



REPUBLIC OF KENYA



KENYA LAW
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**Hatcher & another v Ndavi (Probate & Administration
683 of 2010) [2022] KEHC 11069 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PROBATE & ADMINISTRATION 683 OF 2010**

MW MUIGAI, J

MAY 31, 2022

BETWEEN

ZIPPORAH NDUKU HATCHER 1ST APPLICANT

RICHARD MUNYAO MUTONGA MUTISYA 2ND APPLICANT

AND

JOICE MUTONGA NDAVI RESPONDENT

RULING

1. The deceased herein Antony Mutonga Ndolo died intestate on July 2, 1997. He had two wives Joice Mutonga Ndolo and Esther Mwelu Mutonga. Joice Mutonga Ndolo (the 1st wife) had 9 children while Esther Mwelu Mutonga (2nd wife) had eight children.
2. Joice Mutonga Ndolo and Esther Mwelu Mutonga petitioned for grant of letters of administration intestate and annexed the following documents:
 - a. The death certificate of death certificate No xxxx- Antony Mutonga Ndolo who died on July 2, 1997 aged 67years old and it was issued at Machakos District.
 - b. The Chief's letter dated 15/10/2009 confirming the list of beneficiaries left behind the deceased.
3. The deceased left behind property known as Land Parcel No. Machakos/Mua Hills/116 (49 Ha).
4. The Grant of letters of Administration was issued at Machakos on February 10, 2012 to Joice Mutunga Ndavi and Esther Mwelu Mutonga the 1st and 2nd widows respectively.
5. Esther Mwelu Mutonga (2nd Administrator) died on October 17, 2015 before concluding the administration process of the deceased's estate and an application dated October 26, 2016 was filed by Zipporah Nduku Hatcher (daughter to the 2nd administrator) for substitution.



6. On 14/03/2018 the Application for substitution was granted and Zipporah Nduku Hatcher and Richard Munyao Mutonga were substituted in place of Esther Mwelu Mutonga and a fresh grant was issued to Zipporah Nduku Hatcher, Richard Munyao Mutonga and Joice Mutonga Ndavi.
7. Zipporah Nduku Hatcher (1st administrator) filed a further affidavit on December 5, 2017 stating the following; that her late mother Esther Mwelu Mutonga had three children namely- Zipporah Nduku hatcher, rose Mumbua and Mary Mukonyo; that Esther Mwelu Mutonga (deceased) married Agnes Ndoti Muindi under Kamba Woman to Woman customs ie Iweto; that the said iweto had the following children – Richard Munyao, Isaac Kyalo, Edward Ndiku, Muema and joseph; that the chiefs letter dated October 15, 2009 had indicated that the said children were born of Esher Mwelu which was erroneous; that only three of the above children had been staying at the Antony Mutonga Ndolo estate as the rest went with their mother – Agnes who let settled at her parent’s home – another letter from the chief clarifying the beneficiaries of the deceased’s estate was attached.
8. A replying affidavit by one Agnes Ndoti Muindi stating that she is a beneficiary of the estate by virtue of being married to Esther Mwelu Mutonga as a wife “iweto” and bore her 5 sons; that she was married to Esther to give her sons to inherit and carry on the family name; that traditionally all the children born are considered children of the man of the home and also carries his names as their surname; that she has a superior and equal right to be an administrator to the estate of the late Antony Mutonga Ndolo.
9. Zipporah Nduku Hatcher the 1st administrator filed an affidavit of protest against confirmation of grant on May 16, 2018 which application was dismissed vide ruling dated October 9, 2019 by Hon. Kemei J and parties directed to fix a date on priority basis for the beneficiaries to appear and endorse the distribution approved by this court.
10. The certificate of confirmation of grant was issued on January 22, 2020 and the estate of the deceased namely Machakos Mua Hills 116 was distributed ½ share to be held /registered in the name of the Administrator Joyce Mutonga Ndavi and hold in trust for herself and children of 1st House. The other ½ share of Machakos Mua Hills to be registered in the names of joint Administrators Zipporah Nduku Hatcher & Richard Munyao Mutonga and be held in trust and distributed to the children of Esther Mwilu Mutonga & Agnes Ndoti Muindi.
11. Summons were filed on 10/6/2021 to rectify the certificate of confirmation to add the name of Joice Mutonga Ndavi who was one of the administrators of the deceased and was erroneously omitted in the certificate of confirmation issued on January 22, 2020. The application was granted and the certificate of confirmation dated July 15, 2021 bearing the names of the three administrators issued accordingly.

Summons – Dated 09/09/2021 filed On 13/9/2021

12. Richard Munyao Mutonga, 2nd administrator respectively filed summons seeking the following orders:-
 1. That the rectified certificate of confirmation of grant issued on 28/07/2021 be revoked and a fresh one do issue to reflect in the distribution schedule the names of the following persons who lawfully purchased part of parcel number Machakos/Mua Hills/116:-
 - a. Fredrick Nzioki Kamunzyu
 - b. Alex Mutungi Mutuku
 - c. Petrovic Muthini Muthusi
 - d. Philip Mulomba Kilonzo



- e. Josephine Mueni Nzioka
 - f. Alice Mbaika Mutua
 - g. John Muuke Maingi
 - h. Musila Mwikya
 - i. Fredrick Mutuku Muli
 - j. Gladys Mwikali Towett
 - k. Isaiah Mutuku Mutiso
2. That the costs of this application be provided for.
13. The application was supported by the affidavit of Richard Munyao Mutonga stating that at the time of filing of summons for confirmation of grant and the subsequent summons for rectification thereof the names of the above stated who were beneficially entitled to the deceased's estate were inadvertently omitted; that they lawfully purchased part of Title Number Machakos/Mua Hills/116 and are in actual occupation of their respective portions; that the rectified certificate of confirmation of grant be revoked and a fresh one do issue to reflect in the distribution schedule the names of the said purchasers. A schedule of 11 Purchasers was attached to confirm the purchasers and portions of land bought that is part of the deceased's estate and name to be registered in.
14. The Application was filed on 6/7/2021 by 1st -13th interested parties seeking to be joined to the Succession Cause and to enter appearance in the proceedings.
15. The Affidavit of Protest was filed by Joseph Mutuku Mutonga on 9/12/2021 and stated that he was dissatisfied with the 2nd Administrator's conduct of affairs of their house; children of Agnes Ndoti Muindi. The Protestor asserted that the 2nd Administrator secretly sold 5 acres without consultation and consents of the beneficiaries. Secondly the application for rectification of grant has not considered the already sold 5 acres to Esther Ndosi & Gerald Kasimu and the proceeds of sale have not been disclosed or shared amongst beneficiaries. Thirdly, the land held by Administrators in trust on behalf of beneficiaries should be distributed to the beneficiaries directly as they are in fear of being dispossessed their beneficial shares/interest.
16. An Affidavit of Protest filed on 9/12/2021 by Gerald Mutuku Kasimu & Esther Mukenyi Ndosi indicated that their names as Purchasers were omitted in the Schedule for rectification of Confirmed Grant and confirmed Purchase of 5 acres of Machakos/Mua Hills /116 from Richard Munyao 1 acre, Zipporah Nduku Hatcher 11/2 acres, Isaac Kyalo Mutonga 1 acre, Mary Mukonyo Ndosi 1 ½ acres for Ksh 15.5 million.
17. The 1st Administrator Joice Mutonga Ndavi filed Replying Affidavit on 9/12/2021 and confirmed that the deceased during his lifetime sold some portions of land to Purchasers but did not transfer the interest. The 1st Administrator objected to the rectification of confirmed grant as it was premature and should await the completion of survey works. After survey, each Purchaser and beneficiary will know their actual acreage and each shall get their share.
18. The 1st Administrator conceded 7 purchasers claims as listed in the Schedule; there are other purchasers who are omitted from the Schedule and others added and yet they did not purchase any land.



19. The 1st Administrator claimed the 2nd Administrator has been the stumbling block in the administration of the deceased's estate he has unilaterally sold portions of land without disclosure and filed the summons for rectification of confirmed grant without involving co administrators.
20. The 1st Administrator took the view the Application was brought without consultation with other Administrators and beneficiaries and it is premature, survey is not completed and all parties are not in agreement. The Proposed Schedule presented is not conclusive as there are other parties who are left out. It is therefore in the interest of justice the Summons for rectification be dismissed and allow for consensus.

1st & 2nd Administrators/applicant Submissions:

21. The 1st & 2nd Administrators/applicants submitted that the non-inclusion of the named purchasers in the summons for confirmation was an inadvertent error on the part of the Administrators; that the court has inherent jurisdiction under section 47 of the Law of Succession Act and rule 73 of the Probate and Administration rules made thereunder to entertain any application and determine any dispute under the Act to pronounce such decrees and make fresh orders therein as may be expedient; That the administrator/respondent had not served them with any Reply to the present summons the same stands uncontested and prayed the court grant orders sought.

3Rd Administrator/respondent Submissions:

22. The 3rd Administrators/Respondent submitted that she is the only surviving widow to the deceased; that there are portions of land that had been sold by the deceased to various purchasers and by an error and/or ignorance on the part of administrators this information was not disclosed to their advocates herein prior to confirmation of grant; that the application herein is premature since survey works are yet to complete to establish the exact acreages for all the purchasers.; that the surveyor be allowed to finalize on the now stalled survey process.
23. That the court grants orders that the administrators proceed with the survey works and identify the portions for each purchaser and each beneficiary prior to filing an application for amendment of grant.
24. The 3rd Administrator/Respondent further submitted that the application is premature, it was filed without consultations with other beneficiaries, shares of all the concerned purchasers and beneficiaries have not been established, some purchasers have been left out of this schedule of distribution and others have been wrongly included and since there are pending issues as between the beneficiaries and administrators than need to be resolved so that once such an application is made it will being this matter to rest.

Determination

25. The Court considered various applications pleadings and submissions by Counsel for respective parties and the issue(s) emerging for determination are;
 - i. Should the Summons to rectify the confirmed grant of 28/7 2021 to include the purchasers be granted?
 - ii. Should the court grant orders for survey to be carried out on the suit property Machakos/Mua Hills/116 to apportion each beneficiary's interest.
26. The court's role /function in succession matters is to facilitate intestate and testamentary succession and the administration of estates of deceased persons to beneficiaries and dependents as prescribed by the Law of Succession Act.



27. In the process, where petition for grant of probate where there is a Will or grant of letters of administration in an intestate estate is/are filed, the grant is issued to the Executor(s) or Administrator (s) to carry out their statutory duty in administration and distribution of estates.

28. The personal representatives conduct affairs as prescribed by sections 82 & 83 of LSA on administration and distribution of the deceased's estate. The duties and powers of administration culminate with filing summons for confirmation of grant in an intestate estate outlining the list of beneficiaries of the estate, the list assets that comprise of the deceased's estate that are available for distribution and the proposed mode of distribution and/or written consents of beneficiaries of the deceased's estate.

29. The Court in exercise of section 71 of LSA shall confirm the grant

After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

.....

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

30. The Administrator(s) shall complete distribution as per confirmed grant ideally after 6 months and file full and final accounts in court. In the instant case, the summons for confirmation of grant was granted vide Ruling delivered by Hon. D.K. Kemei J of 9/10/2019 where the Protest was filed on 16/05/2018 dismissed.

31. The Summons seeking rectification of the Summons for Confirmation is to include Purchasers of property Machakos/ Mua Hills/116 subject of distribution to the beneficiaries of the deceased's estate who were inadvertently left out/omitted during confirmation of grant proceedings.

32. The *Law of Succession Act* Section 74 provides for rectification as follows;

Errors may be rectified by Court 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.

33. *In Re Estate of Charles Kibe Karanja (Deceased)* [2015] eKLR the court Hon. W.Musyoka J stated as follows;

It goes without saying that the provisions in Section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a grant of representation..... The certificate issued upon a grant being confirmed does alter the grant of representation made in the matter. It does not replace the grant of representation, and it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed. In short it is the evidence of the confirmation of the grant. From the wording of Section 74, it is plain that the same was not tailored to [or] for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not.



A party wishing to have rectified or altered or amended a certificates of confirmation of grant,rather they ought to apply for review of the orders made upon the application for confirmation of grant, where the alterations sought are fundamental; or for amendment of the certificate under Rule 73 of the Probate and Administration Rules to address minor errors or mistakes in the body of the certificate.

A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. 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 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. Among the imported procedures is the device of review under the Civil Procedure Rules.

34. The rectification envisaged herein is/are not errors being rectified as defined by law, but redistribution of the deceased's estate to include Purchasers of the portions of deceased's estate. If the purchases are proved to be genuine, lawful and legal and agreed upon and consented to by all beneficiaries then the court by virtue of the Schedule of the confirmed purchasers, their acreage and written consents by all beneficiaries would include them in the confirmed grant.

However, by virtue of various Affidavits filed by parties as outlined above there are simmering disputes depicted as follows;

- a. Between Administrators and beneficiaries who have not received their respective shares as required by Confirmed grant as their shares are held by Administrators
 - b. Between Administrators themselves, they cannot agree on engagement of Surveyor and completion of survey to determine the specific acreage /portion allotted to each Beneficiary and what was sold and bought by Purchasers.
 - c. The Schedules of Purchasers to be included in the Rectification of Confirmed Grant differ in number, names and portions bought as listed by each of the administrators separately. Some Purchasers are omitted from the Schedule of Purchasers and others the sale is contested.
 - d. The beneficiaries are apprehensive of sale of land and transfer before they receive their beneficial interest in the said Property Machakos/ Mua Hills/116 shall lead to disinheriting them of their beneficial interest in deceased's estate.
35. From the totality of the concerns and disputes raised with regard to the summons for rectification of confirmed grant , this court cannot legally exercise judicial discretion to grant the summons in the midst of unresolved controversy. Secondly, the Purchasers are not beneficiaries and even then, the court is not satisfied of the respective identities and shares of all persons beneficially entitled and legitimate purchaser claims specifying all such persons and their respective shares.



36. The rectification of confirmed grant herein is redistribution of deceased's estate and requires written consents of all beneficiaries.
37. The current controversy has to be heard and determined first and this court lacks jurisdiction to effectively determine such claims of title ownership and/ or occupation of land. Such claims are properly ventilated before ELC Court by virtue of section 13 of Land & Environment Act; Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR where the court observed as follows:

“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who a neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and rules, which have elaborate rules on suits by and against executors and administrators.

Disposition

1. The summons for rectification of confirmed grant filed on 9/9/2021 is dismissed.
2. The Administrators shall appoint Surveyor to carry out survey in the presence of Administrators, beneficiaries and /or Purchasers and determine each beneficiary's share without demolishing any permanent structures.
3. Each of the purchasers to pursue claim from ELC court by virtue of section 13 of Environment & Land Act.
4. Each party to cater for own Costs.

**DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 31ST MAY 2022
(VIRTUAL CONFERENCE)**

**M.W. MUIGAI
JUDGE**

