



In re Estate of Mithamo Githinji alias Mithamo Kithinji (Deceased) (Succession Cause 205 of 2009) [2023] KEHC 23942 (KLR) (17 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23942 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 205 OF 2009
LM NJUGUNA, J
OCTOBER 17, 2023
IN THE MATTER OF THE ESTATE OF MITHAMO
GITHINJI ALIAS MITHAMO KITHINJI (DECEASED)**

BETWEEN

WANJIRU GACO GU GITHINJI APPLICANT

AND

CEASER MIGWI GACO GU RESPONDENT

RULING

1. The applicant filed summons for rectification of grant on May 25, 2023 premised on the grounds on its face and in the supporting affidavit thereof. The same was filed under certificate of urgency, seeking orders that:
 - a. Spent;
 - b. The certificate of confirmation of grant made to Wanjiru Gacogu Githinji on July 24, 2014 be rectified to reflect as:
 - i. David Thuo Gachogu – Land Parcel Number Kirinyaga/Gathigiriri/1608
 - ii. Ceaser Migwi Gachogu - Land Parcel Number Kirinyaga/Gathigiriri/1607
 - iii. Wanjiru Gacogu - Land Parcel Number Kirinyaga/Gathigiriri/1609Which is the current residence/ position of each of the beneficiaries of their properties where they live/ reside and have developed
 - c. The costs of this application be in the cause.



2. The amended certificate of confirmation of grant was issued to the applicant on July 24, 2014 indicating the beneficiaries of the estate as follows:
 1. David Thuo Gachogu Kirinyaga/Gathigiriri/1607 wholly
 2. Ceaser Migwi Gachogu Kirinyaga/Gathigiriri/1608 wholly
 3. Wanjiru Gacogu Githinji Kirinyaga/Gathigiriri/1609 wholly
3. Since then, there has been no concerns in the subdivision of the estate until the filing of this summons for rectification. The applicant states that she would like the rectification to be done as she is the mother of the other two beneficiaries and being of an advanced age of 101 years, she would like to have the details on the certificate of confirmation of grant correspond with the position on the ground itself. She contests the mode of distribution as indicated in the amended certificate of confirmation of grant as it does not reflect how the beneficiaries are occupying the land. She termed the rectification as a minor one that would not cause any prejudice to any beneficiary.
4. The application was opposed vide a replying affidavit where the respondent stated that when the estate was distributed in 2014, all the beneficiaries were content and knew their portions of land. That he took possession of his portion and planted miraa bushes. That the applicant and the other beneficiary named David Thuo Gachogu have since sold the properties they were bequeathed from the estate of the deceased and have been seeking to take the respondent's land. That following issuance of the certificate of confirmation of grant, the respondent proceeded to process his title deed and received it in his name in 2017.
5. It is his averment that there has been a family feud whose subject is the respondent's property title number Kirinyaga/Gathigiriri/1608 which he got as his inheritance. That the matter was reported to Wang'uru Police Station and later litigated at CMC Wang'uru ELC case No E035 of 2023 wherein the respondent sought orders to evict the applicant and David Thuo Gachogu from his land. He stated that the duo have colluded with each other to destroy his property and frustrate his enjoyment of the land he inherited. He urged the court to dismiss the application as it is bad in law and only serves to further the mischief intended by the applicant.
6. The applicant filed a supplementary affidavit stating that the respondent has never lived on the property Kirinyaga/Gathigiriri/1608 and that his brother David Thuo Gachogu is the one who has been in actual occupation for over 10 years with his family and that he even constructed his matrimonial home there. That all the neighbors and area chief know this fact. She stated that the respondent has been occupying parcel number Kirinyaga/Gathigiriri/1607 for many years and that the parcel numbers were interchanged at the point of confirmation of grant because she did not have an advocate to assist with the process and that it is merely a mix-up that should be rectified.
7. The applicant denied the allegations that she has sold her parcel number Kirinyaga/Gathigiriri/1609 and added that it is still registered in her name. Regarding the CMC Wang'uru ELC case No E035 of 2023, she stated that the court gave orders for status quo pending determination of the suit and that has helped to restore peace momentarily. She averred that even if the respondent is the registered owner of Kirinyaga/Gathigiriri/1608, he has never been in its occupation. She stated that she is too old to tell lies to the court as she is now 104 years old.
8. The application was canvassed by way of written submissions. Both parties filed their submissions.
9. The applicant, in her submissions, relied on Sections 73 and 74 of the *Law of Succession Act* and Rule 43(1) of the *Probate and Administration Rules* in her argument that the application is properly before the court and that it should be considered. That the respondent has been residing on parcel number



Kirinyaga/Gathigiriri/1607 before and after the confirmation of grant while David Thuo Gachogu has been residing on Kirinyaga/Gathigiriri/1608 before and after the certificate of confirmation of the grant. That for the respondent to live on one piece of land and then claim the other, means that he is benefitting twice. That both her sons have lived on and raised their families in the land parcels where they occupy and that the error in the certificate of confirmation of grant can be rectified as it is a clerical error.

10. On his part, the respondent submitted that the applicant's land fall between his land and that of David Thuo Gachogu. That the applicant's land is being occupied by a third party who allegedly bought the land from the applicant. He narrated that before the death of the deceased, all the 3 beneficiaries had houses on Kirinyaga/Gathigiriri/1608, which houses were left on the land after the beneficiaries inherited the different portions. That the applicant is using this application to hoodwink this court into granting the orders sought so that the same defeats the purpose of the suit in CMC Wang'uru ELC case No E035 of 2023 wherein the respondent has sought eviction orders against David Thuo Gachogu.
11. It was his argument that this court cannot grant the orders sought because the purpose of Section 74 of the *Law of Succession Act* and Rule 43 of the Probate and Administration Rules serve to rectify errors in a limited manner, without interfering with the substance of the grant. For this, he relied on the cases of *In the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased)* (2013) eKLR and *John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another* (2016) eKLR where in cases like this, the court recommended applications for review under order 44 of the *Civil Procedure Rules* or Rule 63 of the *Probate & Administration Rules*. That in any event, the applicant has moved the court for orders that do not affect her property but the said David Thuo Gachogu has not sworn an affidavit in support of the affidavit.
12. The issue arising for determination is whether this court can grant the orders sought by the applicant under the head of rectification of the certificate of confirmation of grant.
13. Rectification of a grant, before or after confirmation is provided for in the law as follows:

Section 74 of the *Law of Succession Act* provides:

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, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

Rule 43(1) of the *Probate and Administration Rules* provides:

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.

It is clear that rectification of a grant can only be done by the issuing court in a very limited manner that does not go to the substance of the distribution itself.

14. The applicant is asking the court to interchange the properties issued to 2 of the beneficiaries as indicated in the certificate of confirmation of grant. If the applicant were to seek redistribution of the estate, she should apply for setting aside of the certificate of confirmation of grant and if allowed, file fresh summons for confirmation of the grant with fresh consents and relevant affidavits. The subject properties were already in existence and had been distributed. Otherwise, rectification of this nature



is not permitted by the Act and it goes to affect already distributed estate. In the case of Re Estate of Charles Kibe Karanja (Deceased) 2015 eKLR the Court held as follows:-

“If..... 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.”

15. The limited nature of summons for rectification and the guiding laws was also discussed in the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) (2013) eKLR (supra) where the court held thus:

“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.....”

16. I have noted that this court, though differently constituted and upon application by the applicant, rectified her name as captured in the certificate of confirmation of grant. That was the only rectification sought and it was indeed granted on July 24, 2014. The arguments by both parties herein depict a much bigger issue regarding the already distributed estate of the deceased. Whether or not the applicant has come to this court with clean hands is not an issue I am willing to delve into. However, I do question the fact that David Thuo Gachogu has not participated in litigating this application, but again, that is neither here nor there.

17. The issue before me is if the rectification of the certificate of confirmation of grant can be allowed to the extent described by the applicant. My answer is no, because it exceeds, by far, the allowable limits of rectification within the meaning of section 74 of the Law of Succession Act. As I have indicated herein before, to interchange the properties of the beneficiaries is a matter too far-reaching and cannot be adjudicated through this application.

18. Consequently, the application fails and is hereby dismissed for the aforementioned reasons. There shall be no order as to costs due to the nature of the relationship between the applicant and the respondent.

19. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

