



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of M’mbwiria M’airanyi (Deceased) (Succession Cause
55 of 1999) [2022] KEHC 16336 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 55 OF 1999
EM MURIITHI, J
DECEMBER 16, 2022**

BETWEEN

MARETE MAIRANYI PETITIONER

AND

GIDEON GITONGA NKABU 1ST OBJECTOR

FLORENCE GACHERI ELIAS 2ND OBJECTOR

AND

MUTUA JAPHET NDATHO 1ST INTERESTED PARTY

FELICITY MPINDA MIRITI 2ND INTERESTED PARTY

GRACE IGOKI MBAE 3RD INTERESTED PARTY

JOSHUA MURETI MBAE 4TH INTERESTED PARTY

RUTH NKATHA NKANATA 5TH INTERESTED PARTY

STEPHEN KITHINJI JASPER 6TH INTERESTED PARTY

RUTH GAKII MBAE 7TH INTERESTED PARTY

JAPHET MUTHOMI MUGWIKA 8TH INTERESTED PARTY

RULING

1. Purity Gakii Nkonge (henceforth called the applicant) filed summons for rectification of grant in this court on July 23, 2021 dated July 16, 2021 pursuant to section 74 of the *Law of Succession Act* and rule 43 of the *Probate and Administration Rules*, seeking:

1. Spent



2. That the honourable court be pleased to substitute the name of the initial administratrix who has since passed on with that of Florence Gacheri Elias with that of Purity Gakii Nkonge to enable the deceased estate to be fully administered.
 3. That the honourable court be pleased to issue an order allowing the firm of Munene Kirimi and Co Advocates to come on record after judgment for the administratrix to enable expedient distribution of the deceased estate.
 4. That the honourable court be pleased to issue an order amending the confirmed grant to enable the share passing on to the estate of the late Gedion Gitonga Nkabu (deceased) to pass to his children namely Victor Mutuiri Gitonga, Vincent Kimathi Gitonga & Jacqueline Nkirote Gitonga jointly.
 5. That the honourable court be pleased to issue an order amending the confirmed grant to enable the share passing on to Florence Gacheri Elias measuring 1.5 acres to be enhanced to 2.76 acres to enable the administrator to cater for the costs of subdivision and distribution of the deceased estate.
 6. That the honourable court be pleased to issue an order directing that the share which was passing on to one Florence Gacheri Elias (deceased) to pass on to one and which has been further elaborated in prayer No 5 above to pass to the applicant herein one Purity Gakii Nkonge.
 7. That the honourable court be pleased to issue an order directing the Officer Commanding Station (OCS) Nkubu to avail security during the subdivision process of LR No Abogeta/L Kiungone/334.
 8. That the honourable court be pleased to issue an order directing the Land Registrar Meru Lands registry to dispense with production of title deed for LR No Abogeta/L Kiungone/334 during the subdivision stage.
 9. That the honourable court be pleased to issue an order to the land registrar to lift the inhibition placed over LR No Abogeta/Kiungone/334 to enable subdivision and transfer of the same to the beneficiaries in the rectified grant.
 10. That the honourable court be pleased to issue any or better orders as shall meet the ends of justice.
 11. That cost of this application be in the cause.
2. The application is supported by the affidavit of Purity Gakii Nkonge, the applicant herein, sworn on even date and grounds set out therein. She argues that she is a daughter to Florence Gacheri Elias (now deceased), who was the administratrix of the deceased estate. When the district surveyor filed his report as ordered by court, the registered area was 2.74 ha which was lesser than the surveyed area by 0.51 ha. The said difference of 01.26 acres, which ought to have passed to Florence Gacheri Elias (now deceased), should now pass to her to enable the subdivision and distribution of the subject matter to the rightful heirs as per the grant to be amended by this court. The share of Gideon Nkabu Gitonga (now deceased) should pass entirely to his children namely Victor Mutuiri Gitonga, Vincent Kimathi Gitonga and Jacqueline Nkirote Gitonga. The Land Registrar should dispense with the production of title deed for LR No Abogeta/L Kiungone/334 since it cannot be traced. The desired rectifications shall enable a speedy and smooth distribution of the estate of the deceased by herself as empowered by the court.



3. Marete Mairanya (henceforth called the petitioner) swore a replying affidavit on March 7, 2022 contending that the matter was concluded by the court on May 16, 2019 and the estate was distributed as per the rectified certificate of confirmation of grant. According to him, Purity Gakii Nkonge wants to get the share of other beneficiaries without their consent, as Flora Gacheri Elias (deceased), having been given 1.5 acres, is not entitled to the alleged 1.260 acres. In any event, this there is appeal No 310 of 2019 pending before the Court of Appeal, hence it is only fair, just and equitable for the status quo of the land to be stayed and be kept in abeyance pending the hearing of the appeal. He suggests that the family of Gideon Gitonga Nkabu (deceased) should await issuance of letters of administration to his estate. He prays for the dismissal of the application dated July 16, 2021 as the same is frivolous and amounts to abuse of court process.

Submissions

4. The application was directed to be canvassed by way of written submissions which were respectively filed on September 9, 2022 and June 24, 2022. The applicant submitted that since Florence Gacheri Elias, the administratrix of the deceased passed on prior to the full distribution of the deceased estate as per the confirmed grant, she should be appointed as the administrator. She urged that the District Surveyor ascertained that LR No Abogetha/L Kiungone/334 had a total surveyed area of 2.74 Ha which is greater than the registered area by 0.51 Ha. She urged that the presence of an appeal did not act as stay and the court could proceed to entertain this application and issue the orders sought.
5. The petitioner urged that the applicant has not proved that she was a daughter to Florence Gacheri Nkonge (now deceased), therefore she lacked *locus standi* in this matter. He urged that the estate was distributed by the court as per the rectified certificate of confirmation of grant dated May 16, 2019, and he wondered where the extra 1.5 acres claimed by the applicant would come from. He urged that the application was actuated by greed for more land as the applicant's intention was to grab the other beneficiaries' portions of land which will be fraudulent, unfair, unjust and inequitable. He urged that the children of Gideon Gitonga Nkabu lacked locus standi to represent their deceased father, as they had not obtained letters of administration in that respect. He urged the court to maintain the status quo herein and dismiss the application to pave way for the hearing and determination of the pending appeal in the Court of Appeal.

Analysis and Determination

6. The issue for determination is whether the prayers sought in the application should be granted.
7. This court is minded of the fact that rectification of a grant under section 74 of the [Law of Succession Act](#) is in respect of errors and mis-descriptions only. That section provides 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.”
8. Rule 43 (1) of the [Probate and Administration Rules](#), which echoes section 74 of the [Law of Succession Act](#) says: -

“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 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.....”

9. That position was reiterated in *re Estate of Njagi Rurima (Deceased) [2020] eKLR*, where the court (F Muchemi J) said:

“There is no provision in the act that permits rectification or amendment by adding a new beneficiary in the grant or to redistribute the estate.”

10. I respectfully agree with the court (W Musyoka J) in *re estate of Charles Kibe Karanja (Deceased) [2015] eKLR* interpreting section 74 of the act 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. In probate practice, the term “confirmed grant” has gained currency and it is understood by some to mean the certificate of confirmation of grant. It is a misconception. The certificate issued upon a grant being confirmed does alter the grant of representation... It does not replace the grant of representation...it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed... 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 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, need not approach the court through section 74 of the *Law of Succession Act*, for the reasons that I have given above; 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 be effected through a mere amendment of the certificate of confirmation of grant.”

Findings of the Court

11. The court considers that the applicant indeed lacks locus to seek to be substituted with her alleged deceased mother Florence Gacheri Elias, as she did not apply to court to be appointed as her personal representative.
12. Besides, the applicant seeks to have the share of Florence Gacheri Elias (now deceased) increased to 2.76 acres then re-distributed to her. She further seeks to have the share of Gideon Gitonga Nkabu (deceased) re-distributed to his 3 children. The net effect of these amendments is to re-distribute the estate and introduce new beneficiaries, who were initially not part of the proceedings.



13. Such amendments go to the core of the distribution, and completely alter the distribution of the estate as ordered by the court, and the same cannot, therefore, be effected through rectification of the certificate of confirmation of grant.
14. The court is aware of the fact that there is pending determination an appeal No 301 of 2019 before the Court of Appeal.

Orders

15. Accordingly, for the reasons set out above, the court finds that the applicant's application dated July 16, 2021 is not well founded and it is dismissed.
16. As regards prayer 3 of the application seeking leave for the firm of Munene Kirimi & Co Advocates to come on record for the applicant after judgment, the court grants the same as prayed in terms of order 9 rule 9 of the *Civil Procedure Rules*.
17. There shall be no orders as to costs.
Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF DECEMBER, 2022.

EDWARD M MURIITHI

JUDGE

Appearances:

Mr B Mwirigi Advocate for the appellant.

N/A for the respondent.

