



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 767 OF 2007**

**IN THE MATTER OF THE ESTATE OF MBALU NZUNZA NDAMBO alias MBALUKA  
NZUNZA (DECEASED)**

**JOHN NZUNZA MBALU**

**DAVID NDAMBO MBALU .....APPLICANTS**

**VERSUS**

**ALICE NZISA MBALU ..... RESPONDENT**

**RULING**

**The Application**

The Applicants herein are two of the Administrators of the estate of the deceased Mbalu Nzunza Ndambo alias Mbaluka Nzunza, and were so appointed in a certificate of grant that was issued on the 17<sup>th</sup> December 2013 in respect of the estate of the deceased. They have filed an application by way of summons dated 16<sup>th</sup> July 2015 seeking the following orders :

1. That the certificate of confirmation of grant dated 17<sup>th</sup> December 2013 be rectified in terms of paragraphs 3 and 5 of the Applicants' joint supporting affidavits.
2. That pending the hearing and determination of this application, the Administrators be restrained from disposing of, transferring and or alienating any and all assets comprising the estate of Mbalu Nzunza Ndambo *alias* Mbaluka Nzunza (deceased).

Paragraphs 3 and 5 of the Applicants' joint supporting affidavit sworn on 16<sup>th</sup> July 2015 referred to in the first prayer hereinabove state as follows:

**3. That the three administrators had been chosen as representatives of each of the three households of the deceased. However, though they were to hold the respective properties on behalf of the beneficiaries under them, those beneficiaries were not named, which has opened the administration to abuse. It is imperative that the beneficiaries bestated thus:**

**(a) John Nzunza Mbalu to hold the stated property in trust for himself and the other beneficiaries. Teresia Ndulu Mbalu, John Sammy Kalloki Mballu, Rosemary Mutungwa, Cecilia Nduku Anna Wanza and Patricia Mueni Mbalu (Deceased);**

**(b) David Ndambo Mbalu to hld the stated property in trust for himself and the other baneficiaries: Kakuvi Mbalu Nzunza, Peter Muli Mbal, Joseph Ndambo**

**Mbalu, Mutinda Mbalu, Faith Mueni Mbalu, Ruth Nzilan Mbalu, Dorcas Syombua Mbalu, Grace Wambua, Sammy Mbalu, Jones Mutungai Mbalu (deceased) and Boniface Nzaku Mbalu (deceased).**

**(c) Alice Nzinsa Mbalu to hold the stated property (save for Wamunyu Plot No. 43) in trust for herself and the other beneficiaries; Mbula Mbalu, Kyalo Mbalu, Loko Mbalu, Florence Nthenya, Koki Mbalu and Nzunza Mbalu.**

**5. That property known as Wamunyu Plot No. 43 had been sold to Kavemba Musyoka by the deceased prior to his demise though it had not been transferred to the aforementioned purchaser. The distribution should reflect that the property be transferred to him.**

The grounds for the application are that there is an error that had been committed by not specifying the beneficiaries for each of the three households whom the respective administrators are holding various properties in trust for, that the said beneficiaries stand to be dispossessed of their interest in the estate, and the estate of the deceased risks to be wasted unless the certificate of confirmed grant is rectified as prayed.

The Applicants in their joint supporting affidavit also stated that one of the administrators, Alice Nzisa, has purported to sell to a Mr. James Titus Kisia, several properties without the consent of the other administrators, and without the knowledge of the beneficiaries under her. Further, that it is therefore imperative that any transfer of property of disposal, alienation of property comprising the estate of the deceased be stopped pending the hearing and determination of the application filed herein.

The Applicants' Advocates, Andrew Ombwayo & Co Advocates, filed submissions dated 12<sup>th</sup> October 2015 wherein the facts hereinabove were reiterated, and reliance was placed on the proviso to section 71(2) of the Law of Succession Act as read together with section 84 of the Law of Succession Act for the position that the names of all the beneficiaries and their respective shares must be included in the grant. Further, that section 74 of the Act gives this Court discretion to rectify, alter or amend a confirmed grant.

### **The Response.**

The Respondent thereupon filed a replying affidavit sworn on 24<sup>th</sup> August 2015 in opposition to the Applicants' application. The Respondent alleged therein that one of the administrators being the 1<sup>st</sup> Applicant, has made administration of the estate difficult as he has refused to sign transfer forms for the properties allocated to the Respondent's house that are required to be registered in her name in trust. According to the Respondent, the beneficiaries of each house are disclosed in several documents filed in court by the parties previously, that there is no problem with beneficiaries in her house, and that it will not serve any legal purpose to include them in the confirmed grant.

The Respondent also alleged that the list of beneficiaries disclosed by the Applicants has left out some beneficiaries, and stated that the correct beneficiaries are as follows:

#### **First House (Represented by John Nzunza Mbalu)**

- 1. Ndulu Mbalu – wife**
- 2. Nduku Mbalu – Daughter**
- 3. Wanza Mbalu – Daughter**
- 4. Kaloki Mbalu - son**
- 5. Mukonyo Mbalu – Daughter**
- 6. Mwikali Mbalu – Daughter**
- 7. Mutungwa Mbalu – Daughter**
- 8. John Nzunza Mbalu – Son**

#### **Second House (Represented by Alice Nzisa Mbalu)**

1. **Koki Mbalu – Wife – deceased**
2. **Alice Nzisa Mbalu – Daughter**
3. **Agnes Nduku Mbalu – wife (concubine)**
4. **Mbula Mbalu – Daughter**
5. **Loko Mbalu – Daughter**
6. **Kyalo Mbalu – Son**
7. **Koki Mbalu – Daughter**
8. **Nthenya Mbalu – Daughter**
9. **Nzunza Mbalu – Son**

**Third House (Represented By David Ndambo Mbalu)**

1. **Kakuvi Mbalu – wife**
2. **Sammy Mbalu – Son – Deceased – survived by wife Ann Sammy and children**
3. **Peter Muli Mbalu – Son**
4. **Nzaku Mbalu – son – Deceased – survived by his wife Penina Nzaku and children**
5. **David Ndambo Mbalu – Son**
6. **Muinde Mbalu – Son**
7. **Grace Mbalu – Daughter**
8. **Nzilani Mbalu – Daughter**
9. **Syombua Mbalu – Daughter**
10. **Mutungu Mbalu – Son**
11. **Mutinda Mbalu – Son**
12. **Mueni Mbalu - Daughter**

The Respondent averred that Plot No. 43 Wamunyu Market was allocated to her house and is registered in the name of the deceased, and that the said Kavemba Musyoka who is alleged to have purchased the plot from the deceased is dead, and never filed any suit against the deceased or affidavit of protest against the confirmation of grant.

Sila & Company Advocates for the Respondent filed submissions dated 16<sup>th</sup> October 2015 wherein he reiterated the averments made by the Respondent, and in addition stated that no evidence by way of a sale agreement of the sale of the property known as Wamunyu Plot No 43 to Kavembe Musyoka had been exhibited by the Applicants.

**The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. The issue to be decided is whether the confirmed grant issued herein can be rectified as sought by the Applicants. The Applicants have relied on *Section 74* of the Law of Succession Act which provides for the errors in grants of representation that may be rectified by the court as follows:

***“Errors in names and descriptions or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court; and the grant of representation whether before or after confirmation, may be altered and amended accordingly”.***

The procedure for seeking the relief is set out in Rule 43(1) of the Probate and Administration Rules which states as follows:

***“Where the holder of a grant seeks pursuant to the provisions of Section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made. he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued”***

These provisions limit rectification of grants to three cases:-

(a) errors in names and descriptions of persons or things;

(b) errors as to time or place of death of the deceased;

(c) in cases of a limited grant, the purpose for which such limited is made.

The matter in issue in this application is the addition of the names of beneficiaries in the confirmed grant, the removal of one of the properties namely Plot No. 43 at Wamunyu Market from the distribution to the Respondent, and the distribution of the said property to one Kavemba Musyoka. The said Kavemba Musyoka is alleged to be a purchaser of the property, however the Applicants did not provide any evidence that the deceased sold the said property to justify the property being given to him.

In my view the additions suggested by the Applicants are not the type of errors that are envisaged to be cured by rectification under section 74 of the Law of Succession Act, and that the correct remedy in the circumstances is to have the certificate of confirmation cancelled so as to reopen the confirmation and get all the beneficiaries to consent to the proposals by the Applicants. It was held by Musyoka J. in this regard as follows in **The Matter of The Estate of Hasalon Mwangi Kahero, [2013]eKLR.**

**“An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased's death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if say a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word “error” too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43.”**

I also note that there is a pending summons for revocation of grant dated 14<sup>th</sup> May 2014 filed by two beneficiaries who are sons of the deceased. The two applicants claim in the said summons that their consent was not given during the application for letters of administration and confirmation of grant. They also listed the beneficiaries of the deceased in their application and claim that the identity and shares of the said beneficiaries was not ascertained during the confirmation of grant.

Arising from the foregoing, I accordingly order as follows pursuant to the provisions of section 47 of the Law of Succession Act:

1. The confirmation of grant issued on 17<sup>th</sup> December 2013 and certificate of confirmation of grant dated 19<sup>th</sup> February 2014 be and are hereby revoked.
2. **The Administrators shall file fresh summons for confirmation of grant and shall include the names of all beneficiaries and the distribution of the deceased's estate to the beneficiaries.**
3. **The status quo obtaining as at the date of this ruling with respect to the occupation and possession of the deceased's property and assets to obtain and be maintained pending the hearing and determination of the summons for confirmation of grant. There shall however be no further transfer of the deceased's assets and properties by the administrators and/or beneficiaries.**
4. Each party shall meet their respective costs of the Summons dated 16<sup>th</sup> July 2015.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 22<sup>nd</sup> day of February 2016.

**P. NYAMWEYA**

**JUDGE**