



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 342 OF 2008**

**IN THE MATTER OF THE ESTATE OF JAMES MBITHI NGULA**

**1. GEDION KITAVI MBITHI**

**2. JOSHUA KIMANTHI MBITHI.....PETITIONERS**

**VERSUS**

**1. JOHN MAKAU MBITHI**

**2. MONICA MUTHUE MBITHI**

**3. RUTHY KATULU JAMES MBITHI**

**4. ROSE MUTIO MBITHI.....APPLICANTS**

**RULING**

1. Before this court is an application dated 18<sup>th</sup> February, 2016 for rectification of grant which was issued to the petitioners on 27<sup>th</sup> October, 2009. It is brought under section 74 of the Succession Act and rule 43 of the Probate and Administration Rules. The application is supported by the affidavit of the 1<sup>st</sup> applicant sworn on his own behalf and on behalf of the 2<sup>nd</sup> to 4<sup>th</sup> applicants. He stated that the certificate of grant contains errors since the property known as Mavoko Town Block 3/3251 which is one of the assets of the deceased's estate was left out when the administrators filed for the certificate of confirmation of grant. That the dependants have consented to the mode of distribution of the asset as hereunder:

***i. John Makau Mbithi, Monica Muthue Mbithi, Ruthy Katulu James Mbithi and Rose Mutio Mbithi to hold in equal shares of 5 acres each.***

2. The Application was objected to by the replying affidavit of the 1<sup>st</sup> petitioner. He acknowledged that the property was listed in the list of deceased's assets but that the property was not distributed since his co-administrator could not at the time of confirmation of grant trace the abstract of title. He contended that the proposed distribution by the applicants is skewed and inequitable. That the deceased left a total of twenty-eight (28) beneficiaries and the proposed distribution has left out a lot of surviving beneficiaries of the deceased. He urged that the court makes an order that the 28 beneficiaries do share the property equitably.

3. The 1<sup>st</sup> applicant swore a further affidavit. He contended that the deceased left behind five wives; Rebecca Kamene, Grace Muthue, Rose Mutio, Ruth Katulu and Monica Muthue. That on 4<sup>th</sup> December, 1996 the deceased in a meeting convened for Aini Clan which he belonged distributed his property to his

wives and children and the said was noted by Joseph Munyao Nzioka. He distributed Mavoko Town Block 3/3251 among four wives; Rebecca Kamene, Grace Muthue, Rose Mutio and Ruth Katulu five (5) acres each. Gideon Kitavi Mbithi a son to the first wife Rebecca Kamene agreed to exchange his mother's portion of 5 acres with Monica Muthue who had been given Land Parcel No. Mavoko Town Block 3/95 measuring 5 acres. That as a result of the said exchange the 1<sup>st</sup> petitioner's mother Rebecca Kamene now retained Land Parcel No. Mavoko Town Block 3/95 and Monica Muthue was to retain 5 acres out of Land Parcel No. Mavoko Town Block 3/3251. That it was on the basis of the foregoing that Land Parcel No. Mavoko Town Block 3/3251 is to be shared by the applicants. That the 1<sup>st</sup> petitioner has since transferred Mavoko Town Block 3/95 measuring 5 acres to himself which had been exchanged to his mother. That the deceased distributed his property to his dependants save that Mavoko Town Block 3/3251 it was left out at the stage of confirmation.

4. The parties' submissions were a reiteration of their averments in the rival affidavits.

5. I have considered the Application for rectification of the confirmed certificate of grant as well as the written and oral submissions of the learned counsels for the parties herein. It is not in dispute that at the time of confirmation of grant one of the assets of the deceased namely MAVOKO TOWN BLOCK 3/3251 had inadvertently been left out for distribution amongst the beneficiaries. The Applicants maintain that the said property should now be included and same be distributed among the Applicants to the exclusion of the other beneficiaries on the ground that the said property had been bequeathed to the wives of the deceased one of whom later relinquished her shares in exchange of parcel number MAVOKO TWON BLOCK 3/95 MEASURING 5 Acres equivalent to what she could have received from parcel 3/3251. The main issue for determination is whether or not the property namely **MAVOKO TOWN BLOCK 3/3251** should be shared amongst the four applicants to the exclusion of the rest of the beneficiaries.

6. The Applicants have described themselves as representing the four houses of the deceased with the first wife Rebecca Kamene having been compensated with parcel **Mavoko Block 3/95** which has since been taken over by the 1<sup>st</sup> Petitioner/Respondent by virtue of the fact that he is a son to the said Rebecca Kamene. It is noted that the 1<sup>st</sup> Applicant filed a further affidavit sworn on 14/11/2016 in which he presented minutes of a clan meeting deliberated in 1996. The Petitioner/Respondents to date have not filed a rebuttal to the issues raised in that affidavit and which therefore lends credence to the Applicants that indeed parcel number Mavoko Town Block 3/3251 had legitimately been bequeathed to them with the 1st Applicant now representing his mother's house (Grace Muthue). The Applicants further maintains that sharing the said property among the 28family members would result in an inequitable distribution and would thereby unfairly disadvantage the Applicants. It is noted that indeed none of the family members herein have come forward to oppose the proposed mode of distribution of this one property by the Applicants. This then seems to suggest that a majority of the family members are not opposed to the Applicants request to have the property to themselves. The Applicants also represent the interests of the remaining houses. The deceased had been a polygamous man and as such the property should then be distributed amongst the houses as provided for under Section 40 of the Law of Succession Act which provides as follows:-

***“where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.”***

Having believed the version of events from the Applicants, I find the Respondents claim that the property be shared among 28 members not equitable since each of the members had already been catered for in the distribution of the other properties pursuant to the earlier confirmation of grant vide certificate of confirmation dated 27/10/2009. The division of remaining property **Mavoko town Block 3/3251** among the applicants who represent the remaining four (4) houses of the deceased is in my view proper and equitable. The 1<sup>st</sup> Petitioner's house had already been compensated with parcel Mavoko Town Block 3/95 and their attempt to seek to get a share in Mavoko Town Block 3/3251 is unconscionable and he

should let the other four houses comprising the Applicants to share it. Further the clan resolutions made on 4/12/1996 appear to set the record straight as to the manner in which the deceased intended to share his properties to his family. The Petitioners having been present during the said resolutions have curiously kept quiet about the same as they have not filed any replying affidavits to rebut the averments of the Applicants. The only irresistible conclusion one comes to is that the Petitioners were indeed aware that the parcel number Mavoko Town Block 3/3251 was to be shared amongst the Applicants who comprise the four (4) houses of the deceased. Indeed the parties herein opted not to tender oral testimonies but sought to rely on the rival affidavits and submissions. I am satisfied that even without reception of oral evidence it is quite clear that the Applicants have made out a case for rectification of the confirmed grant and that the remaining property ought to be shared among the Applicants.

7. In the result, I find the Applicant's Application dated 18/2/2016 has merit. The same is allowed in the following terms:-

***(a) The property known as Mavoko Town Block 3/3251 be added as assets belonging to the deceased.***

***(b) The property known as Mavoko Town Block 3/3251 be distributed to John Makau Mbithi, Monica Muthue Mbithi, Ruthy Katulu James Mbithi and Rose Mutio Mbithi to hold in equal shares.***

***(c) A rectified Certificate of Confirmation of grant do issue.***

***(d) Each party to bear their own costs.***

Dated, signed and delivered at Machakos this 15<sup>th</sup> day of **November, 2017.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Karuga for Uvyu for Applicants

Musyimi for Petitioners

C/A: Kituva