



REPUBLIC OF KENYA



**In re Estate of Dominic Kilonzi Nzung'u (Deceased) (Succession Cause 533 of 2012) [2024] KEHC 1472 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1472 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 533 OF 2012**

**FR OLEL, J**

**FEBRUARY 14, 2024**

**IN THE MATTER OF THE ESTATE OF DOMINIC KILONZI NZING'U  
(DECEASED)**

**BETWEEN**

**RAEL NDULE DOMINIC ..... 1<sup>ST</sup> PETITIONER**

**PETER MUEMA NZING'U ..... 2<sup>ND</sup> PETITIONER**

**PATRICK NYAMASYO NZING'U ..... 3<sup>RD</sup> PETITIONER**

**ALEXANDER MANGAU NZING'U ..... 4<sup>TH</sup> PETITIONER**

**AND**

**BENJAMIN KAVOO NZING'U ..... RESPONDENT**

**RULING**

**A. Introduction**

1. Before the court is a summons for rectification of grant brought under section 47 and 74 of the [Law of Succession Act](#) and Rule 43 and 73 of the [Probate and Administration Rules](#). The applicant seeks for the following prayers that;
  - a. Spent
  - b. The confirmed grant issued herein on 21.2.2014 be rectified to remove the following properties from the schedule thereto;
    - i. Aimi Ma Kilungu Plot No 087.
    - ii. Commercial Plot No 787-Aimi Ma Kilungu.



- iii. Share No 1495 At Aimi Ma Kilungu.
  - c. The Applicants name be struck from the schedule to the confirmed grant issued on 21/2/2014.
  - d. The costs of this Application be paid by the Petitioner Respondents.
2. The Application is supported by the Affidavit of Benjamin Kavoo Nzing'u sworn on 17<sup>th</sup> February 2020 in which he contends that his properties Aimi Ma Kilungu Plot No 087, Commercial Plot No 787-Aimi Ma Kilungu and Share No 1495 at Aimi Ma Kilungu were unlawfully listed as forming part of the deceased's estate yet they have never belonged to the deceased. The law was quite clear that only properties of the deceased person formed part of his estate and it was therefore an error to have his property shared out as part of the estate. The applicants were attempting to fraudulently acquire his property using this court process and that the same ought not to be allowed.
  3. The Respondents opposed this application and filed a Relying Affidavit dated 13<sup>th</sup> July 2022 sworn by the respondents Rael Ndule Dominic, Peter Muema Nzing'u, Patrick Nyamasyo Nzing'u and Alexander Mangau Nzing'u wherein they contended that the application as filed is an afterthought, full of falsehoods, misleading, scandalous and does not disclose any cause of action. The respondents aver that the Applicant was a brother of the deceased herein and while applying for the confirmation of grant they factored in the shares of every interested party and/or assets in which the deceased had an interest.
  4. The respondents reiterated that the Applicant herein was their uncle being brother to their father the late Domnic Kilonzo & the Late Nzioki Nzingu. In relation to share number 1495, all the three brothers contributed to purchase the said shares. And subsequently entered into an agreement dated 5<sup>th</sup> June 2007 in the presence of the Area chief and Assistant chief into how the said shares and proceeds therefrom would be distributed, based according to one's contribution. Benjamin Kavoo contribution was determined to be Kshs 15,000/=, Nzioki Nzingu contribution was determined to be Kshs 1000/= and Dominic Kilonzo's contribution was determined to be Kshs 9,000/= respectively.
  5. Later on when issues arose and started simmering between the said brothers, they were all summoned to attend a meeting at the Deputy County Commissioner's office but the Applicant deliberately declined to attend the said meeting. Later on, the applicant secretly and without disclosing the interests of his late brothers obtained a title deed for one of the parcels of land being Title deed Number Konza south/ Konza south block 4(Aimi ma Kilungu) 1140. Finally, the applicant had also filed Machakos ELC No E030 of 2020, where he had also sued the respondents with respect to the above-mentioned property at Konza and the respondents too had filed their counter claim therein.
  6. This application was disposed of by way of written submissions. The Applicant and Respondents filed submissions on 18<sup>th</sup> October, 2022 and 25<sup>th</sup> September 2023 respectively.

### **Analysis & Determination**

7. I have carefully considered the Summons for rectification of grant, the Affidavit in support of the summons, the Respondent's Replying Affidavit and both set of submissions filed. The only issue which arise for determination is whether the confirmed grant issued herein on 21<sup>st</sup> February 2014 should be rectified to remove properties known as
8. Aimi Ma Kilungu Plot No 087, Commercial Plot No 787-Aimi Ma Kilungu and Share No 1495 at Aimi Ma Kilungu from the schedule of properties listed therein.



9. Rectification and annulment of Grant is governed by Section 74 of the *Law of Succession Act*, Cap 160 Laws of Kenya, and Rule 43 and 73 of the *Probate and Administration Rules*.

Section 74 of the *Succession Act*, Cap 160 stipulates as follows:

Errors Maybe rectified by court.

“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, maybe altered and amended accordingly.”

10. In the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR the court did hold that;

“The law on rectification or alteration of grants is Section 74 of the *Law of Succession Act* and Rule 43 of the *Probate and Administration Rules*..... What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out of the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general.....”

11. Section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya) provides that:

“107. Whoever desires any court to give judgment as to any legal right or liability (1) dependent on the existence of facts which he asserts must prove that those facts exist...”

12. There are three plots in dispute; that is; Aimi Ma Kilungu Plot No 087, Commercial Plot No 787-Aimi Ma Kilungu and Share No 1495 at Aimi Ma Kilungu which the Applicant contends are his and they are not the deceased property. However, no concrete evidence has been presented before this court for consideration to indeed show that the said parcels of land were wrongly included as part of the Estate of the deceased either wholly or partially.

13. It is trite law that he who alleges must prove. With regard to plot Aimi Ma Kilungu Plot No 087, there is no document supplied to the court by the applicant to show that he exclusively owns this property nor has he pin pointed the error made by the court in the manner in which the confirmed grant was recorded to warrant its removal. To the contrary, the confirmed grant is clear that the said property is to be sub divided as amongst the three brothers and the applicant’s interest is clear indicated therein. As regards Commercial Plot No 787-Aimi Ma Kilungu, the Applicant has attached what looked like a card titled Aima Ma Kilungu Limited, the section for members name, membership number and ID card number are blank. It is therefore impossible for the court to infer whom the plot belongs to him.

14. The Applicant has also attached a card titled Aima Ma Kilungu Limited- Allotment of Agricultural and Commercial Plots, the section for members name, membership number and ID card number are blank. It is in reference to agricultural plot number 089 which is not in dispute before this court. The other evidence before the court are various receipts for member number being 1495. There are receipts for payment of shares and registration fees;

- a. Dated 12.3.05 for Kshs 4,000
- b. Dated 10.8.1985 for Kshs 50 being registration fees.



- c. Dated 10.8.1985 for Kshs 1,000 being payment for one share.
15. The applicant also did attach his certificate of shares dated 01.07.2006. The share certificate indicates that he has twenty-five shares in Aimi Kilungu Limited. The Respondents on the other hand attached a letter dated 05.06.2007 signed by the three brothers Nzioki Nzing'u, Dominic Kilonzo and Benjamin Kavoo Nzing'u showing their various interest in the parcels jointly bought, which agreement was witnessed by the chief and the assistant chief. The letter has not been disputed by the Applicant and it goes without saying that it does clearly show that the three brothers have common interest in the disputed properties.
16. From the evidence presented before this court there is no error, to be rectified by the court which relates to names or descriptions, or setting out of the time or place of the deceased's death. What is clear is that the applicant wants this court to determine land dispute issues between him and his late brother family over properties that they jointly bought. This court cannot be drawn into such disputes as it does not have the jurisdictions to do so.
17. The upshot, is that I find that the Applicant has failed to satisfy the requirements he need to prove before an order for rectification could be granted. The Summons dated 17<sup>th</sup> February 2020 therefore has no merit and the same is dismissed with costs to the Respondents.
18. It is so ordered.

**RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2024**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2024**

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam - Court Assistant

