



REPUBLIC OF KENYA



**KENYA LAW**

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**In re Estate of Gerald Muturi Maina (Deceased) (Succession Cause  
949 of 2011) [2023] KEHC 2202 (KLR) (Family) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2202 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 949 OF 2011**

**MA ODERO, J**

**FEBRUARY 17, 2023**

**IN THE MATTER OF THE ESTATE OF GERALD MUTURI MAINA (DECEASED)**

**BETWEEN**

**NICKSON MWANGI MUTURI ..... 1<sup>ST</sup> APPLICANT**

**CATHERINE NYAMBURA MUTURI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**EUNICE WAIRIMU MUTURI ..... 1<sup>ST</sup> RESPONDENT**

**WASHINGTON MUCHIRI MUTURI ..... 2<sup>ND</sup> RESPONDENT**

**GRACE WAITHERA MUTURI ..... 3<sup>RD</sup> RESPONDENT**

**ANTHONY MURATHI MUTURI ..... 4<sup>TH</sup> RESPONDENT**

**ELIZABETH WANJIKU MUTURI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before this Court for determination is the summons for Review of Grant dated 30<sup>th</sup> June 2022 by which the Applicants Nickson Mwangi Muturi (hereinafter the 1<sup>st</sup> Applicant) and Catherine Nyambura Muturi (hereinafter the 2<sup>nd</sup> Applicant) seek the following orders:-
  1. Spent.
  2. Spent.
  3. That the appointed administrators, Eunice Wairimu Muturi and Washington Muchiri Muturi do give a full and accurate inventory of the assets and liabilities of the deceased and a full accurate account of all income from the estate supported by bank statements, expenses paid



and dividends paid to the beneficiaries of the estate from 14<sup>th</sup> October 2011 till date of the order.

4. That in the event the appointed administrators, Eunice Wairimu Muturi and Washington Muchiri Muturi are found to have acquired assets from the estate funds and registered in their named or in the names of third parties, an order be issued compelling them to revert any such assets to the estate at their costs.
  5. That in the event the appointed administrators, Eunice Wairimu Muturi and Washington Muchiri Muturi are found to have alienated estate funds for their own benefits or to the benefit of third parties, an order be issued compelling them to revert any such funds to the estate.
  6. That the Certificate of Confirmation of Grant issued in this matter on 1<sup>st</sup> April 2014 and rectified on 28<sup>th</sup> January 2015 be reviewed.
  7. That costs of this application be provided for.
2. The summons which was premised upon Section 83(e) of the *Law of Succession Act*, Rules 49, 63 and 73 of the *Probate and Administration Rules*, Order 45 of the *Civil Procedure Rules*, 2010 was supported by the Affidavit of even date sworn by the two Applicants.
  3. The Respondents opposed the Application through the Replying Affidavit dated 18<sup>th</sup> July 2022 sworn by Eunice Wairimu Muturi (the 1<sup>st</sup> Respondent.) The 2<sup>nd</sup> Respondent Washington Muchiri Muturi and the 3<sup>rd</sup> Respondent Grace Waithera Muturi also swore replying affidavits dated 18<sup>th</sup> July 2023.
  4. The matter was canvassed by way of written submissions. The Applicants filed the written submissions dated 15<sup>th</sup> August 2022 whilst the Respondents relied upon their written submissions dated 25<sup>th</sup> August 2022. The Applicants then filed Rejoinder submissions dated 14<sup>th</sup> September 2022.

## **Background**

5. This matter concerns the estate of the late Gerald Muturi Maina (hereinafter 'the Deceased') who passed away on 10<sup>th</sup> January 2011. A copy of the Death Certificate Serial Number 051429 appears as Annexure 'A' to the Affidavit in support of the petition for letters of Administration dated 21<sup>st</sup> July 2011.
6. The Deceased who died intestate was survived by the following persons:-
  - a. Eunice Wairimu Muturi - Widow
  - b. Stephen Maina Muturi - Son
  - c. Washington Muchiri Muturi - son
  - d. Grace Waithera Muturi - Daughter
  - e. Anthony Murathi Muturi - Son
  - f. Catherine Nyambura Muturi - Daughter
  - g. Nickson Mwangi Muturi - Son
  - h. Elizabeth Wanjiku Muturi - Son
7. Following the demise of the Deceased Grant of letters of Administration intestate was on the October 2011 made to Eunice Wairimu Muturi (Widow) and Washington Muchiri Muturi (Son).



- A Certification of Confirmed Grant was thereafter issued to the two (2) Administrators on 1<sup>st</sup> April 2014 which Grant was latter rectified on 28<sup>th</sup> January 2015. The confirmed grant set out the mode of distribution of the estate.
8. The parties herein are all beneficiaries of the estate of the Deceased. The Applicants are a son and a daughter of the Deceased whilst the 1<sup>st</sup> Respondents is the widow of the Deceased. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents are also children of the Deceased and the siblings of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.
  9. The Applicants contend that the Administrators and some of the beneficiaries have converted and alienated estate funds and assets for their own personal gain and to the detriment of the Applicants herein. That although the estate assets were required under the terms of the confirmed grant to be held by a limited liability company, to date more than seven (7) years after the Grant was confirmed the said assets have not been transferred.
  10. The Applicants further aver that the Administrators continue to bank income derived from the estate into an account which is under the sole control of the 2<sup>nd</sup> Respondent and that the 2<sup>nd</sup> Respondent has not been accountable to the other beneficiaries regarding these funds. That dividends and bonuses which were initially paid to the beneficiaries have not been paid for several years.
  11. The Applicants alleges that an auditor appointed by themselves to audit the estate accounts was denied access to the books by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That the Respondents have unreasonably demanded that the 1st Applicant bear fifty per cent (50%) of the cost of auditing the estate.
  12. The Applicants aver that vide a letter dated 7th February 2023 Counsel for the Respondents proposed a new mode of distribution of the estate to replace the mode of distribution indicated in the confirmed grant. The Applicants however rejected their proposal as unfair and unequitable and countered with a proposal of their own. The Applicants state that their counter proposal was however rejected by the Respondents lawyer. The Applicants claims that in desperation they wrote a letter dated 11th April 2022 to the 1st Respondent who is their mother appealing to her maternal sense of fairness in an attempt to avoid acrimonial litigation. That this overture was rebuffed through a letter written by the Respondents Advocate.
  13. The Applicants then filed this application seeking orders that the Administrators be compelled to file accounts regarding the manner in which they have administered the estate.
  14. As stated earlier the applicant was opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents through their Replying Affidavits all dated 18<sup>th</sup> July 2023. The Respondents state that the Administrators have all along involved the applicants in this succession cause and point out to the fact that the Applicants gave their consent to the proposed mode of distribution of the estate.
  15. That contrary to allegations made by the Applicants, the two have always benefited from the estate that the Applicants are both fully aware and indeed consented to the 2<sup>nd</sup> Respondent managing and controlling the estate as the other siblings were residing abroad in the USA and Canada.
  16. The 2<sup>nd</sup> Respondent in his Replying Affidavit averred that at the time of the death of the Deceased there was ongoing construction of two buildings in Ngara which construction was completed under his supervision and management using estate funds. That in the year 2015 he supervised construction of a new building at Pangani on LR No. 209/1644 which took six (6) years to complete.
  17. The 2<sup>nd</sup> Respondent further averred that by consent of all the beneficiaries a company known as Gatana Investments Company Limited was formed in which all beneficiaries had equal shares. It had been agreed that all estate property be registered in the name of this company. That the said company owns LR NO. 209/2820/16 Park Road Estate a fact of which the 2 Applicants are fully aware.



18. The 2<sup>nd</sup> Respondent declares that under his watch the value of the estate has grown from 260 Million to Kshs.375 Million thus the accusation that the administrators have been mismanaging the estate is not credible. That currently each beneficiary receives a sum of Kshs.300,000 monthly.
19. The Respondents aver that the estate has now been fully distributed and there are no properties available for re-distribution. That each beneficiary should now own control and manage their own individual properties. The Respondents state that the present application has been brought in bad faith and urge the court to dismiss the same.

### **Analysis And Determination**

20. I have carefully considered the application filed by the Applicants as well as the written submissions filed by both parties.
21. The Applicants have sought to have the confirmed grant reviewed. However what that the Applicants are actually seeking is a complete overhaul of the mode of distribution set out in the confirmed grant issued by the court.
22. At the time the grants was being confirmed the Applicants raised no objection indeed they signed a consent dated 14<sup>th</sup> February 2014 confirming that they were in agreement with the mode of distribution of the estate.
23. The Applicants now wish to abandon the mode of distribution set out in the confirmed grant. However this cannot be achieved through a review of the grant.
24. Rectification (or review) 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.”
25. 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.”
26. 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.
27. 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.



28. 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.
29. The question of when a Grant may be rectified has been addressed severally by the courts in Kenya.
30. 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)

31. The changes being proposed by the Applicants are not minor. Such changes cannot be averred through an application to review the grant.
32. In order to achieve the changes being proposed the Applicants must seek to revoke the confirmed grant and apply to amend the mode of distribution of the estate. I therefore dismiss the prayer for review of the grant.
33. The remaining issue for determination is whether the Administrators of the estate should be ordered by the court to file accounts with respects to their management of the estate.
34. The duties of an Administrator are clearly set out in Section 83 of The *Law of Succession Act*, Cap 160 Laws of Kenya. Sections 83(e) and (9) of the said Act provide as follows:-

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- (b) .....
- (c) ....
- (d) .....
- (e) 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 dealing therewith up to the date of the account.



- (f) Subject to Section 55 to distribute or 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) 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.” [own emphasis]

- 35. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were appointed as Administrators of the estate in the year 2011.
- 36. The relationship between the Administrators of the estate and the beneficiaries is one which is fiduciary in nature. The Administrators are legally obliged to give an account of their administration of the estate.
- 37. In the case of RE: *Estate Of Julius Mimano (deceased)* [2019] eKLR, Hon Justice William Ouko stated as follows:-

“Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.” (own emphasis)

- 38. There is no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have ever filed accounts in respect of their administration of the estate.
- 39. The duty to provide accounts is a statutory duty imposed upon the personal representatives of the an estate. The Respondents cannot evade this duty by claiming that the estate has been fully distributed.
- 40. I therefore allow prayer (3) of this application. I direct that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents within sixty (60) days file in court true accounts of all their dealings with the estate of the Deceased from 1<sup>st</sup> April 2014 to date. This being a family matter each side will bear their own costs.

**DATED IN NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**MAUREEN A. ODERO**

**JUDGE**

