



REPUBLIC OF KENYA



In re Estate of Adam Chebelieny Kibosia (Deceased) (Succession Cause 129 of 2019) [2022] KEHC 15468 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 129 OF 2019
RN NYAKUNDI, J
NOVEMBER 17, 2022**

BETWEEN

MARGARET JEMUTAI KIBOSIA 1ST APPLICANT

MILKA JEBET CHEEBELIENY 2ND APPLICANT

AND

DR. JOHN KIBOSIA 1ST RESPONDENT

BENJAMIN KIBOSIA 2ND RESPONDENT

WYCLIFE KIPRONO LIMO 3RD RESPONDENT

PHILIP KIPKEMBOI KIBOSIA 4TH RESPONDENT

KIPRONO CHEBOI KIBOSIA 5TH RESPONDENT

RULING

1. Before me for are summons dated October 18, 2021 in which the Applicants seeks orders that: -
 1. That the Certificate of Confirmation of Grant issued on July 21, 2021 be rectified as follows;
 - a. For the name of one Eunice Cherotich Mutwol be included at paragraph (a) (2) thereof
 - b. The name of their deceased sister Christine Chelagat Kibosia be included
 - c. The name of their late brother David Kiprop Kibosia at paragraph (a) (2)(25) thereof be indicated as deceased and;
 - d. The name of Anne Cherono Kibosia which has been repeated at paragraph (a)(2)(8) be deleted.



2. That the movable properties at paragraph M (Movable properties) be amended to include all the 26 beneficiaries as opposed to only 12 sons.
 3. That the 3rd and 4th Administrators be compelled to execute forms of transfer and all the necessary instruments of transfer as contained in the Certificate of Confirmation of Grant and failure of which the Deputy Registrar to execute.
 4. That security be provided to the surveyor at the time of the survey process and the same be implemented through the OCS Moiben police station.
2. The application is supported by the affidavit of Margaret Jemutai Kibosia, sworn on October 18, 2022.

The Applicants' Case

3. The 1st Applicant deposed that she has noted some errors in the Certificate of Confirmation of grant that was issued on July 6, 2021. With regard to the property known as Moiben/Moiben Block 3/ Kapsiliat/254 the 1st Applicant deposed that the names of Eunice Cherotich Mutwoi to be included in the distribution schedule. The name of Anne Cherono Kibosia has been repeated and that their brother David Kiprof Kibosia is deceased and should be included as such. The 1st Applicant also wants the name of their deceased sister Christine Chelagat Kibosia to be included in the said Certificate of Confirmation of Grant.
4. The 1st Applicant deposed that with regard to the property known as Moiben Shopping Mall a bank account was opened at National Bank of Kenya and not Co-operative Bank of Kenya. The proceeds therein to be shared among the 25 beneficiaries and that the administrators with respect to the said property to be Margaret Jemutai Kibosia, Milka Jebet Chebelieny, John Cheruiyot Kibosia and Kiprono Cheboi Kibosia.
5. The 1st Applicant argues that there was an error in the omission of other beneficiaries share to the movable properties wherein only sons have been listed. The 1st Applicant contends that in the mediation settlement agreement and its adoption by the Court, all beneficiaries were to have a share in the moveable assets.
6. The 1st Applicant argues that the male administrators have been reluctant to comply with the mode of distribution reflected in the Certificate of confirmation of grant and thus there is need to compel them to execute the necessary transfer documents or the same be executed by the Deputy Registrar on their behalf.
7. The 1st Applicant further deposed that the County Surveyor requires security to carry out the survey of the immovable assets and thus there is need for the Court to order that the OCS Moiben police station do provide security.
8. In opposing the said application, the Objectors/Respondents filed Grounds of opposition dated November 3, 2022 together with a replying affidavit dated November 7, 2022 sworn by Dr. John Kibosia.

The Objectors'/Respondents' Case

9. The Objectors' case is that this instant application has been brought in bad faith and is an abuse of Court process. The Respondents argue that the application is vexatious, frivolous and untenable in law.
10. The Respondents argue that this matter is currently before the Court of Appeal and is pending determination and thus this Court should not deliberate on the matter herein.



11. The Respondents argue that in the present application, the Applicants herein are only seeking to enforce the impugned mediation settlement agreement that is currently before the Court of Appeal.
12. The Respondents contend whereas there four (4) administrations in the instant matter, the Applicants have always excluded the two others from matters concerning the estate herein.
13. The Respondents argue that the proposed amended and/or Certificate of Confirmation of Grant has since omitted some beneficiaries being Aden Kiprono Kibosia and Kiplagat Kibosia.
14. The Respondents argue that they have an arguable appeal with high chances of success.
15. The Respondents filed their submissions on November 9, 2022 whereas the Applicants did not file any.

Determination

16. Rectification of grants is provided for in section 74 of the *Law of Succession Act*, Cap 160, Laws of Kenya and Rule 43(1) of the *Probate and Administration Rules*. Section 74 provides as follows:

74. 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.”

Rule 43(1) provides 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 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 made.”

17. From the language of section 74 of the *Law of Succession Act* and Rule 43(1) of the *Probate and Administration Rules*, the scope of rectification of grants of representation is limited to 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. I may add that such other minor errors in that genre could also be rectified.

18. *In the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased)* [2013] eKLR:-

“The law on rectification or alteration of grants is Section 74 of the *Law of Succession Act* and Rule 43 of the *Probate and Administration Rules*...What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out the time or place of the deceased's death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general...

“Where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the *Law of Succession Act*, the applicant ought to approach the court under order 44 of the *Civil Procedure Rules*. A review under Order 44 of the *Civil Procedure Rules* may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should



have moved the court under this provision-Order 44 of the Civil Procedure Rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant.”

19. Further my reading of the instant application also transcends section 74 of the act by its very characteristics as premised by the applicant. It therefore enshrines section 80 of the civil procedure act and order 45 rule 1 of the civil procedure rules. There is clear evidence from the affidavit sworn by the deponents that lean towards demonstrating that it has been discovery of new and important matter or evidence which after due diligence was not within their knowledge or though produced before the court at the time there was a mistake or error apparent on the face of the record when the certificate of confirmed grant was finally endorsed by the court. I also of the considered view that the applicants have demonstrated other sufficient reasons which demand of this court to exercise its unfettered discretion donated to the court under section 1(a), 1(b) and section 80 of the civil procedure act as read in conjunction with rule 73(1) of the Probate and Administration Rules. The mere fact that the respondents have filed an appeal to be dealt with in the future without any stay of execution with regard to the proceedings before the lower court does not necessarily oust the jurisdiction of that court. That to me is the case at bar.
20. In the present case the Applicants seek to rectify or amend the Certificate of Confirmation of Grant that was issued on July 6, 2021. The relevant and necessary rectification and corrections sought in the application are within the purview of section 74 of the act and concurrently primarily the provisions of section 80 of the civil procedure act and order 45 rule 1 of the Civil Procedure Rules.
21. With respect to the property known as Moiben/Moiben Block 3/Kapsiliat/254 the Applicants want the name of Eunice Cherotich Mutwol to be included in the distribution schedule. I have keenly perused the said Certificate and I note that the name of Eunice Cherotich Mutwol already appears in the said schedule and thus there is no need to include it again.
22. The Applicant also allege that with respect to the aforementioned property the name of Anne Cheron Kibosia appears twice and that there is need to delete one. I have looked at the said schedule and the said name only appears once in all the clauses in the Certificate of Confirmation of Grant and thus there is no need for rectification.
23. The Applicants further want that the name of David Kiprop Kibosia to marked as deceased. In view of David Kiprop Kibosia being deceased. The Court directs that parties do nominate one of his beneficiaries in his place.
24. The Applicants also want the name of their deceased sister Christine Chelagat Kibosia to be included in the Certificate of Confirmation of Grant as a beneficiary of the deceased. The Applicants argue that the said beneficiary was inadvertently left out and should be included under all the properties listed as a beneficiary. A cursory look of the said certificate in deed reveals that the said name was never included in the Certificate of Confirmation of Grant. A perusal of the Mediation Settlement Agreement although indicates Christine Chelagat Kibosia as beneficiary of the deceased’s estate and thus there is need to rectify the Certificate of Confirmation of Grant.
25. With regard to the property known as Moiben Shopping Mall (Moiben Township) the Applicants averred that a bank account was opened at the National Bank of Kenya and not at Co-operative Bank of Kenya. The Applicants also want that the said proceeds be said equally among the 25 beneficiaries and that Margret Jemutai Kibosia, Milka Jebet Chebelieny, John Cheruiyot Kibosia and Kiprono Cheboi Kibosia be the ones charged with administering the said property. With regard to the issue of the bank



account, the Court notes that Co-operative Bank of Kenya was the bank that had be proposed by the parties however the parties have since opened a bank account with National Bank of Kenya and hence the bank for purposes of administering the property known as Moiben Shopping Mall (Moiben Township) shall be National Bank of Kenya.

26. From the Certificate of Confirmation of Grant on record the subject property was only to be administered by Margret Jemutai Kibosia and John Cheruiyot Kibosia. From the Mediation Settlement Agreement, the said property was only to be administered by Margret Jemutai Kibosia and John Cheruiyot Kibosia. The sought rectification will only amount to altering the said order.
27. The applicants argue that there was an error in the omission of other beneficiaries share with regard to movable properties. The Applicant contend the sons were the only ones listed as beneficiaries under this category. From the Certificate of Confirmation of Grant on record the movable property being shares at KCB, Kenya Breweries Ltd, Barclays Bank A/C 28769 and Sirgoi Holdings were to be shared equally amongst the 11 sons of the deceased. I have looked at the Mediation Settlement Agreement regarding the said distribution, and note that it is indeed true the said movables were to be shared equally among the (25) beneficiaries of the deceased. The Certificate of Confirmation of Grant however did not capture the spirit of the parties under this clause and thus needs to be amended and rectified accordingly.
28. The substratum of the Respondents' case however does not really speak to the present application but is rather solely pegged on the issues before the Court of Appeal. The said issues will be canvassed in the said forum and parties will have the opportunity to raise their various concerns regarding the Mediation Settlement Agreement at that particular point in time. This Court however has been called upon to rectify the Certificate of Confirmation of Grant so as to capture the spirit and intention of the parties during the mediation process. While appreciating that that blunders are always made humans beings, the said blunders should not kill the substance of the Mediation Settlement Agreement that was agreed upon by the parties. Rule 73 of the *Probate and Administration Rules* gives the Court power to make orders to meet the end of justice.
29. As a matter of emphasis Article 27 of *the Constitution* 2010 provides that every person is equal in the eyes of the law and before the law; and the Article goes further to state that there should be no discrimination on any ground including gender which encompasses marital status; *the Constitution* does not allow discriminatory rules and customs in matters of personal law, including inheritance.
30. There ought to be no classification into categories of male, female, married or unmarried; there ought to be no discrimination against the male or female children of a deceased person; nor discrimination between the married daughters and unmarried daughters of a deceased person.
31. In the case of *Peter Karumbi Keingati & 4 others v Dr Ann Nyokabi Nguithi* [2014] eKLR, the court held as follows:

“As regard to the argument by the Applicants that married daughters ought not to inherit their parent’s property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent’s in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not



such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that the court will grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of *the Constitution 2010*, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.”

32. In the distribution matrix of intestate estate both the spouses and the children are given prominence by the law. That is why section 38 captures the letter of the law to the effect that the net intestate estate shall subject the provisions of section 41 and 42 dealing with the polygamous family divide upon the surviving child, if there is only one or be equally divided among the surviving children. The law requires that their shares be divided equally amongst them. That is instructive and any departure by way of consent or mediation agreement shall not be repugnant to the provisions of *the constitution* or the enabling statute on matters of succession. I consider the right to life under article 26 of *the constitution* transcending the right to physical existence of our humanity. In the case of *S -v-Makwanyone* (1995) 3 SA 391 the court held *inter alia* that the right to life means more. It incorporates a right to human existence. According O'Regan J “The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.”
33. The corpus of the succession act is explicit to the extent that daughters have been given the right of inheritance to bring equality with sons of the deceased intestate, and the exclusion of daughter or daughters from the heirship scheme is by the text of *the Constitution* discriminatory leading to oppression of the other gender and a negation of fundamental rights. The right of inheritance of a daughter or daughters accrues by birth hence coparcenary is a birth right. In my view given the constitutional imperatives to bring about equality of status as codified therein it is progressive to hold that even the various customs and culture stand for equity, justice and conscience in our society. Those other class in the intestate estate who are of individualist attitude may find it hard to understand the significance of *the Constitution*. Adverting to the nature of the right to life as broadly conceptualised in the text of our Constitution demands that no human being shall be deprived of the fundamentals and enjoyment of that right to life. Taken in its wide and proper dimension I consider the fundamentals right to life to comprise the right of every human being not to be deprived of his or her right to have their appropriate means of subsistence a decent standard of life. From this perspective depriving any heir to the intestate estate of the deceased has the effect of infringing article 26 of *the Constitution*. In sum therefore similar concerns lie in the entire spectrum of the litigation history of this succession cause. Put at its simplest form it is now open to this court to make a commentary as to the substantive



summons as filed by the applicant. Rightly so I have alluded to some of the compelling and interest which have held the beneficiaries hostage to this estate for a long time. I hope they will find favour in our justice system to bring this protracted litigation to a closure. As a consequence, in addition to the highlights elsewhere in this ruling the other legitimate reaction is as herein under:

34. In a case of this nature where the deceased died intestate and was a polygamous man survived by two or more widows and children the anchor on distribution of his estate is Section 40 of the *Law of Succession Act* which primarily provides as follows; “(1)Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate, shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net interest within each house shall then be in accordance with the rules set out in sections 35 to 38”
35. In the end having keenly looked at the rectifications sought out by the Applicants visa vis the Certificate of Confirmation of Grant on record and the Mediation Settlement Agreement by the parties. It is without a doubt that the Certificate of Confirmation of Grant that was issued on July 21, 2021 needs to be rectified so as to capture the true nature of the Mediation Settlement Agreement that was entered into by the parties herein.
36. With regard to pray three (3) of this application. The Applicants and the 3rd and 4th Administrators are the joint Administrator and Administratrix of the Estate of the late Adam Chebelieny Kibosia. This as per the Certificate of Confirmation of Grant issued on July 21, 2021.
37. The law requires that the properties be distributed within 6 months after the confirmation of the grant. In *Re Estate of Gitere Kahura (Deceased)* [2020] eKLR the Court stated that the primary mandate of the probate Court is distribution of the estate and once an order is made distributing the estate, the Administrators must comply or the Court would be compelled to remove them as Administrators. The Court further stated that administrators have a duty to the beneficiaries to ensure distribution of the estate within the stipulated time.
38. Notably, the duties of personal representatives are fiduciary in nature and they have being laid out in Section 83 of the *Law of Succession Act*. Under Section 83(f) the administrator (s) of a deceased’s estate has a duty to distribute the estate to the beneficiaries and section 83(g), provides for administrators’ duty to render the accounts. This was elaborated in the case of *Kerugoya Succession Cause No. 36 of 2013 Re Estate of Wilfred Munene Ngumi (Deceased)* [2020] eKLR where the learned Judge stated: -
- “Section 83(g) of the Act mandates administrators of an estate to, within six months of the confirmation of grant or longer period as the court may allow, complete the administration of the estate, and to produce to the court a full and accurate account of the completed transaction. “
39. In *Re Estate of the Late Kubuta Kamara Nguuro alias Pharis Njegegu (Deceased)* [2021] eKLR, the Court expressed itself as follows:
- “24. This state of affairs is not healthy and should not be countenanced by the court. The applicants prayed that the Executive Officer/Deputy Registrar do sign all the documents on behalf of the respondent. In *Rose Wanjiku Kuria - vs- Nganga Mugwe* [2003] eKLR and which decision I agree with, the court held that by virtue of Section 79 of the *Law of Succession Act*, the administrator



gets all the property of the deceased vested in him/her and the court further stated that the Court's Registrar or his deputy or any other officer of the court not having been granted Probate or letters of administration and therefore having had no property of the deceased vest in him and no powers and duties in accordance with provisions of the Law of succession Act, cannot become an executor or administrator and as such cannot administer the estate of the deceased person and the court to order him or authorize him to administer by signing any of those documents as requested in this summons, is to make an order which is not supportable under the Law of Succession Act.

40. With that in mind the functions of an Administrator are very clear and cannot be delegated to the Deputy Registrar. Where any of the Administrators is not performing their functions as per the provisions of the law then parties are at liberty to seek their removal. An Administrator who fails to perform his or are duties without any reasons is in fact in contempt of Court orders. The duty bestowed upon them is heavy and time bound and thus needs to accorded the seriousness it deserves.
41. With regard to prayer (4) of the application, once the Surveyor has been appointed then the Surveyor can make an application seeking the Court to provide extra security if need be. As it is the Court cannot issue orders in vain and thus at this juncture the Court cannot grant the said prayer.
42. Having identified the errors apparent in the Certificate of Confirmation of Grant that was issued on July 21, 2021, I hereby allow the application which in my considered view fall squarely under the provisions of Section 74 of the Succession Act, Rule 73(1) of the Probate and Administration Rules section 80 of the civil procedure act and order 45 rule 1 of the Civil Procedure Rules. Sequentially, an amended Certificate of Confirmation of Grant do issue within the fulcrum of the summons dated October 18, 2022. With this the objection raised by the respondent in opposition to the grant of the orders in the aforesaid summons is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF NOVEMBER, 2022.

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R. NYAKUNDI

JUDGE

In the presence of:-

1. M/S Ledishah advocate

