



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE MATTER OF THE ESTATE OF ENK (DECEASED)
SUCCESSION CAUSE NO. 2423 OF 2010

GK.....APPLICANT

VERSUS

PK.....1ST RESPONDENT

BN..... 2ND RESPONDENT

SM.....3RD RESPONDENT

PW.....4TH RESPONDENT

JK.....5TH RESPONDENT

AND

MW..... 1ST INTERESTED PARTY

EM..... 2ND INTERESTED PARTY

LW.....3RD INTERESTED PARTY

NN.....4TH INTERESTED PARTY

RULING

Applicant's Case

GK, the Applicant, filed Summons dated 23rd March 2020 under Section 74 of the Law of Succession Act, Rule 43(1) Probate and Administration Rules, sections 1A, 1B, 3A and 99 Civil procedure Act, Order 41 Rule 1, Order 45 of the Civil Procedure Rules, Articles 27(1) (2) and 159 (2) (d) of the Constitution of Kenya seeking the following orders;

1. Spent

2. That this Honourable Court be pleased to adopt as drawn, the draft Certificate of Confirmation of Grant annexed herein as 'GK 10' as the final and correct Certificate of Confirmation of Grant for the estate of Eliud Njoroge Kuria.

3. That this Honourable Court be pleased to rectify the Certificate of Confirmation of Grant dated 15th January 2016 by deleting KIAMBOGO/KIAMBOGO/BLOCK 1/683 which is repeated.

4. That this Honourable Court be pleased to rectify the names of the beneficiaries' in the Certificate of Confirmation of Grant dated 15th January 2016 to include their surnames as per an earlier grant dated 15th November 2016.

5. That this Honourable court be pleased to rectify Ruai plots indicated as 209 and 210 in the Certificate of Confirmation of

Grant dated 15th January 2016, to Ruai Plots J209 (LR No. 105/8769) and J210 (LR No. 105/8770) together with their bonus plots No. J209B and J210B.

6. That this Honourable Court be pleased to rectify Embakasi property details from LR No. 24886/45 to LR No. 29923/81.

7. That this Honourable Court be pleased to include banking details as per annexure GK-10.

8. That an order do issue specifying each beneficiary of the estate will get nine shares each from equal distribution in Hotstar Investments shares, to ease transmission of shares to beneficiaries at the registrar of companies.

9. That costs be provided for.

This application is supported by an affidavit sworn by the Applicant on his own behalf and that of 1st and 2nd Interested Parties and based on the grounds that there are errors on the face of the record, missing details in the Certificate of Confirmation of Grant dated 15th January 2016 and that new information has been availed which ought to be reflected in the Certificate of Confirmation of Grant. Further that the administrators have failed to administer the estate and are unable to reach consensus on the mode of execution of the Grant. And that the 1st Respondent procured an erroneous Certificate of Confirmation of Grant dated 15th January 2016 and subsequent decree dated 27th January 2020 which he is using to demand upfront payment from the estate, contrary to court orders. That the Applicant filed an application dated 29th July 2019 and the same was consolidated with the 1st Respondent's Application and a ruling was delivered on 13th December 2019 but it did not fully address issues on rectification. Also that the judgement dated 24th April 2019 distributed Hotstar Investments shares in the ration of 70:30 to the 1st and 2nd families respectively. Lastly that the estate is wasting away and liabilities piling up.

Opposition

PK, the 1st Respondent, filed a **Replying Affidavit** dated 29th June 2020 where he denied that there has not been consensus among the administrators on rectifying the Certificate of Confirmation of Grant dated 15th January 2016 and stated that there have been deliberations which are still ongoing addressing issues resultant from the 3rd Respondent's filing of a Notice of Appeal dated 17th May 2019 against judgment delivered on 10th May 2019 with intention to have it withdrawn. He also denied that there is new information on the property by Embakasi Ranching as he had provided similar information to the court during trial of this matter via his submissions dated 14th December 2018.

Further he denied that the consent agreement entered into by the respondents was adverse to the 1st family as it excluded key assets of the estate, for instance, Hotstar Investments Ltd and Hotel Starehe Ltd and stated that all rules on mediation were followed to reach the consent. He also averred that the court cannot adopt the draft Certificate of Confirmation of Grant annexed as it had already issued another certificate dated 10th May 2019 which is being executed having being extracted from judgement delivered on 10th May 2019. He also stated that the annexed draft Certificate introduced new amendments to the Certificate of Confirmation of Grant and deleted distribution of matrimonial homes.

He averred that the Ruai plots were not included in the judgement delivered on 10th May 2019 or Application for Summons of Confirmation of Grant dated 30th June 2014 thus it should not be included and that Hotstar Investments Ltd houses Hotel Starehe is in LR No. 209/2788/17 in Nairobi CBD and the proposal that the shares be distributed directly to the beneficiaries was rejected and it was ordered that it be distributed to the houses.

He stated further that the change in details of the Embakasi property is not supported by any justification or evidence as it is not included in the judgement dated 10th may 2019. Also that LR. Njoro/Njoro1/39 Gikapu is not contained in the said judgement. Nor did the court on 13th December 2019 allow for rectification of registration details and distribution of Hotstar Investments Ltd.

It is also his averment that LR No. Kiambogo/Kiambogo/ Block 1/683 is not contained in the judgement dated 10th May 2019 or summons dated 30th June 2014 nor certificate dated 10th May 2019. Further that the court on 13th December 2019, ordered the removal of repetition of Kiambogo/Kiambogo/ Block 2/683 and not Kiambogo/Kiambogo/Block 1/683 which is not a property of the estate as it is neither contained in the judgment or confirmation of grant dated 10th May 2019. He stated that the Applicant has been intermeddling in the estate even though management of the estate befalls the administrator and not the beneficiaries.

He further stated that the court declined to rectify the names of the beneficiaries and the Ruai plots on 13th December 2019 and advised that the applicant approach the court through alternative forum which parties have been doing through mediation.

The Applicant filed a **further affidavit dated 14th July 2020** stating that there are no ongoing deliberations nor has there been meetings or convergence amongst the 4 co-administrators and that there has only been one fully constituted meeting on 20th January 2020 since 2011 and that the 3rd Respondent had filed HCC No. E003 of 2020 due to ongoing deadlocks regarding Hotstar Investment Ltd. He denied having acted as an administrator in the estate and stated that the 1st Respondent abdicated his duties and opposed distribution of estate. He also stated that the 1st Respondent refused to follow up on the title deeds for the Ruai plots and that he conducted a search at the Ministry of Lands in 2018 and found that the said Ruai plots belong to ENK and is in possession of share certificate No. 228 dated 28th November 1982 confirming ownership. He further stated that plots No. J209 and No. J210 were allocated to the 1st Interested Party being the 1st wife vide judgment dated 10th may 2019.

He averred that the court annexed mediation or issue of *sub judice* did not arise because of the consent or any court order but as an initiative of 1st Respondent. Additionally, he stated that the 1st Respondent has been acting as an executor in the estate and enforcing the contested grant even though he has been in the process of extracting Certificate of Confirmation of Grant on ruling dated 13th December 2019 but he produced an erroneous copy together with a decree for upfront payment of Kshs. 1,665,895. He also stated that the court directed that he approaches court through an alternative forum but was not clear on what forum thus the court ought to clarify and further clarify issues on Makuyu/Kimorori/Block 1/1824, 1825,1826,1827,1828 and 1829 because the judgement dated 13th December 2019 suggested distribution of proceeds of sale but the beneficiaries wanted to utilize the land.

BN, the 2nd Respondent, filed a **Replying Affidavit dated 23rd July 2020** stating that the court delivered judgment on 10th May 2019 prescribing equitable and just mode of distribution and a confirmation of grant extracted therefrom on 13th December 2019 which included some assets, mode of distribution not reflective in the said judgement. He also attached a draft amended certificate of confirmation of grant which he also stated would not prejudice the smooth transfer by transmission of all the assets.

SM, the 3rd Respondent, filed a **Replying Affidavit dated 23rd July 2020** denying that the Applicant has ever approached him or any of the parties in relation to a consent for application of rectification and/or amendment of grant. He averred that the prayers sought had already been dealt with and rejected by a different court. He opposed the proposed distribution of the property but agreed that discovery of the registration details of Ruai plots and its bonus plots was only made after application for confirmation of grant. Regarding the Embakasi property, he stated that the title number changed from LR No. 24886/45 after subsequent survey by the original owners but both registration numbers refer to one and the same plot. He also averred that the application is defective as it was brought under section 74 of the Law of Succession Act yet it goes to the core of the distribution and cannot be effected without touching the orders of the court on distribution of the estate.

The 1st interested Party, MW filed a **Replying Affidavit Dated 8th September 2020** where she stated that there are errors and omissions in the Certificate of Confirmation of Grant for instance repetition of property known as Kiambogo/Kiambogo/Block 2/683 despite the same having been struck out by the court. She stated that the Certificate of Confirmation of Grant is an anomaly as it shares the same date as the judgement i.e. 10th may 2019 and further averred that the ruling dated 13th December 2019 is *per incuriam* and thus the Applicant is seeking further clarification. Regarding the Ruai plots, it is her averment that obtaining titles has been hampered due to backlog at Embakasi ranching hence the reason for not attaching required titles. She concurred with the Applicant that Njoro/Ngata/Block 1/1049 and Nairobi/Block 98/8 are matrimonial properties and should remain as allocated to the surviving spouses absolutely and that the Ruai plots and their bonus plots should be properly identified. She avers that the court ought to intervene as it is in the best interest of all the beneficiaries and further because she and the Applicant did not participate in the summons for confirmation of grant hence weren't aware as they relied on the administrators words.

Submissions

The **Applicant** filed **submissions dated 25th January 2021**. He submitted that the confirmed grant is faulty in that it repeats a property; that it omits correct asset registration details and that it contradicts itself in judgment and the extracted grant with respect to the mode of distribution of the property of the estate. It is his submission that the law under Order 45 Rule 1 of the Civil Procedure Rules 2010 and Section 80 of the Civil Procedure Act allows for review in certain scenarios as follows:

- a) Upon discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made;
- b) On account of some mistake or error apparent on the face of the record;
- c) For any other sufficient reason; and
- d) That the application for review must be made without unreasonable delay.

He submitted that prayer number 8, that sought to have each beneficiary of the estate to get 9 shares each from distribution of Hotstar Investments Limited to ease transmission at the Registrar of companies is spent following the orders of the court to that effect ELC Petition No. E003 of 2020 given on 22nd September 2020.

He has submitted that there was discovery of new evidence in that the administrators did not know about existence of land registration details for Ruai plots and their bonus plots, information which he can now provide; that the information on the Land Registration details for Embakasi Property were improperly given as LR No. 29923/45 and that he has discovered its true details as LR No. 22923/81 after the summons for confirmation of grant dated 30th June 2014 had been filed and orders made. He further submitted that the grant had been rectified vide ruling dated 13th December 2019 to the effect that Kiambogo/Kiambogo/Block 2/683 had been changed from Kiambogo/Kiambogo/Block 1/683 and repetition of the same had been deleted but the same was not reflected in the impugned certificate of confirmation of grant. It is therefore his contention that there is an apparent error on the face of the record.

He submitted that there is a clear conflict between judgement delivered on 10th may 2019 and the certificate of grant extracted therefrom in regard to Makuyu/Kimorori/Block 1/1824-1829. He contends that the court ordered parcels 1824 and 1825 be valued, sold and proceeds distributed equally among all beneficiaries and further 1826 - 1829 be equally subdivided amongst the children. He further contends that there is a conflict in the mode of distribution of the property on where the shares are of physical property or proceeds from the sale of the land as the grant extracted is in conflict with judgement dated 24th April 2019 at paragraph 24.

It is also his contention that the surnames of the beneficiaries ought to be included because most government institutions insist on presence of surnames as they appear in the National Identity Cards.

He submitted that the Certificate of Confirmation of grant ought to be dated 13th December 2020 as it was most recent rectification date and not 19th May 2019 when the judgment was delivered.

He further submitted that the court erred in relying on the Court of Appeal case of Rose Kaiza vs. Angelo Mpanju Kaiza 225 of 2008 (2009) eKLR because the facts in that case contrasted with his application as the Applicant was not party to the summons prior to confirmation of grant being issued and that the Applicant did not know about the existence of the Ruai plots and their registration details at the time of filing summons of confirmation and only discovered them afterwards.

The applicant relied on Section 74 of the Law of Succession Act and Rules 29, 73 and 63 of the probate and Administration and the case of *Tokesi Mambili and Others v. Simon Litsanga* where the court held that;

“In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. Where the application is based on sufficient reason it is for the court to exercise its discretion”

He also relied on *Francis Origo and Another v. Jacob kumali Mungala* where the court stated that:

“In an application for review the applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge and could not be produced at the time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly the applicant must make the application for review without unreasonable delay.”

Further, he relied on *Nyamogo & Nyamogo v. Kogo (2001) EA 174* where court said **“that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case”.**

PK, the 1st Respondent raised a Preliminary Objection (PO) dated 29th June 2020 to the Applicant’s Application under determination and filed detailed submissions on the PO. These form part of this court’s record and I need not repeat them in detail here. I will however highlight the major issues raised in that PO and submissions without necessarily repeating all the submissions. He argues that the issues and prayers sought by the Applicant are *res judicata*, the same having been addressed by this court (Hon. Lady Justice Dora Chepkwony) in the applications dated 29th July 2019 and 30th July 2019 through a ruling delivered on 13th December 2019. Secondly he argues that the Application under consideration is an abuse of the court’s process because the Applicant was opposed to the same prayers he is now seeking in the application dated 30th July 2019 and finally that the application is bad in law because the applicant is seeking distribution orders for properties of the estate that were not distributed in the Judgment delivered on 10th May 2019 and also that he is seeking distribution orders for properties that do not belong to the estate of the deceased as they are neither contained in the judgment dated 10th May 2019 or application for confirmation of Grant dated 30th June 2014.

The 2nd Respondent submitted at length to demonstrate that the Application is *res judicata*, an abuse of this court’s process and bad in law. He has attached the Ruling delivered on 13th December 2019 for support of his submissions. He cited *Uhuru Highway Developers Limited v Central Bank of Kenya & 2 others [1996] eKLR* where the Court of Appeal held that:

“In order to rely on the defence of *res judicata*, there must be:

- i) A Previous suit in which the matter was in issue;**
- ii) The parties were the same or litigating under the same title;**
- iii) A competent court heard the matter in issue;**
- iv) The issue has been raised once again in a fresh suit.”**

He identified the following as the matters that have already been adjudicated but which the Applicant has sought similar orders in this Application and asked this court to find that the issues are *res judicata*:

On the issue of Kiambogo/Kiambogo/Block1/683, he submitted that there is an error in that the correct reference is Kiambogo/Kiambogo/Block 2/683 and that this order was granted for striking out the repetition of this parcel and that what remains now is execution of the orders of the court.

On the issue of change of Beneficiaries names, he submitted that he has sought through his application dated 30th July 2019 to have the names of beneficiaries changed to reflect details in his draft certificate of confirmation of grant annexed to that application and marked PK-2 but this was declined by the court after the Applicant herein opposed the prayer. He submits that this prayer has, in any event, been overtaken by events and that it would serve no purpose as the Certificate of Confirmation of Grant dated 10th May 2019 has already been executed without the said change.

On the issue of Ruai Plots, he submitted that the Applicant herein wanted, through his application dated 29th July 2019, the Judgment delivered on 10th May 2019 amended to include details of these plots on the basis of new information that he had purported to have but that this was addressed by the court in paragraph 21 of the Ruling delivered on 13th December 2019.

In respect of the Embakasi Property, the 1st Respondent submitted that he has sought to have the same rectified through his application dated 30th July 2019 but this was declined by the court. He submitted that the estate of the deceased does not have any title of ownership in respect of L.R NO. 24886/45 which the Applicant seeks to have changed to read LR. No. 29923/81.

In respect of Njoro/Njoro/Block1/39(Kikapu) he submitted that this property was omitted in the judgment delivered on 10th May 2019 but the court in the Ruling delivered on 13th December 2019 granted that order and this property was included in the Certificate of Confirmation of Grant dated 10th May 2019.

On the Banking details, it is submitted in his (1st Respondent) application dated 30th July 2019 he sought rectification of Bank details but the court declined to grant.

On the issue of abuse of court he submitted that any property of the estate that was not distributed in the judgment delivered on 10th May 2019 should be subjected to distribution proposals from all the parties because distribution through rectification of grant amounts to abuse of the court process; that the same applies to seeking distribution of properties that do not form part of the estate of the deceased.

BN, the 2nd Respondent acting in person associated himself with the Applicants submissions.

The 3rd Respondent, SM, filed submissions dated 15th September 2020. He submitted that the law on rectification of grant is clear and was settled in the case of **In the estate of Charles Kibe Karanja (deceased) (2015) eKLR** where the court held that:

“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. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure rules. Among the imported procedures is the device of review under the Civil Procedure Rules. In the relevant rules on review under the Civil Procedure Rules, an order of the court can be revised on the grounds of an error on the face or the record or discovery of new and important evidence that was not available at the time of the making of the order sought to be reviewed or for any other sufficient reason.

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the court has confirmed the grant or a heir or survivor of the deceased who had previously been previously unheard of materializes after distribution, the court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November 2006 so as to include the discovered assets and to distribute them. It is only after the review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

It is his submission that prayer 5 cannot be granted because the listed properties are newly discovered assets and were not known prior to the confirmation of grant as a certificate of confirmation cannot be rectified to redistribute property.

He also submitted the court can exercise inherent jurisdiction and distribute equally the newly discovered Ruai plots as was held in re estate of **Kanyigi Gatwe (deceased) (2018) eKLR** where the court held that;

“Though there is no dispute that some properties of the deceased which were not included in the estate of the deceased have been discovered, there is nevertheless a dispute on the mode of distribution. I am of the view that the proper approach is to move the Court with an application for review to include the discovered assets in the estate of the deceased and to include them in the distribution of the estate after the grant is reviewed and set aside. The application to amend the grant is without merits. I dismiss it. Each party to bear its own costs.”

He did not oppose to prayer 4 of rectification of beneficiaries names. He submitted that such rectification would make it easier with the final distribution of the properties.

Lastly he submitted that the application should be dismissed.

The 2nd and 3rd interested parties filed submissions dated 2nd September 2020. They submitted that the court should adopt the certificate of confirmation of grant annexed in the Applicant's application marked GK-10 and the court rectify the certificate of confirmation of grant dated 16th January 2016 by deleting Kiambogo/Kiambogo/block 1/683 which is repeated and further include surnames for the beneficiaries, and rectify Ruai plots 209 and 210 to j209 LR No. 105/8769 and J210 LR No. 105/8770 with their bonus plots J209b and J210B and further rectify details of Embakasi property from LR No. 24886/45 to LR No. 29923/81, include bank details as per the GK-10, distribution of shares of Hotstar Investments Ltd equally to all be beneficiaries to ease transmission. They rely on their replying affidavit dated 23rd July 2020 and section 74 of the Succession Act;

It is their submission that there are discrepancies in the certificate of confirmation of grant extracted by the 1st Respondent on the 13th December 2019 whose contents vary from courts judgement dated 10th May 2019 and ruling dated 13th December 2019. To buttress their submission they rely on **Succession cause No. 798 of 2012 Estate of Hezron Muriuki Njogu (deceased) 2017 eKLR**.

It is also their submission that the court should be guided by Article 159 (2) (d) of the Constitution and Rule 73 Probate and Administration Rules in finding that their annexed certificate of confirmation of grant is the true distribution of the of the deceased's estate as per courts judgement.

Analysis and Determination

I have considered this matter. The parties have put in detailed affidavits and submissions which I have read together with provisions of the law and the cited authorities relied on. It is clear to me that the Applicant, in citing Order 45 Civil Procedure Rules, is seeking Review of the orders of this court. Secondly, by citing Section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, the Applicant must also be seeking Rectification of the Grant. Do these provisions come to his aid? Put differently, has the Applicant satisfied the court that he deserves the orders he is seeking?

Starting with the issue for Review, Order 45 provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. Secondly, he must demonstrate to the court that there has been some mistake or error apparent on the face of the record and thirdly, an application for review can be made for any other sufficient reason.

On the issue of an error or mistake apparent on the face of the record it is clear that, the error the subject of the application ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record (see *Muyondi v. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243 and *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR).

The Applicant seeks review of the Certificate of Confirmation on the basis that there was an error apparent on the face of the record because this court pronounced itself that the repletion of Kiambogo/Kiambogo/Block 2/683 should be deleted but the same was not done. I have noted that in paragraph 20 of the Ruling delivered on 13th December 2019, Justice Dora Chepkwony stated that **"A close look at the Judgment under paragraph 31. The Plot Kiambogo/Kiambogo/Block2/263 is replicated at the table of distribution. However, the beneficiaries are not changed in the two columns and I therefore strike out one column."** This matter was therefore conclusively dealt with and cannot be brought back for review basing it on **"error apparent on the face of the record"**. There are however other avenues of moving the court where a party is not satisfied with orders of the court. The Applicant does not lack in counsel and is at liberty to pursue other available channels.

Regarding Makuyu/Kimori/Block 1/1824-1829 a holistic reading of the judgement dated 10th May 2018 shows the court acknowledged the developments on plots 1824 and 1825 and recommended that the two be sold and the proceeds equally distributed among all the 10 beneficiaries who would get at least 10% of the proceeds. The judge also suggested that the remaining plots 1826, 1827, 1828 and 1829 all measuring a total of 8 acres be subdivided accordingly to all the children getting an acre each.

The Court of Appeal when addressing the issue of discovery of new evidence as ground for allowing a review application had the occasion to pronounce itself in **Rosa Kaiza Vs. Angelo Mpanju Kaiza** [2009] eKLR where the court quoting from a commentary by *Mulla* on similar provision of the **Indian Civil Procedure Code 15th Edition at page 2726** stated;

"Application on this ground must be treated with great caution and as required by Rule 4 (2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

In the present case, the Applicant seeks review of the certificate of confirmation of grant based on the claims of discovery of new and important evidence which he had no knowledge of prior during summons for confirmation as he was not party to the proceedings. He seeks for Embakasi property details to be altered from LR No. 24886/45 to LR No. 29923/81 to reflect the actual registration details. The 1st respondent however opposed this alteration on the basis of the LR No. 29923/81 not being in the judgement dated 10th May 2016.

Regarding the Ruai plots, I have confirmed this is the case. In paragraph 21 of the Ruling delivered on 13th December 2019, the court stated that: **“With regard to plots Nos. Ruai Plots Nos. J208, J209, BEING (LR. NO. 105/8770), J210 (LR. 105/8769) and Bonus Plots No. J209, J209B parties can approach the court on an alternative forum but not under a review application.”**

As far as the names of the beneficiaries go, the court deliberated and made a ruling on it. This court therefore cannot revise these orders or pronounce on them again. It can however order that the certificate be amended to reflect court orders.

Regarding banking details, this information in neither new or was it discovered after confirmation. The court deliberated on the banking details presented being those belonging to the estate of the deceased and made a finding of the same and gave judgment. This prayer thus falls out of the ambit of Order 45 for review purposes and the parties should seek the inclusion of the same through a different forum.

In respect to the orders of review, it is clear to me that the issues sought to be reviewed are not new. They were subject of the earlier applications dated 29th July 2019 and 30th July 2019. The Applicant did not persuade this court that he deserves the prayers he is seeking to have the orders of this court reviewed. He has not satisfied the requirements for review of court orders stipulated under Order 45 Civil Procedure Rules. He may be better placed to seek alternative channels of addressing these issues.

Now turning to rectification of grant, it is clear what **Section 74 of the Law of Succession Act provides in this regard. It provides that:**

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) Probate and Administration Rules equally deal with the procedure in coming to court to seek rectification and what ought to be rectified.

Is the Applicant within the ambit of Section 74 Law of Succession Act?

Firstly, it is clear to me that the Applicant did not know exactly what he was seeking, hence the mix-up between review and rectification. As submitted it is clear that the issues the Applicant is seeking to have reviewed were dealt with by the court and various pronouncements made regarding the same issues. This led the 1st Respondent to raise the PO and submit at length on the matter of *res judicata*.

This Court, Musyoka, J. dealt with the issue that what Section 74 of the Law of Succession Act seeks to address is the alteration of the grant not certificate of confirmation. The Judge in In re estate of Charles Kibe Karanja (Deceased) [2015] eKLR had this to say in that regard:

“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 not 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 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.”

In the present case the Applicant makes reference to section 74 being one of the grounds he relies on in this application. It is trite law that section 74 cannot be used to alter the contents of a certificate of confirmation of grant as the same is a mere approval for instrumenting a grant made to a particular person. Further purposeful reading of section 74 indicates that the intention of the proponent are only to the extent that limited errors in the grant can be addressed not those that go deep into the root of the execution of the grant. Thus it is my view that, the Applicant erred in placing reliance on section 74 of the act.

Further, the applicant relied on Rule 43(1) of the Probate and Administration Rules:-

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.

The rule above is clear on the form of application to be made specifically in relation to rectification of grant. It is my opinion therefore that the prayer for rectification of confirmation of grant lacks merit as it is not permissible within the ambit of Section 74 and its provisory rule 43(1). However for completeness of this Ruling I will consider whether the Applicant deserves the prayers he is seeking to have the grant rectified. In the case of *In the estate of Charles Kibe Karanja (deceased) (2015) eKLR* where the court held that:

“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. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of court orders is not directly provided for in the Law of Succession Act and the Probate and Administration

Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure rules. Among the imported procedures is the device of review under the Civil Procedure Rules. In the relevant rules on review under the Civil Procedure Rules, an order of the court can be revised on the grounds of an error on the face or the record or discovery of new and important evidence that was not available at the time of the making of the order sought to be reviewed or for any other sufficient reason.

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the court has confirmed the grant or a heir or survivor of the deceased who had previously been previously unheard of materializes after distribution, the court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November 2006 so as to include the discovered assets and to distribute them. It is only after the review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

From the totality of these proceedings and the rival arguments of all the parties it is clear to me that there is nothing that falls within the ambit of Section 74 Law of Succession Act and that may require my intervention to grant the prayers sought. As eloquently submitted by the 1st Respondent and supported by some of the other respondents, there are no 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, that may require intervention of this court to rectify. What the Applicant seeks to have rectified result from orders that do not fall under this section. Besides, as submitted, these issues have been ventilated and decided by the courts.

I agree with the 1st Respondent. The matters raised by the Applicant are res judicata. On that ground alone, this application fails. This court has been told that prayer No. 8 has been ventilated and resolved in another dispute filed at the ELC Division of the High Court. That is in order and I trust that the parties will execute those orders. As regards this Application, I hereby decline to grant the orders sought in prayers 2, 3, 4, 5, 6, and 7 of the Application dated 23rd March 2020. On the issue of costs, I order that each party shall bear own costs. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH JULY OF 2021.

S. N. MUTUKU

JUDGE