



REPUBLIC OF KENYA



In re Estate of Nguku Nthiwa Mbai (Deceased) (Succession Cause 325 of 2009) [2024] KEHC 3811 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3811 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 325 OF 2009**

FR OLEL, J

APRIL 12, 2024

IN THE MATTER OF THE ESTATE OF NGUKU NTHIWA MBAI (DECEASED)

BETWEEN

WILLY MAKAU NGUKU 1ST PETITIONER

BEATRICE MBITHE NGUKU 2ND PETITIONER

AND

MATHEW WAMBUA SANZI APPLICANT

RULING

A. Introduction

1. Before the court is the Amended summons for rectification of grant dated 25th November 2021 brought under section 47 and 74 of the [Law of Succession Act](#), Cap 160 and Rule 49 and 73 of the [Probate and Administration Rules](#). The applicant seeks for the following prayers that;
 - a. That the certificate of Grant issued by this Honorable court on the 3rd June 2019 be rectified and fresh certificate of confirmation of grant do issue in the following manner,
 - i. The shares of Kasyima Sanzi, Muoki Sanzi, Serah Sanzi, Katee Sanzi and Mathew Wambua Sanzi comprised within Kalama/Muumandu/307 be consolidated to become 0.0833 Ha and the same be registered in the names of Mathew Wambua Sanzi absolutely.
 - ii. The shares of Kasyima Sanzi, Muoki Sanzi, Serah Sanzi, Katee Sanzi and Mathew Wambua Sanzi comprised within Plot No 371 Kalembwani and Ngaamba Farmers Ltd be consolidated to become 0.16666 Acres and the same be registered in the name of Kasyima Sanzi absolutely.



- b. That an order do issue for the deputy Registrar of this court to sign on behalf of the administrator's all the relevant documents including but not limited to transmission forms for the effective transfer of the properties of the Estate to the beneficiaries.
2. The Application is supported by the grounds on the face of the said Application and the Supporting affidavit of Mathew Wambua Sanzi sworn on 25th November 2021 and Supplementary Affidavit dated 23rd June 2023. While this application is opposed by the respondents through the replying affidavit of Willy Makau Nguku dated 10th February 2022.

B. The Application

3. The applicant contends that after the certificate of confirmation of Grant had been issued, they did consult a surveyor and it had come to the attention of five beneficiaries' namely; Kasyima Sanzi, Muoki Sanzi, Serah Sanzi, Katee Sanzi and Mathew Wambua Sanzi that the portion of land which they were entitled to inherit individually did not make Agricultural and economic sense as the portions were too small. The said beneficiaries had therefore agreed to consolidate their respective shares and have the same transferred absolutely as prayed for above.
4. The rectification sought did not in any way affect and/or change the interest of other beneficiaries nor did it touch on their shares and therefore they would not be prejudiced in any manner. This court was therefore urged to allow this application and also direct the Deputy registrar to sign all transmission documents to effect transfer of the estate since the administrators had failed and/or neglected to do so.
5. The Respondents opposed this application through the Replying Affidavit of Willy Makau Nguku who deposed that the said application lacked merit as distribution was done after the court had heard all the parties. The rectification sought was misplaced as it sought to consolidate shares that do not exist in the grant and therefore unmerited. Further as administrator's, they initially did not have funds to facilitate the distribution process, but were currently in a position to do so, but the said process could only move on after this application had been determined. This application was therefore an abuse of the process of the court and they prayed that it be dismissed.
6. In the Supplementary Affidavit, the applicant reiterated that the shares the sought to be consolidate were not nonexistent as the five beneficiaries' shares were intact, but it did not make economic or agricultural sense to sub divide the land as proposed. In parcel LR No Kalama/Muumandu/307 if shared amongst the five beneficiaries, they would individually get 0.083333335 and for LR. No Plot 371 Kalemweni & Ngaaba Farmers Ltd, the shares of the five beneficiaries totaled to 0.16666666 HA. The prayers sought in the amended summons were therefore valid.

C. Submissions

7. The Applicant did file their submissions on 23rd June 2023, wherein they reiterated the fact that they were beneficiaries of the Late Sanzi Nguku (a deceased Son) of the Estate and based on the advice of their surveyor , they had realized that the portions they were entitled to were too small and would not make Agricultural or economic sense and therefore they had agreed to consolidate their respective shares and the same be transferred to the individual beneficiaries as prayed for in the amended summons. This was individually confirmed by the five administrators who has signed a consent to that effect.
8. As regards prayer (2), the applicants did contend that the estate Administrator's had failed, neglected and/or ignored to administer /effect distribution of the estate in a proper manner as directed by court, yet they had a mandate to do so under section 83(f), (g) and (i) of the *Law of Succession Act* to do so



within six months from the date of confirmation of Grant. The confirmed grant had been issued on 4th July 2019 and four (4) years down the line no concrete reason had been advanced before court as to why the administration of the Estate had not been complete. The court had wide discretion under Section 47 of the *Law of Succession Act* to entertain any Application and to make expedient orders and it was therefore in the interest of Justice to allow the deputy registrar to sign off the transfer by transmissions forms. Reliance was placed on *RE; Estate of Wilfred Munene Ngumi (deceased)* 2020 eKLR.

9. The Administrator's/Respondents did also file their Submissions on 6th November 2023. They did submit that rectification of grant was provided for under Section 74 of the *Law of succession Act*, Cap 160 laws of Kenya and Section 43(1) of the Probate and Administration Rules. The law provided for rectification where there was an error in the names, description of any party or property, or error as to the place and time of death. The power given under the said section of law and rules were therefore not general. What the applicant has sought for was for Amendment of grant and that could not be dealt with under Section 74 of the *Law of succession Act*.
10. Under the confirmed grant, the share of the late Sanzi Nguku was to be jointly registered in favour of all his children. In parcel Kalama/Muumandu/307 his beneficiaries/children were to get a consolidated acreage of 0.2ha, while in LR. No Plot 371 Kalembweni & Ngaaba Farmers Ltd, they were to get 0.4ha, which acreage were to be jointly registered in the names of all his children. To that extent, it had not been shown which error was made by court in allocating all his children equal share and therefore there was no basis upon which to grant the orders sought. Reliance was placed on *In the matter of the Estate of Hasalon Mwangi Kabero* (2013) eKLR & *In the matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased)*, (2013) eKLR.
11. Further the respondent did submit that there was no need for the Deputy registrar to sign off the transfer by transmissions forms as they had not refused to finalize the distribution process. Initially the problem was lack of funds, but that had been overcome and the only issue pending and had stopping finalization of this process was this application filed by the applicant in 2021. Otherwise the administrators remained ready and willing to complete the administration process.
12. The administrator's/respondents therefore prayed that this court finds that this application lacks merit and proceed to dismiss it with costs.

D. Analysis & Determination

13. I have carefully considered the Amended 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 3rd June 2019 should be rectified as proposes and/or whether the deputy registrar should sign off the transfer by transmissions documents.
14. 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.”



15. While Rule 43(1) of the *Probate & Administration Rules* further provide that;
- “where the holder of the grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to names or description of any person or thing or as to the time and 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 made.”
16. From the wordings of these provisions, it is clear that rectification of grant is limited to correction of errors in the names and description or in the setting forth the time and place of the deceased death. In general terms, rectification is not meant to correct errors which would substantially alter the grant.
17. *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.....
- Where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the *law of succession Act*, the applicant ought to approach the court under order 44 of the *civil procedure rules*. A review under Order 44 of the *Civil Procedure Rules* maybe sought upon discovery of a new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision-Order 44of the civil procedure rules on account of some mistake or error apparent on the face of the record and on the ground that there existed sufficient reason for review of the certificate of confirmation of grant.”
18. In *Re; Estate of Njagi Rurima (Deceased)*,(2020) eKLR, Florence Muchemi J did state that;
- “There is no provision in the Act which permits rectification or Amendment by adding a new beneficiary in the grant or to redistribute the estate.”
19. Similarly in *Re; Estate of Charles Kibe Karanja(Deceased)*,(2015) eKLR W.Musyoka J While interpreting section 74 of the Act did state that;
- “From the wording of Section 74, it is plain that the same was not tailored for amendment of such document’s as certificate of confirmation of grant, but rather of grants of representation themselves, be they be full, limited , confirmed or not. A party wishing to have rectified or altered or amended a certificate of conformation of grant, need not approach court through section 74 of the *law of succession Act*, for reasons that I have given above; rather they ought to apply for review of the orders made upon the application for confirmation of grant where the alterations sought are fundamental or for amendment of the certificate under Rule 73 of the probate and administration rules to address minor errors or mistakes in the body of the certificate.
- A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. 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 almost others; it would be imprudent to seek rectification or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the root core of the distribution & cannot be effected without touching on the orders made by the court on distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant.”

20. While the applicant’s proposal is logical, it cannot be allowed under the provision’s the basis upon which his application is brought before court. The said rectification as proposed does not constitute an error as what the applicant seeks to do is to have the assets of the estate redistributed. Such changes are fundamental/not superficial, and the court further notes that not all the children/beneficiaries of (Sanzi Nguku- deceased son) have consented to the proposed redistribution. The same therefore cannot be allowed. Finally, what the applicant proposes can very easily be effected after distribution, by partitioning/ sub dividing the land given to the said beneficiaries as they so wish without affecting the interest of the other parties herein.
21. Finally, on the issue of having the deputy registrar sign the transmission documents, it is clear that the administrators have power under section 83(f), (g) & (i) of the *Law of Succession Act* to complete administration of the estate within 6 months from the date of confirmation of grant and to produce before court accurate accounts of the completed administration. The confirmed grant herein was issued on 4th July 2019 and obviously it has taken over 4 years yet the estate is yet to be distributed. This partially can be attributed to the delay in determining this application, which goes without saying was an impediment towards finalization of the distribution process.
22. The petitioner’s/respondents herein are therefore put on notice that under section 83 of the *Law of Succession Act*, the court shall require the completion of the administration and distribution of the estate in accordance with the confirmed grant within the next 6 months. If the administrator shall by then not have set in motion and completed the transmissions process, the deputy registrar/ executive office of this court will be at liberty to execute and complete the said transmissions documents strictly as provided for under the confirmed grant dated 4th July 2019.

E. Disposition

23. 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. Prayer (1) of the Amended Summons dated 25th November 2021 therefore has no merit and the same is dismissed, while prayer (2) thereof is allowed as per the findings stated in paragraph (22) above.
24. The court also noted that there is an application (undated), but filed on 21st January 2022 which seeks for orders that the deputy registrar be authorized to sign the transfer by transmission forms. Having made a determination herein on the said issue, based on Section 74 of the *Law of Succession Act* as read with rule 44 of the probate and administration rules and while applying the “oxygen principles” to expeditiously dispose off matters, in timely manner. I do declare that the said application filed on 21st January 2022 be marked as compromised and shall be subject to the orders issued herein.
25. This being a family matter, I direct that each party shall bear their own costs for the two applications determined herein.
26. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF APRIL, 2024.



FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 12TH DAY OF APRIL, 2024.

In the presence of;

Mr Muthoka for Applicant

Ms Makau for Respondent

Sam Court Assistant

