



REPUBLIC OF KENYA



In re Estate of Samuel Murithi Mugambi (Deceased) (Succession Cause 1065 of 2005) [2023] KEHC 19524 (KLR) (Family) (4 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1065 OF 2005
EKO OGOLA, J
JULY 4, 2023**

RULING

1. Before the court is a Summons Application dated March 21, 2023 where the Applicant prays for the following orders:
 - a. That this Honorable court be pleased to rectify Grant of letters of Administration intestate issued upon Eric Kiruja Mureithi
 - b. That this honorable court be pleased to issue a rectified confirmation of Grant of Letters of Administration reflecting land parcel Kiirua/Kiirua Nkando/336 to form part of the estate of the deceased in the schedule of distribution of the assets of the estate of the deceased
 - c. That the mode of distribution of the estate of the deceased be rectified as shown in the schedule of Distribution
 - d. That the costs of the application be made in the cause
2. The application is premised upon Section 74 of the *Law of Succession Act* and Rule 43 (1), (2) & (3) of the *Probate and Administration Rules* and is supported by the Affidavit of Eric Kiruja Muriithi sworn on March 21, 2023.
3. In this case, the deceased Samuel Muriithi Mugambi died on May 16, 2004. Consequently, Eric Kiruja Muriithi was issued with Grant of letters of Administration to the estate of the deceased on July 6, 2005. The Grant was subsequently confirmed on September 17, 2007 and rectified on April 21, 2015.
4. The Applicant states that when petitioning for letters of Administration, land Parcel Kiirua/Kiirua Nkando/336 was omitted in the list of the assets of the estate of the deceased. The Applicant further stated that in recollecting the estate of the deceased, he discovered the said property.
5. The Applicant seeks to rectify both the grant and the confirmation of grant to incorporate the property to form part of the estate of the deceased.



6. The Application is unopposed.

7. Section 74 of the *Law of Succession Act* provides that: -

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.

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.

8. Rectification of a grant of Letters of Administration is therefore limited to matters set out under Section 74 of the *Law of Succession Act*. As per this provision rectification of grant deals specifically with correction of error which the court may order without changing the substance of the grant. This includes 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 visualized under the Section is a mistake which may occur on the face of the grant like typing errors in names of persons or the things. A rectification seeking to include properties which were not in the schedule of the assets when filing the cause and not included in the grant may not fit in the matters provided under Section 74 of the Act.

9. *In the matter of the Estate of Hasalon Mwangi Kabero* [2013] eKLR

The court stated;

“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'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 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.” (mine emphasis)

10. *In the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased)* [2013] eKLR

The court stated;

“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 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.....

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 new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. 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.”

11. In *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR

The Court held;

“...the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time.

Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”

12. *In re estate of Charles Kibe Karanja (deceased)* [2015] eKLR

The court stated;

“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the *Law of Succession Act* and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules.....

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after



review or revision of the said orders that an altered certificate of confirmation of grant can issue.” (mine emphasis)

13. There is harmony in the above decisions that rectification of grant deals with correction of errors and/or mistakes in names and description. A party seeking rectification to bring in assets not originally included in the grant cannot be said to be seeking rectification. An application for review listing the assets and proving their discovery and that they could not be included in the grant despite the exercise of due diligence would be appropriate and would give the court opportunity to consider whether to review the grant or not.
14. Nevertheless, Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* provide: -
 - “Section 47 of the *Law of Succession Act*, stipulate that:
“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”
 - “Rule 73 of the Probate and Administration Rules stipulates that:
“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
15. In this regard, the court can entertain any application of whatever nature under section 47 aforesaid and invoke its inherent power under Rule 73 and make orders for the sake of justice.
16. Rule 63 of the *Probate and Administration Rules* recognizes that the provisions of Order 45 of the *Civil Procedure Rules*, are some of the specific provisions of the Civil Procedure Rules applicable to succession proceedings. It states that;
 - “Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), ... shall apply so far as relevant to proceedings under these Rules.”
17. I will invoke the above provisions to determine whether the Confirmation of Grant can be reviewed. Under Order 45 of the *Civil Procedure Rules*, review can only be allowed under the following circumstances:

Discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made.

 2. Mistake or error apparent on the face of the record.
 3. Any other sufficient reason which may make the court to review its order.
18. The Applicant avers that the property was not included in the Petition and was as a result not included in the confirmed Grant.



19. In *National Bank of Kenya Ltd versus Njau* (1995-1998) 2EA 249 (CAK); at page 253 of the judgment, the Court said: -

“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. The error or omission must be self-evident and should not require an elaborate argument to be established.”

20. There has been no objection raised by the other beneficiaries or by any other person with regard to this application. The Applicant has attached a copy of the Title Deed marked EK02 proving that the deceased was the owner of Kiirua/Kiirua Nkando/336.

21. Given that the review succeeds, the Grant and the resultant Confirmation of Grant shall be amended to include property Kiirua/kiirua Nkando/336

22. Costs shall be in the cause

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2023.

E K OGOLA

JUDGE

Ruling delivered online the presence of:

M/s Swaka for the Administrator/Applicant

Ms Gisiele Court Assistant

