

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2679 OF 2000

IN THE MATTER OF THE ESTATE OF LAWRENCE KIMANI KHIRRECU (DECEASED)

MONICA MUKUHI KHIRRECU.....APPLICANT

VERSUS

JAMES MUIGAI KHIRRECU.....BENEFICIARY/OBJECTOR

RULING

1. Before me is a summons for rectification of confirmed grant dated 22nd November 2019 filed by Monica Mukuhi Khirrecu one of the two administrators in the matter, the other administrator being Augustine Ngugi Khirrecu.

2. The application was filed under Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules and seeks the following orders -

1. That the Certificate of Confirmation of Grant issued to the applicants by the Honourable Court and rectified on 25th day of February 2013 be further rectified to make the change in the distribution of the following property:

Name	Description of Properties	Shares
Monica Mukuhi Khirrecu	Kajiado/Kaputei-North/15138	Lifetime interest
	Kajiado/Kaputei-North/15139	
	Kajiado/Kaputei-North/69173	
	Kiambaa/Waguthu/832	
	Nairobi/Block 90/153	
	Plot No. 43 Ruaka	
	Karuri Town Plot No. 50	
	East African Breweries Ltd Shares	

2. That the costs of this application be in the cause.

3. The application has grounds on the face of the summons and is supported by an affidavit sworn by Monica Mukuhi Khirrecu. The grounds are that the certificate of confirmed grant was erroneous in that it stated that the estate was to be inherited by the said Monica Mukuhi Khirrecu in whole instead of a life interest, that the assets of the estate had changed as some of the assets had been sold and re-invested in other properties, and that pursuant to a ruling by Asenath Ongeri J. dated 11th October 2019, the court had ordered that the certificate of confirmed grant be rectified.

4. In the supporting affidavit sworn by Monica Mukuhi Khirrecu the applicant, it was deponed that in the rectified certificate of confirmed grant as the widow of the deceased the applicant received the assets of the estate in whole instead of a life interest which was an error.

5. It was further deponed that assets which were Kiambaa/Ruaka/707, Nyandarua/Ndemi/1777, Nyandarua/Ndemi/1778, Nyandarua/Ndemi/1779, Nyandarua/Ndemi/1780, Nyandarua/Ndemi/1781, Nyandarua/Ndemi/1782, Nairobi/Block 1/16/972, Karuri Town Plot No. 50 (Karuri Urban Council) and Plot No. 43 Ruaka had been sold and the proceeds re-invested.

6. It was also deponed that the assets acquired using the resources of the estate and which should be included in the list of assets of the estate in the rectified certificate of confirmed grant were Kajiado/Kaputei-North/15138, Kajiado/Kaputei-North/15139, and Kajiado/Kaputei-North/69173, and that the beneficiaries of the deceased's estate had consented to the rectification of certificate of confirmed grant.

7. It was lastly, deponed by the applicant that property known as Loitokitok/Emperon/454 was bought using a loan facility from Transnational Bank in 2011 for Kshs 1,000,000= together with a second facility from Family Bank for Kshs 2,000,000= where the Objector co-signed the same and was

domiciled on the property and therefore the property did not form part of the estate of the deceased.

8. In response to the application for rectification of confirmed grant James Muigai Khirrecu a son of the deceased and beneficiary (the Objector) filed an affidavit of protest sworn by himself on 16th January 2020 in which he deponed that the application should have been filed by the two administrators, that the applicant had failed to render an account as ordered by the court on how much she sold the plots for, that the assets were sold without the consent of the beneficiaries, that the applicant had not provided copies of titles or searches to establish the current ownership of the plots proposed for inclusion in the rectified confirmed certificate of grant, that the applicant had fraudulently omitted to include some assets, and had also sought to fraudulently include some assets in the rectified certificate of grant, and that the order of Ongeri J. in the ruling of 11th December 2019 was clear that the certificate of rectified confirmed grant should read as follows–

Name	Description of Properties	Shares
Monica Mukuhi Khirrecu	Nairobi/Block 90/153	To hold in trust on her own behalf and on behalf of other beneficiaries namely- -Augustin Ngugi Khirrecu -Thomas Kimani Khirrecu -Angela Wanjiru Khirrecu -Paul Njoroge Khirrecu -James Muigai Khirrecu
	Kajiado/Kaputei-North/15138	
	Kajiado/Kaputei-North/69174	
	Kiambaa/Waguthu/2959	
	Kiambaa/Waguthu/2960	
	Loitokitok/Emperon/454	
	East African Breweries Ltd Shares	

9. The Objector also filed a supplementary affidavit of protest in which he deponed that even before the issuance of the rectified grant wherein the applicant was made sole owner of the assets of the estate, the applicant had transferred the Kiambaa land to her name and sold the plots therein, and that such conduct had not been disclosed in the applicant's statement of accounts filed in court.

10. In response to the Objector the applicant filed a replying affidavit to the supplementary affidavit of protest and maintained that LOITOKITOK/EMPERON/456 was bought by her hard earned income, that KIAMBAA/WAGUTHU/832 which formed part of the estate had been subdivided into 14 plots and sold in 2008, except for two plots KIAMBAA/WAGUTHU/2959-2560, for the purpose of developing the commercial property KAJIADO/KAPUTEI – NORTH/69174 and that LOITOKITOK/EMPERON/454 was bought in 2011, and lastly that in the three years in between the administrator (*applicant*) had re-invested the proceeds from sale of the Kiambaa plots to further develop KAJIADO/KAPUTEI-NORTH/69174.

11. The applicant further deponed that the Objector was given ample opportunities to come on board in the development and maintenance of the properties of the estate but had shown no interest, though he was a beneficiary of the deceased's estate as well as the estate of the applicant when she dies.

12. Parties counsel filed written submissions to the application and the objections. In their submissions, Ms. Njoroge J. M. Advocates for the applicant mainly dwelt on whether LOITOKITOK/EMPERON/454 belonged to the estate of the deceased and maintained that it was bought by loans taken by the applicant and was thus not part of the estate. Counsel also argued that inclusion of the property in the estate of the deceased, would prejudice or infringe upon the rights of the applicant since the property belonged to her.

13. Counsel submitted further that an objector had the burden to demonstrate through evidence what he or she alleged, and relied on case law such as the case of Estate of Patrick Mungai Kugega (*deceased*) Nbi HCSC No. 1374 of 2000, and in the matter of the Estate of David Wahinya Mathene (*deceased*) Nairobi HCSC No. 1670 of 2004 and maintained that the Objector had not discharged that burden.

14. On their part, Counsel for the protestor Aunga Omwenga & Company filed written submissions in which they contended that pursuant to a ruling of the court dated 11th October 2019 paragraph 35 – the court ordered that the administrator herein (*applicant*) be reflected in a rectified certificate of confirmed grant of letters of administration “as trustee for her own benefit and for the benefit of the other beneficiaries.”

15. It was submitted by counsel also that pursuant to negotiations following the court's directions, the applicant and the beneficiaries had agreed on the assets to be included in the rectified certificate of confirmed grant of letters of administration except for plot LOITOKITOK/EMPERON/454 which the applicant/administrator wants excluded from the estate but the objector insists that it be so included.

16. It was the contention of the counsel for the objector that the applicant had not submitted to this court a statement of account which clearly reflected how she acquired that land asset from her own financial sources, since she was just a retired primary school teacher.

17. Having considered the application, the objection and other documents filed, as well as the submissions of counsel on both sides, in my view the issues for determination are whether the applicant can come to court without involvement of the 2nd administrator, secondly whether this court can rectify the certificate of confirmed grant to include assets which were acquired subsequent to the confirmation of grant. Thirdly, whether the property LOITOKITOK/EMPERON/454 is part of the estate of the deceased. The fourth and last issue is who bears the costs of the application.

18. With regard to the first issue whether the applicant Monicah Mukuhi Khireccu can come to court alone in an application for rectification of grant of letters of administration without the second administrator Augustine Ngugi Khireccu, in my view the applicant cannot do so since she is a joint administrator of the estate with the said Augustine Ngugi Khireccu. She could only apply to this court alone if the application was against the other administrator or if she wanted to replace the other administrator. As a joint administrator she has no capacity to come to court alone and obtain orders that affect the estate and all beneficiaries without the involvement or consent of the joint administrator. On that account this application will fail.

19. With regard to the second issue whether this court can rectify a certificate of confirmed grant of letters of administration to include assets acquired by the administrator after the grant was confirmed, I note that this court in a ruling dated 11th October 2019 ordered inter alia as follows –

“35(iv) THAT the rectified grant to be further amended to reflect that the 1st respondent is holding the properties as trustee for her own benefit and for the benefit of the other beneficiaries.”

20. It is important to point out that the rectified certificate of confirmed grant under reference was rectified by the court on 25th February 2013 under the names of the two administrators and the properties listed were KIAMBAA/WAGUTHU/832, NAIROBI/BLOCK90/153, KIAMBAA/RUAKA/707, NYANDARUA/NDEMI/1777, NYANDARUA/NDEMI/1778, NYANDARUA/NDEMI/1779, NYANDARUA/NDEMI/1780, NYANDARUA/NDEMI/1781, NYANDARUA/NDEMI/1782, NAIROBI/BLOCK 116/972, KARURI TOWN PLOT NO. 50 (KARURI URBAN COUNCIL) PLOT NO. 43 RUAKA, and EAST AFRICAN BREWERIES SHARES. In that ruling, the court merely ordered that the properties be now held by the applicant in trust for the beneficiaries instead of being held by the applicant in absolute ownership as reflected in that rectified certificate of confirmed grant.

21. However, instead of a rectified certificate of confirmed grant being sought in terms of the court’s orders, the applicant has filed the present application, in which a number of the assets in the said rectified certificate of confirmed grant are left out, and has included several other assets said to have been acquired subsequent to the confirmation of grant.

22. In my view, this court cannot rectify the confirmed grant in the manner requested by the applicant. This is because the jurisdiction of this court to rectify a grant of letters of administration as conferred by Section 74 of the Law of Succession Act is limited since it provides as follows –

“74. 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.”

23. In addition to the above provisions of the Act, Rule 43(1) of the Probate and Administration Rules provides as follows –

“43(1) 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 description 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 in Form 110 for such rectification through the registry in the cause in which the grant was issued.”

24. It follows therefore from the above provisions of the law, that the powers or jurisdiction of this court in rectifying a grant of letters of administration is limited and specific and can only be used to rectify errors as to the names or description of any person or thing or the time or place of death of the deceased, or in the case of a limited grant, the purpose for which the grant was made.

25. The issue of the jurisdiction of this court in rectification of grants of representation, whether or not confirmed has been dealt with in various court cases. It will suffice here if I cite the case of – **In the matter of the Estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR** where the court stated as follows:

“The law on rectification or alteration of grant 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 and 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 ...”.

26. It follows in my view, that even if the present application was filed by the two administrators, this court is not clothed with the power to rectify the confirmed grant to include assets acquired after the grant was confirmed as proposed, even if the said assets were acquired from funds from the estate. The present application for rectification of grant thus has to fail, and I will dismiss the same.

27. The third issue is whether plot LOITOKITOK/EMPERON/454 belongs to the estate. With regard to whether LOITOKITOK/EMPERON/454 belongs to the estate of the deceased, no evidence has been tendered before this court to show that the property was registered in the name of the deceased or that it belonged to the deceased. In my view, it does not belong to the estate of the deceased.

28. The fourth and final issue is on who bears the costs of the application. This being a family matter, I order that parties bear their respective costs of the proceedings.

29. I must emphasize however, that the administrator (*the applicant*) being the trustee in the estate of the deceased for all the listed assets, she remains a trustee, and though it is not a function of this court to include those subsequently acquired assets in the certificate of confirmed grant of letters of administration in the deceased’s estate, she has an obligation to hold the income from the deceased’s assets for the benefit of the beneficiaries and has an obligation to account for the same.

30. I thus find no merits in the summons for rectification of grant dated 22nd November 2019 and dismiss the same. Since this court had further rectified the confirmed grant, I order as follows –

(a) A further rectified certificate of confirmed grant do issue with the same assets in the rectified certificate of confirmed grant dated 25th February 2013, with the difference only being that Monica Mukuhi Khirrecu will hold the assets as trustee as ordered by Justice Asenath Ongeri in the ruling of this court of 11th October 2019.

(b) The applicant Monica Mukuhi Khirrecu as trustee, will have to give an account to all the beneficiaries of the estate and file the same

in court within 45 days from today, on how she has handled all the affairs and assets of the estate.

(c) Parties will bear their respective costs of the application, as this is a family matter.

(d) The matter will be mentioned on 30th November 2020 to confirm compliance with (a) and (b) above.

Dated and delivered at Nairobi this 7th day of October, 2020.

George Dulu

JUDGE

This ruling was delivered virtually due to the COVID-19 pandemic and Government Health Regulations issued thereon.