



**Kimeu v Kimeu (Family Appeal E002 of 2021)
[2024] KEHC 17213 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
FAMILY APPEAL E002 OF 2021
TM MATHEKA, J
MAY 17, 2024**

BETWEEN

MARIA KIMEU APPELLANT

AND

KAVINDU KIMEU APPELLANT

JUDGMENT

1. On 26/11/2019 counsel for the parties herein – Mr. Mbithi for 2nd Administrator/petitioner, Ms. Nzilani for petitioner/Administrator – appeared before Hon. L.K Mwendwa, SRM and recorded a consent on the distribution of the estate of the late Kimeu Mumbanya (deceased).
2. The consent was adopted by the court thus:
By consent counsels (sic) for both the 1st and 2nd petitioner/administrators distribution be as follows:
 1. That land parcel no. Kiteta/Ngiluni/1521 be shared equally between the 1st and 2nd petitioner/administrators in where their respective homesteads are. (emphasis added)
 2. That land parcel No. Kiteta/Ngiluni/1636 to go to the 1st petitioner Kavindu Kimeu.
 3. That land parcel NO. Kiteta/Ngiluni/1631 to go to the 2nd petitioner Maria Kimeu.
 4. That consent be and is hereby adopted.
 5. The consent culminated in a certificate of confirmation of grant dated 9/12/2019.
Tawa Srm Succession Cause No. 12 Of 2018

In The Matter Of The Estate Of The Late Kimeu Mumbanya (deceased) Certificate
Of Confirmation Of Grant



I Herebycertify that the above written grant of representation to the estate of the late Kimeu Mumbanyaissued to Kavindu Kimeu And Maria Kimeutherein named has this 26th day of November 2019 been confirmed by the court pursuant to the provision of section 71(1) and (3) of the Law of Succession Act.

Dated at Tawathis 9th day of December 2019.

.....
Scheduled Description of Property Share of Heirs Kavindu Kimeu & Maria Kimeu Kiteta/Ngiluni/1521 in equal shares (where their respective homes are).

Kavindu Kimeu Kiteta/Ngiluni/1636 whole. Maria Kimeu Kiteta/Ngiluni/1631 whole.

3. Vide summons for rectification of grant dated 13/8/2020 and brought under section 74 of the Law of Succession Act, Cap 160 of the Laws of Kenya and Rule 43, 49 and 73 of the Probate and Administration Rules. Kavindu Kimeu the 2nd petitioner sought the following orders inter alia:
 1. That this honourable court be pleased to issue orders restraining petitioner/respondent by herself, agent, servant or any such person act under her authority or instructions from subdividing, disposing, selling, wasting, interfering or in any manner whatsoever dealing with the assets of the estate particularly Land parcel No. Kiteta/Ngiluni/1521 pending the inter-parties hearing and determination of this application.
 2. That the grant of letters of administration issued to the said Kavindu Kimeu and Maria Kimeu on 26/11/2019, be rectified to have the word “in equal portions” replaced with “where their respective homesteads are”.
 3. The summons was supported by the grounds in the face to th effect That the homesteads of the two petitioners stand on different acreages on the land Parcel Kiteta/Ngiluni/1521 and it was in the interests of fairness and justice for this court to grant the orders sought. That it was necessary for the respondent to be restrained from continuing with the intended subdivision of the suit land to the detriment of the applicant; That no prejudice would be occasioned to any of the parties herein if the orders sought are granted; That this honourable court is clothed with the jurisdiction to issue the orders sought
 4. The application was supported by the affidavit of Kavindu Mumbanya where she deponed that; She annexed the grant of letters of administration made to her and her co administrator on 26/11/2019. According to her the grant contained an error as to how the assets of the deceased were to be distributed, in that the phrase “in equal shares where their respective homesteads” as used in the confirmed grant of letters of administration did not capture the actual acreage on the ground in the Land Parcel Kiteta/Ngiluni/1521 in that the different homesteads do not stand on equal portions of land. It was her desire that the said error be rectified by the court so that the property Land Parcel would be distributed between her and her co administrator in accordance with the boundaries placed as per the wishes of the deceased as per the agreements dated 18/8/1994 and 24/8/1998.
 5. It was her position that the distribution “in equal portions” as opposed to “where the respective homesteads are” would amount to her eviction from the portion she currently occupied together with her children hence the need for this honourable court’s intervention through rectification of the grant. She urged the court to rectify the grant accordingly and to issue a certificate of confirmation of grant.



6. The summons was opposed vide the replying affidavit of Maria Kimeu sworn on 28/8/2020. Her position was that the parties had, on 26/11/2020 recorded a mutual consent on the distribution of the deceased's estate inclusive of parcel No. Kiteta/Ngiluni/1521, where they that acknowledged that each is settled and works on separate portions of the said parcel and as co-wives each is entitled to an equal half (1/2) share and the distribution would take into account their respective homesteads and non would lose or suffer any eviction from her homestead.

She contended that the grant was confirmed on this mutual understanding and consent thus parcel No. Kiteta/Ngiluni/1521 should be shared as per that consent and the certificate of confirmation of grant. "in equal shares where their respective homesteads are". This takes care that the respective homesteads would wholly fall on the rest of the share for each party and none would lose the homestead; that this parcel measures 1.0 Ha as per the search certificate hereto and each party was entitled to half (0.5) Ha which would include the respective homesteads and also leave ample grazing and cultivating land ; that it was irrelevant that the "different homesteads" do not stand on equal portions of land as each leaves other land for other activities by each party who should take care that they confine their homesteads and works within their half share of the land but not spread all over the place so as to cross into the others" share.

7. She deponed further that on the advice of her advocate the application for rectification of grant was incompetent and bad in law in that: The rectification sought was substantial, going into the mode of distribution as opposed to mere rectification of errors as envisaged and set out in law.
8. It is from the foregoing that the learned magistrate, made his ruling on 9/2/2021. Upon capturing the essence of section 74 of the LOSA he proceeded to state:

"I am being called up to determine whether the proposed rectification is an error in names and description of the estate property herein or seeks to amend the mode of distribution which is not within the power donated by section 74 LSA as discussed earlier in this ruling. If the proposed rectification seeks to introduce a different mode of distribution, then this will not be the proper forum and/or procedure for the applicant to move the court that should be by way of an application for review. If the converse is true, then I will proceed to order for rectification.

It is prudent to note that the estate herein comprises of three parties and it is only Land Parcel No. 1521 in which this application relates to. According to the court, the grant herein was confirmed on 26/11/2019 pursuant to a consent recorded by both parties. As relates Land Parcel No. 1521, the parties expressed their wish as follows:

"Kiteta/Ngiluni/1521 – shared between (equally) 1st and 2nd Petitioner/ Administrator in where their respective homesteads are"

4. On the face of it, it would appear to be a mere issue of semantics but upon deeper reflection it appears that what is in contention between the parties is whether each of the respective shares will be within where their homesteads stand and whether the shares would be equal. Does this affect the mode of distribution applied upon by the parties at the time of confirmation on 26/11/2019?
5. I note that from the wording of the consent as captured by the proceedings on 26/11/2019 the words "equally" is in parenthesis and is followed by an elaboration that each of the beneficiary will get a share



where here homestead is. I'm thus of the considered opinion that the application herein does not seek to re-distribute the estate but rather rectify the consent as recorded. According to me this goes as far as correcting the description but does not introduce new beneficiaries, on new parties are alter the mode of distribution.

6. This obtaining, I find that the present application falls within the description granted by section 74 Law of Succession. Consequently, I find the application dated 13/8/2020 merited and is hereby allowed with costs.
 1. It is this finding that provoked this appeal on the following grounds:
 2. The learned trial magistrate erred in law and fact and grossly misdirected himself in arriving at a ruling and orders that in effect amounted to setting aside a consent order on distribution of Kiteta/Ngiluni/1521 and irregularly rectifying a certificate of confirmation of grant as to mode of distribution of a shared matrimonial property when there did not exist any errors or valid grounds or basis as set out in law, and without any sufficient grounds or justification disregarded, ignored or failed to sufficiently and correctly or at all appreciate and interpret the relevant law and judicial authorities cited before him.
 3. The learned trial magistrate erred in law and fact and grossly misdirected himself in reaching erroneous and prejudicial findings and in effect wrongfully and irregularly rectifying a certificate of confirmation of grant contrary to law, in affect prejudicially resulting in a substantive an unauthorised alteration in the agreed mode of distribution which was not one of the errors the court was entitled to a rectify and hereby effectively re-distributing the property Kiteta/Ngiluni/1521 otherwise than in the agreed distribution in equal shares as between two co-wives, a re-distribution which is illegal and is not a rectification of errors specified under section 74 of the [Law of Succession Act](#).
 4. The learned trial magistrate erred in law and fact when he held that the 1st administrator's (respondent) application dated 13/08/2020 satisfied the criteria for rectification of the specified errors within and as envisaged by section 74 of the [Law of Succession Act](#) when no such errors existed requiring any rectification which was contrary to law and judicial authorities.
 5. He erred in failing to reach the proper finding as envisaged by law that the 1st petitioner/ respondent's only lawful course was not rectification of the certificate of confirmation of grant but rather a review of the consent orders that settled the mode of distribution contained in the certificate of confirmation of grant, and subsequent revocation of the grant to rather than rectification of the certification of confirmation of grant which is not subject to any rectification.
 6. The learned trial magistrate's findings, ruling and orders in purporting to set aside consent orders on mode of distribution to in effect rectify a certificate of confirmation of grant are a gross error of law and are contrary to the evidence. Which resulted in a new substantial re-distribution of the subject property otherwise than the consented equal shares to a matrimonial property between co-wives equally entitled as consented.
 7. The learned trial magistrate erred in awarding costs against the appellant whilst disregarding that the parties before him were poor co-wives entitle to equal shares to plot No. Kiteta/Ngiluni/1521 as it was the matrimonial property hosting their respective homesteads and being co-wives and thus family members, the appropriate order was for each party to meet its own costs in succession matters.
 8. Parties filed written submissions which I have considered.



9. From the grounds of appeal, the submissions and the record as set out herein above the main issue is whether there was any error in the consent as filed, and whether that error could be corrected by way of an application for rectification of grant.
10. For the appellant it is argued that a certificate of confirmation of grant goes into substantive and final distribution of the estate and cannot be subject a rectification order under section 74 of the *Law of Succession Act*; and that the ruling amounted to an irregular and wrongful variation of the terms of a consent order wrongful and the unfair award of costs against the appellant, a co-wife and co-administrator of the estate.
11. The appellant relied on Section 74 of the *Law of Succession Act* which states:

Errors may be rectified by court

“Errors in names and descriptions, or in setting fourth 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.

And Rule 43(1) of the P&A Rules which states:

“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 the 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, he shall apply by summons in Form 110 for such rectification

1. It was submitted for the appellant that there was no legal provision for the rectification of the certificate of confirmation of grant and that Judicial interpretation of these provisions emphasise that only the temporary grant can be rectified and only in respect of the delimited errors, and not the certificate of confirmation which settles the distribution of the estate assets.
2. The appellant also relies on re Estate of Njau Kanyoria (deceased) [2019] e KLR, where the court re-affirmed that under section 74 of the Act, the certificate of confirmation of the grant, and the mode or terms of the distribution of a deceased’s estate thereunder cannot be rectified through an application for rectification of the grant.

“ .. There is no provision for rectification to add a new beneficiary an or redistribute the estate”.
1. The court was referred to the holding in re estate of Charles Kibe Karanja (deceased) [2015] e KLR, where the court demonstrated the differences, and the handling a grant of representation, and a certificate of confirmation of grant, in interpretation of section 74 rectification, and the separate avenue of dealing with the latter if it has errors, the court stated:

“ .. It goes without saying that the provisions in section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a



grant of representation The certificate issued upon a grant being confirmed does not alter the grant of representation ... it does not replace the grant of representation ... it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed ... it is the evidence of the confirmation of the grant. From the wording of section 74, it is plain that the same was not tailored for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not ...”

7. It is submitted that a certificate of confirmation of grant can only be amended through review:

“... such changes are fundamental, not superficial. They go to the core of the 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 erected 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.”
8. As for the power for review, the court in *re estate of Charles Kibe Karanja (deceased)* [2015] e KLR stated: -

“... Review is not directly provided for in the law of succession, it is read into the same by virtue of “Rule 63 of the Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules ... Hence in this case;

“an application ought to [have been] made to accommodate the said assets or beneficiaries ... and the court may review its orders made at the point of confirmation on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed ...”
9. It is also argued for the appellant that the ruling of the subordinate court amounted to the wrongful and irregular variation of the terms of a consent order-That consent orders have contractual effect between the consenting parties and cannot be varied or set aside except by consent of the parties or on the grounds for varying or setting aside is settled by different judicial decisions
10. This court was referred to *Kericho Guest House Enterprises Limited v- Kenya Breweries Limited* [2018] e KLR, where the court widely cited several other decisions that confirm the above position: -
11. The Court of Appeal in *SMN v ZMS & 3 Others* [2017] e KLR

“ 17. There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties”
12. *Flora N. Wasike v Destimo Wamboko* [1988] e KLR

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons ..”



13. Kenya Commercial Ltd v Specialized Engineering Co. Ltd [1982] KLR

“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 collusion 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 to set aside an agreement”.

14. On the issue of costs, the appellant submitted that the award of cost against her was unfair and unjust considering the parties involved, and the nature of the matter.
15. The Respondent did not file any submissions. When she appeared in court upon service, she told the court she did not understand why she was being sued yet the land had already been distributed. She told the court that she did not want to be served with any papers and she would not come back to court. She told the court that her son had distributed the land, that she was married in 1960, yet her co-wife was married in 1982 and wanted land that she and her husband had bought.
16. I have carefully considered the matter before me. It is in record that Kimeu Mumbanya died in 1999. The cause was first filed at High Court of Kenya at Machakos Succession Cause no. 16B of 2008 on 16/4/2008.
17. It was transferred to Tawa Law Courts and became SRM Succession Cause No. 12/2018. It has been in these corridors for 16 years.
18. It is not in dispute that on 26/11/2019, a consent was entered into which brought the matter to a close – only for the respondent to file the summons for rectification of the grant.
19. From the Ruling the learned magistrate clearly understood that section 74 LOSA will only allow the rectification of of a limited number of errors. However, from which ever end one looks at it, the final orders of tee court do not sync with that understanding. This is because that the ruling clearly diverted from the right path. The court had on record, the consent as dictated by the advocates, and signed on the court record. This consent states that the property will be shared equally, maintaining the petitioners’ homesteads. That is the clear wording of the consent. The extracted order also captured this and so does the certificate of confirmation of grant.
20. According to the learned trial magistrate the decision is to amend the consent was based on the fact that the words “equally” were in parenthesis. However, the court record is clear that there was no parenthesis and the record indicates the intention was equal, maintaining the homesteads. The learned trial’s conclusion that the term equally was a mistake was not supported by the record, because as pointed out it started with the advocates’ dictation of the consent in court.
21. It is important to point out that even if there was a mistake in the consent, that mistake could not have been rectified through a summons for rectification of grant.
22. The learned magistrate, by allowing the application obviously created a change in the mode of distribution of the estate contrary to the consent before the court and the Certificate of Grant the court had made to the parties. How? By removing the word equally or in equal shares the court changed the mode of distribution because now the specific share would be limited to a share where the home steads were located. The size of the share became un specified. This created a new mode of distribution. The court definitely misconceived the purport of the “rectification” in the LOSA as set out in s. 74 of the LOSA and rule 43 of the P&A Rules.



23. On the issue of costs, I need not say much. There was no reasonable ground to punish the appellant with costs taking into consideration the nature of the matter.
24. It on this basis that I find that the appeal has merit
25. The order of the learned magistrate made on 9/2/2021 allowing the summons for rectification of the certificate of grant made on 26th November 2019 and dated 9th December 2019 be and is hereby set aside.
26. A certificate of confirmation of grant to issue in accordance with the Consent of Parties entered on 26/11/2019
27. The order on costs against the appellant be and is hereby set aside.
28. Ultimately the appeal is allowed. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH MAY 2024.

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-05-19 22:27:06

The Judiciary of Kenya

