



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Sarah Njeri Njoroge (Deceased) (Succession Cause 2"B" of 2017) [2022] KEHC 15194 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 15194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
SUCCESSION CAUSE 2"B" OF 2017  
SN MUTUKU, J  
SEPTEMBER 21, 2022  
IN THE MATTER OF THE ESTATE OF SARAH NJERI NJOROGE (DECEASED)  
IN THE MATTER OF  
MONICA WANJIKU NJOROGE ..... PETITIONER**

**RULING**

**The Summons**

1. Under consideration is summons for rectification of grant dated May 3, 2021. The application is brought by David Mukii Mereka, the executor of the will of the deceased herein. The summons is anchored on section 74 of the Law of Succession Act and rule 43 (1) of the Probate and Administration Rules.
2. The summons seeks to rectify the certificate of confirmation issued on October 6, 2017 to the executor. The rectification sought is to have the names of Adam Schmid, Paul Henry Schering, Greta Marie Schering and Franziska Schering included as beneficiaries and to remove LR No Kajiado/Kitengela/4745 and 90 Shares in Rolf's Catering Limited C 14068 from the list of assets included in the certificate of confirmation.
3. The grounds in support of the summons are found on the face of it and in the supporting affidavit sworn by David Mukii Mereka on May 3, 2021 to the effect that he is the executor named in the will and testament of the deceased dated April 24, 2015; that there is a certificate of confirmation of grant dated April 29, 2020 as a result of which the family of the deceased have brought an application seeking orders, *inter alia*, to have the Executor transfer LR No Kajiado/Ololoitikoshi/2919 failure to which the Deputy Registrar of the High Court be directed to do so.
4. It is deposed that the execution of the transfer of the said property as prayed will disinherit the other beneficiaries including Adam Schmid and his siblings Paul Henry Schering, Greta Marie Schering and Franziska Schering. It is deposed that LR No Kajiado/Kitengela/4745 is not mentioned in the will of the deceased and that of her late husband but it is included in the certificate of confirmation of grant



in addition to 90 shares in Rolfs Catering Limited C 1470568; that the said heirs have not brought an application to bring the said assets within the estate of the deceased and that the additional assets are not available for distribution within the estate of the deceased and should therefore not be included.

5. The summons is opposed by Monica Wanjiku Njoroge, Evanson Njoroge Wagachie, James Wagacii Njoroge and Patrick Karanja Njoroge, 1<sup>st</sup> to 5<sup>th</sup> beneficiaries respectively, through their lawyers Kinyanjui, Kirimi & Co Advocates. They have filed grounds of opposition to the effect that confirmation of grant of probate cannot be rectified since the same amounts to amending the Will of the deceased; that the errors sought to be corrected are not envisaged by section 74 of the Law of Succession Act read together with rule 43 (1) of the Probate and Administration Rules; that the application is malafides and frivolous and that the application is purely meant to scuttle the distribution and transmission of the estate of the deceased.
6. Mr Kang'ethe, acting for Franziska Schering, Greta Marie Schering and Paul Henry Schering, the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> beneficiaries respectively did not oppose the application. He is supporting it.

### Oral Submissions

7. The application was argued orally on July 27, 2022. In his arguments, Mr Mereka submitted that Title No Kajiado/Kitengela/4745 does not exist; that the property was under the name of a company known as Thururu Limited and was distributed before confirmation of the grant dated July 29, 2020 and there the property being non-existent ought not to appear in the confirmed grant and that this is an error that can be corrected by rectification.
8. He submitted that the grant refers to beneficiaries who are not included in the confirmed grant and that this is an error that can be cured by rectification. He submitted that Title No Kajiado/Olekasasi/587 was bequeathed to Fransziska Schering and therefore unless this property is included in the certificate of confirmation of grant, the same cannot be transmitted to her, hence the prayer to have it included through rectification of grant.
9. Mr Mereka further submitted that there is no prejudice suffered by any beneficiary and that all beneficiaries including those in Germany have executed a consent in support of the rectification and that he is not aware of any withdrawal of the consent by any beneficiary. He submitted that he is not able to execute transmission documents unless rectification is granted.
10. Mr Kang'ethe supported the application for rectification and argued that there is no prejudice to be suffered by the beneficiaries; that there is no way the executor will be able to transmit the property that is not included in the grant; that nothing tangible is being amended in the wills of the deceased and her husband.
11. The application is opposed by Mr Kirimi. In his oral submission, Mr Kirimi told the court that the firm of Kinyanjui, Kirime & Company Advocates took over this matter on August 19, 2021 by which time the application under consideration had been filed; that at first his clients did not have a separate legal representation and did not have independent advice; that Mr Mereka, the executor, was also representing them; that there is conflict of interest and that the consent of the beneficiaries drawn by Mr Mereka was recanted in the affidavit dated May 19, 2021.
12. Mr Kirimi submitted that this court's jurisdiction under section 74 of the Law of Succession Act and rule 43 (1) of the Probate and Administration Rules ties the hands of the court on what can be rectified and that not every matter that requires rectification. He submitted that this is a grant of probate and not intestate proceedings; that there are probate proceedings and that where there is a will that has not been challenged, the grant should be confirmed in accordance with the will; that the certificate of



confirmation was extracted strictly by the will and that the prayers sought do not align with section 74 and Rule 43(1).

13. It was further submitted that Mr Mereka is asking the court to rewrite the Will of the deceased to introduce or remove a property in the grant and introduce other people in the confirmation of grant and alter the distribution of the estate; that there is no mistake, error or ambiguity that would call for an application to rectify the grant of probate. It is argued that it has not been shown that without rectification transmission cannot go through.
14. In his rejoinder, Mr Mereka denied acting for any beneficiary but another firm of advocates was acting for them and that the consent by the beneficiaries was executed by that other firm of advocates. He argued that the application is within the law and that it would be no use to proceed with the grant as it is because there will be no full distribution of the estate.

### **Determination**

15. While I note that Mr Mereka filed written submissions despite this court's directions on March 30, 2022 that this matter be argued orally, and that this was opposed by Mr Kirimi, it is my view that no party is prejudiced by that fact.
16. The law governing rectification of grants is section 74 of the *Law of Succession Act* and rule 43 (1) of the *Probate and Administration Rules*. For emphasis, I will cite these provisions. section 74 reads as follows:

"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."

17. Rule 43 (1) reads as follows:

"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."

18. These provisions are clear and specific that what is subject of rectification, upon application, are the following:
  - i. Errors in names;
  - ii. Errors in descriptions;
  - iii. Errors in setting out the time and place of deceased's death;
  - iv. Errors in the purpose in a limited grant.
19. That is exactly what the authority relied on by Mr Mereka, *In re Estate of Henry Mwithimbu Karigu (Deceased)* [2020] eKLR states. The judge in that case refused to handle other substantial amendments sought in that case. The learned judge stated as follows:

"However, I do note that other quite substantial amendments were sought which relate to the specific shops or side of buildings to be occupied by the respective beneficiaries as



well as issues of a deceased beneficiary. It bears repeating that the scope of rectification of grant under section 74 of the Law of Succession Act is quite limited and cannot handle such substantial issues which may require further evidence or visit to the locus in quo or interrogation by appellate court. Perhaps, a proper application for review of judgment or appeal is the way out of this quagmire.....”

20. Similar reasoning is found in the two authorities cited by Mr Kirimi: *In re the Estate of Mocosio* [2000] eKLR and *In the Matter of the Estate of Hasalon Mwangi Kabero* [2013] eKLR.
21. I have considered the application before me and the arguments advanced for and against it. It is clear to me that what is sought to be rectified is the following:
  - i. inclusion of the names of Adam Schmid, Paul Henry Schering, Greta Marie Schering and Franziska Schering as beneficiaries;
  - ii. removal of LR No Kajiado/Kitengela/4745 from the assets in the certificate of confirmation;
  - iii. removal of 90 Shares in Rolfs Catering Limited C 147068 from list of assets
22. I need not belabor the point that what is sought to be rectified is outside the scope of rectification under section 74 of the *Law of Succession Act* and rule 43(1) of the *Probate and Administration Rules*. What is sought to be rectified are not errors as envisioned in those provisions but substantial matters that have no space under prayers for rectification of grant.
23. What is of concern to this court is that the summons for confirmation of the grant of probate and the grounds advanced in support of the same were filed by the same executor now before this court seeking rectification. The situation the parties find themselves in would have been avoided. As pointed out by Mr Kirimi, the law provides for recourse for probate proceedings and this may be the way to go to address the issues now being presented to this court for rectification outside the scope of such rectification.
24. I am afraid this application is not merited for failure to fall within the ambit of rectification of grant. Consequently, the summons for rectification of grant dated May 3, 2021 is hereby dismissed. I order every party to bear own costs.
25. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 21<sup>ST</sup> SEPTEMBER 2022.**

**S. N. MUTUKU**

**JUDGE**

