



REPUBLIC OF KENYA



**In re Estate of Stephen Maina Gichaga (Deceased) (Succession Cause
167 of 2008) [2024] KEHC 6735 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 167 OF 2008
HM NYAGA, J
JUNE 5, 2024**

BETWEEN

MARGARET WANJIRA MAINA 1ST APPLICANT

JANE NJERI MAINA 2ND APPLICANT

ROSE WAMBUI MAINA 3RD APPLICANT

AND

JOHN GACHARA MAINA RESPONDENT

RULING

1. Vide summons dated 9th October 2023, the Applicants seek for orders: -
 - I. That the Grant of Probate issued to Margaret Nyawira Maina & Esther Wanjiku Njau on 3rd December, 2009 be rectified in the following respects as provided for by Rule 43(1) of the [Probate and Administration Rules](#);
 - II. To remove Margaret Nyawira Maina as an administrator as she is deceased.
 - III. Margaret Wanjira Maina to have Umoja Innercore Plot No A116 IN Whole Share and to delete the said property from the schedule of John Gachara Maina as it had been bequeathed to Margaret Wanjira Maina in whole as per the will.
 - IV. To remove the property known as OL Kalou Plot No 114 as belonging to Margaret Wanjira Maina in whole share as it was to be bequeathed to John Gachara Maina in whole share.
 - V. The property known as Thika LR No 13511/154 to be held in equal shares between Rose Wambui Maina and Jane Njeri Maina
 - VI. That the costs of this Application shall be provided for.



2. The Application is supported by an Affidavit of Margaret Wanjira Maina reiterating the above grounds. In addition, she averred that it is desirable that the above error be rectified by the court and she annexed an original consent signed by other dependents consenting to the amendment.
3. The application is opposed by John Gachara Maina through his Replying Affidavit dated 24th October, 2023. He disputed that Margaret Wanjira Maina , Jane Njeri Maina & Rose Wambui Maina are the administrators of the deceased estate as alleged in the summons and averred that he is suitable to replace the Administrator Margaret Nyawira Maina who is the deceased to balance the gender equality.
4. He asserted that this cause was administered intestate and the said will was never adopted by this court and was rejected by the deceased's family including the Margaret Wanjira Maina as there was need to amend the will since Margaret Wanjira Maina , Jane Njeri Maina and Rose Wambui Maina insisted on inheriting LR Gilgil West/125 and Olkalou-Plot No 114 which they were not bequeathed in the will and other changes, and as a family they agreed on mode of distribution..
5. He asserted that this Court made a typing error on Plot No A116 Umoja Innercore Section 1-nairobi in awarding Margaret Wanjira Maina and himself whole share each instead of awarding them jointly and on Plot No LR No 13511/154 Thika Road in awarding Rose Wambui Maina and Jane Njeri Maina whole share each instead of awarding them jointly.
6. He deponed that Rose Wambui Maina & Jane Njeri Maina have already transferred and possessed Plot No LR No 13511/154 Thika Road jointly but Margaret Wanjira Maina has refused to surrender ½ share of Plot No A116 Umoja Innercore Section 1- Nairobi to him insisting that the share of beneficiaries was awarded as per the will which was never presented to this Honourable Court as the matter was filed and heard intestate.
7. He averred that if certificate of confirmed grant will be rectified, he and Margaret Wanjira Maina should inherit jointly Plot No A116 Umoja Innercore Section 1- Nairobi.
8. He deponed that the Applicants ought to have applied for review of the grant as provided for under section 74 of the [Law of Succession Act](#) and Rules 43 and 73 of the [Probate and Administration Rules](#), Order 12 Rule (7) Order 51 of the [Civil Procedure Rules](#), Sections 3A, 1A and 1B of the [Civil Procedure Act](#).
9. He contended that not all beneficiaries signed the consent to the amendment as alleged and that one Margaret Wamaitha is a stranger herein but stated that if she is representing the late Lawrence Muriuki Maina she should present a death certificate.
10. He averred that the instant summons is incompetent, defective, vexatious, frivolous and an abuse of the court process and urged the court to dismiss the same with costs to him.
11. The Objector also filed a Notice of Preliminary Objection dated 20th November,2023, on grounds reproduced verbatim as follows: -
 - I. That the Application is wholly incompetent and bad in law as it does not meet the mandatory requirements of the [Law of Succession Act](#), Cap 160 Law of Kenya and Probate and Succession Act
 - II. That the Application is wholly incompetent and bad in law as it does not meet the mandatory requirements of Rule 63 of the [Probate and Administration Rules](#) and Orders 45 and 51 of the [Civil Procedure Rules](#), 2010.



- III. That the Application is otherwise misconceived, frivolous, unfounded, has no merit and is an abuse of the due process of this Honourable Court.
12. The Objector thus prayed that the Application dated 9th October, 2023 be struck out and/or dismissed with costs.
 13. The Applicant Margaret Wanjira Maina swore further affidavit in response to the Respondent's replying affidavit. She clarified that the Applicants herein have never been administrators of the estate but are just beneficiaries and statement indicating them as administrators was a typing error.
 14. She has no objection to any other beneficiary being appointed an Administrator to replace the deceased herein.
 15. She deponed that the court relied on the will of the deceased to make distribution to the beneficiaries and that there is no order of the court declaring the will null and void.
 16. She further averred that as per the will of the deceased she was to be granted Plot No A116 Umoja Innercore Section 1 in Nairobi to the exclusion of all other beneficiaries.
 17. She deposed that she has lawfully applied for the rectification of grant as per the *Probate and Administration Rules*.
 18. She urged the court to grant the prayers sought.
 19. The Respondent swore a further Replying Affidavit on 6th February, 2024.
 20. He averred that certificate of confirmation of grant with regard to property known as Plot No A116 Umoja Innercore Section 1-nairobi should be reviewed to reflect that the same is jointly owned by Margaret Wanjira Maina and John Gachara Maina while Thika LR No 13511/154 should be reviewed to reflect that the same is jointly registered in the names of Rose Wambui Maina and Jane Njeri Maina.
 21. He asserted that they all agreed as a family to file the succession intestate and they were granted letters of administration intestate on 19th June, 2008 which was later confirmed on 3rd December, 2009, and that Margaret Wanjira Maina has not disclosed the full revised/amended schedule for distribution of the assets of the estate of Stephen Maina Gichaga as to how it should appear in the amended certificate of confirmation of a grant.
 22. The Application was canvassed through written submissions.

Applicants' Submissions

23. With respect to the Preliminary objection, the Applicants submitted that the same is without merit as the application herein has been filed as per Rule 43(1) of the *Probate and Administration Rules* and therefore there is no need to file a review. To buttress their submissions, the Applicants cited the case of *In re Estate of Henry Mwithimbu Karigu (Deceased)* (2020) eKLR.
24. In respect to the application, the applicants submitted that they want to correct a typing error that was made on the grant dated 3rd December, 2009.
25. They submitted that all the court needs to do is to look at the will and see how distribution was made and thus there is no need for a review or the need to call in new evidence. In support of this proposition, reliance was placed on the aforesaid case.
26. The applicants urged the court to allow the Application as prayed.



Respondent's Submissions

27. The Respondent majorly reiterated the averments in his affidavits in his submissions.
28. He submitted that the instant application has been brought under the wrong provisions of the law and it does not disclose who is to substitute the deceased administrator Margaret Nyawira Maina.
29. He argued that pursuant to the provisions of Section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules this application is bad in law. To further buttress this position he referred this court to the case of in re estate of Charles Kibe Karanja (Deceased) [2015] eKLR where the court discussed the import of Section 74 of the Law of Succession Act.
30. He posited that the Applicants ought to have sought for review as provided under Rule 63 of the Probate and Administration Rules and that granting the orders sought will be tantamount to reviewing the orders of this court.
31. He prayed that the Application be dismissed with costs.

Analysis and determination

32. The issues that arise for determination are: -
 - a. Whether the Preliminary objection dated 20th November, 2023 has merit.
 - b. Whether the Applicants should be granted the orders sought in the Application.

Whether the Preliminary objection dated 20th November, 2023 has merit

33. What constitutes a preliminary objection was determined in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where the court explained as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

34. In the words of Sir Charles Nwobold P at page 701, B: -

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

35. It is thus clear that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any fact has to be verified from elsewhere or the court is called upon to exercise judicial discretion.



36. In the case of *Oraro v Mbaja* (2005) 1 KLR 141, the Court held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

37. The Respondent’s main objection is that the instant application offends the mandatory requirements of Rule 63 of the *Probate and Administration Rules* and Orders 45 & 51 of the *Civil Procedure Rules*, 2010. The Applicants on their part argue that the application is for rectification and has been properly brought pursuant to Rule 43(1) of the *Probate and Administration Rules*.

38. It is patent therefore that for this court to make a determination whether this summons offends the said requirements of Rule 63 of the *Probate and Administration Rules* and Orders 45 & 51 of the *Civil Procedure Rules*, 2010 or not, it will have to probe and ascertain facts and probe documents or evidence. Therefore, the Court finds and holds that what has been raised by the Respondent/objector cannot be determined as a Preliminary Objection and the same is therefore not merited. I overrule the objection.

Whether the Applicants should be granted the orders sought in the Application

39. The law relating to rectification of grants is provided for in section 74 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rule 43(1) of the *Probate and Administration Rules*. Section 74 provides as follows:

“

“74. Errors may be rectified by court, 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, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

Rule 43(1) provides as follows:

“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 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.”

40. The 1st Order that the Applicants are seeking is the removal of Margaret Nyawira Maina as an Administratrix on grounds that she is now deceased. From the record Margaret Nyawira Maina was one of the administratrix of the deceased’s estate. There is a death certificate on record showing that she died on 20th June, 2014.

41. The Respondent has submitted that summons is poorly drafted as it does not disclose the name of the administrators to substitute Margaret Nyawira Maina (deceased). This position is erroneous since under Section 81 of the *Law of Succession Act*, Esther Wanjiku Njau being the only surviving



Administratrix is automatically entitled to carry on with the powers and duties of administration of the estate. The said section provides that: -

“upon the death of one or more several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them”.

42. That said, it is directed that the surviving administratrix ought to be the one to complete the administration of the estate, if not done so already. The respondent’s prayer to be made a co-administrator is thus without any meaningful purpose.
43. I will now deal with other orders sought in the application. Among them is that the distribution of Umoja Innercore Plot No A116 wholly to Margaret Wanjira Miana as per the will and to delete the said property from the schedule of the Respondent herein and removal of the property known as OL Kalou Plot No 114 as belonging to Margaret Wanjira Maina in whole share as it was wholly bequeathed to the respondent herein. The Applicants further asked this court to rectify property known as Thika LR No 13511/154 to be held in equal shares between Rose Wambui Maina and Jane Njeri Maina. This property as per the grant was distributed wholly to the parties herein.
44. In my view, the rectification as sought by the Applicants will not just be rectifying the confirmed grant, but will bring substantial changes to the grant by redistributing the properties.
45. Rectification of a Grant is only permissible to cure minor errors, mistakes and irregularities in the Grant. However, the Applicants’ intention is to completely alter the mode of distribution of the estate. This is not what was envisaged by section 74.
46. In this regard, I am guided by the case of *In The Matter of the Estate of Geoffrey Kinuthia Nyamwinda (Deceased)* [2013] eKLR where the court held as follows;

“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.’

47. Further *in re Estate of Charles Kibe Karanja (deceased)* (*supra*) the court held as follows: -

“If a party wishes to have the assets of the estate redistributed or there is the discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of the grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected 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. The remedy of review of Court orders is not directly provided for in the *Law of Succession Act* and the *Probate and Administration Rules*, but it is imported into probate practice by Rule 63 of *Probate and Administration Rules*, which has adopted a number of procedures from the *Civil Procedure Rules*.....

“Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the



said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....’

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

48. In my view, the applicants should have filed an application for review on the proposed mode of distribution.
49. Also I did note that Esther Wanjiru Njau, the surviving administratrix, in her affidavit sworn on 3rd April 2017, did aver that the property which comprises the estate herein was fully distributed and transfer was effected to the beneficiaries. She even annexed copies of transfers to her affidavit.
50. That being the case, it baffles me that the same person can now purport to give a consent to the applicants herein.
51. If the estate has been distributed as stated, then there is nothing left to litigate over herein. Parties are bound by their pleadings and it is rather telling that the said Esther is not the one making the application as an administratrix. It appears like there are some not so good reasons as to why she chose to take a back seat and purport to give a consent to the applicants.
52. In the circumstances, I find that the application lacks merit and it is dismissed.
53. In summary, the Preliminary Objection is overruled and the instant application is also dismissed.
54. This being a family matter each party should bear their own costs.
55. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF JUNE, 2024.

H. M. NYAGA

JUDGE

In the presence of;

Court Assistant Jeniffer

Mr. Wanyanga for administrator

Mr. Ochangu for John Gachara

