



REPUBLIC OF KENYA



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In re Estate of Henry Chepnyonyei arap Kimwei also known as Henry Chepnyonyei alias Henry Kimwei (Deceased) (Succession Cause 198 of 2014) [2025] KEHC 4222 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 198 OF 2014**

JRA WANANDA, J

APRIL 4, 2025

**IN THE MATTER OF THE ESTATE OF HENRY CHEPNYONYEI ARAP KIMWEI
ALSO KNOWN AS HENRY CHEPNYONYEI ALIAS HENRY KIMWEI (DECEASED)**

**IN THE MATTER OF
NICHOLAS KIPTOO MWEI APPLICANT**

RULING

1. This Ruling is an off-shoot of the earlier one I delivered herein on 5/07/2024. In that Ruling, I summarized the background of this matter as follows:
 - “2. The background of this matter is that the deceased, Henry Chepnyonyei, died intestate on 11/06/2011 at the age of 88 years. It is not in contention that he was married to 2 wives, Julia Chelimo Kimwei (1st house and also deceased) and Rebeccah Cheptoo Mwei (2nd house) and had a big number of children, including the 1st Applicant, the Respondent and the 2nd Applicant’s late mother. He also had a number of properties, including various parcels of land. The deceased was also said to have left behind a Will in which he appointed the said Rebeccah Cheptoo Mwei (2nd house) to be the executor thereof. Pursuant thereto, the said Rebecca Jeptoo Mwei on 6/06/2014 filed a Petition seeking Probate of Written Will.
 3. The Grant was then on 18/09/2014, given to the said Rebeccah Cheptoo Mwei. However, the same was challenged by the other widow, Julia Chelimo Kimwei (1st house) but after protracted litigation, the matter was settled by consent and by the fresh Grant given on 7/09/2018, the two widows were appointed co-Administrators. The Grant was later confirmed on 25/03/2019 and the estate distributed. From the record, the estate was divided between



and/or along the lines of the 2 houses. The Grant was however amended on 7/03/2022. This amendment was challenged by the 2nd Applicant and her sisters through their Advocates, Ngeno, Ondieki & Co. but later, the parties entered into the consent dated 14/12/2022 in settlement thereof.

4. One result of the said consent is that the 1st widow, Julia Kimwei (1st house) who had died in the intervening period, was substituted as co-Administrator, with her son, the Respondent herein, Nicholas Kiptoo Mwei. The fresh Grant containing this substitution as well as the Further Amended Certificate of Confirmation were then given on 14/03/2023. Once appointed a co-Administrator, the Respondent on 28/03/2023 applied for Rectification of the Further Amended Certificate of Confirmation. This Application was allowed and the Further Amended Certificate of Confirmation issued on 30/03/2023.”

.....

6. The two Applicants and the Respondent are all scions of the 1st house in that the 1st Applicant and the Respondent are a daughter and a son, respectively, of the late Julia Kimwei, the matriarch of the 1st house, and the 2nd Applicant is a granddaughter of the same Julia Kimwei. The Applications are therefore in respect to disputes entirely within the 1st house. The 2nd house is not involved.

2. The Further Amended Certificate of Confirmation referred to above, and issued on 30/03/2023 was however challenged by 2 family members on the ground that it was regularly obtained by the Applicant herein. In determining that challenge, by my said Ruling dated 5/07/2024, I found and directed as follows:

- “i) The order granted herein on 28/03/2023 allowing the Respondent’s Summons for Rectification of Grant, dated 28/03/2023, is hereby set aside in its entirety and/or vacated.
- ii) Consequently, the Further Amended Certificate of Confirmation of Grant issued herein on 30/03/2023 is also hereby set aside, nullified, revoked and/or cancelled together with all actions or steps undertaken or implemented pursuant thereto or on the basis thereof.
- iii) For avoidance of doubt therefore, the Grant that now remains in force or reverts to its validity is the Further Amended Certificate of Confirmation of Grant issued herein on 15/03/2023.
- iv) The Respondent’s said Summons for Rectification of Grant, dated 28/03/2023, be now fixed for inter partes hearing.
- v) The parties are however at liberty to enter into discussions with the aim of reaching a settlement over the matters or dispute herein.
- vi) This being a family matter, I make no order on costs.”

3. It is under the above background therefore that the Applicant’s current Summons for Rectification dated 28/03/2023 has returned for determination, but this time, on inter partes basis. The Application is filed through Messrs Arap Mitei & Co. Advocates and the prayers sought are as follows:



- i. [.....] spent
 - ii. That the Amended Certificate of Confirmation of Grant dated 15/03/2023 be rectified in the following respects as provided under Section 43(1) of the Probate and Administration Rules:
 - a. The distribution of parcel number Nandi/Kokwet/12 be amended as follows:

Judith Cheptanui - Nandi/Kokwet/12 – 3 acres

Gideon Kimutai - Nandi/Kokwet/12 – 2 acres

Nicholas Kiptoo Mwei - Nandi/Kokwet/12 – 3 acres (to hold in trust for the estate of Tony Kiplimo – Deceased)
 - b. LR No. 1181/72 Kapsabet Municipality be distributed as follows:

LR No. 1181/72 - Nicholas Kiptoo Mwei, Gideon Kimutai, Ezekiel Kipkoech, Lilian Jepkemei Mwei and Irene Chelimo - whole
 - c. Mosoriot plot No. 35 comprising of a petrol station and rental units.

Mosoriot plot No. 35 – Janet Cheronno Tigit, Elvis Kiprono Kurgat, Judith Cheptanui and Mariam Chepkosgei Magut - whole
 - iii. That the costs of this Application be borne by the Respondent.
4. In the Certificate of Urgency accompanying the Application, it was stated that the beneficiaries agreed on the mode of distribution but one of the beneficiaries, Judith Cheptanui, was inadvertently left out in the amended Certificate of Confirmation of Grant for the parcel number Nandi/Kokwet/12, that there was a mix-up in the names of the beneficiaries for LR No. 1181/72 and Mosoriot Plot No. 35 which has now been explained and rectified, and that the County Surveyor Nandi has already done the survey and is waiting for the amendments with respect to plot No. Nandi/Kokwet/12 to finalize the subdivisions.
5. The Application is supported by the Affidavit sworn by the Applicant, Nicholas Kiptoo Mwei, in which he deponed that in the Further Amended Certificate of Confirmation Grant issued on 15/03/2023, there was an omission which needs to be rectified in the manner set out in the above prayers. He deponed further that the beneficiaries have already assigned themselves properties as per the mode of distribution proposed above, and that the Application has been brought promptly.

Replying Affidavit

6. There does not seem to be any Replying Affidavit filed specifically in respect to the instant Application by any party as I have not come across any, either in the physical file or in the Judiciary Case Tracking System (CTS) portal. I may state that on 16/12/2024, Mr. Chemwok acting herein for one Mariam Chepkosgei Magut, informed the Court that he had filed his Replying Affidavit “long time ago”. For this reason, I directed him to supply to the Court a physical copy thereof. None seems to have been forwarded as directed though. However, as shall be noted below, Messrs Chemwok & Co. did file written Submissions opposing the Application.

Hearing of the Application

7. It was then agreed that the Application be canvassed by way of written Submissions. Pursuant thereto, the Applicant, through Messrs Arap Mitei & Co., filed the Submissions dated 15/01/2025 while Messrs Chemwok & Co. filed the Submissions dated 21/11/2024 on behalf of the said Mariam



Chepkosgei Magut. Up to the time of concluding this Ruling, I had not come across any Submissions filed by or on behalf of any other party.

Applicant's Submissions

8. I am constrained to overlook the Submissions made by the Applicant's Counsel as they comprise of factual matters that are nowhere deponed in the Supporting Affidavit and neither do they appear even in the body of the Application. In this regard, the Court of Appeal in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR, stated as follows:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

9. It is therefore trite law that a Judgment cannot be based on written Submissions, in place of, or in substitution for factual evidence, and if so done, such a Judgment would be a nullity.

Submissions filed Messrs Chemwok & Co.

10. Counsel based his Submissions on a Replying Affidavit said to have been sworn on 20/06/2023 which however as aforesaid, I have not come across. Be that as it may, Mr. Chemwok cited the case of Flora N. Wasike vs Destino Wamboko [1998] eKLR, the case of Purcell vs Trigell Ltd Ltd [1970] 2 ALL ER 671, the case of Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR, and also the case of Cristie v Cristie [1951] 2 ALL ER 574, and submitted that the Applicant has not demonstrated in any way that there has been any fraud, misrepresentation duress or any other circumstances necessitating the setting aside of the consent. He urged the Court to take note of the consent dated 14/12/2022 which details the distribution of the deceased's property as agreed by all parties, and in which consent, his client, the said Mariam Chepkosgei Magut, had been put in charge of the estate, but however the Applicant now seeks to change the same to have himself in charge without consulting the said Mariam Chepkosgei Magut. He also pointed out that it had been agreed in the consent that one Gideon Kimutai was to be given 9 acres, which the Applicant now seeks to change to 12 acres without a reasonable explanation. He also observed that the Applicant seeks to have the said Mariam Chepkosgei Magut removed from the property L.R. 1181/72 and that she be replaced by one Ezekiel Kipkoech which is also baffling as it had been unanimously agreed that the said Mariam Chepkosgei Magut was to remain in Kapsabet and would have 3 shops thereon.
11. According to Mr. Chemwok, the Application seeks to rewrite a consent, which act the Court cannot do. He then cited Section 74 of the *Law of Succession Act* and also Rule 43(1) of the Probate & Administration Rules and submitted that the process of rectification is similar to that of the making of a Grant, and which means that all beneficiaries should have been notified. On the question whether an Administrator can act independently without consulting his co-Administrators, he cited the case of In re Estate of Bernard Mukhove Barasa (Deceased) (Succession Cause 757 of 2015) [2022] KEHC 10146 (KLR), and also the case of In re Estate of Makokha Idris Khasabuli (Deceased) [2019] eKLR and submitted that the Applicant is not a sole Administrator but is acting as though he is. In conclusion, he prayed that the Application be dismissed with costs.



Determination

12. The issues that arise for determination in this matter can be summarized as follows:

“Whether the Amended Certificate of Confirmation of Grant dated 15/03/2023 and arising out of the Consent dated 14/12/2022 should be rectified.”
13. The Court’s power to order for Rectification of a Grant is donated by the provisions of Section 74 of the *Law of Succession Act*, which provides 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”.
14. Section 74 therefore expressly specifies the limited nature of errors in Grants that may be rectified.
15. Regarding the procedure for seeking Rectification, Rule 43(1) of the Probate & Administration Rules then provides 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
16. In acknowledging the powers bestowed upon the Court insofar as Rectification of Grants is concerned and the limits thereof, L. Gitari J, in the case of *Re estate of Kanyingi Gatwe (Deceased) (2018) eKLR* held as follows

“9. I have considered the application. From the onset I allow prayer No. -2- in as far as it relates to rectification of names. This is provided under Section 74 of the *Law of Succession Act* which gives the court jurisdiction to correct errors in names and descriptions or in setting out the time and place of deceased’s death, or purpose in limited grant which may be rectified by the court, altered or amended accordingly. The court can therefore order corrections of errors or mistakes which will not affect the substance of the grant.”
17. It is generally accepted that the provisions cited above limit or restrict the Court’s powers to rectify Grants to only 3 instances, namely, (i) errors in names and descriptions of persons or things; (ii) errors as to time or place of death of the deceased; and (iii) in cases of a limited grant, the purpose for which such limited grant is made. The question is now therefore, whether the instant Application fits within the 4 walls of the restrictions above.
18. Looking at the Application, it is clear that what it seeks is not a mere correction of a simple error. What it seeks are substantial changes and/or alterations to the Certificate of Confirmation of Grant which will, no doubt, substantially interfere with the core of the mode of distribution. In regard to such far-reaching changes sought to be made to a Grant in the nature of those now being sought by the Applicant herein through the avenue of Rectification, I cite the decision of Ali-Aroni J (as she then



was), made in the case of In Re estate of George Ragui Karanja (Deceased)(2016)eKLR, in which she stated as follows:

“....., distribution of an estate cannot be revisited through a rectification application, for such applications are ideal for correction of errors and omissions going by the language of section 74 of the *Law of Succession Act*. Redistribution amounts to a revision of the orders made by the court at the confirmation of grant. Such orders should be disturbed only through appeal or review or by the consent of the parties.” (emphasis mine).

19. Similarly, W. Musyoka J, in the case of In re estate of Charles Kibe Karanja (deceased) [2015] eKLR held that:

“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant”

10. In light of all the above, my view is that the nature of amendments sought by the Applicant, if granted, will bring about unilateral substantial changes to the Grant as it would, without the approval of the signatories to the already adopted consent and/or the affected parties, fundamentally vary the mode of distribution already adopted. That cannot be done through the Rectification of Grant route. For this reason alone, I would decline the Application.

20. There is a second hurdle for the Applicant. This arises from the fact that it is not in doubt that the Amended Grant sought to be rectified was made pursuant to a consent arrangement signed by the parties themselves, the family members. In the circumstances, it is imperative to note the circumstances within which a consent order can be reviewed, varied or set aside. On this point, the Court of Appeal, in the case of Brooke Bond Liebig v Mallya 1975 E.A 266 held as follows:

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement.”

21. Again, the Court of Appeal in the case of Kenya Commercial Bank Ltd. v. Specialized Engineering Co. Ltd (1982) KLR P.485 held that;

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court set aside an agreement.”

22. Finally, Hancox JA (as he then was), in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625 stated as follows:

“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out “



23. Looking at the instant Application, it is evident it does not allege the existence of any fraud or collusion, or any other such reason that would justify the Court altering it in the manner proposed by the Applicant. This is clearly a case of one party, after agreeing and entering into to a “deal” with another, subsequently and unilaterally, after executing it, changes his mind over the “bargain” already executed and returns with an attempt to overturn some of those agreed terms. This is even more apparent from the fact that no reasons have even been offered for the unilateral “change of mind”. Needless to state, this is not, and cannot be accepted as a ground for setting aside or altering a consent. Allowing the Application under the excuses preferred would set a dangerous precedent under which recording of consents in Court would amount to nothing and would lose total meaning.
24. There is also a 3rd obstacle. This is because it is also clear that a big portion of the amendments proposed will affect the respective sizes of acreage already distributed to various beneficiaries. The Court has not been informed whether all these affected people were served with the Application or whether they are even aware of it, and in case they are aware, what their response is.
25. The only alteration that can be allowed is one which, it can be demonstrated, was a term of the consent dated 14/12/2022 signed by the parties but which could have been inadvertently omitted, or not included or reflected in the subsequent Court order adopted on 6/03/2023, or in the subsequent Amended Certificate of Confirmation of Grant dated 15/03/2023.
26. Further, in respect thereto, although I note that in the Certificate of Urgency (although not repeated in the Affidavit), the Applicant alleges that one of the beneficiaries, Judith Cheptanui, was inadvertently left out in the Amended Certificate of Confirmation of Grant for L.R. No. Nandi/Kokwet, I have perused the consent dated 14/12/2023 signed by the parties and cannot trace anywhere in that consent, and my attention was not drawn to any clause, where the said Judith Cheptanui was allocated such share.
27. Before I pen-off, I must state that I am taken aback with the casualness with which such an important Application with far-reaching consequences, if granted, seems to have been prosecuted. The Supporting Affidavit, and by extension, the entire Application, besides being too sketchy and devoid of relevant information, does not even make any effort at all to bring out any grounds recognized for altering a consent order. There does not seem to have been any serious conviction or resolve in the prosecution of the Application.

Final Orders

28. In the premises, I rule and order as follows:
 - ii) The Applicant’s Summons for Rectification of Grant, dated 28/03/2023, is dismissed with costs to the said Mariam Chepkosgei Magut, who is the only party who filed a Replying Affidavit.
 - ii. I give liberty to any of the beneficiaries, including the said Judith Cheptanui, who can demonstrate that a term of the consent dated 14/12/2022 signed by the parties and awarding or giving a share or benefit to such beneficiary, was inadvertently omitted, or not included or reflected in the subsequent Court order adopted on 6/03/2023, or in the subsequent Amended Certificate of Confirmation of Grant dated 15/03/2023, to move the Court to seek inclusion or restoration of such term.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF APRIL 2025

.....



WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Chemwok for Mariam Chepkosgei Magut - Objector

N/A for other parties

Court Assistant: Brian Kimathi

