



REPUBLIC OF KENYA



In re Joshua Githiari alias Joshua Githiari Kibui (Deceased) (Succession Cause 15 of 2019) [2023] KEHC 566 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 15 OF 2019
CM KARIUKI, J
FEBRUARY 9, 2023
IN THE MATTER OF THE ESTATE OF JOSHUA
GITHIARI ALIAS JOSHUAGITHIARI KIBUI (DECEASED)**

IN THE MATTER OF

**PETER MUGI GITHIARI 1ST ADMINISTRATOR
VIRGINIA WANJIRU GITHIARI 2ND ADMINISTRATOR**

JUDGMENT

1. Before this court for determination is the application dated July 20, 2022. The application is predicated on the grounds on the face of the application and the supporting affidavit of Peter Mugi Githiari. These are:-
 - i. The current succession cause was filed in Nakuru High Court and registered as HC Succ No 813 of 2015, and in due course, one Grace Nduta Githiari was appointed as the administrator of the estate.
 - ii. On May 13, 2021, the aforesaid grant of letters of administration was revoked, and on March 3, 2022, the Applicants were appointed as the new administrators.
 - iii. This succession cause has been in court from 2015, and as such it is in the interest of justice for the grant that was issued to the Applicants to be confirmed.
 - iv. Karanja Kibui Njau (deceased) and Joshua Githiari Kibue (deceased) were registered as the tenants in common in equal, undivided shares of all that parcel of land known and described as LR Nyandarua/Leshau Karai Trading Centre/96.
 - v. The said Karanja Kibui Njau and Joshua Githiari Kibue are deceased, and their respective estates have a claim over the said parcel of land.



- vi. The Applicants have instituted Nyahururu CMC ELC No E07 of 2022 against Alice Wambui Karanja, the administrator of the estate of Karanja Kibui Njau, seeking a declaration that the two estates hold equal, undivided shares over the said parcel of land.
 - vii. It is in the interest of justice for the distribution of the said parcel of land to be set aside to await the determination in Nyahururu CMC ELC No E037 of 2022.
 - viii. Consequently, the Applicants seek the following orders from this court: -
 - ix. That the name of Virginia Wanjiru Gathoni be corrected to read Virginia Wanjiru Githiari and a new grant of letters of administration be issued.
 - x. That the grant of letter of administration issued to the Applicants on March 3, 2022 be confirmed before the expiry of 6 months.
 - xi. That the distribution of LR Nyandarua/Leshau Karai Trading Centre 96 be set aside pending the hearing and determination of Nyahururu CMC ELC No E037 of 2022, Peter Mugi Githiari & Ano v Alice Wambui Karanja.
 - xii. That the costs of the application be in the cause.
2. Grace Nduta Githiari filed grounds of opposition dated September 30, 2022, stating as follows: -
 3. That the summons was in acute violation of Section 2 (1) of the *Law of Succession Act*, especially in prayer No Three thereof is concerned.
 4. Nyahururu CMC ELC No E037 of 2022, Peter Mugi Githiari & Anor v Alice Wambui Karanja, was filed on the 17th May 2022 during the pendency of this suit seeking, in the main, a declaration that the estates of Joshua Githiari Kibue and Karanja Kibue Njau hold equal, undivided shares in LR Nyandarua/Leshau Karai Trading Center/96, the suit land herein which is already an issue for determination before this honourable court and hence the suit is res-subjudice.
 5. The summons seek to stay and/or set aside the distribution of the suit property, which has already been distributed in Nyahururu PMC Succ Cause No 222 of 2012 in the Matter of the Estate of the Late Karanja Kibui Njau (deceased) where the half share of the said parcel of land was distributed to Alice Wambui Karanja and a certificate of confirmation of grant issued in that regard and therefore what remains is the identification of which half share on the ground belongs to which estate and not distribution of the said parcel of land.
 6. The certificate of confirmation of grant in Nyahururu PMC Succ Cause No 222 of 2012 in the Matter of the Estate of the Late Karanja Kibui Njau (deceased) has never been reviewed and/or set aside and, therefore, the suit land is no longer pending for distribution.
 7. That what is pending for distribution is half share of suit land belonging to the estate of Joshua Githiari alias Joshua Githiari Kibui (deceased).
 8. That the summons are meant to derail the course of justice as the same is meant to stop the determination of the question as to which part of the suit land belongs to which estate on the ground and which question informed the scene visit of September 23, 2022 by the honourable court.
 9. That the question as to which between this matter and CMELC matter seeking to establish which estate between the estate of Joshua Githiari (deceased) and that of Karanja Kibui Njau (deceased) should take half of the suit land should be stayed was comprehensively dealt with in the summons dated November 26, 2021 filed by Kenneth Njau Githiari the honorable court stayed Nyahururu CM Civil



Case No 308 of 2017- Alice Wambui Karanja v Safaricom Ltd & Grace Nduta Githiari, Kenneth Njau Githiari – interested party which suit has the issue in question as the newly filed Nyahururu CMC ELC No E037 of 2022 Peter Mugi Githiari & Anor v Alice Wambui Karanja, the instant summons is *res judicata*.

10. That litigation must come to an end, and therefore the instant summons, as well as Nyahururu CMC ELC No E037 of 2022 is an attempt to prolong litigation over the said suit land and therefore is not in the best interest of justice.
11. In addition, there was a response from Alice Wambui Karanja in relation to the suit land.
12. The Applicant also filed submissions dated October 17, 2022 in support of their application, and the Respondent filed submissions dated November 4, 2022 in opposition.

13 Analysis and determination

14. I have discerned that the issues for determination in the instant application are the rectification of the 2nd administrator’s name, the confirmation of the grant issued to the Applicants on March 3, 2022, and the setting aside the distribution of LR Nyandarua/Leshau Karai Trading Centre 96 pending the hearing and determination of Nyahururu CMC ELC No E037 of 2022 herein.
15. The substantive authority on rectification of grants is set out in Section 74 of the [Law of Succession Act](#) and Rule 43 (1) of the [Probate and Administration Rules](#).
16. Section 74 of the [Law of Succession Act](#) provides as follows:

“Errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court.”
17. Rule 43 (1) of the [Probate and Administration Rules](#) provides that:

“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.
18. Moreover, In the matter of the estate of [Geoffrey Kinuthia Nyamwinga \(deceased\)](#) [2013] eKLR, the court expressed itself as follows with regard to the issue of rectification of grants;

“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..... These provisions mean 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. However, the effect is that the power to order rectification is limited to those situations; therefore, the power given to the court by these provisions is not general...

 - a. Where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the [Law of Succession Act](#), the Applicant ought to approach the court under order 44 of the Civil Procedure Rules. A review under Order 44 of the Civil Procedure Rules may be sought upon discovery of a new and important matter or on account of some mistake or error apparent on the face of the record or for any sufficient reason. Accordingly, the Applicant, in this case, should have moved the court under this provision-



Order 44 of the Civil Procedure Rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant.”

19. Similarly, *In the matter of the Estate of Hasalon Mwangi Kabero* [2013] eKLR, the court stated that:-

“An error is essentially a mistake. Section 74 and Rule 43 must relate to a name or description, the time and place of the deceased’s death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if, say, a word in the full name of a person is omitted, a word or number, or a figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word “error” too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43.”

20. The Applicants sought for the name of Virginia Wanjiru Gathoni to be corrected to read Virginia Wanjiru Githiari and a new grant of letters of administration to be issued. As envisaged in the aforementioned authorities, the rectification of the grant applied to errors that can be effected without changing the substance of the grant, including errors in names, description of any person or thing, or an error as to the time or place of death of the deceased of the purpose for which a limited grant was issued.

21. The critical element to consider herein is whether the change of name from “Virginia Wanjiru Gathoni” to “Virginia Wanjiru Githiari” will affect the substance of the grant. It appears that both terms refer to the same person. Any of the parties involved have not opposed the same. In my view, the rectification of an error in the co-administrators name is an error that is envisaged under the law as a mistake that may occur on the face of the grant, like typing errors in terms of persons or things. Accordingly, I find that the name of Virginia Wanjiru Gathoni be rectified as prayed and an amended grant be issued.

22. Secondly, the Applicants prayed that the grant of letters of administration issued to the Applicants on 3rd March 2022 be confirmed before the expiry of 6 months.

23. Section 71 of the *Law of Succession Act* deals with the confirmation of grants of representation and states as follows: -

“71. Confirmation of grants

1. After the expiration of a period of six months or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the appointment in order to empower the distribution of any capital assets.
2. Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may
 - a. if it is satisfied that the grant was rightly made to the Applicant and that he is administering and will administer the estate, according to law, confirm the grant; or



- b. if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
 - c. order the Applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
 - d. postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:
- b. Provided that, in cases of intestacy, the grant of letters of administration shall only be confirmed once the court is satisfied as to the respective identities and shares of all persons beneficially entitled. When confirmed, such grant shall specify all such persons and their respective shares.
24. The prayer being unopposed and there being no protest to the same, I am inclined to grant the prayer to confirm the grant of the letter of administration issued to the Applicants on March 3, 2022.
25. Having settled prayers No 1 and 2 of the summons, I will now move to prayer No 3, which is contested. Both the grounds of opposition by Grace Nduta Githiari and the submissions by Alice Wambui Karanja, wife to the late Karanja Kibui Njau and the administrator of his estate stated that there was no question as to the distribution of the suit land as the same had already been dispensed with. However, they asserted that the issue was the identification of which part of the suit land belonged to the deceased person.
26. Having gone through the record, the suit land has already been distributed by the court, and it is not in dispute that the suit land is registered jointly to Karanja Kibui Njau (deceased) and Joshua Githiari Kibue (deceased), whose estate hold an equal half share each. Accordingly, this court, vide its orders dated March 3, 2022, distributed ½ share of the suit land to the deceased's estate and further ordered that the court visit the scene to confirm the sharing done on the ground by the two estates.
27. However, the Applicants moved the ELC Court to tackle the dispute issue, the identity of each estate's half share on the ground. The issue before this court is setting aside the distribution of the suit land; however, the said distribution has already been done, and therefore, that prayer is overtaken by events. I reiterate that this court has already tackled its mandate regarding distribution, and I find it mischievous for the Applicants to move the court on the same. Therefore, this court became functus officio with respect to the distribution of the suit land, and in the circumstances of the case herein, it is my view that this court cannot grant prayer no—three as contained in the application.
28. In the upshot, the application dated July 20, 2022 is partly meritorious, and I do hereby allow the same in the following orders -
- i. That the name of Virginia Wanjiru Gathoni be corrected to read Virginia Wanjiru Githiari and a new grant of letters of administration be issued.



- ii. That the grant of letter of administration issued to the Applicants on March 3, 2022 is hereby confirmed.
- iii. To bring litigation to an end, The Karanja Kibui Njau (deceased) estate will get half of the plot developed and occupied by administrator/agents as observed by the court during the scene visit and be registered in the name of Alice Wambui Karanja and Joshua Githiari Kibue (deceased) estate get the other half in the name of the administrators. They be registered respectively in the parcel of land known and described as LR Nyandarua/Leshau Karai Trading Centre/96.
- iv. To expedite subdivision and transfer, the court's deputy registrar shall execute all relevant documents.
- v. No orders as to costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 9TH DAY OF FEBRUARY 2023.

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CHARLES KARIUKI

JUDGE

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