



REPUBLIC OF KENYA



In re Estate of Johnstone Handa Mutsembi (Deceased) (Succession Cause 336 of 2008) [2023] KEHC 2835 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 336 OF 2008**

WM MUSYOKA, J

MARCH 24, 2023

**IN THE MATTER OF THE ESTATE OF JOHNSTONE HANDA
MUTSEMBI ALIAS JOHNSTONE HANDA (DECEASED)**

RULING

1. There are 2 applications for determination, dated 29th October 2021 and 20th January 2022.
2. The application, dated 29th October 2021, seeks that certain orders be made against the administratrix to allow the administrator access to a property to collect rent, and that she be compelled to sign certain documents to facilitate transmission. The application is at the instance of Edward Handa and Noah Nduku Handa. They aver that the certificate of confirmation of grant was issued on 12th March 2019, and as at the date of the application, the estate was yet to be distributed, due what they describe as lack of cooperation from the administratrix. They also complain that the administratrix was also denying them access to the estate. They rely on a ruling by Chitembwe J, dated 23rd February 2015, that Sitati J delivered on 19th March 2015.
3. The application, dated 20th January 2022, is at the instance of Adda Ndagala Handa, the administratrix. She would like the certificate of confirmation of grant rectified to configure the distribution of the estate as follows: Butsotso/Ingotse/1572 to Edward Omwaka and Ezekiel Ndeto equally; Butsotso/Ingotse/1256 to Rodgers S. Kombo and Festo Indimuli; 0.5 acres of Butsotso/Ingotse/7956 to Edward Handa and Noah Nduku Handa, to hold the commercial houses on it in trust for themselves and other beneficiaries; the remainder of Butsotso/Shikoti/7956, to Adda Ndagala Handa, Eglay Nyakoa, Romanah Abalah, Naomi Mbaye, Lina Awiti and Leah Shikuku, less what had been sold to purchasers. In the affidavit in support, she avers that the confirmation orders of 12th March 2019 had an error, as 2 purchasers were left out, being Leunitah Auko Muruli and Osango Atito, who had bought 0.5 and 0.25 acres, respectively, out of Butsotso/Shikoti/7956.
4. Either side did not respond to the application filed by the opposite side.
5. Both sides addressed me orally on 24th May 2022. I was informed, by Mr. Otsyeno, for the administratrix, that the portion bought by the 2 purchasers was not factored, and the 2 ought to get



their share. I was also informed that the two sets of administrators were not seeing eye-to-eye, which was making completion of administration impossible. Noah Nduku Handa addressed me on behalf of the other side. His point was that although Mutua, Tsonga and Inyangala had bought portions from the deceased, and were issued with title deeds, Leonida and Osango had provided no evidence that they had bought the property. He asserted that the deceased died in 2000, while the agreements were signed in 2001. He said that Parcel No. 380 was not among the assets sold. He said that the surveyor should visit the land, and that he should be allowed to go ahead with transmission.

6. The grant herein was confirmed on 23rd February 2015, in the ruling by Chitembwe J, who had taken oral evidence. The rectification proposed by the administratrix does not change much, except for the factoring of the sales made to Leunita and Osango. The affidavit in support of the application is quite vague on the matter. No sale agreements are attached. Chitembwe J mentioned the sales, in the recital of the evidence, and made provision for them at the distribution, with respect to Butso/7956, although the order did not set out the names of the purchasers. In the directions that Chitembwe J gave on 8th February 2012, he made the purchaser interested party, although the purchaser that the Judge had in mind was not identified or specified. None of the purchasers took part in the oral hearings.
7. Should I rectify the certificate of confirmation of grant to accommodate them? The administratrix premises her application on Rule 43(1) of the Probate and Administration Rules, which provides for rectification of grants. A certificate of confirmation of grant is not a grant of representation, and the changes that she is proposing are not among those envisaged under Rule 43(1). The certificate of confirmation of grant is a court paper extracted from the ruling of 23rd February 2015. The problem is not with the manner the order of 23rd February 2015 was extracted, but it is with the ruling of 23rd February 2015, it did not make specific mention of the 2 purchasers, and even if Rule 43(1) were to apply to certificates of confirmation of grant, which is not the case, the changes sought are fundamental, for the administratrix is asking me to alter the distribution that Chitembwe J had made. That distribution cannot be altered by rectification of the certificate of confirmation of grant, vide Rule 43(1), but by a review of the orders of 23rd February 2015, so that the amendment of the certificate sought would ride on the review orders. See *In re Estate of Lawrence Kimani Khirrecu (Deceased)* [2020] eKLR (Dulu, J) and *In re Estate of Jerioth Nyawira Munyua (Deceased)* [2016] eKLR (Ngaah, J).
8. Would there be basis to review? The record of the oral hearings reveals that the issue of the 2 sales was not seriously agitated before Chitembwe J, and am not surprised that no specific orders were made in the ruling of 23rd February 2015 on them. I have, however, perused through the court file, and noted that there was a consent that was recorded before Kimaru J, on 18th May 2011, by Adda Handa and Edward Omwaka Handa, with respect to the 2 sales, to Leunita and Osango. Curiously, in the ruling of 23rd February 2015, Chitembwe J did not advert to the consent, neither did the parties raise it before him at the hearings, and neither did Mr. Otsyeno mention it in his address to me on 24th May 2022. The application, the subject of this ruling, makes no reference to it at all. I have not seen any record, after 18th May 2011, reversing or vacating the consent, and I suppose that it is still subsisting, and enforceable. Consequently, it ought to be factored in the certificate of confirmation of grant, by way of amendment.
9. Let me reproduce verbatim the proceedings, for avoidance of doubt, and completeness of the record:

“ 18/5/2011

Before L. Kimaru, J

Moses/Kemunto CC

Adda Handa – Petitioner



Edward Omwaka Handa – Objector

Order: By consent, Dr. Leonida Auko Muruli, a creditor to the estate of the deceased shall inherit ½ an acre from parcel No. Butso/so/Shikoti/7956. A parcel of land measuring 124 ft X 92 ft shall to be inherited by Addah Ndakala Handa and to transferred to Osango Atito.”

10. I believe that I have said enough to dispose of the application dated 20th January 2022.
11. Let me now advert to the application dated 29th October 2021. The orders sought seek to give effect to the confirmation orders of 23rd February 2015. It is unfortunate that 8 years have gone by since confirmation of the grant, without the estate being transmitted, yet the law, at section 83 of the *Law of Succession Act*, Cap 160, Laws of Kenya, requires transmission to happen within 6 months of the confirmation of the grant. Failure to transmit the estate within the given timelines, is an indication of failure of administration, which is basis for revocation of grant under section 76(d) of the *Law of Succession Act*. Am told that the administrators cannot agree, and that is creating paralysis in the administration, and, therefore, causing failure in administration. When that happens, grants are revoked. See *In the Matter of the Estate of Joseph Muchoki Muriuki (Deceased)*, Nyeri High Court Succession Cause Number 396 of 1999 (Khamoni, J)(unreported), *In the Matter of the Estate of Lydia Karuru Ahmed (Deceased)* Mombasa High Court Probate and Administration No. 122 of 2001, Khaminwa, J)(unreported), and *In re Estate of Kamatu Mwanthi Kamatu (Deceased)* [2020] eKLR (Odunga, J).
12. Since I am just about to make an order for amendment of the certificate of confirmation of grant, to give effect to the consent order of 18th May 2011, I shall avoid the revocation route, which should give a respite to the administrators, to put their act together. Let them work together, after they get the amended certificate of confirmation of grant, and have the estate transmitted in the next 6 months, from the date of this ruling, as required of them by section 83 of the *Law of Succession Act*. Should they fail to complete the administration, and specifically the transmission of the assets, the court will have no option but to remove them as administrators, and to replace them with other family members or even the Public Trustee, the administrator of last resort.
13. The final orders are:
 - a. That the Deputy Registrar is hereby directed to amend the certificate of confirmation of grant, herein, to incorporate the consent order recorded on 18th May 2011;
 - b. That the administrators shall have 6 months, from the date of the issuance of the amended certificate of confirmation of grant, to transmit the assets as per the schedule in the amended certificate, and to complete administration;
 - c. That the matter shall be mentioned after 6 months, to confirm compliance with (b), above, to facilitate closure of this court file;
 - d. That each party shall bear their own costs; and
 - e. That any party aggrieved by these orders has leave of 28 days to move the Court of Appeal, appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 24TH DAY OF MARCH 2023

WM MUSYOKA

JUDGE



Erick Zalo, Court Assistant.

Mr. Otsyeno, instructed by EK Owinyi & Company, Advocates for Adda Ndagala Handa.

Noah Nduku and Edward Omwaka, in person.

