



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MILIMANI LAW COURTS, NAIROBI**

**FAMILY DIVISION**

**SUCC CAUSE NO.199 OF 1992**

**ALFAYO NJIRU MBITI ..... APPLICANT**

**VERSUS**

**WILSON NJUE MBITI..... 1ST RESPONDENT**

**JACOB NJIRU RWARE ..... 2ND RESPONDENT**

**LUKAS NJAGI JACKTON ..... 3RD RESPONDENT**

**JANE BETHA WANDIA ..... 4TH RESPONDENT**

**MOSES NJERU JACKSON ..... 5TH RESPONDENT**

**ANTONY GACUCO JACKSON ..... 6TH RESPONDENT**

**RULING**

1. JACTON MBITI KABIRURI (deceased) died intestate at Embu District Hospital on 18th June 1979 domiciled in Kenya. He left an Estate comprising land. He was survived by nine (9) sons and one daughter. A Grant of Letters of Administration intestate was made on 30th June 1992 to Wilson Mbiti Njue and Jacob Njiru, both being his sons.

2. On 2nd November 2004, the Grant of Letters of Administration intestate was confirmed and the estate of the deceased was distributed among the heirs as follows:-

|                       |                                       |                       |
|-----------------------|---------------------------------------|-----------------------|
| <b>Jane Wandia</b>    | <b>Plot Number 26 Manyatta Market</b> | <b>}</b>              |
| <b>Kekilia Mutitu</b> |                                       | <b>}</b>              |
| <b>Wilson Njue</b>    |                                       | <b>} Equal shares</b> |
| <b>Moses Njeru</b>    |                                       | <b>}</b>              |
| <b>Duncan Nthiga</b>  |                                       | <b>}</b>              |

|                         |                                       |                       |
|-------------------------|---------------------------------------|-----------------------|
| <b>Jacob Njiru</b>      |                                       | <b>}</b>              |
| <b>Anthony Gachungo</b> | <b>Plot Number 18 Manyatta Market</b> | <b>} Equal shares</b> |

|                     |  |                           |
|---------------------|--|---------------------------|
| <b>Luka Njagi</b>   |  | <b>}</b>                  |
| <b>Danson Mumyi</b> | <b>1/5 share of plot Number 29 Manyatta Market</b> | <b>} 1/10 shares each</b> |

|                        |   |                    |
|------------------------|---|--------------------|
| <b>Alfayo Njiru</b>    | <b>1/6/ share of plot number 32 Manyatta Market</b> | <b>} 1/6 share</b> |
| <b>Antony Gachungo</b> | <b>Mavuria/Kithuthiri/1530</b>                      | <b>} 1.5 acres</b> |
| <b>Wilson Njue</b>     |   | <b>} 1 acre</b>    |
| <b>Jacob Njiru</b>     |   | <b>} 1 acre</b>    |
| <b>Luka Njagi</b>      |   | <b>} 1 acre</b>    |
| <b>Moses Njeru</b>     |   | <b>} 0.5 acre</b>  |
| <b>Jane Wandia</b>     |   | <b>} 0.5 acre</b>  |
| <b>Danson Munyi</b>    |   | <b>} 1 acre</b>    |
| <b>Duncan Thiga</b>    |   | <b>} 0.5 acre</b>  |
| <b>Kekilia Mutitu</b>  |   | <b>} 0.5 acre</b>  |
| <b>Alfayo Njiru</b>    |   | <b>} 0.5 acre</b>  |

3. On 9th June 2009 a summons for rectification of the Grant was filed by the advocates for the petitioners (Mrs. N. Kiagayu & Co. Advocates) seeking rectification of the confirmed Grant. Simultaneously with the summons, a consent document was filed in the cause stating –

**“further to the consent we signed herein in support of the distribution of the estate and further to the certificate of confirmation of the Grant issued on 2nd November 2004 herein, we have agreed that the same be rectified so as to reflect the correct shares of the deceased in the plot numbers 32 and 29 in Manyatta Market as 1/6 and 1/5 respectively but that (sic) the heirs remain the same.”**

4. This summons stated that at the time of the deceased’s death, Plot No.29 at Manyatta Market was owned by the deceased and 4 other persons and consequently the deceased’s share in the property (which was due for inheritance) was 1/5 of the plot. The said consent was shown to have been signed on 17th July 2009 by all the ten heirs of the estate of the deceased.

5. Ostensibly on the strength of the said consent, an amended certificate of confirmation of the Grant dated 2nd November 2009 was sealed and signed ...by a Judge of the High Court of Kenya at Nairobi whose name was not indicated. The date of rectification was also not indicated. The amended certificate of confirmation of the Grant adjusted the shares of the heirs in relation to plot numbers 32 and 29 at Manyatta Market by reflecting the deceased’s shares thereof as 1/6 and 1/5 respectively.

6. On 28.10.2010, Alfayo Njiru Mbiti, the applicant took out summons for rectification of the amended confirmed Grant seeking orders that:-

**(1) Spent**

**(2) The Certificate of Confirmation of grant issued on 2nd day of November 2004 and thereafter rectified by an order of this Court be further rectified pursuant to Rule 43(1) of the Probate and Administration Rules as follows\_**

**(a).The share of the applicant ALFAYO NJIRU MBITI in Plot No.32 Manyatta Market be rectified be in the share (sic) of Heir to read as whole share instead of 1/6.**

**(b) The Certificate of Confirmation of grant issued on 2nd day of November 2004 only (sic) be rectified in the deceased’s share in Plot Number 29 Manyatta Market to read as 1/5 share and that the shares of the two heirs to read as 1/10 share each.**

**(3)That costs of this application be waived by the respondents and in any even be awarded to the applicant. #**

7. In the affidavit sworn by the applicant on 28.10.2010 in support of the summons, the applicant averred that the purported consent dated 17.7.2009 filed in support of the summons for the rectification of the Grant was a forgery because the applicant who was shown as having signed the consent had not signed it and Messrs Danson Munyi, Duncan Nthiga and Kakilia who were also sworn as having signed the consent were dead at the time the consent was shown as having been signed.

8. Wilson Mbiti Njue in his affidavit sworn on 27.1.2011 in reply to the application by the applicant averred that the allegations of forgery allegedly in the consent on which rectification of the confirmed Grant was based were not proved and further, that the deceased's Estate could not extend to properties or shares that the deceased did not have or own at the time of his death. In effect, Wilson Mbiti Njue saw nothing wrong with the rectification of the confirmed Grant.

9. **Mr. H. Okumu**, the learned counsel for the applicant urged the Court to allow the 2nd rectification as the 1st rectification was fraudulent as some of the beneficiaries who were shown to have signed the consent on which the rectification was based had not signed it and their purported signatures were a forgery as they were not alive at the time they were shown to have signed. Counsel urged the Court to cancel the first rectification as it was obtained fraudulently.

10. Mrs. Kiagayu, learned counsel for the administrators of the Estate, opposed the application and placed reliance on the replying affidavit of Wilson Mbiti Njue. She contended that there was no fraud attendant to the first rectification and none was proved. She pointed out that the alleged death of the beneficiaries who signed the consent relating to the first rectification was not proved and the dates when the said beneficiaries were said to have died were not shown. Counsel urged the Court to dismiss the application by the applicant.

11. I have carefully perused the application by Alfayo Njiru Mbiti and the affidavits filed by the parties and I have given due consideration to the rival submissions of counsel for the parties. It is trite law that he who alleges must prove what he alleges. In this application, the burden reposed on the applicant to prove that the consent on which the amended confirmed Grant was predicated was a forgery. Even more importantly, the applicant should have shown whether or not the deceased owned alone Plots numbers 29 and 32 at Manyatta or whether he owned them jointly with other people or with another person. The applicant, made serious allegations which, if true, would not only result in the cancellation of the first amendment to the confirmed Grant, but would also lead to prosecution of the perpetrator of the forgeries. The applicant however, merely made startling allegations and failed to offer even an iota of evidence to buttress his allegations in relation to the alleged forgery. Moreover, he was mum on the question as to whether or not the deceased held the two plots at Manyatta with other persons as alleged in the application leading to the first rectification. In short, the applicant made serious allegations which he failed to prove. In the end, his application turned out to be hollow and underserving of the orders sought. It is my finding that the application has no merit. I hereby dismiss it. The applicant Alfayo Njiru Mbiti shall pay to the administrators of the Estate of Jackton Mbiti Kibiruri deceased the costs of the application to be taxed by the Taxing Officer of this Court unless otherwise agreed by the parties. It is so ordered.

**G.B.M. KARIUKI, SC**

**JUDGE**

**Delivered at Milimani Law Courts, Nairobi, on this 19th day of December 2014 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.**

**JUDGE**

**COUNSEL APPEARING**

**Mrs Kiagayu advocate, of N. Kiagayu & Co. Advocates for the 1st respondent**

**Mr. S. G. advocate, of S. G. Mbaabu & Co. Advocates for the applicant**

**Court clerk – Mr. Wahinya Kugwa**