



REPUBLIC OF KENYA



**In re Estate of Robert Oundu Wambia (Deceased) (Succession Cause
205 of 1996) [2022] KEHC 661 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 205 OF 1996
FA OCHIENG, J
JUNE 20, 2022**

BETWEEN

JOEL OKUNDO OUNDU RESPONDENT

AND

EDWARD K.O WAMBIA PETITIONER

RULING

1. The application dated 14th April 2021 sought the rectification of the Certificate of Confirmation of Grant dated 9th February, 2021.

Pursuant to the said confirmation of grant, L.R. No. Kisumu/marera/3405 was divided between two persons in the following proportions;
 1. Edward Kenneth Olango – 6.6393 HA
 2. Joel Okudo Ondu - 0.5617 HA
2. The said distribution was effected on the basis of the Mediation Settlement Agreement dated 20th February 2020.
3. The reason cited by the Applicant, Kenneth Edward Olango Ondu, for seeking rectification was that the estate was intended to be distributed equally amongst the 17 surviving beneficiaries. According to the Applicant, each of the 17 beneficiaries should get 0.45 Hectares.
4. However, the Applicant also set out in his supporting affidavit, particulars of sub-division which would result in sharing out to each beneficiary 0.423 HA. If each of the portions was 0.423 HA, the total land which would have been shared out would be 6.778 Hectares.



5. The Respondent, Joel Okudo Onduswore a replying affidavit, stating that he had no objection to the rectification. He said;

“ 4. That I have no objection to the grant being rectified, as during confirmation of the grant, I know the intention of the court was to have the estate of the deceased shared equally among all the 16 beneficiaries who had been listed during application for grant.”

6. I have perused the lists of the beneficiaries presented by both the Applicant and the Respondent, respectively. The following names are on both lists;

1. Wellington Wambia Ondu.
2. Estate of Joshua Odundo.
3. Meshack Owino.
4. Joel Okudo.
5. Japheth Ouma.
6. Moses Ochieng.
7. Estate of Barack Okore.
8. William Otieno.
9. Erastus Seda.
10. Estate of Mourice Ogwang.
11. Estate of Alphonse Ruben Orao.
12. Jacob Oruko.
13. Micah Oruko.
14. Kenneth Olango.

7. In his affidavit, the Respondent also named Joshua Adundo Adundo, who is not in the Applicant’s list.

8. Meanwhile, in his affidavit, the Applicant named Philip Otiende Adundo and Church, both of whom were not on the Respondent’s list.

9. Whilst the Respondent pointed out that the Applicant had delayed in bringing the application; and also that the Consent Order could not be set aside or varied because it had not been obtained by fraud, or collusion, or by an agreement that was contrary to public policy: He concluded his submissions thus;

“It is my humble submission that this Honourable Court do order distribution and submission of accurate accounts of the inventory and distribution of the estate of the deceased. Consequently, I do pray that the application be dismissed with costs to the respondent.”

10. Frankly, I am unable to reconcile the Respondent’s conclusion with the rest of his earlier submissions.

11. But without any fear of contradiction, I am convinced beyond peradventure, that both parties wish to have their respective shares.



12. The provision of shares to each beneficiary is also in accordance with Justice. That therefore means that the distribution of the property to only two persons; to the exclusion of all the other beneficiaries is a negation of fairness and equity.
13. The Court had earlier given its nod to the Mediation Settlement Agreement, because I was made to understand that that was the consensus of the beneficiaries. Now that it has been made abundantly clear that all the beneficiaries wish to get their respective portions of the estate, I have no hesitation in endorsing that position.
14. However, before concluding this Ruling, I wish to make it clear that ordinarily, the Court would not intervene to vary a Mediation Settlement Agreement. Such an agreement is deemed to be an expression of the will of the parties. It is for that reason that no appeal can be preferred against a Mediation Settlement Agreement.
15. In the event, this case must be appreciated within its own unique circumstances. Those who had signed the Agreement, are the very same persons who have subsequently told the Court that the original agreement needs to be varied, so that all the beneficiaries can be enabled to get their just entitlements.
16. I note that the Petitioner proposes to have 6.365 Hectares transferred, first, to his name. He told the Court that he would thereafter share that portion of land to the other beneficiaries.
17. However well-intentioned the Petitioner may be, this Court cannot proceed in the manner proposed by the Petitioner.
18. An order by the Court gives each beneficiary the asset specifically identified, by size. Indeed where beneficiaries are able to present a Survey Report, inclusive of a map that shows exactly which portion is assigned to each beneficiary, that would facilitate the actual distribution of the property, when the Court confirms the Grant.
19. The Court cannot abdicate its mandate, by handing down to the Petitioner, the authority to determine what he should pass on to each beneficiary.
20. Indeed, when the Court makes an order for the Confirmation of the Grant, the only role left for the Petitioner is to work with each beneficiary, to enable the beneficiary to actualize the order.
21. I have delved into the history of this case. It is my considered opinion that the only way that the Court can assist the beneficiaries to bring it to a close, is by making specific orders that would determine the exact portion of land which was going to be transferred to each beneficiary.
22. Accordingly, the Certificate of Confirmation of Grant dated 9th February 2021 shall be rectified, by setting aside the particulars thereof. However, before the Court gives the final orders, I will give a further hearing to the parties, on the mode of distribution.

DATED, SIGNED AT DELIVERED AT KISUMU

This 20th day of June 2022

FRED A. OCHIENG

JUDGE

