



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.173 OF 2005**

**IN THE MATTER OF THE ESTATE OF THE LATE KIMUTAI TUIMISING - (DECEASED)**

**WILSON K. MUTAI.....APPLICANT/OBJECTOR**

**VERSUS**

**SARAH JERONO TUIMISING**

**& DANIEL KIPRUTO MUTAI..... RESPONDENTS**

**RULING**

1. This matter relates to the estate of Kimutai Tuimising who died on the 22<sup>nd</sup> August, 1980. Letters of administration intestate were issued on 22<sup>nd</sup> June, 2006 and confirmed on 18<sup>th</sup> January, 2011.

2. The applicant **WILSON K. MUTAI**, who is a son of the deceased and also one of the administrators of the estate of the deceased, has filed an application for rectification of the grant issued in the matter on 18<sup>th</sup> January, 2011. The application is brought pursuant to the provisions of section 74 of the Law of Succession Act Cap 160 Laws of Kenya and rule 43 (1) of the Probate and Administration Rules. In the said application, the applicant seeks the following orders:

***1. THAT the grant of letters of administration issued to the said SARAH CHERONO TUIMISING, DANIEL KIPRUTO MUTAI, WILSON KIPTANUI AND JOHN KIPKOECH MUTAI in this matter on 18<sup>th</sup> January, 2011 be rectified in the following respects provided for by rule 43(1) of the Probate and Administration Rules.***

***2. The description of property in the schedule to the certificate of confirmation of grant dated 18<sup>th</sup> January, 2011 to indicate the land parcel No. Kericho/Kabianga/781 to be shared amongst three beneficiaries;***

***a). WILSON K. MUTAI – 5.1666 ACRES***

***b). JOHN K. MUTAI - 4.1666 ACRES***

***c). SARAH CHERONO TUIMISING - 4.1666 ACRES***

***3. THAT the costs of this Application be in the cause.***

3. The grounds on which the application is based are as follows:

**a) THAT the error in the distribution of property is misleading and erroneous.**

**b) THAT such rectification is necessary to reflect the right beneficiaries of the said parcel of land.**

4. The application is also expressed to be supported by the affidavit of the applicant, WILSON KIPTONUI MUTAI and other grounds to be adduced at the hearing of the application.

5. In his affidavit, Mr. Mutai, who is one of the administrators of the estate of the deceased and a beneficiary thereof, avers that a grant in respect of probate was made to them on 18<sup>th</sup> January, 2011. He further avers that in the schedule of property in the Certificate of Confirmation of Grant, the property, title number Kericho/Kabianga/781 ought to have been subdivided amongst three (3) beneficiaries only. He therefore avers that it is necessary that the Certificate of Confirmation of Grant be rectified and the schedule on the shares of heirs to indicate the distribution as prayed in his application. It is also his deposition that it is fair and desirable that the subdivision be rectified by the Court to reflect the true beneficiaries.

6. The application was opposed by the respondents, Sarah Tuimising and Daniel Kipruto Mutai, by way of a replying affidavit sworn on 14<sup>th</sup> March, 2016 by Daniel Kipruto Mutai on behalf of the respondents. They also filed a Notice of Preliminary Objection in which they challenged the jurisdiction of the Court and argued that the matters now being raised by the applicant are *res judicata*.

7. Both the applicant and the respondents filed submissions which they requested the Court to rely on in rendering its decision on the matter.

### **The Applicant's Submissions**

8. In his submissions, the applicant argued that the application raised two issues for determination, namely whether the Certificate of Confirmation of Grant should be rectified, and whether the Court has the jurisdiction to grant the orders sought in the application.

9. On whether the grant should be rectified, the applicant relied on the definition of the terms “**rectify**” and “**rectification**” in *Black's Law Dictionary*, 5th edition.

10. According to the applicant, Rule 43 of the Probate and Administration Rules, which provides for the rectification of grants and the procedure to be followed, must be read with section 74 of the Act. Further, that under this section, the rectification of a grant is allowed where there is an error.

11. The applicant further called in aid the provisions of rule 63 of the Probate and Administration Rules which he submitted provides for the application of the Civil Procedure Rules and the High Court (Practice and Procedure) Rules to matters under the Law of Succession Act. It was his submission that the provisions of Order 44 of the Civil Procedure Act which deals with review is also applicable to succession matters and should enable a party to apply for review in circumstances such as are presently before the Court. His submission was that Order 44, which deals with errors apparent on the face of the record, is complementary to rule 43 and should enable a party to seek rectification of a grant in situations not fully provided for under rule 43.

12. With respect to the matters which he was seeking rectification of, the applicant's submission was that he was seeking rectification of the error in distribution of the property because it was misleading, and the rectification is necessary to reflect the right beneficiaries.

13. According to the applicant, the deceased's estate comprised several parcels of land. The applicant and his brother and step mother were to share land parcel number **Kericho/Kabianga/781**. The other beneficiaries are to share land parcel number **Kericho/Kabianga/ 753**. His submission was therefore that the Certificate of Confirmation of Grant should be rectified to reflect that land **parcel number Kericho/Kabianga/781** is to be subdivided between three beneficiaries, not five, as currently reflected in the Certificate of Confirmation of Grant.

14. On the second issue identified by the applicant, namely, whether the Court had the jurisdiction to grant the orders that he was seeking, the applicant relied on Rule 73 of the Probate and Administration Rules which saves the inherent powers of the Court and gives the Court the jurisdiction to ***“make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*** He urged the Court to allow his application and grant the orders that he sought.

### **Submissions in Reply**

15. The respondents rely on their affidavit in reply and the submissions dated 18<sup>th</sup> July, 2016. They state that this matter has been before the Court for over 11 years, while the grant that the applicant was seeking rectification of had been issued five (5) years ago on 18<sup>th</sup> January, 2011.

16. They aver further that the mode of distribution of the deceased’s estate had been strongly contested. However, after hearing the parties, the Court made a decision on 18<sup>th</sup> January, 2011 and on the basis of the ruling of the Court the Certificate of Confirmation of Grant dated 18<sup>th</sup> January, 2011 was issued.

17. It is their contention that despite the ruling of the Court, the applicant and the other administrator, John Kipkoech Mutai, refused to sign the requisite forms for the effective transmission of the properties in accordance with the grant, and the respondents were forced to apply to Court for orders to compel the applicant and the other administrator to sign the forms. The respondents state that they did this through their application dated 24<sup>th</sup> August, 2011, which was granted on 14<sup>th</sup> of May, 2013.

18. It is the respondents’ further contention that the applicant made an application dated 10<sup>th</sup> June, 2013 seeking to set aside the orders granted on 14<sup>th</sup> May, 2013 under which the applicant and his co - respondent had been ordered to execute mutation and transfer forms, but after hearing the application, the Court dismissed it on 4<sup>th</sup> October, 2013.

19. The respondents aver that the applicant subsequently disobeyed the orders issued, as a result of which the Deputy Registrar, in accordance with the orders of the Court, executed the mutation and transfer forms and the titles were processed in favour of the beneficiaries in accordance with their respective shares as set out in the Certificate of Confirmation of Grant.

20. It is the respondents’ further averment that the applicant has actively frustrated the occupation by the beneficiaries of their respective land parcels, leading to the filing by the respondents of an application dated 23<sup>rd</sup> November, 2015, now pending in Court, seeking orders to compel the applicant and his co-respondent to give vacant possession of the properties to the rightful beneficiaries.

21. The respondents argue that the Court does not have the jurisdiction to issue the orders that the applicant seeks. They refer the Court to the provisions of section 74 of the Law of Succession Act with respect to the powers of the Court on an application for rectification of a grant, and the nature of the errors that the Court can rectify. Their submission is that this provision is intended to allow for minor amendments and not substantive amendments such as the distribution of the estate, and that the distribution of the estate is not included in the list of errors that can be rectified by way of rectification of grant.

22. Finally, it is the respondents’ submission that the application must fail given that the mode of distribution in the grant was given by the Court in its ruling delivered on the 18<sup>th</sup> January, 2011 after hearing the parties. In their view, the applicant is in the present application seeking to have the Court sit on appeal on its own ruling. In their view, the application is totally without merit and should be dismissed with costs to them.

### **Determination**

23. I have read the respective pleadings and submissions of the parties, which I have set out in brief

above. The applicant invites the Court to exercise the powers granted to the Court under section 74 of the Law of Succession Act, which provides as follows:

***“Errors in the names and description or in the 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.”***  
(Emphasis added)

24. Rule 43 of the Probate and Administration Rules provides for the manner in which applications for rectification of grants are to be made. It provides at Rule 43(1) that:

***“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...”***

25. The applicant argues that the Court has jurisdiction to grant the orders that he seeks which, to recap, are to **“rectify”** the Certificate of Confirmation of Grant so that the deceased’s property, **Land Parcel Number Kericho/Kabianga/781**, is shared between three beneficiaries, the applicant and two others, and not among five beneficiaries as provided for in the Certificate of Confirmation of Grant.

26. The applicant has asked the Court to be guided by the meaning attributed to the words **“rectify”** and **“rectification”** in Black’s Law Dictionary. According to the applicant, the term **“rectify”** is defined as follows:

***“To correct or define something which is erroneous or doubtful. Thus, where the parties to an agreement have determined to embody its terms in the appropriate and conclusive form, but the instrument meant to effect this purpose (e.g a conveyance settlement etc) is by mutual mistake so framed as not to express the real intention “of the parties, an action may be brought to have it rectified)”***

27. The applicant sets out the meaning of **“rectification”** as being:

***“The act or process by which something is made right or by which a wrong is adjusted.”***

28. The question is whether what the applicant seeks from the Court is a rectification as defined in Black’s Law Dictionary, and that would accord with the requirements of section 74 of the Law of Succession Act. Section 74 states that the Court may rectify **“names and description or in the setting out the time and place of the deceased’s death or the purpose in a limited grant”**. What the applicant seeks is a redistribution of one of the properties comprising the estate of the deceased. It is not a minor error in the grant that he seeks rectification of, but a major change in the way the estate of the deceased is to be distributed. That, with the greatest respect cannot, in my view, be the subject of rectification under section 74.

29. I find support in taking this view in the words of the Court in **Re Estate of Joseph Gichohi Kiguta (Deceased) (2011) eKLR**, which the respondents have referred the Court to. In that decision, the Court held that the applicant had presented the application for rectification merely in an attempt by the applicant to **re-distribute** the estate in accordance with his desires. In the Court’s view, which I agree with, such an application could not succeed as it was not one of the errors envisaged by the provisions of section 74 on rectification of grant. As was observed **In the Matter of Muniu Karugo (Deceased) Nairobi High Court Succession Cause No. 2668 of 1997**, rectification of grants only deals with obvious errors. It cannot, as the applicant seeks, be used to fundamentally change the character of the grant.

30. The applicant has cited rule 63 of the Probate and Administration Rules which renders Order 44 of the Civil Procedure Act applicable to matters under the Law of Succession Act. It would appear from the submissions of Counsel for the applicant that the intent of this reference was to convince the Court to

review the decision of the Court of 18<sup>th</sup> January, 2011. If this be the intent as I understand it, then again, like the application for rectification, it must fail.

31. I note from the ruling of the Court (Hon. G.B.M. Kariuki J (as he then was) that the Court considered the views of all the beneficiaries as expressed in various affidavits filed in Court, and proceeded to order the distribution of the estate as set out in the Certificate of Confirmation of Grant. No error on the part of the Court has been suggested or established by the applicant, and there is no basis either for review or rectification of the grant. To grant the orders that the applicant seeks would be to sit on appeal on a decision of a court of concurrent jurisdiction, which this Court cannot do.

32. In the circumstances, it is my finding, and I so hold, that this application is without merit, and it is hereby dismissed with costs to the respondents.

**Dated, Delivered and Signed at Kericho this 14<sup>th</sup> day of October 2016.**

**MUMBI NGUGI**

**JUDGE**