



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 92 OF 2011**  
**IN THE MATTER OF THE ESTATE OF ANDASHE MUNYETI (DECEASED)**

**RULING**

1. The application for determination is a summons for rectification of grant, which is undated, but was filed herein on 12<sup>th</sup> November 2019. It seeks rectification of an amended grant that was allegedly issued to Simeon Munyeti Andashe on 14<sup>th</sup> June 2019, following a judgment that was delivered on 14<sup>th</sup> June 2019. It is brought at the instance of Lenard Lusava Shitagwa, an alleged grandchild of the deceased, who I shall hereafter refer to as the applicant. He avers, in his affidavit in support, sworn on 12<sup>th</sup> November 2019, that he was child of the late Margaret Andashe, a dead daughter of the deceased. He also averred that he had brought the application with the support of the other children of the other late children of the deceased who were not provided for, that is to say Charles Andashe and Ruth Munyuli Andashe, the other grand children being Carolyne Mukhago Luhira and Tony Andashe Musungu.
2. The application is also supported by an affidavit sworn by Iddi Yahuma Andashe, on 12<sup>th</sup> November 2019. He also pointed at the judgement delivered on 14<sup>th</sup> June 2019, to the effect that all the children of the deceased were entitled to an equal share to the estate of the deceased. He averred that the names of the children of the his mother were all missing, and he named Margaret Andashe, Charles Andashe, Benjamin Mulundi Andashe and Ruth Munyuli Andashe. He avers that he has brought the application because the administrator was unwilling to include their names in the amended grant.
3. The proposed rectification is resisted by Simeon Munyeti Andashe, who is the administrator of the estate of the deceased. I shall refer to him as the administrator for the purpose of this ruling. He swore an affidavit on 19<sup>th</sup> November 2019. He avers that the applicant and his supporters were not entitled to a share in the estate. As at the time of the deceased's lifetime they were not allocated any shares. He describes the application as a ploy to disinherit some of the beneficiaries of the estate. He avers that some of the beneficiaries named in the confirmation were allocated shares which they have not claimed and which were being used by other persons. He asserted that the deceased had two widows and had allocated property to all of them. He explained that the applicant, Leonard Lusava Shitagwa, was a son of Robai Khavere Andashe, who was still alive, and who had been given a share of the estate of the deceased. His father was described as Joseph Shitagwa. He described Carolyne Mikhago Luhira as a daughter of a daughter of the deceased known as the Ruth Munyori, and whose father was Siali Ndori of Chebara. He described Tonny Andashe as a son of one of his stepbrothers from the second house. He identifies Benjamin Mulindi Andashe as a son of the deceased, who died unmarried and without children. He averred that family had met in 2003 and agreed that the estate be distributed according to the houses. He has attached a document to support that.
4. The application was argued orally on 28<sup>th</sup> November 2019. Both sides breathed life to the averments made in the three affidavits whose contents I have recited above.
5. The application does not purport to be premised on any provisions of the law. Since the application is brought within a succession cause, I shall presume that it is brought under the provisions of the Law of Succession Act, Cap 160, Laws of Kenya.
6. 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) 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 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.”*

7. From the language of section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, it would appear that they are about grants of representation and rectification of errors on such grants.

8. An error means a mistake. See *Concise Oxford English Dictionary*, Twelfth edition, Oxford University Press, New York, 2011, page 485. In *Black’s Law Dictionary*, Tenth Edition, Thomson Reuters, St. Paul, 2004, page 659, defines error as a mistake of law or fact in a court’s judgment, opinion or order. It defines mistake as an error. Section 74 of the Law of Succession Act is, therefore, to be invoked to correct errors or mistakes, relating to grants of representation.

9. Section 3 of the Law of Succession Act, which carries definitions of terms used in the Act, does not define a grant of representation. The definition is carried in Rule 2 of the Probate and Administration Rules, in the following terms:

*““grant” means a grant of representation, whether a grant of probate or of letters of administration with or without a will annexed, to the estate of a deceased person.”*

10. The Law of Succession Act, at sections 53 and 54, provides for the forms that the grant may take. The provisions say as follows:

*“Forms and Grants*

*53. Forms of grant*

*A court may—*

*(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—*

*(i) probate of the will to one or more of the executors named therein; or*

*(ii) if there is no proving executor, letters of administration with the will annexed; and*

*(b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.*

*54. Limited grants*

*A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.”*

11. The undated summons filed herein on 12<sup>th</sup> November 2019, seeks rectification of an amended grant, allegedly issued to the administrator on 14<sup>th</sup> June 2019. It seeks inclusion of three individuals, the applicant and two others, as beneficiaries.

12. The decision that I rendered on 14<sup>th</sup> June 2019 was not a judgment, but a ruling on a review application. I did not order amendment of the grant that had been made to the administrator herein, and, therefore, there cannot be and there is no amended grant dated 14<sup>th</sup> June 2019 on the record. The order made in that ruling was for review of orders, that had been made on a summons for confirmation of grant dated 27<sup>th</sup> April 2102, on 30<sup>th</sup> March 2016, which meant that the certificate of confirmation of grant dated 19<sup>th</sup> July 2015 required to be amended to conform to the review orders of 14<sup>th</sup> June 2019. The undated application that I am called upon to determine cannot, therefore, be in respect of an amended grant dated 14<sup>th</sup> June 2019, since such amended grant does not exist.

13. It would appear that what the applicant proposes to have amended is the certificate of confirmation of grant that was affected by the ruling of 14<sup>th</sup> June 2019. A certificate of confirmation of grant is not a grant of representation. Grants of representation take the form stated in sections 53 and 54 of the Law of Succession Act. They are either a grant of probate or of letters of administration intestate or of letters of administration with will annexed or limited grants. A certificate of confirmation of grant is just a certificate to evidence the fact that a grant of representation has been confirmed under section 71 of the Law of Succession Act. The confirmation process does not produce another grant, unless at that point the court, under section 71(2) (b), orders that the confirmed grant be issued to someone other the administrator who had applied for confirmation. The grant issued at the initiation of the cause remains intact even after confirmation, the certificate of confirmation does nothing more than to confirm that the persons appointed, under the grant confirmed, have been approved by the court to continue to administer the estate and to distribute it in accordance with the distribution schedule set out in the certificate.

14. To that extent, therefore, the certificate of confirmation of grant has nothing to do with section 74 of the Law of Succession Act. It is not one of the documents to be rectified under section 74, for that provision is limited to grants of representation, whether full or limited. That would then mean that if there are any errors on the face of a certificate of confirmation of grant, the same would not be available for rectification under section 74 of the Law of Succession.

15. The other thing about section 74 is that it is fairly specific about the errors that can possibly be rectified under that provision. It is limited to correction or rectification of errors relating to names and descriptions, setting out of time and place of the deceased's death, and purpose of a limited grant. The discretion given to the court by section 74 of the Act can only be exercised to remedy the mistakes that are set out in that provision.

16. I have stated the position above, so that I can assess whether, if one were to apply section 74 of the Law of Succession Act to correct errors in certificates of confirmation of grant, the undated summons discloses errors that would be liable to rectification under that section. Section 74 is about correction or rectification of errors. Is the undated summons about errors?

17. My understanding of the said summons is that some of the survivors of the deceased were not included in the certificate of confirmation of grant according to the applicant, these persons, who were omitted, should be included in the certificate of confirmation of grant. To my mind, the scenario painted by the applicant does not disclose an error or errors. There is, therefore, no mistake or error to be corrected or rectified. That would mean is that if section 74 were to apply to certificates of confirmation of grants, which is not the case here, the circumstances disclosed in the undated summons would not be available for handling through the discretion granted to the court by section 74, to rectify grants of representation in the manner envisaged.

18. The errors sought to be rectified through section 74 would be superficial, relating to errors in names and descriptions. It would appear that errors or mistakes of another kind, such as where the processing of a document, such a certificate of confirmation of grant, omits names of some of the beneficiaries named in a ruling, are not of the kind to which section 74 would apply. That would be an error on the face of the record, which should be redressed through a review application, filed under Rule 63 of the Law of Succession Act, which imports the provisions in the Civil Procedure Rules on review.

19. Secondly, the applicant is not an administrator of the estate of the deceased. Yet, according to Rule 43(1) of the Probate and Administration Rules, the application for rectification under section 74 of the Law of Succession Act, should be mounted by the holder of the grant. It is about the accuracy of their grant, and naturally, it ought to be the administrator asking the court to have the errors on the face of the grant corrected for efficient use of the document. An application under section 74 and Rule 43(1), by a person other than the holder of the grant, would not be incompetent as such a person would have no sufficient interest in a document that does not grant him any authority.

20. So, based on what I have stated so far, it should be clear, that the undated summons that I am called upon to determine has serious technical flaws, and should be dismissed on technical grounds.

21. However, thanks to Article 159 of the Constitution, which invites me to eschew technicalities of procedure and focus more on the substance, I could still look at the matter before me and determine it on its merits. I feel fortified in taking that position by sections 1A and 1B of the Civil Procedure Act, which govern all civil proceedings, including those relating to probate and administration, except where, by virtue of section 3 of the Civil Procedure Act, where those other proceedings are governed by different legislation, which excludes the application of the general civil procedure. I take into account the fact that the applicant has not purported to ground his application on any particular provisions of the law.

22. The applicant's principal claim is that the amended certificate of confirmation of grant generated from the orders made in the ruling of 14<sup>th</sup> June 2019 did left them out. He claims to be a son of a daughter of the deceased called Margaret Andashe, who is deceased. He points at the ruling and says that his late mother was identified as one of the children of the deceased, but at distribution, her descendants, meaning himself were not catered for. He mentions too that a surviving daughter of the late Ruth Munyuli and a son of the late Charles Andashe had also been left out. The administrator agrees that these are children of dead children of the deceased, but says that the deceased had not provided for them when he distributed the estate during lifetime. He to the mother of the applicant, Leonard Lusava Shitagwa, as Robai, and it is not clear to me whether Robai and Margaret refer to the same person.

23. Let me start by raising the issue raised by the administrator, about the deceased having previously distributed his estate during lifetime. That is an issue that is behind us. The matter was heard by Sitati J orally and a judgement was delivered. The court did not find any reason to hold that the deceased had distributed his property before he died. When it was placed before me for review, I equally did not find any material from which I could conclude that the deceased had done anything of that kind. It is an issue that cannot be revisited now.

24. The only issue for me to consider so whether the three individuals before me should be included in the certificate of confirmation of grant. That is to say the applicant Leonard Luvasa Shitagwa, Carolyne Mikhago Luhira and Tonny Andashe Musungu. There is no dispute that these are grandchildren of dead children of the deceased. For two of them, it is common ground that their parents, Ruth Munyuli and late Charles Andashe, are dead. It is not clear to me who the mother of the applicant was, as between Margaret Andashe and Robai Khavere Andashe. Robai Khavere is alive, while Margaret Andashe is deceased.

25. Are the three entitled to a share in the estate of the deceased? In the judgement of 5<sup>th</sup> November 2015, Sitati J had applied section 35(5) of the Law of Succession Act to order that the estate be shared equally amongst all the children of the deceased. In my ruling of 14<sup>th</sup> June 2019 I had directed that all the children of the deceased included daughters and I proceeded to list the surviving children as the persons entitled to a share. I did not include the dead children, even though I had identified them earlier as children of the deceased. As the judgement had ordered devolution amongst all the beneficiaries of the estate, and specifically the all the children of the deceased. That would dead children of the deceased, who are ideally, substituted by their surviving children, that is to say the surviving grandchildren of the deceased. Therefore, the applicant, together with Carolyne Mikhago Luhira and Tonny Andashe Musungu, would be justified to claim the share that ought to have gone to their parents.

26. What does the law say about this? Section 35(5) of the Law of Succession Act, should be read together with sections 38 and 41 of the Law of Succession Act. Section 38 may not be so crucial. It merely provides that where the deceased was survived by children only, that is where there is no surviving spouse, at the point of distribution, the property of the estate shall be shared out equally amongst all the children. Section 41 is more critical. It provides as follows:

*“41. Property devolving upon child to be held in trust Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”*

27. Section 41 generally talks of property being held in trust for children below eighteen, but it also makes the point that grandchildren are entitled to take, in equal shares, the share of the estate that ought to have passed to their late parents. It is common ground that the parents of Carolyne Mikhago Luhira and Tonny Andashe Musungu are dead. The two grandchildren of the deceased would be entitled to the share that would have gone to their parents. I have left out the applicant, Leonard Lusava Shitagwa out of this discussion because the issue of his maternity will need to be resolved first, as between Robai Khavere and Margret Andashe, for one is alive and should take directly, while the other is dead and should take through her child or children.

28. The administrator argued that the fathers of these grandchildren, whose mothers were daughters of the deceased, were not children of the deceased, and they were, therefore, not members of the deceased's household. He also averred that the said grandchildren live elsewhere with their fathers, that is away from the estate. The answer to that is that the deceased died in 2003, long after the Law of Succession Act had come into force. He died intestate, and, therefore, his estate fell for distribution strictly in accordance with Part V of the Law of Succession Act, for the deceased died intestate. Luhya customary law is not applicable for it had been ousted by section 2(2) of the Law of Succession Act. The Act treats all the children of the deceased equally, without discriminating them. That was underscored by Sitati J in the judgement of 5<sup>th</sup> November 2015. It comes out very clearly in sections 35(5) and 38 of the Law of Succession Act.

29. Although the deceased died long before the current Constitution was promulgated in 2010, the court is now dealing with the distribution of the estate under the new Constitution. The said Constitution has very robust provisions on discrimination based on gender. These are found in Article 27 of the Constitution, which says:

*“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

*(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

*(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

*(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

*(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*

*(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*

*(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”*

32. The provisions are very clear that both gender are to be treated equally. Kenyans, who I suppose include the parties hereto, voted unanimously for the new Constitution, and what they voted for, for some, probably, unknowingly, was equal treatment of both men and women. It is well for the parties to appreciate that the provisions in the Law of Succession Act are in tandem with the Constitution 2010 on many aspects, and especially as relates to non-discrimination along gender lines.

33. In addition, international law also applies. It has imposed universal standards when it comes to how women are to be treated, generally. Article 2 of the Constitution, 2010, provides that international law is part of Kenyan law, and that any treaty or convention ratified by the Kenyan state forms part of the law of Kenya. That would mean that such treaties and conventions, as are ratified by Kenya, would have force of law in Kenya whether domesticated or not. Article 2 (1) (4) (5) and (6) of the Constitution, which is relevant to this ruling, says as follows:

*“2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.*

*(2) ...*

*(3) ...*

*(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.*

*(5) The general rules of international law shall form part of the law of Kenya.*

*(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”*

30. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), is among the conventions that the Kenyan state has ratified. The act of ratifying the Convention on the Elimination of All Forms of Discrimination against Women, meant that Kenya condemned discrimination against women in all forms, and committed itself to eliminate any form of discrimination against women. The relevant Articles of the Convention on the Elimination of All Forms of Discrimination against Women state as follows:

*“Article 1*

*For the purposes of the present Convention, the term “discrimination against” women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

*Article 2 ...*

*State Parties condemn discrimination against women in all forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women ...*

*Article 3...*

*Article 4...*

*Article 5*

*State Parties shall take all appropriate measures:*

*(a) To modify the social and cultural patterns of conduct of men and women , with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;*

*(b) ...*

*Article 6...*

*Article 7...*

*Article 8...*

*Article 9...*

*Article 10...*

*Article 11...*

*Article 12...*

*Article 13*

*States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:*

*(a) The right to family benefits ...*

*(b) ...*

*(c) ...*

*Article 14...*

*Article 15*

*1. States Parties shall accord to women equality with men before the law.*

*2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.*

*Article 16 ...”*

31. The standards that are set by the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women require that women be treated equally with men in all spheres of life, including succession. They frown on women being treated as lesser beings. With respect to succession, it would be discriminatory and unfair for the daughters of the deceased, who are immediate blood relatives of the deceased, to be overlooked merely because they got married. It would be contrary to the law, as stated in the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women, to sanction a devolution that would sideline women.

32. When the ruling of 14<sup>th</sup> June 2019 was being delivered, it was not clear, for no material had been placed before me at the time, whether the dead sons and daughters of the deceased had been survived by their own children, who would then have been entitled to take the share due to them. Two of the survivors of the late children of the deceased have come forward, with the potential of a third one, claiming what was due to their late parents. These would be entitled to take the share that should have gone to their dead parents. It may be worthwhile to revisit the matter. The certificate of confirmation of grant may have to be amended to cater for or accommodate their interests.

33. A daughter of the deceased, Sabet Sukuva, addressed me. She did not dwell on the issues the subject of the application, instead she stated that she wanted to renounce her share in the estate of the deceased, and that instead, her renounced share should devolve upon her full-brother, the administrator herein, Simeon Andashe Munyeti. That is acceptable. I shall take it into account in my final orders.

34. There was an issue that the administrator raised, that some of the daughters have not taken up their shares in the estate, instead it is their brothers who were utilizing them. In answer to that issue, I shall refer the administrator to the law that I have discussed in the forgoing paragraphs. The said daughters are entitled in law to those shares in their father’s estate. They can only be excluded if they renounce or waive the interests, or when they take the step that Sabet Sukuva has now taken, propose that their share be given to some other survivor. The court gave them their entitlement, it will be up to them to deal with it as they please.

35. I am not be in a position to make final orders, as the paternity of the applicant is still unclear. I shall only make final orders once that is clarified. The orders that I shall make for now are as follows:

- (a) That the applicant is given thirty (30) days to furnish the court with a copy of his birth certificate to ascertain who his mother was or, in the alternative, to file a letter from the Assistant Chief of the Sub-Location where he hails from clarifying that position;**
- (b) That the matter shall be mentioned after thirty days to receive that information, and for further directions; and**
- (c) That the final orders on the undated summons filed herein on 12<sup>th</sup> November 2019 to be made after compliance with (a) above.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020**

**W. MUSYOKA**

**JUDGE**