



REPUBLIC OF KENYA



**In re Estate of the Late James Kiarie Kahungura alias Kiarri Kahungura (Deceased)
(Succession Cause 60 of 1996) [2023] KEHC 23394 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 60 OF 1996
HM NYAGA, J
OCTOBER 12, 2023**

RULING

1. Vide chamber summons dated 9th March, 2023 expressed to be brought under Section 47 of the [Law of Succession Act](#), Rule 43, 49 and 73 of the [Probate and Administration Rules](#), the Applicant seeks for Orders:-
 - a. Spent
 - b. That the court do grant orders that the District Surveyor do demarcate parcels No. RN 38602 Erithia, Bahati/Kabatini/Block 1/3051 and Bahati/Kabatini Block 1/48 according to the confirmed grant dated 28th July, 2022
 - c. That the surveyor fees be paid through proceeds/ earnings from Tractor Registration No. KTH 916 in control of Sammy Mburu Kiarie and John Njoroge Kiarie
 - d. That an inventory be given of the earnings of the tractor registration No. KTH 916 from the time the deceased passed on.
 - e. That in default of the co-administrator signing the relevant mutation forms and land board consents the executive officer do sign on his behalf.
 - f. That costs be provided for.
2. The application is premised on grounds that: the co administrator Sammy Mburu Kiarie has refused to co-operate with the applicant to hire a surveyor to implement the grant; that the co administrator have been singlehandedly running a tractor KTH 916 without giving accounts for the same; that efforts to get the co-administrator co-operate to have a surveyor to subdivide the deceased's properties for distribution has been rendered impossible by the co-administrator; and that unless the court intervenes the distribution of the estate will never end.
3. The Application is also supported by an affidavit of Caroline Wangui Thiongo sworn on the even date on her behalf and on behalf of Ann Njoki and Alice Waithera.



4. Sammy Mburu Kiarie opposed the summons through his Affidavit sworn on 27th April, 2023 on his behalf and on behalf of John Njoroge and Mary Muthoni Kiarie.
5. He averred that pursuant to court's directions issued on 27th March, 2023 Plot No. Njoro/RN 38602 Eriithia should be distributed in accordance to the certificate of confirmation made to Rahab Njeri Kiarie dated 9th February, 2004 which has never been revoked.
6. He contended that Tractor Registration no. KTH 619 is incapable of distribution as the same was written off on 15th January 1996 following an accident.
7. Caroline Wangui Thiongo swore further affidavit on 8th May, 2023. She averred that the distribution of plot No. Njoro/RN 38602 Eriithia to Teresia Wairimu Kiarie and Sammy Mburu Kiarie was not agreed upon by all beneficiaries as can be seen from the proceedings of 9th February, 2004.
8. She prayed that the property be distributed as per the schedule in the confirmed grant by professor Joel Ngugi on 28th July, 2022 where all the beneficiaries will get a share from parcel Njoro/RN 38602 Eriithia
9. She contended that the tractor registration no. KTH 916 was sold and instead tractor registration no. KTCA 347 C was bought and it is in good working order and in the custody of her two brothers Sammy Mburu Kiarie and John Njoroge Kiarie.
10. She prayed the tractor KTCA 347 C be sold and proceeds shared amongst all beneficiaries and for the proceeds of the plot sold at Engashura Kirima to be divided amongst all beneficiaries or to be used to settle the legal fees.
11. Sammy Mburu Kiarie, similarly swore a further affidavit on 13th June, 2023 wherein he deposed that the issue of whether the certificate of confirmation of grant can be delegitimized for want of consent can only arise when persons not satisfied file an application for revocation of grant and thus the affiant with her fellow beneficiaries are estopped from challenging its legitimacy in these proceedings since no such application has not been filed.
12. He averred that the affiant together with her fellow beneficiaries cannot rely on a questionable confirmed grant of 28th July 2022 when the original certificate of confirmation of grant has never been revoked, procedurally or otherwise.
13. He contended that there is no evidence to prove that tractor registration number KTH 916 was sold and tractor Registration No. KTCA 347 C bought instead. According to him the later tractor belongs to the deceased's late wife one Rahab Njenga Kiarie.
14. He averred that if the affiant maintains her position then her recourse would lie in filing an application for review instead of irregularly seeking prayers which this Honourable court has no discretion to grant.
15. The Application was canvassed by way of written submissions.

2nd Administrator/Applicant's Submissions

16. The applicant submitted that the previous grant issued to Rahab Njeri on 9th February, 2004 became inoperative due to her death before distribution of the estate. To support her submissions, the Applicant relied on the case of In the Matter of the *Estate of Mwangi Mugwe alias Eliza Ngware (Deceased)* Nairobi High Court Succession Cause No. 2018 of 2001 where Khamoni J (as he then was) held that an application for substitution was improper and could only be brought under Section 76



of the *Law of Succession Act* for Revocation of Grant on the grounds that it had become useless and inoperative following the demise of the holder.

17. The Applicant argued that Professor J. Ngugi when called upon to substitute the two administrators Sammy Mburu Kiarie and Caroline Wangui Thiongo went ahead and issued a grant dated 28th July, 2022 which according to the Applicant, the court is empowered to do so under Section 47 of the *Law of Succession Act*.

Respondent's Submissions

18. The Applicant thus argued that the court having granted a fresh grant and distributed the estate, the only pending issue is for a surveyor to go to the estate and distribute the parcels of land as sought in the Applicant's Application.
19. She submitted that tractor registration number KTCA 347 C should be sold and the proceeds distributed amongst the beneficiaries.
20. She contended that the sharing of the properties is equitable and just since the issue of distribution has been finalized.
21. The respondent submitted on two issues, namely;
 - a. Whether the application is defective and premature for citing wrong provisions of the law that go to the root of the Application
 - b. What is the proper mode of distribution?
22. On the first issue, the respondent submitted that the application is defective for having been brought under the wrong provisions of the law. According to the respondent Rules 43, 49 and 73 of the probate and administration rules are inapplicable.
23. The respondent submitted that the application also offends the provisions of Order 51 Rule 10(2) of the Civil Procedure Rules. He argued that as per the interpretation of said Order 51, it is clear a defect that goes to the substance of the Application warrants dismissal of such application. To support this position reliance was placed on the decision of the High Court in Tanzania in John Marco Vs Self Joshua Malimbe Misc. Land Application No. 66 of 2019.
24. The respondent submitted that the present application does not seek to rectify any of the aspects contemplated under Rule 43 and that the alleged rectified grant dated 28th July 2022 cannot be considered operational as it substantively alters the shape and landscape of the Original grant by seeking to alter the mode of distribution without consent of the beneficiaries. To bolster his submissions, the respondent relied on *In re estate of Charles Kibe Karanja* (Deceased) [2015] eKLR where the court stated that;

“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 effected without touching the orders made by the court at the distribution of the estate. Consequently, such changes cannot and should be effected through a mere amendment of the certificate of confirmation of grant.”



25. The respondent also relied on the case of *In the Matter of the Estate of Muniu Karugo (Deceased)* Nairobi High Court succession cause number 2668 of 1997 where Koome J held that rectification only deals with obvious errors and it cannot be used to fundamentally change the character of the grant.
26. The respondent submitted that they filed an affidavit of protest on 20th February 2023 and the same ought to be heard before any orders appurtenant to the application are considered.
27. The respondent argued that the rectified grant amended the mode of distribution of the deceased estate resulting in the new beneficiaries to specific shares of the estate which was not contemplated in the original grant. Reliance was placed on the case of *In re Estate of Makokha Nyilisi Musa (Deceased)* [2020] eKLR where the court opined that the certificate of grant cannot be amended to reflect or accord with new proposed mode of distribution or new beneficiaries as such amendment goes to the core of distribution and completely alters the distribution of the estate ordered by the court.
28. The respondent thus argued that the application is irredeemably defective and premature and cannot be saved by invocation of Article 159(2) (d) of *the constitution* since the error/defect goes to the root of the application.
29. In regards to the second issue, the respondent submitted that tractor Registration no. KTH 916 does not exist for distribution as it was written off 27 years ago. He also submitted that there is no evidence that the same was sold. The respondent maintained that Tractor Registration no. KTCA 347 do form part of the deceased estate thus cannot be sold and proceeds shared amongst the beneficiaries.
30. With respect to plot no. Njoro/RN 38602 Eriithia, the respondent submitted that the same should be distributed in accordance with the original grant which is still operational as it has never been revoked or reviewed.

Analysis & Determination

31. I have read the application, affidavits on record and the accompanying annexures. The main issue that arises for determination is Whether the Applicant should be granted the orders sought in the application.
32. I have perused the court record and I note on 27th April, 2022 the Applicant Caroline Wangui Thiongo filed a chamber summons dated 26th April, 2022 seeking for substitution of the name of Rahab Njeri Kiarie as the Administrator with that of Sammy Mburu and Caroline Wangui Thiongo and for an order for distribution of the deceased's Estate including parcel 38602 Eriithia.
33. When the matter came up for hearing before my brother Professor J.M Ngugi J,(as he then was) on 26th July, 2022, the parties recorded consent that Caroline Wangui Thiongo and Sammy Mburu be appointed as the new administrators. That consent was adopted as an order of the court. The court directed that new grant to issue and fixed a date for directions on 21st November, 2022.
34. Subsequently, a rectified grant dated 28th July, 2022 was issued, wherein the sharing of Plot No. Njoro/RN 38602 Eriithia was not in conformity with the original grant dated 9th February, 2004. According to the original grant, the aforesaid parcel of land was to be shared equally between Teresia Wairimu & Sammy Mburu where each was to get 2 ½ acres. In the subsequent grant the same plot is to be shared amongst all beneficiaries. Sammy Mburu Kiarie and John Njoroge Kiarie are to get one acre each and the remaining share to be distributed equally amongst the rest of the beneficiaries.
35. It is clear from the court record that the court did not handle any prayer regarding distribution of the plot in issue as indicated in the rectified grant. The respondent submitted that this was not the agreed



- mode of distribution and he has filed an affidavit of protest against confirmation of the second grant which is yet to be heard and determined.
36. Rectification of grant Section is provided for under 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.”
37. 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.”
38. 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.....”
39. Rectification on the mode of distribution is not a correction of an error as envisaged under Section 74 of the *Law of Succession Act* and Rule 43 of Probate and Administration Rules.
40. The Rectification therefore reflected on the grant dated 28th July,2022 regarding Plot No. Njoro/RN 38602 Eriithia would be considered invalid.
41. Having said that, the question that arises is whether this court can, without an application to that effect, annual/revoke the grant dated 28th July 2022.
42. In my view, this court will be seen to be reviewing the order of that date without being moved and hence it is without jurisdiction to do so. This is not an error under the slip rule that can be amended by the court suo moto. It alters the entire grant and as such there is need to have the court moved to revoke the same.
43. Regarding Tractor Registration No. KTH 916, the Applicant averred that the same was sold and another Tractor Registration No. KTCA 347 was bought. The Respondent on his part averred that the Tractor No. KTCA 347 do not form part of the estate and that there is no evidence that the former tractor was sold. The respondent further stated that the former tractor was totally written off 27 years ago. He annexed an order of prohibition of use of a defective Vehicle which indicates that the said tractor was extensively damaged. The Applicant did not controvert this position.
44. The Respondent argued that in view of the above, the aforesaid tractor is not available for distribution.
45. I agree with the Respondent since the Applicant has not led concrete evidence to demonstrate that Tractor Registration No. KTH 916 was sold. There is overwhelming evidence that it is no longer available for distribution. This court will not order for its sale as proposed as that will be tantamount to issuing orders in vain.



46. There is also no sufficient evidence that Tractor Registration No. KTCA 347 forms part of the deceased estate and I shall therefore not make any orders regarding it.
47. In my opinion, now that the grant issued on 28th July 2022, has not been annulled or revoked, then the correct avenue is to have it complied with, unless the annulment or revocation is ordered.
48. The respondent has filed an affidavit of protest against the said subsequent grant. I am of the view that the protest comes a little late in the day, it should have been done before the grant was issued. What the respondent ought to do is to apply to annul/ revoke the grant in question.
49. Having stated the above, I am aware that this court has jurisdiction to do what is necessary to ensure that the ends of justice are met under section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules. Section 47 of the *Law of Succession Act* provides: -
- “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.
- Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”
50. On the other hand, Rule 73 of the *Probate and Administration Rules* provides that: -
- “73. 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.”
51. In my view these provisions do not give the court jurisdiction to review an order issued by a court of concurrent jurisdiction suo moto.
52. As I stated earlier, it is clear the initial grant was revoked by the subsequent grant issued by my brother Professor J.M Ngugi J (as he then was) on the said date of 28th July, 2022. That initial grant became useless and inoperative following the death of the sole administrator and as such the Respondent cannot rely on it on grounds that it was not formally revoked. The subsequent grant remains in force unless it is annulled or revoked.
53. The orders sought by the Applicant regarding the aforesaid parcel of land are pursuant to the subsequent grant and unless revoked, then the parties have to comply.
54. In the end, I allow prayers (b) of the application. Each beneficiary shall contribute equally to the survey fees.
55. I also allow part of prayer (e) of the application. The administrators are given 30 days to commence the process of survey and in default further orders will be issued by the court at a date to be given.
56. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF OCTOBER 2023.

H. M. NYAGA

JUDGE

