



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Lydia Kageci Waihenya (Deceased) (Succession Cause  
328 of 2014) [2024] KEHC 8531 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8531 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 328 OF 2014  
MA ODERO, J  
JULY 12, 2024**

**IN THE MATTER OF THE ESTATE OF LYDIA KAGECI WAIHENYA - (DECEASED)**

**RULING**

1. Before this court for determination is the Notice of Motion dated 3<sup>rd</sup> August, 2023 by which the Applicant seek the following orders:-
  - “ 1. That this Honourable Court be pleased to rectify the Certificate of Confirmation of Grant dated 25<sup>th</sup> May, 2023 to include the Interested Party’s 10 acres out of LR Nyeri/Kiganyo/8343/21.
  2. That this Honourable Court be pleased to rectify the name of the Applicant on the certificate of confirmation of Grant dated 25<sup>th</sup> May, 2023.
  3. That this Honourable Court be pleased to rectify paragraph 44 and 48 of the Judgment delivered on 25<sup>th</sup> May, 2023 to reflect that the shares allotted were 1000 and the Deceased held 49% shareholding in the company.
  4. The costs of this application of this application be provided for.”
2. The application which was premised upon Section 74 and Rule 43 (1) of the *Law of Succession Act* and was supported by the Affidavit of even date sworn by Mary Wangari Waihenya the 3<sup>rd</sup> Protestor/ Applicant.
3. The Petitioner/Respondent Tera Waigwa Waihenya opposed the application through her Replying Affidavit dated 5<sup>th</sup> December, 2023.

**Background**

4. This succession cause relates to the estate of the late Lydia Kagechi Waihenya (hereinafter the Deceased’) who died intestate on 30<sup>th</sup> March, 1999. A copy of the death certificate Serial Number 0158263 is annexed to the citation dated 29<sup>th</sup> January, 2014.



5. The Deceased was survived by the following persons.
  1. Karen Wanyeru Njoroge - Daughter
  2. Rachael Gathoni Gitau - Daughter
  3. Dr. Tera Waigwa Waihenya - Daughter
  4. Dr. Dan Kamunya Waihenya - Son
  5. Mary Wangari Waihenya - Daughter
  6. Dr. peter Maina Waihenya - Son
  7. Caroline Wacheke Mbaka - Daughter
  8. Margaret Gachanibi Waweru - Daughter
6. The Deceased's estate comprised the following;-LR NO NYERI/KIGANJO/8343/21 - 25.6 AcresLR NO. NYERI/KIGANJO/8152/20 - 25.6 Acres490 Shares in Waihenya Chemist Limited
7. Following the demise of the Deceased a Grant of letters of Administration Intestate was on 15<sup>th</sup> April, 2016 issued to Tera Waigwa Waihenya (the Respondent).
8. Vide a judgment delivered on 25<sup>th</sup> May, 2023 Hon. Lady Justice Florence Muchemi set out the manner in which the estate of the Deceased was to be distributed.
9. Following this judgment the Grant issued to the Respondent was duly confirmed on 25<sup>th</sup> May, 2023. The certificate of confirmed Grant provided that the estate left behind by the Deceased was to be divided amongst all the beneficiaries "in equal shares"
10. The Applicants have now filed the Notice of Motion dated 3<sup>rd</sup> August, 2023 seeking to have the confirmed Grant rectified. The Applicants aver that the beneficiaries of the estate are all, in agreement that Christopher Kagema Gichuhi (hereinafter the Interested Party") holds a beneficial interest in ten (10) acres out of LR NO. Nyeri/Kigayo/8343/21, which beneficial interest was not taken into account in the distribution of the estate. The Applicants pray that the Grant be rectified in order to reflect the allocation of this ten (10) acres to the Interested Party.
11. The Applicants further seek to rectify the Grant in order to amend the Shareholding of the Deceased in Waihenya Chemist Company (hereinafter 'the Company') to be 49% and not 98% as indicated in the confirmed Grant
12. Finally the Applicants pray that the name of the 3<sup>rd</sup> Applicant Mary Wangari Waihenya which is indicated in the confirmed Grant as Mary Wangari Karuoro be amended.
13. As stated earlier the Respondent who is the administrator of the estate has opposed this application for rectification of the certificate of confirmed Grant. The Respondent indicated that she was dissatisfied with the judgment delivered on 25<sup>th</sup> May, 2023 and intends to appeal against the same. That she has an arguable appeal.
14. The Respondent is not in agreement with the Applicants that the Interested Party has a beneficial Interest in ten (10) acres of the estate property.
15. The Respondent further denies that the 3<sup>rd</sup> Applicant is known as Mary Wangari Waihenya. She insists that the 3<sup>rd</sup> Applicant is married to one Professor Kamuoro Mwangi and has been properly referred



to as Mary Wangari Kamuoro. For all these reasons the Respondent opposes any rectification of the Grant.

16. The application was canvassed by way of written submissions. The Applicants filed the written submissions dated 28<sup>th</sup> March, 2024 whilst the Respondent did not file any written submissions

### **Analysis And Determination**

17. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties.

The Applicants are seeking to have the certificate of confirmed Grant issued to the Respondent on 25<sup>th</sup> May, 2023 rectified.

18. 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.”

19. 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.

20. From the language of Section 74 of the *Law of Succession Act* and Rule 43(1) of the *Probate and Administration Rules*, the scope of rectification of grants of representation is limited to “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. I may add that such other minor errors in that genre could also be rectified.”

21. *In Re estate of Geoffrey Kinuthia Nyamwinga (deceased)* [2013] eKLR where the court stated:

“The law on rectification or alteration of grants in 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...”

22. The Applicants are seeking to rectify the certificate of confirmed Grant so as to allocate to 10 acres of land to the Interested Party whom they claim was omitted as a beneficiary of the estate.

23. The Interested Party is Not one of the children of the Deceased. In fact the Respondent alleges that the Interested Party is a creditor and asserts that he is not owed anything by the estate.

24. The Applicants are also seeking to rectify the Grants to alter the Shareholding of the Deceased held in the company. Once again this will affect the mode of distribution of the estate and is not covered by Section 74. All in all I find that the changes being sought by the Applicants are critical and not minor



will have far-reaching consequences. Under no terms can such amendment be said to relate to a mere minor errors in name or descriptions.

25. By this Summons the Applicants are seeking to vary/alter the entire mode of distribution of the estate. Such far reaching changes cannot be effected through a Summons to rectify and are not anticipated by Section 74.
26. The only option available to the Applicants is to have the entire Grant revoked and to seek issuance of a fresh confirmed Grant to include the changes they wish to encompass.
27. Secondly the Applicants seek to amend the Grant in order to rectify the name of the 3<sup>rd</sup> Applicant. Ordinarily such request to rectify a name would amount to a minor error and ought to be allowed.
28. However in her replying Affidavit the Respondent has opposed this proposed rectification and has even alleged that the identity card being relied on by the 3<sup>rd</sup> Applicant was obtained fraudulently.
29. Allegations of fraud cannot be dealt with under Section 74 of the Law of Succession Act. Such allegations are very serious and the Respondent must be granted an opportunity to prove said allegation by way of concrete evidence.
30. In the case of Urmila W/o Mahendra Shah -vs- Barclays Bank International Ltd & Another [1979] eKLR, the court stated as follows:-  

“.....Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt something more than a mere balance of probabilities is required.”
31. In view of the allegation of fraud made by the Respondent I find that this prayer also falls outside of the ambit of ‘rectification’ under Section 74.
32. For the above reasons I find that the Notice of Motion dated 3<sup>rd</sup> August, 2023 cannot be allowed. The same is hereby dismissed in its entirety. This being a family matter each side will bear their own costs.

**DATED IN NYERI THIS 12<sup>TH</sup> DAY OF JULY, 2024.**

.....

**MAUREEN A. ODERO**

**JUDGE**

