



**In re Estate of Dismas Openda Sisungu (Deceased) (Succession Cause  
19 of 2010) [2023] KEHC 17776 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17776 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 19 OF 2010**

**DK KEMEL, J**

**MAY 22, 2023**

**IN THE MATTER OF THE ESTATE OF DISMAS OPENDA SISUNGO (DECEASED)**

**BETWEEN**

**MOSES NYONGESA OPENDA ..... PETITIONER**

**AND**

**EVANS WAFULA MAKOKHA ..... OBJECTOR**

**RULING**

1. The petitioner has filed an application dated August 3, 2018 premised on section 74 of the *Law of Succession Act*, rule 43, 49 and 73 of the *Probate and Administration Rules* seeking: that rectification of the certificate of confirmation of grant to correct the error that the land parcel No E Bukusu/Nalondo/3639 reading 2.4 Ha to read 1.527 Ha; that the land parcel No E Bukusu/S Nalondo/3640 reading 2.0 Ha be rectified to read 1.27 Ha; and that the costs of the application be provided for.
2. The application is premised on the grounds on the face of the application and supported by an affidavit sworn by Moses Nyongesa Openda. He deponed that the letters of administration intestate were made to him on July 19, 2010 and the same was confirmed on October 4, 2012. He deponed that the certificate of grant has errors in respect of the acreage of the land allocated to Evans Wafula Makokha measuring 2.4 Ha and the land allocated to him measuring 2.0 Ha. He further deponed that the total acreage of the two parcels of land shows to be 4.4 Ha while on ground the land measures 2.8 Ha.
3. The said application is opposed by Evans Wafula Makokha. He avers that his late father Eric Makokha bought from the deceased Dismas Openda Sisungu a parcel measuring 8 acres but when they surveyed it was found to be 6 acres and it was agreed that they have same 2.4 ha which he was given. He avers that in 2014 the petitioner filed a suit against him seeking to re-survey the parcels of land which was done jointly and all the beneficiaries were satisfied with the acreage that were given. He avers that the present application seeks to reduce their shares of land yet they were not even involved and the titles



have already been issued. He avers that the rectification of the grant is mischievous, ill begotten and malicious.

4. The objector swore a further affidavit deponing that it is clear from the survey report that the mutation form that was used to subdivide the parcel namely E Bukusu/S Nalondo/255 was registered on April 17, 2002 yet the deceased herein died on June 8, 2005 which is possible fraud. He averred that his late father had bought land from the deceased herein on January 13, 1976 measuring 8 acres with 0.7 at the cost of Kshs, 5, 710/= . He avers that when the survey was done after succession it was found that their share is less than 8.07 acres that was purchased and it was agreed that they get 2.4Ha which was confirmed and a title was issued to that effect.
5. The question to be answered is whether the rectification sought could be carried through under section 74 of the Law of Succession Act?
6. 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."

7. 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."

8. 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.
9. In the matter of the estate of Hasalon Mwangi Kabero [2013] eKLR, where the court stated:

"When dealing with an application for rectification of grant to add a full name of person who was omitted."

"An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased 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 or a word or number or 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."

10. Base on the averments of both parties there clearly exists an issue on the acreage of the deceased property. The petitioner deponed that there were errors in respect of acreage in respect to land allocated to Evans Wafula Makokha from land parcel No E Bukusu/Nalondo/3639 measuring 2.4 Ha and



land allocated to Moses Nyongesa Openda in respect to land parcel No E Bukusu/S Nalondo/3640 measuring 2.0Ha. he deponed that the land on ground is small and equivalent to about 2.8Ha and that the land should be shared prorata so that Evans Wafula Makokha receives 1.572 Ha while Moses Nyongesa Openda receives 1.27Ha. The objector on the other hand deponed that his late father purchased 8 acres but on survey of the E Bukusu/Nalondo/3639 they found it to be only 6 acres and it was agreed that they have the same share of 2.4 ha which he was given and titles were issued accordingly. He deponed that in 2014 a joint survey was conducted and all the beneficiaries were satisfied and that the present application only seeks to reduce the shares of his land.

11. It is noted that the petitioner had been issued with a certificate of confirmation of grant wherein all beneficiaries were allocated their shares under the estate and that the objector herein was also allocated 2.4 Ha as shown in the certificate of confirmation of grant dated 4/10/2014. From the averments of the objector, it is clear that his father had bought from the deceased 8 acres which was reduced to six acres at the time of confirmation. It is also not in dispute that titles have since been issued to the beneficiaries as well as the objector. As matters stand, it would appear to me that the estate had been fully distributed and that the petitioner was expected to come to court and confirm that the exercise of distribution has been concluded. It is also not in dispute that the petitioner has since lodged a civil suit in the Environment and Land Court being Bungoma ELC No 77 of 2014 seeking for rectification of the register and resurvey of the parcels of land and that a survey report was subsequently prepared. If that is the position, then it is my view that the petitioner should proceed and ventilate his claim before the said court. The petitioner should not be allowed to mount two causes of action before two different courts over the same subject matter. It is instructive that titles have already been issued to the beneficiaries and that any dispute thereafter should be directed to the Environment and Land Court for determination. In that regard, I must agree with the Objector's concerns that the petitioner is out to deprive him of his possession of the parcel that had been agreed upon during the confirmation of grant. I find that the petitioner's conduct in abandoning the ELC matter which is still pending and coming up with the present application disguised as a rectification is mischievous and meant to pull the rug from under the Objector and to vex him. The petitioner should know that the distribution of the estate is already complete as titles have been issued. If there are any disputes, then the same should be taken before the appropriate court for adjudication.
12. In view of the foregoing observations, it is my finding that the petitioner's application dated 3/8/2018 lacks merit. The same is dismissed with costs to the objector.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2023**

**D. Kemei**

**Judge**

**In the presence of:**

**Wekesa for Wamalwa Simiyu for Petitioner**

**No appearance Sichangi for Objector**

**Kizito Court Assistant**

