



**In Re Estate of William Mtkunywa Mutwir Alias William Ikunywa Mutwiri  
(Succession Cause 7 of 2017) [2022] KEHC 12452 (KLR) (24 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12452 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 7 OF 2017  
RN NYAKUNDI, J  
AUGUST 24, 2022**

**IN THE MATTER OF THE ESTATE OF THE LATE:  
WILLIAM MTKUNYWA MUTWIR ALIAS WILLIAM IKUNYWA  
MUTWIRI - DECEASED**

**BETWEEN**

**ALICE MAKENA MUTWIRI ..... APPLICANT**

**AND**

**SAMUEL KIMATHI MUTWIRI ..... RESPONDENT**

**RULING**

1. This is yet another application filed by Alice Makena Mutwiri under certificate of urgency filed in court on 5/7/2021 seeking suspension of the co-administrator Samuel Kimathi Mutwiri.
2. In the second limb, the applicant seeks an order for rectification of grant initially confirmed and rectified further on 19/8/2020 in support of the application is an affidavit deponed by the applicant as follows;
  - 1) A rectified certificate of confirmation was made by this court on August 23, 2020.
  - 2) That my administrator has moved lands office to sub-divide and transfer part of the estate formerly Kitale Municipality Block 16/116 Kaura wa Benhau now Kitale Municipality Block 16 Kaura wa Bechau/375 measuring 1.04 Hectares and 377 measuring 0.85 hectares for his selfish ends.
  - 3) That sub-division has also created title numbers Kitale Municipality Block 16 Kaura wa Bechau 375 and 378 in the names of our deceased father and it is necessary to reflect the changes on the rectified grant.



- 4) That the matter has been registered and identified in court annexed mediation case number 90 of 2021 and issued for mediation and is due for hearing on 29/7/2021 hence it will be necessary to rectify the title to enable the mediator proceed without any hitch.
  - 5) That prior to his demise, our father had given the administrator who is the only son a portion measuring 2.5 acres, the benefit of which he has already enjoyed and utilized.
  - 6) That we have sat down with the beneficiaries and agreed that the net estate in Kitale Municipality Block 16 Karua wa Bechau comprising of the now titles 375 to 378 be shared amongst the daughters after settling the taxes and other liabilities.
  - 9) That I have already paid outstanding taxes to KRA.
  - 10) That I did not know the changes in the title until I visited the lands office recently and that when I was informed that the titles now listed in the rectified certificate of confirmation is non-existent.
3. In opposition to the application, one Samuel Kimathi Mutwiri averred as follows in challenging the application for suspension of his role as co-administrator and fresh quest on distribution.
- (1) That in response to the proposed mode of distribution in respect of the property in Eldoret Municipality Block 4/22 the same is a family home and therefore should be entrusted to all family members. I am entitled to at least a proportion of 10% in respect of the property since I was staying with the deceased after the demise of the wife who was my mother and also am managing the property.
  - (2) That in respect of property in Eldoret Municipality Block 11/561, I propose that the property be shared between the daughters and I be excluded as the property belonged to Ruth Ntirietwa Mutwir- Deceased mother.
  - (3) That in response to the property in Eldoret Municipality Block 11/590 I am entitled to be awarded the whole share of the property for the reason that it belonged to William M;Kinyua Mutwiri alias William Ikunywa - deceased who was my father.
  - (4) That in response to the property in Eldoret Municipality Block 16/Kaura wa Bechau 375, 376, 377 and 378, I am entitled to have the entire estate since I have fully and solely developed the property.
  - (5) That in response to the property in Eldoret Municipality Block 50/49 Kaubeyon, I have no interest in property hence the same can be shared equally between the daughters.
  - (6) That in response to the property in Meru Ntima/Mtakikira 3814 the same is not available for distribution since it is ancestral home hence I should hold the property for myself and in trust for all the family members.
  - (7) That in response to the assets in Barclays Bank A/c XXXXX family members are entitled to share equally including myself.
  - (8) That in response to the assets in Britam Wealth Management Fund A/c No. 1xxx and stares CDS Account No. XXXX as I have no interest in the same.
  - (9) That I shall be excluded from mode of distribution in respect of the assets to Diamond Trust A/c No.XXXX as I have no interest in the same.



4. All in all, the application is expressed to be brought pursuant to section 47 and Rule 73 of the Law of Succession rule 49 of the same Act and Article 145 of the Constitution. Before I say anything, it is observed from the record the administrators have applied for rectification of the confirmed grant on two occasions. The record bears me witness, that on 13/5/2015 and 19/8/2020 the same grant applied for and issued by this court was rectified.

**Decision:**

5. It is now settled law that in an application of this nature for the applicant to succeed it must be shown that the confirmed grant is tainted with errors on the face of the record or mistake appear which mars the correctness, justness, legality or propriety of the subject matter. The provisions governing rectification of grant already issued by the court falls within sections 74 and 75 of the Succession Act. It reads as follows:

“Errors in names and description or in seeking out the time and place of the deceased’s death, if 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 rectified accordingly.”

6. The court in the matter of the estate of Muniu Karugo (DCD) succession Cause No.2669 of 1997 Koome J as she was then neid:

“The intestate was the father of two administrators, a brother and a sister. Rectification of the confirmed grant was sought by the brother alleging that the confirmation involved the name of a third beneficiary who was not entitled to a share in the Estate. The court dismissed the application on the grounds that the rectification seeks to deal with obvious errors, and it cannot be used to fundamentally alter the mode of distribution of the estate. See also the principles in *Kamau v Kirima* [2002] 2 KLR 172”

In other words, rectification targets permissible errors, fundamental errors, typographical mistakes on the face of the record but not to change the character of the grant issued by the court save for circumstances expressly stated in the statute. As the facts in this case demonstrate a probate court is not in the business of rectifying grants duly issued to the parties on distribution of the intestate estate. The court has no jurisdiction to re-open intestate or initiate proceedings at the whim of the administrators as a continuum of seeking leave of the court to rectify final decree on confirmation of grant. It is my view that there are very clear provisions under section 83 of the Succession Act for compliance for the administrators to file a final probate account. This was the position taken by the court in the matter of the Estate of Muniu Karugo (DCD). The confirmed grant cannot be rectified as the confirmation was not a misdirection but a deliberate order made after parties provided material evidence on how the property should be distributed.

7. Having considered the background to this application and bearing in mind that litigation involved distribution of the Estate to the beneficiaries under section 35, 36, 37 and 38 of the Law of Succession, it must come to an end. It is my considered opinion that to allow this application without sufficient evidence will be in breach of section 7 of the Civil Procedure Act. This kind of approach in the end would turn out to be a waste of both the court scarce resources fundamental justice.
8. The basic tenets or suitability test under section 74 of the Succession Act has not been met by the applicant. I find no merit to strip the earlier decision of the language decree in the certificate of confirmation.
9. It is so ordered.



DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 24<sup>TH</sup> DAY OF AUGUST, 2022.

R. NYAKUNDI

JUDGE

