



**In re Estate of Grace Waveti Wambogori (Deceased) (Succession Cause
151 of 2004) [2023] KEHC 19700 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 151 OF 2004**

LM NJUGUNA, J

JULY 3, 2023

**IN THE MATTER OF THE ESTATE OF GRACE WAVETI
WAMBOGORI (DECEASED)**

BETWEEN

CHARLES KITHINJI STEPHEN APPLICANT

AND

MARY WANGIRI NJERU 1ST RESPONDENT

NANCY MUTHONI NJERU 2ND RESPONDENT

JOYCE RUNJI NGUU 3RD RESPONDENT

RULING

1. The matter for determination before this court is the summons for revocation of the grant dated the March 28, 2022.
2. It is the applicant's case that the administrators concealed material facts relevant to this case in that they failed to include him as a beneficiary of the estate of the deceased notwithstanding the fact that he is a son of the deceased hence a rightful beneficiary; that the respondents are on the verge of selling Land Parcel Nos Ngandori/Kirigi/3440 and 3156 to innocent third parties which will render him destitute by disinheriting him. The application is supported by an affidavit sworn on even date wherein the applicant deponed that the respondents colluded with other beneficiaries in the distribution of the estate and as a result, disinherited him.
3. The 2nd and 3rd respondents filed an undated replying affidavit wherein they opposed the application by stating that upon the death of their mother, all the beneficiaries including the applicant participated in the succession proceedings. That during the deceased's lifetime, she had gifted their brothers including the applicant 2 ½ acres of land while their eldest sister, Elizabeth Gicugu was gifted 1 acre of the



deceased's estate. It is their case that, it is not true that the applicant sold the parcel of land gifted to him by their mother to raise money to cater for medical expenses for their mother but the same was sold for his own benefit after which he proceeded to buy land elsewhere. That at the time that the applicant disposed off his land, their deceased mother was still in good health and was receiving rental income from Plot No Ngandori/Kirigi/3156. It was their argument that after the grant was confirmed, the land was sub divided and thereafter disposed off to third parties who are currently in occupation and further, the applicant vacated the said land on his own volition even before it was disposed off. That the applicant did not appeal against the mode of distribution as previously ordered by the court and further, no good reasons have been advanced to warrant this court issue the orders sought herein.

4. The 1st respondent via a replying affidavit sworn on July 21, 2022 deposed that upon the death of the deceased, they filed a succession cause wherein she was appointed as an administrator together with Nephath Nyaga (deceased). That the deceased prior to her death called all her daughters to inform them that she wanted the applicant to stay with her for she was too old. It is her case that the deceased later directed the applicant to sell his land so that he could permanently stay with her. That by the time the deceased died, she left the applicant living on the family land Ngandori/Kirigi/3440. She deposed that, they agreed they should cede a ¼ of Ngandori/Kirigi/3440 to the applicant. She faulted the 2nd and the 3rd respondents for going against the said agreement by selling the said portions of the estate. She thus urged this court to allow the application as prayed.
5. The court heard the application by way of *viva voce* evidence after which the parties were directed to file written submissions which directions they complied with.
6. The applicant submitted that this court ought to allow the application herein for the reasons that when the grant was confirmed on March 24, 2009, he was residing on land parcel Ngandori/Kirigi/3440 and further, he had already sold his piece of land as per his mother's advice. That the respondents ought to have included the applicant as a beneficiary of the deceased's estate as the grant dated on March 24, 2009 was non –operational for the reason that the applicant had stayed on his mother's land for more than ten years. The applicant placed reliance on sections 38 and 42 of the LSA to support his application for rectification and/or relocation of the grant. This court was therefore urged to allow the application herein.
7. The 2nd and 3rd respondents submitted that the applicant has not satisfied the requirements for rectification/rectification of the grant issued to the administrators. That the applicant duly participated in the succession proceedings and executed form 38 consenting to the appointment of his brother as an administrator. Additionally, it was submitted that he was involved in the hearing of a protest to which a ruling was thereafter delivered. It was argued that the applicant did not appeal against the said ruling and therefore this application is just an afterthought. The 2nd and 3rd respondents submitted that the succession was finalized thirteen years ago and thereafter, they disposed off their portions of land to third parties who are currently in occupation of the same. That the applicant has not joined the occupants as parties in the cause herein and therefore, any adverse orders issued by the court would be tantamount to condemning them unheard. To support this proposition, the 2nd and 3rd respondents relied on the case of Re Estate of Obedi Rubarita (Deceased) eKLR. It was also submitted that the 1st respondent was the administrator who proposed to the court the mode of distribution which was adopted by the court and therefore, she cannot be heard to challenge the whole process by agreeing with the applicant in urging this court to allow the application herein. That since the estate has been fully distributed, it would not serve any purpose for the applicant to be appointed as an administrator of the estate. This court was therefore urged to dismiss the application before it.



8. I have considered the application herein, the replying affidavits, the evidence on record, and the parties' respective submissions. The applicant's case is that the administrator failed to include him as a beneficiary of the estate of the deceased notwithstanding the fact that he is a son of the deceased and hence a rightful beneficiary. In my view, the only issue which this court is invited to determine is whether the grant of letters of administration issued to the 1st respondent should be revoked.
9. The grounds upon which the said application is premised are that the grant was obtained by concealment of material facts relevant to the said grant; that the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant. When the application came up for hearing before this court, the applicant's testimony was to the effect that he was given his portion but sold the same to go and stay with the deceased as he provided for his needs. He admitted that he had inherited 2½ acres of the deceased's estate which he sold but still desired to inherit part of the remaining land that the deceased herein had been sitting on. The 2nd and the 3rd respondents on the other hand testified that all parties were involved in the succession process and further, all the beneficiaries were present in court during the confirmation process.
10. The circumstances under which a grant can be revoked are provided for under Section 76 (a) - (e) of the [Law of Succession Act](#) and include;
 - a. Where the proceedings to obtain the grant were defective in substance;
 - b. Where the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - c. Where the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - d. Where the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - e. Where the grant has become useless and inoperative through subsequent circumstances.
11. The Learned Justice W Musyoka [in Re Estate of Agwang Wasiro \(Deceased\)](#) [2020] eKLR explained the above provisions and in doing so held thus: -

“Under Section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining it was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the



petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.”

12. It is trite that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard of proof in civil cases (the degree of certainty with which a fact must be proved to satisfy the court of the fact) is the balance of probabilities. Therefore, the applicant’s burden remains even if the respondent fails to file any defence in response [See sections 107 and 108 of the *Evidence Act*, equally *Miller Vs Minister of Pensions* [1947] 2 All ER 372, *Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & another* [2014] eKLR].
13. I have perused the documents in the court file and I have come across a Chief’s letter dated June 24, 2004 which lists the dependants of the deceased including the applicant herein, a Form 38 which the applicant signed and together with the other beneficiary, he was present in court during the confirmation of the grant which he now wants revoked. In the same breadth, there is evidence that the three sons inherited 2½ acres of land from the same estate, which the applicant also admits. He argues that he sold his share because the deceased directed her to do so; further, that together with the respondents, they entered an agreement to the effect that he would benefit from ¼ acre of Ngandori/Kirigi/3440.
14. In the instant case, the applicant has not denied that he signed the consent to confirmation of grant herein and that he was present during confirmation. He was aware of the succession case and he signed the relevant consents.
15. Having perused the evidence presented before this court in its entirety, I note that the allegation that the respondents herein concealed material facts relevant to this case and that they failed to include the applicant as a beneficiary has not been proved and indeed it is not true.
16. On whether the said grant could be rectified, the same is provided for under section 74 of the *Law of Succession Act*, cap 160, Laws of Kenya and rule 43(1) of the *Probate and Administration Rules*. Under section 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.
17. Rule 43(1) on the other hand provides that :-

“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.”
18. From the above provisions, it is clear that the power of a court to order rectification of a grant is not general but only limited to instances specified therein. That is where the errors which are sought to be rectified relates to names or descriptions, or setting out of the time or place of the deceased’s death.



[See *in the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased)* [2013] eKLR and also *in re Estate of Kathuita Kavira (Deceased)* [2019] eKLR].

19. These matters specifically refer to 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.
20. The issue of rectification of grant has been addressed in various decisions in the High Court which I have considered here as persuasive authorities. *In the matter of the Estate of Hasalon Mwangi Kabero* [2013] eKLR:

“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.”

21. Similarly in *In the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased)* [2013] eKLR:-

“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....

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.”

22. The court has taken the liberty to peruse the said agreement referred to by the applicant and indeed, the same reads that the three daughters of the deceased herein had agreed to cede a ¼ acre of Ngandori/Kirigi/3440 to the applicant herein. The said agreement has been denied by the 2nd and 3rd respondents. The court also noted that it was entered into after the grant had been confirmed and therefore the applicant cannot rely on the said agreement to revoke a grant under Section 76 of the *LSA*. As I have observed herein above, the grant can also not be rectified as the applicant has not brought the same within the parameters set out under rule 13.
23. In the end, I find that the application has no merit and I hereby dismiss the same but with no order as to costs.
24. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

