



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of Symon Nyanumba Mokiye (Deceased) (Succession Cause  
190 of 2008) [2023] KEHC 26792 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26792 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
SUCCESSION CAUSE 190 OF 2008  
TA ODERA, J  
DECEMBER 18, 2023**

**IN THE MATTER OF**

**ALVIN TITO MOKIYENDE ..... 1<sup>ST</sup> APPLICANT  
JACKLINE NYAMOITA ROGONCHO ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. By a Summons for Amendment and/or Rectification of Certificate of Confirmation of Grant and Grant filed by the firm of Ochwangi & Co. Advocates and dated 7.6.2023, the Applicants sought the following orders:
  1. Spent\*
  2. The Honourable Court be pleased to amend/rectify grant and certificate of confirmation of grant dated 11<sup>th</sup> day of September 2022 and include Jackline Nyamoita Rogoncho as the administratrix of the estate in place of Samwel Nyabuto Nyanumba and Alvin Tito Mokiye as a beneficiary in place of William Mokiye Nyanumba and Rose Kerubo Bosire.
  3. Upon granting prayer (2) herein the Honourable Court be pleased to issue a new grant for letters of administration over the estate of Symon Nyanumba Mokiye(deceased) which shall include the applicants herein.
  4. The Honourable Court be pleased to rectify the certificate of confirmation of grant dated 27<sup>th</sup> day of July 2010 and include the said Alvin Tito Mokiye and Jackline Nyamoita Rogoncho.
2. The grounds on the face of the Application are that the succession cause had been completed and the grant confirmed. Some of the beneficiaries had since died and had not been replaced and/or substituted therefore impeding the process of distribution of the Estate. The Applicants therefore sought to replace their kinsmen.



3. The 2<sup>nd</sup> Applicant swore an Affidavit in support of the Application on 7.6.2023. She deponed that she had the 1<sup>st</sup> Applicant's authority to swear the affidavit. She further deponed that the succession cause was commenced and concluded. A grant of letters of administration was issued to Samwel Nyabuti Nyanumba, Kennedy Mochere Nyanumba and Robert Ongeru Kibwage on 12.9.2008. The said grant was confirmed and a certificate of confirmation of grant was subsequently issued on 27.7.2010. Some members of the family, Samwel Nyabuti Nyanumba and William Mokiye Nyanumba, had since died hence the need for substitution. The Applicants had since obtained Letters of Administration ad Litem over their estates. She deponed that the family had agreed on substitution and attached a copy of the family minutes. She urged the Court to allow the summons for rectification of grant.

### **Determination**

4. I have considered the Application, the Supporting Affidavit and the Annexures therein.
5. The Grant of Letters of Administration Intestate in this matter was issued on 11.9.2008 to the following people:
  - i. SAMwel Nyabuti Nyanumba
  - ii. Kennedy Mochere Nyanumba
  - iii. Robert Ongeru Kibwage
6. I have perused to the Court's record and there is no indication that the said Grant was ever revoked or annulled. If anything, the Grant was confirmed on 23.7.2010 and Certificate of Confirmation of Grant subsequently issued.
7. The death certificates attached are with regard to Samwel Nyabuti Nyanumba and William Mokiye Nyanumba. It then follows that 2 Administrators are still alive- Kennedy Mochere Nyanumba and Robert Ongeru Kibwage. Their names and signatures appear in the Family Minutes attached to the Affidavit.
8. It is my humble view that the prayer for substitution of the deceased administrator is, in the circumstances, misplaced. The Law, as I understand it, is that grants are issued in personam and cannot therefore be transferred to another party. I am guided by the persuasive decision of Re Estate of Muroko Kimitu (Dcd) [2019] eKLR. In that decision, the Court referred to the decision of the High Court John Karumwa Maina v Susan Wanjiru Mwangi [2015] eKLR where that Court relied on the Court of Appeal decision of Florence Okutu Nandwa and Another vs John Atemba Kojwa, Court of Appeal Civil Appeal No. 306 of 1998 at Kisumu. The Court of Appeal held that a grant of representation is made in personam and is specific to the person appointed and cannot be transferred to another person.
9. So, then what should happen when one or more of several administrators dies? Section 83 of the [Law of Succession Act](#), Cap 160 of the Laws of Kenya provides thus:
  81. Powers and duties of personal representatives to vest in survivor on death of one of them  
Upon the death of one or more of several executors or administrators to whom a grant of personal 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.

10. The procedure, however, is not as automatic. This has been the subject of judicial determination and there is a plethora of cases on the same.

11. In *Re Estate of Joel Rukwaro Thuku (Deceased)* [2018] eKLR, the Court held as follows:

7. What happens where a sole executor or administrator or where more than one, all have died? The law of succession does not provide for substitution of a single administrator or executor (see in the matter of the estate of Mwangi Mugure alias Elieza Ngware (deceased) and in the matter of the estate of Mary Wairimu Ngware (deceased) Nairobi HCC Succession Cause No. 2018 of 2001.

8. In such a scenario, Section 76(e) of the Law of Succession comes to play on account that following the death of the sole administrator/executor or all administrators or executors, the grant becomes inoperative through subsequent circumstances. Subsequently, a limited grant of letters of administration de bonis non would then issue to any of the heirs or beneficiaries with the consent of the rest. In that regard I am guided by the reasoning in the case of (*In the matter of the estate of Hannah Njuki (deceased)* Nairobi High Court Succession Cause No. 463 of 1997) where Ang'awa J held that:

“where an administrator dies before completion of administration, the next cause of action should be to apply for a grant of letters of administration de bonis non, which is limited to the completion of the administration of the estate.”

12. In *Re Estate of Chemwok Chemitei (Deceased)* [2021] eKLR, the Court cited the case of *Re Estate of Mwangi Mugure Mugwe alia Elieza Ngware (deceased)* [2003] eKLR, where Khamoni, J expressed himself as follows:

“...the inoperative word is “substitution”. The *Law of Succession Act* has no provisions talking about substitution of a deceased single administrator.... In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the *Law of Succession Act* and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground “that the grant has become useless and inoperative through subsequent circumstances.” The Applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer, if need be, for confirmation of the new grant. The application, should of course, be ‘supported by consent from adult beneficiaries in the estate of the first deceased person, the second deceased person being the deceased administrator.”

13. The Court further relied on the case of *Re Estate of George Ragui Karanja (Deceased)* [2016] eKLR where Hon. Musyoka J. held as follows:

The *Law of Succession Act* does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative... It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the *Law of Succession Act*, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of



the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.

14. In *Andrea Ruithibu R. Kanyiri v Teresia Njoki Mbugu* [2016] eKLR, the Court held as follows:

“...what is the effect of the death of a co-administrator. Justice W. Musyoka, in discussing a similar issue In the matter of the estate of Edward Kanyiri Kunyia (Deceased) had this to say: -

“Regarding the death of the co-administrator, the position is that the grant...has become inoperative. The grant was made jointly to the applicant and his mother, who has now died. It was intended that the two act together in the administration of the estate. A grant is a certificate. It is issued to a particular person or persons. If the holder of the grant dies the grant becomes useless, as it cannot be transferred to another person. If it was made to two persons and one dies it becomes inoperative. Under section 76 of the *Law of Succession Act* such grant is liable to revocation. It should be revoked and another grant made.”

A similar opinion was expressed by the same judge in the Estate of Simon Ngugi Nganga (Deceased) [2013] eKLR:

“The matter of the death of a co-administrator cannot be dealt with as a rectification or review of the certificate of confirmation of grant. It is more fundamental. It touches on appointment of administrators. The grant...was made to two persons. It is expected that the two are to act jointly at all times with respect to the administration of the estate. With the death of one of them, the grant becomes useless as the surviving sole administrator cannot act on the basis of a grant which still bears the name of a dead administrator.... Since the grant has become useless and inoperative, it ought to be revoked and fresh appointments of administrators be made. The surviving administrators cannot even use the grant, as it is useless, to seek orders that the applicant now seeks in this application.”

15. I fully associate myself with the foregoing. Once an Administrator dies, the grant becomes useless and inoperative as it was intended to be used jointly by all the administrators. It means that the surviving administrators cannot really make any move with regard to the grant on account of one of them being deceased. In the instant case, the Applicant ought to have applied for revocation of grant under Section 76(e) of the *Law of Succession Act*, apply to have a grant issued in the names of the 2 surviving Administrators and possibly also apply for confirmation.

16. It is therefore untenable for the Applicant to seek to substitute an Administrator.

17. The Applicant filed the Summons seeking to rectify of a grant. Section 74 of the *Law of Succession Act* provides as follows:

74. 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.

18. Rule 43(1) of the Probate and Administration Rules provides thus:

43. 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.
19. My understanding of Section 74 of the *Law of Succession Act* is that rectification is only for clear matters being errors in names, descriptions, time and place of deceased's death and the purpose of the grant, where the same is limited.
20. I am further fortified by the numerous decisions touching on the scope of rectifications as relates grants. Some of these decisions include Re Estate of Kahiga Mwathi (Deceased) [2022] eKLR; Re Estate of Samuel Cheruiyot Chesire [2022] eKLR; Re Estate of Philip Opuka [2015] eKLR; Re Estate of Late Robinson Wachira Mwangi (Deceased) [2020] eKLR; Re Estate of John Kirehu Guchu (Deceased) [2013] eKLR; Re Estate of Stanley Mwiti Itheria (Deceased) [2017] eKLR; Re Estate of Joseph Mapesa Nakuku (Deceased) [2019] eKLR and Estate of Hasalon Mwangi Kahero [2013] eKLR.
21. I am strongly persuaded with the finding in Estate of Hasalon Mwangi Kahero [2013] eKLR where the Court held that the provisions of the Civil Procedure Rules are not analogous to the provisions of Section 74 of the *Law of Succession Act* and Rule 43 of the Probate and Administration Rules. The *Law of Succession Act* only permits rectification of grants in 3 delineated areas:
- A. Errors in names and descriptions of persons or things;
  - B. Errors as to time or place of death of the deceased; and
  - C. In cases of a limited grant, the purpose for which such limited grant is made.
22. The Court in Estate of Hasalon Mwangi Kahero (Supra) further held that an error is essentially a mistake. That mistake must however fall within the ambit of Section 74 of the *Law of Succession Act* and Rule 43 of the Probate and Administration Rules.
23. The nature of prayers sought by the Applicants obviously go beyond the spectrum of Section 74 of the *Law of Succession Act*.
24. In Re Estate of Makokha Nyilisi Musa (Deceased) [2020] eKLR, the Court relied on the decision of Re Estate of Charles Kibe Karanja (Deceased) [2015] eKLR where the Court 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 effected without touching the orders made by the court at the distribution of the estate. Consequently, such changed 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 and practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules.



25. This was the holding of Hon. W. Musyoka J in Estate of Simon Ngugi Nganga (Deceased) [2013] eKLR: The Court held that matters touching on the death of an administrator are fundamental issues that cannot be dealt with as a mere rectification or review of a grant. I believe I have made my point clear.
26. Before I conclude, I also note that there were minutes attached to the Application, which I imagine were meant to pass of as a consent. Looking at the Minutes, I note that Mary Kemunto Nyanumba's signature and name are not in the minutes. Further, Jafarson Nyabutowas absent in the meeting. It therefore cannot really be said that the Applicant indeed procured all the Beneficiaries' consents.
27. In view of the foregoing, I am inclined to dismiss the application dated 7.6.2023.

**DATED, DELIVERED AND SIGNED AT KISII THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023.**

**TERESA ODERA**

**JUDGE**

**In the presence of:**

The Applicant-Absent

Court Assistant- Absent

Mwiti -Court Assistant

