



REPUBLIC OF KENYA



In re Estate of the late Peter Kipkurgat Kuto - deceased (Succession Cause E155 of 2019) [2024] KEHC 12885 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E155 OF 2019
RN NYAKUNDI, J
OCTOBER 25, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE PETER KIPKURGAT KUTO

BETWEEN

PRISCA TARKWEN RUTO PETITIONER

AND

METHUSELAH KIPKEMBOI KUTO 1ST OBJECTOR

ABRAHAM KIPRUTO ROTICH 2ND OBJECTOR

RULING

1. This court through a ruling delivered on August 13, 2024 directed that a valuation be conducted on land known as IR NO. 8267 LR. NO. 772/8 before final orders are made. The parties have since filed two applications as to review of the grant issued on 29th April, 2024. The first application is dated 25th September, 2024, wherein the applicant seeks orders as follows;
 - a. Spent
 - b. That the confirmation of Grant be reviewed and provision be made by way of distribution of the land parcel known as LR. NO. 8267 LR. NO. 772/8 for Prisca Tarkwen Ruto.
 - c. That the names of the beneficiaries as entered in the amended certificate of confirmation of grant be rectified as follows:
 - i. Naumi Jekemei Kuto to Read Naomy Jepkemei Kuto
 - ii. Nancy Jesang Kuto to read Nancy Jesang.
 - iii. Nora Jepkosgei Kuto to read Norah Jepkosgei Tanui
 - iv. Nereu Jeprotich Kuto to read Nerious Cherotich Tanui



- v. Cleophas Kipchirchir Kuto to read Cleophas Kipchirchir Kirwa.
 - vi. The costs of the summons be sourced from the estate
2. The summons was supported by the affidavit sworn by Prisca Tarkwen Ruto and on grounds that there is an error apparent on the face of the record as a beneficiary of the estate has been omitted from the distribution and that it is necessary that the summons be considered expeditiously to enable a speedy conclusion of administration of the estate.
3. The second application for review is dated 16th September, 2024 in which the applicants seek orders that:
 - a. The amended certificate of confirmation of grant issued to Prisca Tarkwen Ruto, Elizabeth Jepchumba Kuto & Methuselah Kipkemboi Kuto in this matter on 29th April, 2024 be rectified to correct the names of the beneficiaries listed as
 - i. Rhoda Jepkemei Kuto to read Rodah Jepkemei Kurgat
 - ii. Rebecca Jemurgor Kuto to read Rebecca Kuto
 - iii. Eunice Jepngetich Kuto to read Eunice Chepngetich
 - iv. Milka Jepleting Kuto to read Milcah Chepleting Kuto
 - v. Sally Jebet Kuto to read Selly Chebet
 - vi. Martha Jeptoo Kuto to read Martha Cheptoo
 - vii. Nickson Kipchirchir Kuto to read Nickson Kipchirchir
 - viii. Andrew Kimeli Kuto to read Andrew Rotich
 - ix. Gideon Kiplimo Kuto Gideon Kiplimo Kuto
 - x. Caroline Jepkoech Kuttoh to read Carolyne Jepkoech Kuttoh
4. The court is therefore to distribute the remainder of the estate and consider the application for review.

Analysis and Determination.

5. The application is expressed to be brought under the provisions of Order 45 Rule 1 of the Civil Procedure Rules. The application can also be reviewed under the lens of Section 74 of the [Law of Succession Act](#), Cap 160 Laws of Kenya and Rule 43(1) of the Probate & Administration Rules. Section 74 provides as follows:

“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.”
6. On the other hand, the provisions of Rule 43(1) speak in the following terms:

“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 the names or descriptions 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.”

7. From the reading of the aforementioned provisions, rectification of grant of letters of administration is limited to issues as set out in section 74 of the Law of Succession Act. The rectification or review is referring to particularly corrections of error which the court may order without changing the substance of the grant. These include errors in names, description of any person or thing or an error as to the time or place of death of the deceased or the purpose for which a limited grant was issued. An error which is envisaged under the section is a mistake which may occur on the face of the grant like typing errors in names of persons or things. To this end, the applications are allowed to the extent that the names as rectified in the applications should reflect as such in the final Certificate of rectification of grant. It is the court’s considered view that this settles the issues revolving around errors and mistake on the face of the record.
8. The second issue canvassed by the parties touches on the inclusion of Prisca Tarkwen Ruto as the widow of the deceased. The applicant stated that she was left out of the distribution matrix and there is need for her to be included.
9. I should point out at this stage that the issue was considered by this court in the ruling dated 13th August, 2024. This court stated in part:

“First, the court takes judicial notice that the applicant Prisca Tarkwen Ruto thought being a spouse to the deceased, her interest and entitlement to the estate are peculiarly not captured in the original Certificate of Confirmation of Grant dated 20th December, 2023 nor the subsequent one dated 29th April, 2024. More important, is the life interest under the Succession Act which confers the right to the surviving spouse over the intestate estate. It is emerging that the applicant’s name as a surviving spouse is not incorporated in the distribution matrix referencing all beneficiaries consistent with Section 29 of the Act ...

It is therefore to be acknowledged that the administrators have a duty to revisit and review the metrics of inheritance as ordained in the primary Certificate of Confirmation of Grant as duly amended on 29th April, 2024.”

10. The decision in itself was designed to allow the parties to consider a favourable distribution model in consonant with the law.
11. As directed by this court, the parties have since conducted a valuation on the parcel of land known as IR NO. 8267 LR. NO. 772/8 and the said parcel of land has been valued at Kshs. 300,000,000/=. The valuation report indicated that there are developments on the suit property and that they were unable to establish whether the same is matrimonial property. This court takes cognizance that the valuation was an order made by its own motion just to inform the specifics of the estate in question and it is no way meant to dissuade the parties to opt for the disposal of the intestate estate of the deceased.
12. In the instant case, we have two categories of beneficiaries or heirs to the estate being the children and spouses of the deceased.
13. The rights of inheritance are protected and guaranteed within the provisions of the Law of Succession Act, the Constitution and international law. With regard to the spouses, Section 35 (2), (3) (5) and Section 38 of the Law of Succession Act provides that:

“A surviving spouse shall, during the continuation of life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate



by way of gift taking effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date. Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made. Subject to the provisions of Section 41 and 42 and subject to any appointment or award made under this Section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. 38 where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”

14. In terms of how an estate should be distributed in circumstances such as this, the court in the case of *In Re Estate of John Musambayi Katumanga – (Deceased)* [2014] eKLR stated as follows:

“Under Part V, a surviving spouse is entitled absolutely to the deceased spouse’s chattels and a life interest in the remainder. The surviving spouse, particularly the widow, is regarded as having the greatest stake in the estate. Spouses during marriage take care of each other. They depend on one another for a variety of material and emotional things. The dependency is usually higher on the part of the wife. In the traditional step-up the wife takes care of the home and the children, while the husband is out looking for resources for the family’s sustenance. Often the women are housewives or persons holding lowly jobs, which afford them time to be close to their homes and family. It is in recognition of this arrangement that the law of marriage imposes a duty on husbands to provide for and maintain their wives. This duty remains even after death, but this time the burden is on the estate. It is because of it that the surviving spouse takes the household goods and enjoys a life interest in the capital assets.”

15. In cases such as this where a person dies intestate leaving more than one spouse, the applicable law is Section 40 and 41 of the *Law of Succession Act*. The surviving spouse or spouses are entitled to a life interest and other movables survived of the deceased. The second limb of distribution of the deceased’s heirs positively identified in that lineage under Section 29 of the *Law of Succession Act* is to be shared within the ambit of Section 38 as read with Section 40 of the *Law of Succession Act*.

16. Kenya’s inheritance regime expressly provides for the women’s rights to equality, property adequate standard of living, family and dignity under Art. 27, 28, 40 and 45 of *the Constitution* and binding International and Regional Conventions as envisaged in Art. 2(5) & (6) of *the Constitution*. For example, the Protocol to the African Charter on the rights of women in Africa speaks direct to this issue that:

“a widow shall have the right to an equitable share in the inheritance of the property of the husband. A widow shall have the right to continue to live in the matrimonial house. Further, women and men shall have the right to inherit equitable shares in their parents’ properties”.

17. The enactment of the Succession Act remedied any disempowerment of women of Kenya which provides protective and guaranteed provisions consistent with Art. 27(4) of *the Constitution*.

18. The court takes judicial notice that the test outlined in the above provisions substantially compromised the rights on inheritance which accrue to one of the spouses namely Prisca Tarkwen Ruto. In



approaching this issue, I am minded to borrow the inspiration words from the decision of the apex court of India in *Deva Metal Powders (p) Ltd. Vs. Commissioner, Trade Tax, Uttar Pradesh* which interpreted similar provisions to our section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules the court observed therein as follows:

“A bare look at Section 22 of the Act makes it clear that a mistake apparent from the record is rectifiable. In order to attract the application of Section 22, the mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. “mistake” means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error, a fault, a misunderstanding, a misconception “Apparent” means visible; capable of being seen; obvious; plain. It means “open to view, visible, evident, appears, appearing as real and true conspicuous, manifest, obvious, seeming.” A mistake which can be rectified under Section 22 is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration.

13. In our view rectification of an order does not mean obliteration of the order originally passed and its substitution by a new order. What the Revenue intends to do in the present case is precisely the substitution of the order which according to us is not permissible under the provisions of Section 22 and, therefore, the High Court was not justified in holding that there was mistake apparent on the face of the record. In order to bring an application under Section 22, the mistake must be “apparent” from the record. Section 22 does not enable an order to be reversed by revision or by review but permits only some error which is apparent on the face of the record to be corrected. Where an error which is apparent on the face of the record to be corrected. Where an error is far from self-evident, it ceases to be an apparent error. It is, not doubt, true that a mistake capable of being rectified under Section 22 is not confined to clerical or arithmetic mistake. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof. As observed by this court in *Master Construction Co. (P) Ltd. V. State of Orissa*, an error which is apparent from record should one which is not an error which depends for its discovery on elaborate arguments on questions of fact or law.”
19. It was also held in our local jurisdiction in the cases of *Muyodi v Industrial and Commercial Development Corporation & Anor* (2006) 1 EA 243 and *Paul Mwaniki v National Hospital Insurance Fund Board of Management* (2020) eKLR that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.
20. It is to be observed that the review is not an appeal. It is observed that the power of review can be exercised for the correction of a mistake, error of fact or of law on the face of the record and not to substitute a different view of the court. These powers are exercised within the limits of the statute under Section 80 of the *Civil Procedure Act*, Rule 73 (1) of the Probate and Administration Rules and Order 45 Rule 1 of the Civil Procedure Rules.
21. Although *the constitution* in Article 27 speaks of equality before the law and non-discrimination in so far as inheritance rights are concerned it is the promise unfulfilled for the Kenyan women. It is a fact that the higher percentage of women cultivate all parcels of land for subsistence and also for commercial purposes but they do not control the proceeds from the land and it comes to inheritance rights there



is always a struggle between men and women for the very simple reason of competing rights of culture and law. These conditions of inequality and discrimination under Article 27 (4) of the constitution persist despite Kenya's commitment under international law to secure equality for women. Kenya has signed and ratified various International and Regional Instruments i.e International Covenant on Civil and Political Right, the International Covenant on Economic, Social and Cultural Right, the Convention on the elimination of all forms of discrimination against women and the African Charter on Human and People's Rights taken together with other instruments as recognised under Article 2 (5) &(6) of the constitution any such obligations for the State to depart from fulfilling this promises undermines constitutionalism and the Right to equality. International Human Rights Law embodies a long-standing commitment to equal rights of women and men. Most basically is the emphasis with respect to women's inheritance right. CEDAW, as one of the key instruments on equality and non-discrimination, is more emphatic that any social and cultural patterns of conduct of men and women, with a view to achieve the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or superiority on either of the sexes or on stereotyped roles for men and women as contained in the charter must be done away by the state or any such persons, community, tribe. (Underlined Emphasis is Mine)

22. In some it is beyond dispute in our constitution and International Law the equal treatment of men and women in the ownership of property as enshrined in Article 40 of the constitution, including property acquired during marriage and passed on under Laws of intestate succession has clearly codified in the Act governing such matters within the Republic of Kenya is protected and guaranteed. In Kenya, generally speaking family in Section 29 of the Law of Succession Act refers to individuals related by blood, lineage, marriage, being traced either through the male line (Patrilineal) or the female line (Matrilineal). This family tree forms the basic structure in which to define the heirs or beneficiaries to the intestate or testate estate. For the purposes of this case, it can be seen from the record that Prisca Tarkwen Ruto though recognised as a spouse for reason of marriage with the deceased nevertheless she was left out of the initial distribution of the estate of the deceased. That error of law must be corrected however belatedly.
23. Applying the law laid down by superior courts in Kenya and also the aforesaid decision from the comparative jurisprudence to the facts of the case at hand, I am of the view and the previous decision excluding Prisca Tarkwen Ruto from inheriting any of the intestate estate whether movable or immovable is an error of fact and law to be remedied by this court.
24. In view of the above, the following declarations are laid down by this court:
 - a. The property known as IR No. 8267 LR. 772/8 shall be shared equally amongst all the beneficiaries inclusive of the applicant herein who was initially left out.
 - b. An award of Compensation of Kshs. 13,356,032.00/= held at Kenya Commercial Bank in account No. 1281670014 in the name of the late Peter Kipkurgat Kuto – deceased be shared equally amongst all the beneficiaries including the applicant save for Mathew Kiplagat Kuto and Naphtali Kiprotich Kuto, who had their share surrendered pursuant to an order dated August 13, 2024.
 - c. This being a family matter, the costs to be in the cause.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 25TH DAY OF OCTOBER 2024

R. NYAKUNDI

JUDGE



In the Presence of:
Mr. Mogambi Advocate

