



**In re Estate of the Late Waeni Maingi Nthenge alias Waeni Maingi (Deceased)
(Succession Cause 844 of 2010) [2024] KEHC 1626 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 844 OF 2010**

FR OLEL, J

FEBRUARY 21, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE WAENI
MAINGI NTHENGE ALIAS WAENI MAINGI (DECEASED)**

BETWEEN

KIILU MAINGI PETITIONER

AND

MUINDE MATOLO RESPONDENT

RULING

A. Introduction

1. Before court for determination is the amended summons for rectification of grant dated 13. 06. 2022. The said application is premised on Section 74 of the *Law of Succession Act*, Cap 160 and Rule 43 & 73 of the *Probate and Administration Rules*. The applicant seeks for orders that the certificate of confirmation of grant dated 09.12.2022 issued to Kiilu Maingi the petitioner be rectified to indicate that acreage given to Jonah Kaloki Maingi to read 0.7785ha instead of 0.4047ha and that his title deed be rectified to confirm the new measurements. The said application is supported by the grounds on the face of the said application of the supporting affidavit of the applicant.
2. This application is opposed by the Respondent who filed his comprehensive replying affidavit dated 16th September 2022

B. Pleadings

The Application

3. The applicant did aver that the certificate of confirmation of grant herein was issued on 09.12.2011 and the said grant did contain an error as concerning Mr. Jonah Kaloki Maingi share of the estate property



known as Masii/Vyulya/1206 {hereinafter referred to as the suit parcel of land}. Under the said grant he was to get a share of the suit parcel of land measuring 0.4HA and indeed the suit parcel was later sub divided and he got his share thereof known as Masii/Vyulya/1860 measuring 0.4047 HA. There was an error as this did not correspond to the actual acreage on the ground which measured approximately 0.7785ha (a fact confirmed by the surveyors) and that it was in the interest of justice and fairness that the said application be allowed to rectify this error.

The Response.

4. The Respondent did file a comprehensive Replying Affidavit wherein he stated that the applicant (Kiilu Maingi) was uncle and he was appointed as the administrator of this estate. Later on 09.12.2011, the grant was confirmed and the suit parcel was subdivided as follows;
 - a. Jonah Kaloki Maingi was given 0.4ha which he had purchased
 - b. Titus Mutisya Wambua was given 0.2ha which he had purchased
 - c. The remainder of the land was registered in the name of the applicant Kiilu Maingi to hold interest for himself and other beneficiaries including Ndeto Matolo Maingi (Respondent's mother) Ndolo Dominic Muthuku, Monica Mbeni Muia, Ndunge Kithusi and Kalondu Mutiso.
5. The said confirmed grant was implemented and parcel Number Masii/Vyulya/1206 sub-divided to create parcel Masii/Vyulya/1860 to 1862. Parcel Masii/Vyulya/ 1860 measuring 0.4047 was registered under the name of Jonah Kaloki Maingi while parcel Masii/Vyulya/1862 was registered in the name of Titus Mutisya Wambua. The 3rd portion being Masii/Vyulya/1862 was registered under the names of the applicant to hold interest of the family as per the confirmed grant.
6. That after sub-division was effected Mr. Jonah Kaloki Maingi started to claim that where he had built his 'home' formed part of Masii/Vyulya/1860.This prompted the him to file for revocation of the grant as he wanted his mother's share to be registered under his name but vide a Ruling delivered on 10.10.2016 the court did hold otherwise. Mr Jonah Kaloki Maingi, then proceeded to file a civil suit before the chief magistrate court at Machakos being (Machakos CMCC No. 71 of 2015) wherein he sought for orders that the respondent's house be demolished on the basis that the respondent had trespassed into his parcel of land Masii/Vyulya/1860.
7. The trial magistrate did order that the surveyors do visit the suit parcel and return a report on who was in occupation of Masii/Vyulya /1860 and/or if there was any trespass thereon. In the report filed, the surveyors were clear and did find that that the Respondent had built his home on parcel Masii/Vyulya/1862 and there as a distinct sisal plantation boundary between the two parcels of land. The trial court proceeded to also find that the applicant was entitled to peaceful possession and occupation of parcel No. Masii/Vyulya/1860 measuring 0.4047ha and granted an injunction in his favour. It was also to be noted that the court declined to order that the applicant was entitled on 0.7785 ha as requested.
8. The Respondent further submitted that he was aware that in 1978, the applicant had bought a portion of the estate property measuring 0.4ha which the court awarded to the plaintiff (Jonah Kaloki Maingi) at trial before the Magistrate court, and therefore he had completely no basis to seek for a large portion on (0.7785ha). The administrator herein (Kiilu Maingi) had also informed him that he was not the one who had filed this application and that it was Mr.Jonah Kaloki Maingi who had done so without his authority and/or instructions and this was done in bad faith, to enable the said Mr. Jonah Kaloki Maingi to evict him from their land and grab a portion of parcel no. Masii/Vyulya/1862.



9. The application as filed was fatally defective for the reason that the said Mr. Jonah Kaloki Maingi had not been joined as a party thereto. There was no error in the confirmed grant dated 09.12.2011, the sub-division of the estate property was rightly effected according to the schedule of distribution and in conformity with the certificate of confirmation of the grant. The said application was brought before court in bad faith and the Respondent did pray that the said application be dismissed with costs.

C. Submissions

The Applicant Submissions

10. The applicant filed his submissions on 13.04.2023 and reiterated all the facts pleaded in the said application. The applicant submitted that he had demonstrated that the surveyor who carried out the survey work had made a mistake on the acreage shared to Mr. Jonah Kaloki Maingi whose true acreage of land was found to be 0.7785ha instead of the 0.4047ha awarded to him. This fact could be confirmed by the mutation report which was annexed and thus the call for rectification was justified. The Replying Affidavit filed by the Respondent had also alluded to the fact that beneficiaries had not given consent. However, this could be surmounted by inviting/summoning the said beneficiaries during the hearing of this application for them to confirm that indeed they had no objection to the confirmed grant being amended. The applicant therefore prayed that his application be granted with costs.

Respondent's Submissions

11. The Respondent filed his submissions on 03.10.23 and deposed that the applicant was most underserving of the orders sought as the estate property was rightly sub-divided as per the confirmed grant and new title deeds issued to parties with exact acreage as decreed in the confirmed grant. The said Mr. Jonah Kaloki Maingi had filed a suit in Machakos CMCC no. 71 of 2015 wherein he sought to demolish the Respondent property and for issuance of injunctive orders. The court did send government surveyors to the ground and they returned a report to the effect that both parties resided within their respective boundaries and that the Respondent had not trespassed into the land of the said Mr. Jonah Kaloki Maingi. This issue was thus determined and there was no appeal filed as against the said judgment.
12. The Respondent relied on the case of *In Re Estate of M.N.J (deceased)*(2018) eKLR where it was held that there must be an end to litigation. The principle of *res judicata* was applicable in succession matters and having not appealed as against the Judgement issued by the trial court, Mr. Jonah Kaloki Maingi could not be allowed to regurgitate this issue again before this court.
13. The Respondent also pointed out that the orders sought were not within the ambit/did not fall under provisions of Section 74 of the *Law of Succession Act* as the changes sought would go to the core of distribution as done and would affect the interest of other parties. The proper approach should have been to review of the orders made at the confirmation of the grant. See *Re Estate of Charles Kiba Karanja(deceased)* 2015 eKLR, *Estate of James Wainaina Ng'ang'a (deceased)* (2021) and *Re Estate of Njau Kanyoria (deceased)*(2019)eKLR.
14. The orders being sought to change the size of a parcel of land was not the same as rectification of an error as envisaged under the law and that would amount to re-distribution of the estate. Mr. Jonah Kaloki Maingi had falsely filed this application, through the administrator who had no knowledge and/or consent of the same. The application was hopelessly incompetent and the Respondent prayed that it be dismissed with costs.



Analysis & Determination.

15. I have considered the said application, the affidavit made in support thereof and in opposition thereto, the parties respective submissions and find that the only issue for determination is whether the applicant should be allowed to rectify the confirmed Grant dated 09.12.2022 to amending the acreage given to Mr. Jonah Kaloki Maingi to read 0.07785ha instead of 0.4047ha and that his title deed No Masii/Vyulya/1860 be rectified to confirm the new measurements.
16. Rectification of Grant id provided for under Section 74 of the *Law of Succession Act*, Cap 160 laws of Kenya, which provided that;

“Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, maybe rectified by the court, and the grant of representation, whether before or after confirmation, maybe altered and amended accordingly.”
17. The said section 74 of the *Succession Act*, Cap 160 laws of Kenya is to be read together with Rule 43(1) of the *Probate and Administration Rules*, which provide 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 of descriptions of any person or thing or as to the time or place of 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.” Rectification is allowed in order to correct a mis- description of a property or to correct a name which has not been fully or properly described in the grant.”
18. The errors allowed to be corrected under section 74 of the *Law of succession Act*, Cap 160 are those with respect to names/ description of parties or property, time and place of death of the deceased or in case of limited grant the purpose for which it is sort. Herein the suit property was known as Masii/ Vulya/1206, which at confirmation was sub divided into three portions and the same distributed as agreed. The applicant’s proposal to enlarged the share given to Mr. Jonah Kaloki Maingi from 0.4047 ha to 0.7785ha would in effect touch on and change the interest of other beneficiaries and that would definitely go beyond the ambit of rectification of grant as envisaged under Section 74 of the *Law of succession Act*.
19. In *Re Estate of Charles Kibe Karanja (Deceased)* 2015 eKLR, the court did hold that;

“If..... there is discovery of new assets that were not available or had not been discovered at the time of distribution, amongst 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 distribution. They cannot be effected 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. The proper approach ought to be an application for review of the orders made at the confirmation of the grant.”



20. Further the court did further find that;

“I find that the sweeping changes proposed to be made by the summons do not fall under the category and scope of rectification under section 74. By this summons the Administrator is proposing to make fundamental and far reaching changes to the grant issued under the guise of rectification. In the certificate of confirmed grant issued on 18th October 2000 and rectified on 12th October 2004 and further rectified on 23rd October 2007 the family of Njoroge Nyambura were not included as beneficiaries to the estate yet the administrators by this summons seeks to include them as beneficiaries. The administrator must apply to revoke the original grant and apply that the same be Re issued with the proposed changes in the mode of distribution of the estate. The consent of ALL the beneficiaries must be obtained once again.”

21. The changes sought by the applicant herein to increase the land acreage is fundamental and goes to the core of the distribution. It cannot be effected without affecting the interest of other beneficiaries and therefore I do find and hold that such changes cannot be effected through amendment of the confirmed grant. If the same is to be allowed, the administrator has to apply to revoke the original grant and apply for fresh issuance of the same with the new mode of distribution proposed and consented to by all beneficiaries. In this instance, the same has not been done and therefore the application as filed fails.

22. This finding out to have been enough to dispose of this application but there is the issue of whether the said application being *res judicata*. One Mr. Jonah Kaloki Maingi did file a suit being Machakos CMCC No 71 of 2015 as against the respondent herein. In the said suit he sort for permanent orders to bar the respondent from trespassing into his parcel of land. While giving his evidence the said Mr. Jonah Kaloki Maingi did seek for a declaration that his parcel Masii/Vyulyu/1860 occupies an area that was 0.775ha and not 0.4047ha as indicated in the title deed. The court trial court did specifically make a finding in its judgement dated 02.12.2021 that his parcel of land, measured 0.4047 and his cause of action extended only to that extent.

23. Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

24. It is now old hat that the said doctrine applies to both suits and applications as was held in *Abok James Odera vs. John Patrick Machira* Civil Application No. Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of *res judicata* there must be:

- (i). a previous suit in which the matter was in issue;
- (ii). the parties were the same or litigating under the same title;
- (iii). a competent court heard the matter in issue;
- (iv). the issue had been raised once again in a fresh suit.



25. The rationale of the doctrine of *res judicata*, was explained in the the decision of the Court of Appeal in [Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others](#) (2017) eKLR.

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

26. In the [Maina Kiai case](#) (*supra*), the Court quoted with approval the Indian Supreme Court in the case of [Lal Chand vs. Radha Kishan](#), AIR 1977 SC 789 where it was stated;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit.”

27. The issue of whether Jonah Kaloki Maingi bought a portion of Masii/Vyulya/1860 measuring 0.4047ha or 0.775ha was conclusively determined by the trial court in Machakos CMCC No 71 of 2015. The said Mr. Jonah Kaloki Maingi did not file an appeal as against the said Judgement and it goes without saying that it is not proper for this court to revisit the said issue. Further it is also my finding that such a claim is a land claim, which falls outside the jurisdiction of this court and could only be properly handled by the Environment and Land Court. The issues raised are thus *res judicata* and devoid of merit.

Disposition

28. The upshot is that the Amended Summons for rectification of grant dated 13.06.2022 is hopelessly defective and completely devoid of merit. The same is dismissed with costs to the Respondent.

29. The costs are assessed at Ksh.30,000/- payable within the next 30 days. In default execution to issue.

30. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF FEBRUARY 2024.

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 21ST DAY OF FEBRUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

In the presence of;

No appearance for Petitioner/Applicant



Mr. Mutinda Kimeu for Respondent
Sam Court Assistant

