



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 320 OF 1987**

**IN THE MATTER OF THE ESTATES OF THE LATE TIMOTHY WANZETSE OMUSIKOYO  
(DECEASED)**

**BETWEEN**

**DAVID M.J. MUNYENDO.....ADMINISTRATOR/APPLICANT PETITIONER**

**VERSUS**

**LIVINGSTONE W. WANZETSE & 2 OTHERS.....RESPONDENTS**

**RULING**

**Introduction**

1. The deceased in this suit TIMOTEO WANZETSE OMUSIKOYO died on the 23<sup>rd</sup> September, 1981. Grant of letters of administration were issued to David Mathew J. Munyendo on 12<sup>th</sup> May, 1988 and confirmed on the 14<sup>th</sup> December, 1988. The issue of distribution arose and the court made a ruling on the 21<sup>st</sup> day of February, 2012 which altered the grant as follows;-

PLOT EAST WANGA/LUBINU/461

1. DAVID M.J. MUNYENDO – 3 ACRES
2. EDWARD MUNYENDO – 1 ½ ACRES
3. LIVINGSTONE WABURILI WANZEZE – 3.2 ACRES
4. PAUL WERE WANZEZE – 3.95 ACRES
5. NELSON LUMBASI WANZEZE – 2.60 ACRES
6. JUSTUS WASHIKA WANZEZE – 2.3. ACRES

PLOT EAST WANGA/LUBINU/199

WALTER OBUTARE WANZEZE – 2.6 ACRES

2. It was further ordered that should there be a problem relating to fixing of the exact acreage for plot 461 the shares of Livingstone Waburili and Paul Were shall be reduced so as to accommodate fixing of the exact shares of the other beneficiaries but this reduction should not exceed more than 10% of the shares of these two beneficiaries.

### **The Application**

3. On 23<sup>rd</sup> of April, 2014 the petitioners filed a summons for rectification and confirmation of grant which was brought pursuant to Rule 43 of the probate and Administration Rules and Section 74 of the law of Succession Act Cap 160 Laws of Kenya. He prayed for rectification of the amended certificate of grant issued to him on 5<sup>th</sup> February, 2013. He annexed his proposal on how the deceased's property should be re-distributed. He brought the said application on grounds that the amended certificate of grant did not reflect what was agreed. The application is supported by the annexed affidavit of the petitioner in which he gives a schedule of distribution of the deceased estate afresh as stated at paragraphs (4) and (5) of the said affidavit. The petitioner wants to be issued with another grant as per the schedule above.

### **Response.**

4. The application is opposed. Livingstone W. Wanzetse filed a replying affidavit to oppose the said application. He deponed that the application was an abuse of court process because distribution was in conformity with the ruling of the court and there is no error that can lead to an amendment. He also depones further that the distribution was arrived at after a full trial and that the application is aimed at reviewing the orders of the court through the back door. He raises the issue of resjudicata and claims that the applicant is introducing new matters after judgment and again that the errors complained of are imaginary as they do not form the ruling of this court on distribution.

### **Submissions and Determination**

5. The application was canvassed by way of written submission filed and exchanged by the parties herein. I have carefully read through the rival submissions.

6. The application herein is promised 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 to representation that may be rectified by the court, such as 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. These may be rectified by the court and the grant of representation whether before or after confirmation, may be altered and amended accordingly.

7. The procedure for seeking the relief is set out in Rule 43(1) which echoes the provisions of Section 74 of the Law of Succession Act Rule 43(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.....”

8. A clear reading of the above provisions shows that the provisions of the Law of Succession Act and the Probate and Administration Rules are not analogous to the provisions in the Civil Procedure Rules on amendment of pleadings which are extremely broad and are not comparable to what Section 74 of the Act and Rule 43 of the Rules provide. These provisions are extremely restricted. They permit rectification only 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 case of a limited grant the purpose for which such limited grant is made.

The power to rectify a grant is limited to these three situations or circumstances, and not otherwise.

9. The rectification sought in this case is redistribution of the deceased estate. The applicant wants this court to revisit what had already been settled and re-do the distribution afresh. The acreage proposed by the applicant is different from that, which this court allowed on 5<sup>th</sup> February, 2013. It is not an error as envisaged under the above provisions of the law and the same cannot be rectified in the manner proposed by the applicant.

10. The applicant's remedy would be either to appeal or seek a review of the court's earlier ruling.

11. This court therefore finds that the applicant's application lacks merit and the same is dismissed but with no orders as to costs.

Ruling delivered, dated and signed at Kakamega this 1<sup>st</sup> day of September 2016

**R. N. SITATI**

**JUDGE**

In the presence of;-

.....present in person .....Applicant

.....Mr. Nyikuli for Munyundo (present).....Respondents

.....Mr. Lagat.....Court Assistant