



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.1501 OF 2001

IN THE MATTER OF THE ESTATE OF DAVID MUTISYA USWII (DECEASED)

RULING

1. The application for consideration is the summons dated 29/2/2016. The applicant Fidelma Mwonga one of the administrator seeks that the **distribution of the estate be reviewed, distributed afresh and rectification of the certificate for confirmation of grant issued on the 19<sup>th</sup> of December 2014**. She avers in her supporting affidavit dated the 29<sup>th</sup> of February 2016, that she has consulted with the other administrators in particular Peter Mutisya and noted discrepancies arising of the court's ruling on the distribution of the estate. The ruling attached is dated the 19<sup>th</sup> December 2014 and was delivered by Justice G.B.M. Kariuki9 (as he then was).

2. Fidelma Mwonga in her affidavit in support of the said application dated the 29th February 2016 avers that she has consulted with administrators who have noted the discrepancies arising out of the court order. The deceased had three wives with the following beneficiaries;

3. 1st House	4. 2nd House	5. 3rd House
6. Peter M. Mutisya	9. Fidelma M. Mwonga Anne Mutinda (represented by Leonard Mutisya, Kennedy Mutinda and Uswii Mutinda)	10. Dennis Mutisya
7. Catherine Kaunga		Sila Mutisya
8. John Mutisya		

That plot number 11798 is a commercial property with a petrol station standing thereon and all along before and after distribution income from the properties was shared equally among the 3 houses. Further that the net proceeds of the 2nd house should be shared with her getting ½ whilst Anne Matunda gets half (½) represented by her children. That the court gave the entire property to the grandson of the deceased locking out the proposal for distribution he made. That the property is prime in terms of value and generates a lot of income and that other beneficiaries have been left out. Further that the property known as **Matungulu/Kyaume/1963** be amalgamated with Plot No. 11789 and shared equally among the 3 houses. Further, that during the said confirmation of grant the court left out 0.9 HA of the property known as **Matungulu/Sengani/3400** in favor of Fidelma Mwonga as proposed and of which no objection was raised. Further that the share given to her known as no. 2151 is the same as 15-139. That the deceased had in his lifetime donated the said property to her as next of kin. That the court gave her the said property but at the same time gave the plot represented by share to his brother's children. That **Matungulu/Sengani/258** was her mother's matrimonial home and the same had been subdivided by her later mother into two **Matungulu/Sengani/3400** and **Matungulu/Sengani 3399** of which she had been given title no. 3400 and the other was given to his late brother Ancient Mutinda's children, Leonard, Kennedy and Uswii. That the KCB shares should go to the three houses equally.

11. **Anne Mwikali Mutinda** is opposed to the said application for rectification of grant. She filed the affidavit of protest dated 8th June 2016. She avers that the applicant did not consult her on the alleged omissions and discrepancies. She is opposed to Fidelma Mwonga holding any property in trust for the children of Mutinda Mutisya as they have reached the age of majority. That under the certificate the property Plot No. 11798 has been solely distributed to the sons of Mutinda Mutisya she urged the court to rectify the same to reflect that the said plot be distributed to **Peter Mutisya, Dennis N. Mutisya and Leonard M. Mutisya** to share equally and in trust for the three houses. Further that the court directed that in regards to **Matungulu/Kyauma/1963** the name of Fidelma Mwonga be replaced with Leonard M. Mutisya to hold in trust for the sons of Mutinda Mutisya. That in the certificate of confirmation **Matungulu/Kyaume/1963** has been distributed to **Peter M. Mutisya, Dennis N. Mutisya and Leonard M. Mutisya** to hold in trust for the sons of the late Mutinda Mutisya. In addition, that the property **Matungulu/ Kyaume/1963** be amalgamated with plot no. 11798 and shared equally amongst the three houses.

That the net proceeds due to the second house be shared in accordance with the court ruling dated 19th December 2014 and not equally between Fidelma Mwonga and the sons of Mutinda Mutisya as that would prejudice the latter.

12. She deposed further that **Share certificate 2151**, which represents plot no. **15-139 Muka Makuu** has been distributed solely to Fidelma Mwonga. That it is in the interest of justice that the certificate to be rectified to reflect that plot no. 15-139 Muka Makuu be distributed to Fidelma Mwonga, Leonard Mutisya, Kenneth Musyoki Mutinda, and Gerald Uswii Mutinda to share equally in accordance with the ruling dated 19th December 2014. That the certificate of confirmation of grant **Matungulu/Sengani/258** has been distributed to Leonard M. Mutisya to hold 0.12 Ha in trust for the sons of the late Mutinda Mutisya. That the ruling dated 19th December 2014 directed that Fidelma shall not be entitled to inherit **Matungulu/Sengani/258** as the same was her matrimonial home with the deceased and it is where she resides with her sons to-date. That it is in the interest of justice that the confirmation of grant be rectified to be in line with the court ruling dated 19th December 2014 to reflect that all that property described as **Matungulu/Sengani/258** be wholly distributed to Leonard M. Mutisya to hold in trust for the sons of the late Mutinda Mutisya.

13. **Dennis Ngalu Mutisya** one of the administrator's in reply through his affidavit dated the 3rd June 2016 to the said application avers that his co-administrators **Peter Musau Mutisya** and **Fidelma Mbithe Mwonga** did not consult him regarding the said errors and omissions or discrepancies on the confirmation of grant dated 19th December 2014. Adding that the properties listed and distributed under him have already been sold and transferred by Catherine Ndeiva Kaunga one of the beneficiaries of the estate of the deceased to a third party namely Peter Paul Muthoka and is no longer available. The property is **Kangundo/Isinga/89**. He attached copies of certificates of search dated the 26/02/2004, 5/04/2004 & 20/05/2016 evidencing the transfer of the said property. That it is in the interest of justice that the above property be reverted to the estate for fair distribution for the intended beneficiaries being the 1st and 3rd house. That a family meeting held on 22nd August 1998 it was agreed that since the deceased had 3 properties at Muka Makuu Co-operative Society each of the three houses should get one property. That plot no.15-092 together with shares certificate 2171 Muka Makuu has been distributed to him to hold absolutely representing the 3<sup>rd</sup> house. Plot no. 15-94 Muka Makuu certificates no 2178 has been distributed to Peter M. Mutisya to hold absolutely representing the 1<sup>st</sup> house. That according to the records at Muka Makuu Cooperative Society, Share Certificate No.2171 represents Plot No. 15-094 Muka Makuu while Share Certificate No. 2178 represents Plot No. 15-092 Muka Makuu. That there is error in in the distribution under the certificate of confirmation of grant as share certificates and properties they represent have been interchanged. That it is in the interest of justice that share certificate 2178 representing plot no. 15-092 Muka Makuu be distributed to Peter M. Mutisya representing the 1st house and share Certificate no. 2171 and plot no. 15-094 Muka Makuu be distributed to me representing the 3rd house.

14. Fidelma Mwonga in her further affidavit dated 26th July 2016 avers that the 3rd house only had 2 siblings namely the late Ancient Mutinda represented by Anne Mwikali Mutinda the widow and Fidelma Mbithe Mwonga. Leonard Mutinda and Gerald Mutinda are sons of her late brother Ancient Mutinda and Anne Mwikali and who are only entitled to ½ of the 3rd house share. She avers that the proposal made by Anne Mwikali seeks to disinherit her as it proposes that Plot no. 1178 be shared among Peter Mutisya, Dennis Mutisya, and Leonard Mutinda leaving her out. That since the demise of her mother rental proceeds from 11798 has always been shared equally. Whilst plot no. 15-139 Muka Makuu having been gifted to her by her late father before his demise despite the same the grant indicates that plot no. 15-139 be shared equally between her and her late brothers children (Leonard, Kennedy and Gerald) adding that plot no. Sengani 258 was her late parent's matrimonial home and not Anne's as she had been house because they had not built a home of their own. However, after the demise of her father, her mother subdivided the plot Sengani 258 into two giving Anne Mwikali the portion containing the family home and remaining a small portion for her and they had since lived and occupied their respective portions. That the proposal that plot no. 11798 and **Matungulu/Kyaume/1963** be amalgamated and shared equally among the three houses with the share of the 3rd house being shared equally between Leonard on behalf of his deceased's father and the applicant.

15. Anne Mwikali in her further affidavit dated 27th September 2016 put it to the court that there was an error in the confirmation of grant the name Ancient has been left out in the name of Leonard Mutisya while the name Mutinda has been omitted from the names of Leonard Mutisya Mutinda. That it is prudent for the full names of Late Ancient Mutinda Mutisya and Leonard Mutisya Mutinda. That in the said certificate of confirmation of Grant the names of Kenneth Musyoki Mutinda and Gerald Uswii Mutinda have been misspelt as Kennedy Musyoki Mutinda and General Uswii Mutinda respectively. Further that there is an error as the KCB shares have been solely distributed to Leonard M. Mutisya to hold in trust for the child of the late Ancient Mutinda Mutisya. That it is in the interest of justice that the certificate of confirmation is rectified to reflect in accordance with Schedule A and ruling of the court dated 19th December, 2014.

16. Peter Mutisya a beneficiary to the estate in his affidavit dated that 19<sup>th</sup> of August 2016 depones he makes the affidavit with regard to property known as Plot 15-094 comprised in the estate. That the said property ought not to be subject of distribution since his late father had already nominated him as next of kin of the same, he attaches a share certificate evidencing the same.

17. Parties filed submissions which I have read and considered together with the affidavits filed by the parties and the law governing the applicant's application. The applicant's submissions dated the 24<sup>th</sup> October 2016 and 24<sup>th</sup> January 2014 reiterates her affidavits adding that the review of the Ruling and Rectification of grant sought is bonafide and will serve justice to the parties. Anne Mwikali Mutinda a beneficiary in her submissions too reiterates what is deposed in her affidavit. She relies on Rule 63 of the Probate and Administration Rules which she argues is subject to the same principles of review made in the context of the civil proceedings under the Civil Procedure Act and Rules.

## **DETERMINATION**

18. Let me start with the undisputed matters that is no dispute that some names of the beneficiaries were not correctly spelled. Section 74 of the law of Succession Act provides that, *"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.* The Certificate of Confirmation of Grant shall be rectified to read the full names of Ancient Mutinda Mutisya and Leonard Mutisya Mutinda. The certificate of confirmation of Grant the names of Kenneth Musyoki Mutinda and Gerald Uswii Mutinda have been misspelt as Kennedy Musyoki Mutinda and General Uswii Mutinda respectively be rectified appropriately. The names of Kenneth Musyoki Mutinda and Gerald Uswii Mutinda shall be correctly spelled.

19. The issues in this matter are as follows;

**i. Whether the distribution of the estate should be reviewed and distributed afresh?**

**ii. Whether the Certificate of Grant should be rectified so as to accord and reflect the distribution proposed by the parties?**

20. Rule 63 of the Probate and Administration Rules allows the application of Order XLIV of the Civil Procedure Rules which is currently Order 45 of the Civil Procedure Rules. Order 45, rule 2(1) provides, “An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed”. In the case of **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996)** (unreported) it was held:

*“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”*

The circumstance upon which a court can review an order has been clearly set out in the said Order. From the affidavits filed the parties are in agreement that distribution of some of the properties should be reviewed.

21. The ruling dated 19th December 2014 held that, “*Fidelma shall not hold plot no. 11798 in trust for the sons of Mutinda Mutisya (deceased). Instead the said plot should be shared equally between the children of the said deceased that is to say between Leonard Mutisya, Kennedy Musyoki Mutinda and General Uswii Mutinda who have attained the age of majority.*

*On item 5 of schedule “A” Fidelma shall not be entitled to inherit plot no. Matungulu/Sengani/258*

*Item 19 of schedule “A” Fidelma Mwonga shall share equally plot no. 15-139 Muka Mukuu with the child of the late Mutinda Mutisya*

*As regards item 14 schedule “A” Fidelma Mwonga’s name shall be removed and shall be replaced with the name of Leonard Mutisya Mutinda who shall hold in trust for the children of Mutinda Mutisya (deceased)*

*In item 17 the name Fidelma Mwonga shall be removed and replaced with that of Leonard Mutisya Mutinda who shall hold in trust for the children of Mutinda Mutisya deceased.”*

22. I have read the entire Ruling dated the 19<sup>th</sup> December 2014 and Schedule “A” which was considered by Retired Justice Kariuki together with the proposal made by the parties in their current affidavits. The properties with issues are **plot 11798, plot 258, share 2151 and plot 15-139**. My understanding is that plot 11798 and Matungulu/ Kyaume /1963 should be amalgamated and shared equally between the 3 houses. That was the proposal in Schedule “A”. The certificate of confirmation dated the 19<sup>th</sup> December 2014 indicates that plot no. 11798 was to be shared between Leonard Mutisya, Kennedy Mutinda and Uswii Mutinda who are children of Ancent Mutinda. The Ruling indicates that Fidelma shall not hold plot no. 11798 in trust for the sons of Mutinda Mutisya. There is no objection by the parties on the proposed amalgamation. **Plot no. 11798 and Matungulu/Kyaume/1963 shall be amalgamated and shared amongst the 3 houses equally. The portion between Fidelma Mwonga and Leonard Mutisya shall be shared equally. The grant will be amended to reflect the same.**

23. On plot Matungulu/ Sengani/258 Fidelma Mwonga was not to inherit. Fidelma avers that 0.9 Ha is her inheritance. Ann Mwikali claims that it is her matrimonial home. I have gone through the affidavits and find no evidence of any sub division of the said plot. I decline the review distribution on the same. **Plots no. 15-139 Muka Mukuu and share 2151 belong to Fidelma Mwonga, the grant amendment will be amended to reflect the same.** It is averred that there is an errors in the share certificate. **Share certificate No. 2178 representing Plot No. 15-092 Muka Mukuu is distributed to Peter M. Mutisya representing the 1<sup>st</sup> house and Shared Certificate No.2171 and Plot no. 15-094 Muka Mukuu is distributed to Dennis Ngalu Mutisya representing the 3<sup>rd</sup> house. The KCB shares will be shared equally between the 3 houses.** On the plots alleged to be sold there is no order for review, any aggrieved party can pursue their claim legally. Each party to bear its own cost.

Dated, signed and delivered this 29<sup>th</sup> day of November 2018.

**R. E. OUGO**

**JUDGE**

In the presence of;

**Mr. Cherongis h/b Mr. Omenge for the Applicant**

**Respondents Absent**

