



REPUBLIC OF KENYA



**In re Estate of Andrew Achoki Mogaka (Deceased) (Probate & Administration  
35 of 2019) [2024] KEHC 13905 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
PROBATE & ADMINISTRATION 35 OF 2019  
WA OKWANY, J  
OCTOBER 24, 2024**

**IN THE MATTER OF THE ESTATE OF ANDREW ACHOKI MOGAKA (DECEASED)**

**BETWEEN**

**ANASTACIA NDUNGE ACHOKI ..... 1<sup>ST</sup> PETITIONER**

**TABITHA KEMUNTO ACHOKI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PRISCILLA BOSIBORI ACHOKI ..... 1<sup>ST</sup> PETITIONER**

**JOB MECHA ACHOKI ..... 2<sup>ND</sup> PETITIONER**

**RULING**

1. This ruling is in respect to the Application dated 22<sup>nd</sup> March 2022 wherein the Applicant seeks the Rectification of Grant. The application is brought under Rule 43 (1) of the Probate and Administration Rules and is premised on the following grounds: -
  1. That the deceased was a partner in Manor House Farm in Trans Nzoia County in which farm he was entitled to a share of approximately 115 Acres.
  2. That after the survey of the said farm, the deceased was allocated L.R. No. 32829/5 measuring 45.911 Hectares and L.R. No. 32829/7 measuring approximately 0.3282 Hectares.
  3. That at the time of confirmation of this Grant, the Petitioners did not have the correct survey details hence erroneously referring to L.R. 32829/2 as the property of the deceased.
  4. That the said 2 parcels aforesaid constitute all the deceased's land at Manor House measuring 46.239 Hectares (114.256 Acres) contrary to the previous estimate of 115.5 Acres.
  5. That Anastacia Ndunge Achoki shall have L.R. 32829/7 measuring 0.3282.



6. That approximately 1.2. Acres of the previous 115.5. Acres has been allocated to public utilities hence the need to adjust the acreage previously allocated to the respective houses of the deceased.
  7. The Court by mistake omitted an old tractor –FIAT which was allocated to Anastacia Ndunge Achoki from the confirmed Grant.
  8. There is an error regarding Motor Vehicle KAS 825N which the beneficiaries now want transferred to Priscilla Bosibori Achoki.
2. When the matter came up before me for determination on 23<sup>rd</sup> November 2023, parties were directed to explore Mediation as a way of resolving the longstanding succession dispute on the mode of distribution of the estate of the deceased.
  3. Parties attended Mediation proceedings and arrived at a Mediation Settlement Agreement which they filed before this Court on 22<sup>nd</sup> December 2023.
  4. At the hearing of the Application on 29<sup>th</sup> May 2024, Mr. Mokaya, Counsel for the 2<sup>nd</sup> and 4<sup>th</sup> Petitioners submitted that his clients were not agreeable to the Mediation Agreement because the proposed consent did not capture what was discussed and agreed upon. He however conceded that his clients signed the said Agreement. This Court directed the parties to record a consent on the clauses that they had agreed upon so that the contentious issues could be sieved out for determination.
  5. On 25<sup>th</sup> September 2024, Mr. Mokaya asked the Court to adopt the Mediation Report save for the last clause which was not clear on the property to be surveyed. In a rejoinder, Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners informed the Court that all the land parcels had been surveyed but that parties were unable to reach a settlement.
  6. Mr. Abraham Onchoke Achoki, the deceased's son from the 2<sup>nd</sup> household also informed the Court that they were not in agreement with the rectified mode of distribution captured in the Mediation Agreement as the 1<sup>st</sup> household was trying to take over everything.
  7. I have considered the rival arguments made by the parties and I find that the main issue for determination is whether the Application for Rectification of Grant is merited.
  8. The law on rectification or alteration of Grants is premised on Section 74 of the *Law of Succession Act* which states as follows: -
    74. 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.
  9. Rule 43(1) of the Probate & Administration Rules provides:-
 

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.
  10. The above provisions posit that Rectification of Grant is limited to matters of error which may be amended by an Order of the Court without substantively changing the contents of a Confirmed Grant.



I refer to the case of the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased) [2013] eKLR, where it was held that: -

“The law on rectification or alteration of grants is 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 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....

11. The deceased’s son, Mr. Achoki, contended that they were not in agreement with the mode of distribution. The Court of Appeal at Kisumu pronounced itself on the issue of any evidence contradicting written agreements in the case of the Speaker Kisii County Assembly vs. James Omariba Nyaoga [2015] eKLR, thus; -

“The 1st appellant’s attempt to vary the terms of the letters of appointment, in our view, offends the provisions of sections 97 and 98 of the Evidence Act, chapter 80 laws of Kenya, which attempt we must reject. This is not the first time we are doing so. In the case of John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No 217 of 2003] (UR), we cited, with approval, Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 12, on interpretation of deeds and non-Testamentary Instruments paragraph, 1478 as follows:-

“Extrinsic evidence generally excluded: Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document. Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.”

12. Halsbury’s Laws of England (4<sup>th</sup> Edn) Vol. 9 (1) at para 622, states that:-

“Where the intention of parties has in fact been reduced to writing, under the so-called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms”.

13. Based on the foregoing, I find that having attended the Mediation Proceedings and having willingly, freely and voluntarily appended his signature to the Mediation Settlement Agreement, Mr. Abraham Achoki, the deceased’s son, is bound by the terms set out therein. I also find that the resolutions listed on the said agreement were devoid of any ambiguity so as to warrant this court’s intervention. I further find that parties are bound by the terms of the said agreement which form the basis for the mode of distribution proposed in the instant application for rectification of grant.
14. I note is that the proposed mode of distribution, in the instant Application for Rectification of Grant, is not the exact replica of the resolutions made in the Mediation Settlement Agreement. The question which arises is whether this court should adopt the Rectified Mode of Distribution Schedule attached to the Application for Rectification of Grant or the terms agreed upon in the Mediation Settlement



Agreement. In resolving this issue, I will rely on Section 59B (4) and (5) of the [Civil Procedure Act](#) which provides as follows: -

- (4) An agreement between the parties to a dispute as a result of a process of mediation under this Part shall be recorded in writing and registered with the Court giving the direction under subsection (1), and shall be enforceable as if it were a judgment of that Court.
- (5) No appeal shall lie against an agreement referred to in subsection (4).

15. I find that this Court is bound by the Mediation Settlement Agreement because it takes the form of a Consent recorded by the parties. Such an agreement can only be set aside under specific circumstances as stated in Kenya Commercial Bank Ltd vs. Specialized Engineering Co Ltd [1982] KLR P 485 where it was held that:-

“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 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.”

16. For the reasons that I have stated in this ruling, I find that there is justification in allowing the Application for Rectification of Grant. It is my final determination that the Application is merited and I therefore allow it. The Mediation Settlement Agreement is therefore hereby adopted as an Order of the Court and shall bind the parties in the distribution of the Estate of the deceased.

17. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS  
24<sup>TH</sup> OCTOBER 2024.**

**W. A. OKWANY**

**JUDGE**

