



In re Estate of David Muriuki Kamweti (Deceased) (Succession Cause 2692 of 2014) [2024] KEHC 13735 (KLR) (Family) (8 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2692 OF 2014
PM NYAUNDI, J
NOVEMBER 8, 2024**

BETWEEN

EDWARD KAGEMA KAMWETI APPLICANT

AND

NICHOLAS NDIRITU KAMWETI 1ST RESPONDENT

WAMUCII GLADYS KAMWETI 2ND RESPONDENT

LYDIA WAMBUI KAMWETI 3RD RESPONDENT

RULING

1. The application for determination is summons dated 5th June 2023 filed by Edward Kagama Kamweti (the Applicant) seeking the following orders;
 - a. That the grant of probate made by this honourable court to Edward Kagama Kamweti, Jane Konyu Kamweti, Wamucii Gladys Kamweti, Lydia Wambui Kamweti and Agnes Wanjiku Kamweti be rectified to only in so far as pertains the residuary property placed in trust in the will to show that Agnes Wanjiku Kamweti was holding residuary property in trust as per the will.
 - b. That grant of probate made by the Honourable court to Edward Kagama Kamweti, Nicholas Kamweti, Jane Konyu Kamweti, Wamucii Gladys Kamweti, Lydia Wambui Kamweti and Agnes Wanjiku Kamweti be rectified only in so far as pertains the properties mentioned in the will but which have been granted to Agnes Kamweti (deceased) in the grant confirmed on 19th September 2017.



- c. That the grant of probate be rectified to remove the names of Agnes Wanjiku Kamweti and Jane Konyu Kamweti alias Konyu Muriuki Kamweti as executrixes/trustees under the grant as they are now deceased.
 - d. That all rental income deriving from the residuary property, and which are currently being collected and employed by Wamucii Gladys Kamweti for her personal use and employment to the detriment of all other beneficiaries to the estate be deposited in the court till the application herein has been heard and determined.
 - e. Spent.
 - f. Spent.
 - g. That Wamucii Gladys Kamweti be ordered to account for all the rental income she has collected from the residuary property from the time of the death of Agnes Wanjiku Kamweti till filing of this application.
 - h. Costs of this application be borne by the estate.
2. The applicant states in his affidavit sworn on 5th July 2023 that the deceased left a will dated 17th October 2002. The executors of the will are Edward Kagema Kamweti, Nicholas Kamweti and Wamucii Gladys Kamweti. Agnes Wanjiku Kamweti and Jane Konyu Kamweti alias Konyu Muriuki Kamweti are deceased. The deceased distributed some of his assets in the will, it was discovered later that some properties were excluded.
 3. The will had a provision for residuary property which was to be held under trust by the trustees. The Applicant avers that contrary to the will, the court allowed the residuary property to be transmitted to Agnes Wanjiku Kamweti despite there being no family trust created under her name to receive the property.
 4. That the assets so transmitted to Agnes Wanjiku Kamweti in the Certificate of Confirmation of Grant issued on 19th September 2017 should therefore revert to the estate to be placed under a trust held by all surviving trustees as was stated under the will.
 5. Further, that any title deed attained under the properties granted to Agnes Wanjiku Kamweti in her personal capacity under the confirmed grant of probate or any transfers undertaken by her should be deemed as having been undertaken by her in her capacity as a trustee to the estate of the testator and is binding on all the trustees of the estate of the deceased.
 6. The Applicant seeks that the grant be rectified to exclude the deceased administrators.
 7. It is further averred that, Wamucii Gladys Kamweti and or her agents have been collecting share dividends, rental and land lease income from some of the residuary properties and using them for her personal use. He asked the court to compel her to account for all rental income she has collected from the residuary property not in the will and a trust created to hold the residuary and all proceeds there from.
 8. In response, Wamucii Gladys Kamweti, the 2nd Respondent has filed Replying Affidavit sworn on 16th April 2024. She states that the summons for rectification is incurably incompetent and defective, and the Orders sought are legally incapable of being granted because the firm of Mang'era Langat is not properly on record. The firm properly on record is the firm of S.N. Thuku & Associates Advocates. That the prayers for rectification are not within the statutory scope of rectification of grants. She averred that the beneficiaries of the estate agreed to forego the creation of a trust of the residuary estate.



- That the estate of the deceased was long distributed. The issues regarding the estate should not be included in this succession cause, especially on submitting accounts.
9. The summons was canvassed by way of written submissions. The Applicant filed written submissions dated 29th May 2024. He takes issue with the fact that the residuary properties devolved to Agnes Wanjiku Kamweti. According to him, the residuary estate was to be held in trust by all the trustees. He submitted that this court has wide discretion to issue any orders. He argued that the vesting of the residual estate of the deceased to Agnes Wanjiku Kamweti is an error which falls under section 74 of the Laws of Succession Act and can be rectified by this court.
 10. He further submitted that the estate of the deceased is vested on the personal representatives under Section 79 of the *Law of Succession Act*. That the administrators of the estate of the deceased have a fiduciary duty to produce accounts as stipulated under Section 83 of the *Law of Succession Act*. Reliance was placed in the decision of *In re Estate of Estate of Daudi Owino Olak (Deceased)* [2022] eKLR and *In re Estate of David Kyuli Kaindi (Deceased)* [2015] eKLR.
 11. On the issue of costs, the applicant submitted that the deceased's Will at clause 6 calls for reimbursement of an executor/trustee for any business done by them on behalf of the residuary estate or trust from the residuary estate. Relying on the case of *Christine Wangari Gachigi & 3 others v Elizabeth Wambui & 9 others* [2014] eKLR, he submitted that the estate of the deceased should bear the cost and being an executor of the estate, he is indemnified from paying costs under Section 92 of the *Law of Succession Act*.

Analysis And Determination

12. I have carefully considered the Summons, affidavits filed rival submissions and the relevant law.
13. The issues for determination are
 - a. Whether the Applicants counsel is properly on record
 - b. whether the application has merit and the Court should rectify the grant
 - c. whether the Respondents furnish accounts.
14. On the 1st issue, the Respondent contends that the firm of Mangera, Langat Advocates are not properly on record as they have not sought to formally come on record for the Applicants. The Applicant in response states that he was never instructed Riungu Raiji & Co. Advocates, who were acting on behalf of the estate. That delay in filing their Notice of Change of Advocates was occasioned by challenges in mapping onto the platform. I find the reason given plausible and will find that the firm is properly on record.
15. On the 2nd issue, an application for rectification of a grant should be premised on Section 74 of the *Law of Succession Act* and Rule 43(1) of the *Probate and Administration Rules*. Section 74 provides for the errors on grants of representation that may be rectified by the court. It 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.



16. The procedure for seeking the relief is set out in Rule 43 (1), which echoes Section 74 of the [Law of Succession Act](#). Rule 34(1) says: -

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 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.....

17. The provisions in Section 74 and Rule 43 provide a closed list. They permit rectification of grants in three clearly defined cases: -

- a. errors in names and descriptions of persons or things;
- b. errors as to time or place of death of the deceased;
- c. in cases of a limited grant, the purpose for which such limited is made

18. By virtue of Section 76 (e) a grant may be revoked if it is on account of subsequent circumstances it becomes useless and inoperative. In this case, two of the executors have since died. Accordingly, revocation of the grant is inevitable with respect to the deceased administrators and by dint of Section 81 of the [Law of Succession Act](#) a fresh grant will issue to the surviving executors as the executors for purposes of vesting all executorship powers into their hands so as to complete the administration of estate. For those reasons, the prayer for removing the names of the deceased executors from the grant is merited and justified hence allowed as prayed.

19. The applicant has also sought for rectification of the grant on the ground that the residuary of the estate of the deceased should be held in trust by all the trustees and not Agnes Wanjiku Kamweti. I have gone through the deceased's will dated 17th October 2002. I have also gone through the certificate of confirmation of grant issued by this court. Clause 4 of the will provides that, "my trustees shall hold my residuary estate upon trust for my children and my wife in whatever shares that my said trustees might consider fair at their own discretion".

20. The certificate of grant issued by this court on 19th September 2017, pursuant to Summons for Confirmation of Grant dated 11th July 2017 as supported by joint affidavit in support sworn by all the executors (including the Applicant) on 5th July 2017 provided a schedule for distribution of the assets of the estate at paragraph 6. In essence the Applicant herein seeks to vacate orders of the Court that were based on a consent.

21. He contends that he did not agree to the transmission of assets to Agnes Wanjiku Kamweti now deceased. His signature is on the joint affidavit. He has not denied that signature. In the case of [Flora N. Wasike v Destimo Wamboko](#) [1988] eKLR the Court observed, while citing with approval the decision in [Purcell v F C Trigell Ltd](#) [1970] 2 All ER 671, where Winn LJ said at 676;

It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.

22. In [Brooke Bond Liebig v Mallya](#) (1975) EA 266 Mustafa Ag. VP stated thus;

The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain



circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.

23. It is evident therefore that for the court to interfere with a consent judgment the party seeking to review the order must present sufficient grounds to enable the Court exercise its discretion in that regard. In *Duncan Onyango Odera v Mary Adhiambo Wasonga & Eliud Otieno Odingo (Suing as Legal Representatives of the Estate of Benard Ooko Otieno alias Benard Otieno Odera [Deceased])* [2021] eKLR Aburili J observed
- [30] ...a consent order will only be set aside if it can demonstrated that it was procured through fraud, non- disclosure of material facts or mistake or for a reason which would enable the Court to set it aside.
24. The Applicant does not seek to explain the delay in challenging the Confirmation of Grant. The certificate was issued in 2017 and has been used to transmit assets to beneficiaries including himself. If as he alleges he did not concede this application should have not taken 6 years to present. Accordingly, it is my finding that the orders issued by the Court on 19th September 2017 and 14th February 2018 were issued on the basis of consent by the parties.
25. Having satisfied myself that the Certificate of Confirmation of Grant is a valid Court order, it is evident that the assets are no longer part of the Estate of the deceased having been transmitted to Agnes Wanjiku Kamweti.
26. It is common ground that letters of Administration with respect to the estate of Agnes Wanjiku Kamweti are yet to issue. The facts in the instant case are almost on all fours with those in *Edema & 2 others v Edema & 5 others* (Miscellaneous Succession Cause E001 of 2022) [2022] KEHC 9960 (KLR) (6 July 2022) (Ruling) in which the Applicant sought orders against the Respondents for intermeddling. As in the instant case the Applicants in that case presented the Application in the absence of Letters of Administration.
27. The Court referred to the decision of Dulu J. *in the matter of the Estate of Geoffrey Meitamei Lonina (Deceased)* [2012] eKLR where the Court stated Indeed, under Section 45(1) and (2) of the *Law of Succession Act* (Cap 160) this Court has powers to protect the assets of a deceased person. However, in my view only an administrator or an interested party in an existing administration cause, can apply for protection of the deceased's assets. In the present matter, no application for letters of administration has been filed under Sections 51, 53 or 54 of the *Law of Succession Act*. Therefore, in my view, the provisions of Section 45 of the Act cannot be brought into play by the applicant. She has no legal standing in law to bring the present application. On that account, I find that the application is misconceived.
28. More recently in the case of *in re Estate of James George Maruti (Deceased)* [2021] eKLR Riechi J summarized it as follows-
- The applicant may be having a cause of action or interest as a beneficiary to protect and preserve the estate or intermeddling and waste. She however has lacked locus standi to secure the relief sought. Without first obtaining either limited or full grant of letters of administration.
29. I find therefore, that it is well established by law and judicial precedent that for a party to move to preserve the estate they need to be clothed with the requisite mandate, in this instance letters of administration. The orders sought are also not issuable against the Respondents as they have not taken



out letters of administration with respect to the estate. I proceed therefore to dismiss prayer (d), (e) and (f) of the summons.

30. In the end, the application dated 5th June 2023 succeeds only to the extent that the Grant of Probate issued herein on 17th December 2014 is revoked and a fresh Grant will issue de bonis non administratis, to Edward Kagema Kamweti, Nichols Ndiritu Kamweti and Wamucii Gladys Kamweti.
31. The Administration be finalised within 120 days from the date hereof. In the event any Executor declines to sign any forms necessary for the transmission of any asset within 21 days from the delivery of such documentation the Deputy Registrar, Family Division to execute the same in their stead.
32. Owing to the relationship of the parties involved and the issues raised in this matter I make no order as to costs.

It is so Ordered.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

P. NYAUNDI

JUDGE

In the presence of;

Fardosa Court Assistant

