of the Act on the basis that the administrators have failed to discharge their duties as required of them.
19. Having considered the application in light of the applicable law, I am inclined to disallow the application for the reasons given in the preceding paragraphs. I however direct the administrators to comply with section 83 of the [Law of Succession Act](#) within the next ninety days of this ruling and in default, this court shall recall and revoke the grant as confirmed 17 years ago.
20. Mention on May 29, 2023 to confirm compliance with section 83 of the [Law of Succession Act](#).
21. There shall be no order as to costs. Parties to be notified forthwith by the registry using the email addresses filed in court and a print out filed in the court file.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023**

**R.E. ABURILI**

**JUDGE**

