



In re Estate of Clement Itolondo Likhutu (Deceased) (Succession Cause 366 of 2001) [2024] KEHC 4770 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 366 OF 2001**

PJO OTIENO, J

MAY 8, 2024

BETWEEN

ELIJAH LUCHITIO MUKABALE PETITIONER

AND

FRANCIS AMBAYE MUKABALE 1ST OBJECTOR

JOSPEH NGAIRA 2ND OBJECTOR

RULING

1. For court's determination are two applications dated 23/10/2023 and dated 20/11/2023 respectively. The application dated 23/10/2023 was initiated by the petitioner and is brought pursuant to sections 47 and 83 of the *Law of Succession Act* and rule 73 of the *Probate & Administration Rules* seeking the orders that; the court be pleased to issue an order directing the Land Registrar Kakamega to dispense with the production of title deeds in respect of LR No. Isukha/Mukhonje/536, LR No. Isukha/Lukos/28 and LR No. Isukha/Mukhonje/1108 and that court empowers its executive officer court to execute all relevant documents on behalf of the deceased beneficiaries of the estates of Martin Bulinda Mukabale, Teresina Impiti, Ernest Ilavoka Mukabale, Pius Milimi Mukabale and Thomas Kenyatta Itolondi who are delaying the finalization of the transmission process.
2. The application is supported by the grounds on the face of the record and the affidavit of Elijah Luchitio Mukabale sworn on the even date in which he avers that the court directed that property known as LT Isukha/Mukhonje/1536 be distributed amongst Adrian Indenche Mukavale (deceased), Martin Mulinda Mukabale (deceased), Alphonse Muchia Mukabale, Joseph Ngaira Mukabale, Francis Ambeyi Mukabale and Teresina Impiti (deceased). He asserts that this court rectified the grant on 18/7/2023 to the effect that the share of Adrian Indenche Mukavale would go to Raphael Tom Indenche who is his only survivor. He claims that the process of transmission has been made difficult by Martin Bulinda Mukabale, Teresina Impiti, Ernest Ilavoka Mukabale, Pius Milimi Mukabale



and Thomas Kenyatta, Thomas Kenyatta Itolondo, Joseph Ngaira, Francis Ambeyi Mukabalaa and Christopher.

3. The application is resisted by Francis Amneyi Mukabale by the replying affidavit sworn on 28/11/2023 in which he avers that their advocate was not served with the application leading up to the rectification of the grant leaving out some beneficiaries and that the name of Joseph Ngaira Mukabale has been erroneously mentioned in the place of Alphonce Mushira Mukabale.
4. The second application dated 20/11/2023 was initiated by the objectors and it is brought pursuant to sections 47 & 74 of the Law of Succession Act and Rules 43,63 & 73 of the Probate & Administration Rules seeking the orders that; the court reviews and/or sets aside the proceedings and orders made on 18/7/2023 issued on the administrator's application dated 18th July, 2023; that the ruling dated 24/3/2023 be reviewed substituting the name of Joseph Ngaira Mukabale with the name Alphonce Mushira Mukabale at paragraph 7 of the judgment and order (b) of the judgment which was erroneously typed and thus a fresh or rectified certificate of confirmation of grant be issued to reflect the changes.
5. The application is mounted on the grounds on the face of the record which are reiterated in the supporting affidavit of Francis Ambeyi Mukabale sworn on 20th November, 2023. The grounds are that *vide* an application dated 18/7/2023, the petitioner sought the rectification of the certificate of confirmation of grant issued on 24/3/2023 in order to change the name of Adrian Indeche Mukavale who is deceased and replaced with the name of Raphael Tom Indeche to be the beneficiary of the parcel of land known as LR No. Isukha/Mukhonje/1536 which is registered in the names of the deceased (Clement Itolondo Likhutu) herein. The dissatisfaction is that the application and rectified certificate of confirmation of grant were not served on various advocates on record and that Raphael Tom Indeche is a grandson of the deceased who has other siblings who were not captured in the rectified grant. The other claim is that there is an error apparent on the face of the judgment dated 24/3/2023 being that the name Joseph Ngaira Mukabale has been erroneously typed in the place of Alphonce Mushira Mukabale which ought to be corrected and that the typing error touches on the substratum of sharing of the estate because Alphonce Mushira Mukabale was supposed to receive a lesser share of the estate.
6. Parties were directed to file and exchange submissions in canvassing the two applications pursuant to which directions both sides have so complied with by filing separate submissions for each of the applications. The court has on his part taken time to read both sets of submissions and given the same the due consideration.
7. Having considered both matters in totality, the court takes the view that the Objectors' application be dealt with fast because it resists the implementation of the certificate of confirmation in its current form. It is thus more efficacious to settle on the due shares to all beneficiaries before implementation is considered. The implementation shall only become necessary if the rectified certificate of confirmation remains unassailed. If however it gets upset, or the scheme of sharing be interfered with, it shall be of no use to consider the application to implement the certificate.
8. It is the submission by the Objectors that there is an error apparent on the face of the judgment dated 24/3/2023 in that the name of Joseph Ngaira Mukabale has been erroneously mentioned in the place of Aplhonce Mushira Mukabale, in paragph 7 and in order (b), thus representing a false impression of the intentions of the beneficiaries as disclosed in the certificate of confirmation of grant before the rectification. It is further argued that the application meets the sufficient reason threshold for review because the application for rectification was not served on all the parties and cites the decisions in Official Receiver and Liquidator V Freight Forwarders Kenya Ltd [2005] eKLR the Court of Appeal held, that any other sufficient reason need not be analogous with the other grounds in the provision of



the statute and the Rules. The petitioner then takes the singular position, contends and asserts that by failing to sign transmission documents, the beneficiaries are making the administrator fail in his core duty of distribution of the estate.

9. For the petitioner it is submitted that the application for review does not meet the circumstances for review as set out in order 45 of the Civil Procedure Rules since the foundation of the application was that it was not served to all the law firms that had conduct of the matter. On the rectified certificate of confirmation of grant, it is submitted that Raphael Tom Indeche was indeed a grandson to the deceased entitled to inherit on account of his deceased father and that the objectors have not demonstrated how the rectification of the certificate of confirmation of grant has prejudiced their interest on the estate.
10. On the stay of execution of the orders of 18/7/2023, the submission goes that the objectors have not met the conditions for stay of execution as set out in Order 42 Rule 6 of the Civil Procedure Rules and he further poses the question of what execution is likely to be carried out and what needs to be stayed.
11. In the submissions, the petitioner takes the singular position, contends and asserts that by failing to sign transmission documents, the beneficiaries are making the administrator fail in his core duty of distribution of the estate.

Issue Analysis and Determination

12. The issues that arise for determination on the first application are; whether the proceedings taken *ex-parte* on the 18.07.2023 and yielding the rectified certificate of conformation of grant issued on the same deserve being disturbed by way of review or setting aside and if the ruling dated date the 24.03.2023 calls for review on account of presenting an error apparent on the face of the record.
13. Even though the parties have submitted on the merits of request for stay, the same is not due for grant at this stage because the prayer became otiose when the application was heard and no order can issue on it beyond this determination.
14. On the rectified grant, the objector does not dispute the fact that Adrin Indeche, Mukavale was a beneficiary to the estate who was adjudged to inherit parcle number Isukha /Mukhonje/1536. It is equally not in dispute that the said Adrian is dead. Equally conceded is the fact that one Raphael Tom Indeche is a son to the said Adrian. The dispute appears to be that there could be other children/beneficiaries of Adrian who may lay a claim to the property hence Raphael should not be deemed the only child entitled. To that controversy, this court, like Musyoka j, takes the view that the estate of the deceased beneficiary ought not be administered withing the proceedings over the estate of his father. That estate must be left to be administered independently and, in a petition, appropriately initiated in terms of order number (f) in the ruling of 24.03.2023. For the reason that there exists a decision on how the shares of Adrian Indeche Mukavale ought to be dealt with, the court concedes that in directing that the same goes to his son without being subjected to succession, and a grant of letters of administration does not suffice here, the orders of 18.07.2023 were made pursuant to an error staring at the court on the face. For that error, the decision of 18.07.2023 is reviewed and set aside.
15. On the prayer to review the ruling of 24.03.2023, the court take the view that, review as a remedy serves the purpose of correcting obvious and apparent mistakes or error staring at the court on the reading of the record; a discovery of a new and important matter of evidence which was not available and could not be availed, due diligence notwithstanding , at the time the order sought to be reviewed was made, and which make the order cease to serve the ends of justice, or for any other sufficient reason or cause. Owing to its corrective effects in delivery of justice, it is one of the remedy the Law of succession Act imports from the Civil procedure Rules for application in probate and administration matters.



16. In the instant application, the applicant pitches same on the ground of an error apparent on the face of the record. The Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243 discussed what amounts to an error apparent on the face of the record and said: -

“In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

17. Musyoka J’s decision in the ruling dated 24th March, 2023, now sought to be reviewed read and goes: -

a. ...

- b. That Isukha/Mukhonje/1536 shall be shared out equally between the estate of the late Adrian Indeché Mukavale, the estate of the late Martin Bulinda Mukabale, Alphonse Muchila Mukabale, Joseph Ngairé Mukabale, Francis Ambeyi Mukabale and the estate of the late Teresina Impiti, with the share due to Joseph Ngairé Mukabale being less the acreage of Isukha/Mukhonje/1537 and 1538, as directed in Kakamega HCCC No. 64 of 2006;...

18. The court takes the view that order (b) in the said ruling flows from the decision at paragraph 7. The decision in paragraph 7 itself flows from an earlier judgment by Chitembwe J dated 12.07.2012, in Kakamega HCC No. 64 of 2006, by which, and for very elaborate reasons disclosed therein, the judge nullified the transfer of the property of the deceased Known as parcel number Isukha Mukhonje/1536 in favour of Alphonse Mushila Mukabale and reverted same into the estate.

19. A plain reading of the decision of 24.03.2023, without much minute scrutiny, reveals that the judge was following and respecting the decision of 12.07.2012 which affected the interests of Alphonse Mushila Mukabale and not Joseph Ngairé Mukabale. It is thus plain to the court that the reference to Joseph Ngairé Mukabale in both paragraph 7 and order (b) were an outright slip. The reasoning leading to that decision could only have intended to refer to Alphonse Mushila Mukabale and no one else. That error become even more in the order (b) which implements the decision in the civil suit which said:

“Since the evidence on record shows that the deceased, Clement Itolondo also had two other plots namely Isukha/Lukose/28 and Isukha/Shitochi/1108 and the 1st defendant is also entitled to get his share of the deceased’s estate, I will take the two portions he sold to the two defendants as part of his share and to be taken into account when the deceased’s estate is being distributed. I do take the two defendants as innocent purchasers for value without notice...”



Having found that the 1st defendant's registration as owner of Isukha /Mukhonje /244 was unlawful, I do order that title deed for plot number Isukha/Mukhonje/1536, registered in the names of Alphonse Mushila Mukabale be revoked and the title revert to the names of the late Itolondo Likhutu.”

20. The judgment repeatedly refers to 1st defendant in the case who was was Aplhonse Mukabale Mushira while Joseph Ngaira Mukabale was the 1st Plaintiff. The above analysis leads the court to the finding that the names of Joseph Ngaira Mukabale at paragraph 7 of the judgment and in order (b) appeared by error and ought to be corrected and substituted with the names Alphonse Muchila Mukabale. When court sought clarification from the counsel for both parties, Ms Kadenyi Advocate readily agreed that the mistake is glaring.
21. Accordingly, therefore, the application dated 20.11.2023 succeeds in terms of prayer 2 and 4. With that outcome, the rectified certificate of confirmation issued on 18.07.2023 sought to be enforced by the application dated 23.10.2023, ceases to exist and the said application stands overtaken by events thus deserving no determination.
22. The application must however be seen to have intended to achieve the conclusion of administration by transfer. For its objects not be lost, it is directed that resultant certificate of confirmation of grant, after this determination shall be implemented within 60 days, from today, by all the beneficiaries signing the deeds of transmission. If for any reason there shall failure on such execution, the Deputy Registrar shall do so in place of any beneficiary who shall have not signed.
23. The court notes that the ruling distributing the estate does prescribe the acreage each of the beneficiaries entitled to take Isukha/Mukhonje/1536 gets. When the counsel for the parties addressed the court, both agreed that the property measures 7.26ha. To that quantum, the court takes into account the quantum of land sold by Alphonse and which the court in the civil matter directed to form part of his inheritance. The two parcels he sold aggregate at 0.34 ha. That means that before subdivision into three the land measured 7.6 ha. That is the size of land to be shared equally between the six beneficiaries. Sharing same equally entitles each to get 1.266ha. On that size of land the court takes into account the 0.34ha Alphonse had sold and reduces same from the quantum due. While all else shall get 1.266ha, Alphonse Mushila Mukabana shall get 0.932 ha.
24. For clarity purposes and for avoidance of doubt, it is ordered that: -
 - **a. That Isukha/Mukhonje/1536 shall be shared out equally between the estate of the late Adrian Indeche Mukavale, the estate of the late Martin Bulinda Mukabale, Joseph Ngairi Mukabale, Francis Ambeyi Mukabale and the estate of the late Teresina Impiti, who shall each get 1.266ha while Alphonse Muchila Mukabale, shall get 0.932ha on account of the fact that the acreage of Isukha/Mukhonje/1537 and 1538, have been taken into account as directed in Kakamega HCCC No. 64 of 2006;
 - b. The beneficiaries are directed to avail the requisite documents with the administrator and to sign all the deeds necessary for transmission within 60 days from today.
 - c. In the event any of the beneficiaries shall fail to avail the required documents or execute the deeds for the transmission of the estate, the deputy registrar is hereby directed to execute the relevant documents on behalf of such beneficiaries.
 - d. This being a family matter, the court makes no order as to costs.
 - e. Mention on 25.9.2024 to report the progress.



Dated, signed and delivered at Kakamega this 8th day of May, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Kadenyi for the Petitioner

No appearance for Mukavale J. for the Objectors

Court Assistant: Polycap

