



**In re Estate of Misheck Kiratu (Deceased) (Succession Cause  
62 of 2013) [2025] KEHC 14609 (KLR) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14609 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
SUCCESSION CAUSE 62 OF 2013  
RM MWONGO, J  
OCTOBER 15, 2025  
IN THE MATTER OF THE ESTATE OF MISHECK KIRATU (DECEASED)**

**BETWEEN**

**JOSEPHINE NJOKI MACEMO (DCD) ..... APPLICANT**

**SUING THROUGH PERSONAL REPRESENTATIVES AGNES WANJIRU  
MACEMO AND LYDIA WAKUTHII MWANIKI**

**AND**

**MICHAEL NJAGI MISHECK ..... PETITIONER**

**RULING**

**The Application**

1. The applicant filed a notice of motion dated 28<sup>th</sup> September 2020, premised on the grounds set out on its face and in the supporting affidavit, seeking the following orders:
  - a. Spent;
  - b. Spent;
  - c. That this honourable court be pleased to review or set aside orders for rectification of grant that were made on 06<sup>th</sup> March 2019 to the respondent herein; and
  - d. That the costs of this application be provided for.

**Background**

2. A grant of letters of administration in the estate of the deceased was issued to Francis Mugo Kiratu (deceased) on 01<sup>st</sup> August 2012. On 21<sup>st</sup> August 2013, the appointed administrator died and he was substituted in the proceedings by his son, the respondent herein. Thereafter, the grant was confirmed



distributing the estate of the deceased comprising of land parcel number Ngiriana/Ngiriambu/809 amongst 3 beneficiaries namely Alabina Wanja Mugo-3.8acres, Michael Njagi Misheck-3.8acres and Josephine Njoki Macemo-1.5acres.

3. The respondent then filed summons for rectification of grant dated 19<sup>th</sup> November 2018 seeking that the portion of the estate given to Josephine Njoki Macemo be reduced to 0.75acres and Jane Njoki Muriuki be given the remaining 0.75acres. He also sought that the name of the land be corrected from Ngiriana/Ngiriambu/809 to Ngariama/Ngiriambu/809.
4. The summons for rectification was heard on 06<sup>th</sup> march 2019 when the court noted that the 2<sup>nd</sup> respondent Josephine Njoki Macemo was absent. The applicant stated that Jane Njoki Muriuki, their sister who had been left out of the distribution had been provided for in the estate through the changes proposed. The application was unopposed and the court satisfied itself that Josephine Njoki Macemo had been served with the application. The application was allowed as prayed and an amended certificate of confirmation of grant was issued.
5. Through her present application, the applicant contends that she was never served with the summons for rectification. She claims that she was condemned unheard against the rules of natural justice, and hence, the rectification orders should be set aside. She stated that the process server lied to the court about having served her with the documents. According to her, the orders are necessary because the respondent is in the process of executing the amended certificate of confirmation of grant.
6. On 28<sup>th</sup> January 2021, the applicant died and was substituted in the proceedings by Agnes Wanjiru Macemo and Lydia Wakuthii Mwaniki, her personal representatives

### **Replying Affidavits**

7. Jane Njoki Muriuki filed a replying affidavit stating that the respondent who is her brother, had initiated succession proceedings without involving her. She filed summons for revocation but withdrew them when the respondent agreed to give her a part of the estate. That the applicant was duly served with the summons for rectification and she knew that half of what she had been given was not hers.
8. The respondent also filed a replying affidavit stating that the applicant had always been aware that half of the portion allocated to her belonged to her sister Jane Njoki Muriuki who claimed it. That the applicant was served with the summons but she chose not to respond in any way.

### **Further Affidavit**

9. The applicant filed a further affidavit stating that Jane Njoki Muriuki is not a daughter of the deceased. That her father is one Njagi Kairanga, the deceased's step-brother; and that her mother is Mwara Njeru. Her siblings are Waruguru Njagi and Kagundu Njagi. She stated that Jane Njoki Muriuki is her cousin, a niece of the deceased. According to her, the deceased had 3 children namely Josephine Njoki Macemo, Francis Mugo Misheck and Michael Njagi Misheck.
10. It was her case that since the succession proceedings began in 1992, there was no consensus that she would hold land on behalf of Jane Njoki Muriuki and she was not a dependant of the deceased. She stated that she was never served with the summons for revocation by Jane Njoki Muriuki or the summons for rectification by the respondent. That if she had been served, she would have been able to oppose the summons. That the applications were fueled by the respondent who since the rectification, is using the portion of land alleged to have been given to Jane Njoki Muriuki. The applicant's case



was supported by Alabina Wanja Mugo who filed an affidavit reaffirming the averments made in the further affidavit.

### **Submissions in the appeal**

11. The application was canvassed by way of written submissions.
12. The applicant submitted that all the family members were consulted before the succession proceedings were instituted. It came as a shock when the deceased's niece sought revocation of the grant, forcing the respondent to have the grant rectified to include her as a beneficiary. She relied on Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules and argued that the court had the power to review its orders to rectify the grant. Reliance was placed on the case of Republic v Vice Chancellor Jomo Kenyatta University of Agriculture and Technology [2008] KEHC 2252 (KLR).
13. She argued that the rectification order offends the rules of natural justice. Further reliance was placed on section 74 of the *Law of Succession Act* and Rule 43(1) of the Probate and Administration Rules. She stated that the scope of rectification of a grant is very limited and was misapplied in this case where a new beneficiary was unjustly and improperly added. She relied on the case of In re estate of Charles Kibe Karanja (Deceased) [2015] KEHC 2067 (KLR) where the court discussed the scope of rectification of a grant. She urged the court to review or set aside its order for rectification of the grant.
14. Through his submissions, the respondent urged the court to exercise its discretion judiciously in this matter. He argued that the applicant has failed to advise the court on any resultant parcels of land arising from the deceased's estate which is under administration. He stated that it was only right that Jane Njoki Muriuki who wanted to have the grant revoked, be given a part of the estate from the share that had been given to the applicant.
15. Alabina Wanja Mugo filed submissions in support of the applicant's case. She stated that the respondent was a dishonest administrator and he should be removed from his office of administrator of the estate. She relied on the case of Republic v Attorney General & another Exparte Mike Maina Kamau [2020] KEHC 10013 (KLR) and section 76 of the *Law of Succession Act*. Further reliance was placed on the cases of Samuel Wafula Wasike v Hudson Simiyu Wafula CA No.161 of 1993, In re Estate of John Gakunga Njoroge (Deceased) [2018] KEHC 5151 (KLR) and In Re estate of M'Mbijiwe M'Itunga (deceased) (2018) eKLR. It was her argument that the grant issued to the respondent is ripe for revocation on the court's own motion since the administrator has no interest in giving the estate to the proper beneficiaries.

### **Issue for Determination**

16. The issue for determination is whether the court should review its order of 06<sup>th</sup> March 2019 rectifying the certificate of confirmation of grant.

### **Analysis and Determination**

17. Review is provided for under Section 80 of the *Civil Procedure Act* as follows:

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

18. Similarly, Order 45 Rule 1 of the Civil Procedure Rules provides:

- “(1) 1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

19. From the above, there are clearly only 3 factors for the court to consider before reviewing its findings. These are:

- a. That there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed; or
- b. That there has been some mistake or error apparent on the face of the record; or
- c. Any other sufficient reason.

20. The impugned order is one of rectification which was allowed by the court, having satisfied itself that the summons for rectification dated 19<sup>th</sup> November 2018 had been duly served but was not challenged. On record, there is an affidavit of service dated 05<sup>th</sup> March 2019, and it is sworn by one Dickson N. Muchira. It states:

“I Dickson N Muchira Of P.o Box 108 Kianyaga in the republic of Kenya do hereby swear and state as follow:

- 1. That I am a court process-sever of the high court of Kenya hence competent to swear this affidavit.
- 2. That on 19<sup>th</sup> February 2019 I received summons for rectification of grant dated 19<sup>th</sup> November 2018 and a hearing notice dated 18<sup>th</sup> February 2019 from the applicant Michael Njagi Misheck with instructions to serve the 1<sup>st</sup> and 2<sup>nd</sup> respondents Alabina Wanja Mugo and Josphine Njoki Macemo
- 3. That on the same day I proceeded to njuki-ini location,ngiriambu sub-location kegwa village where the first respondent and the applicant resides.
- 4. That I met the applicant who directed me to the 1<sup>st</sup> respondent's home whereby he pointed to me the 1<sup>st</sup> respondent.



5. That I introduced myself to the 1<sup>st</sup> respondent and the purpose of my visit and upon confirming to me of her identity, I served her with copies of summons for rectification of grant dated 19<sup>th</sup> November 2018 and a hearing notice dated 18<sup>th</sup> February 2019 where she accepted service at 10:30am but refused to sign on my copies which I return duly served.
  6. That on the same day in company of the applicant I proceeded to Nyangati Location, Nyangati village where the 2<sup>nd</sup> respondents resides.
  7. That the applicant directed me to the 2<sup>nd</sup> respondent's home and pointed to me the 2<sup>nd</sup> respondent.
  8. That I introduced myself and the purpose of my visit and upon confirming her identity I served copies of summons for rectification of grant and hearing notice and she accepted service but refused to sign my copy which I return herewith duly served.
  9. That what is deponed hereinabove is true to the best of my knowledge information and belief.”
21. The applicant contends that she was not served with the application. She stated that had she been served, she would have opposed the application. The applicant’s sister-in-law, Alabina Wanja Mugo supports the review application herein. The affidavit of service indicated that she was also served. However, she filed an affidavit in support of the applicant’s case, denying that she was ever served with the summons for rectification.
22. Service of court processes is governed by Order 15 rule 15 (1) of the Civil Procedure Rules, which provides as follows:
- “The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.”
23. From this provision, it is evident that where, as here, an affidavit of service filed, the court is able to satisfy itself that indeed, parties were served. In *Shimmers Plaza Limited v National Bank of Kenya Limited* (2015) KECA 945 (KLR), the Court of Appeal observed:
- “Once there is an affidavit of service which is not rebutted by any evidence, the court is entitled to presume that service was properly effected. The burden lies with the party alleging non-service to prove otherwise.” [Emphasis added]



24. If a party disputes service, the onus is on them to prove that they were not served with the court processes. This was the finding in the case of *Mwithiga v Njeru & another* [2025] KEHC 12233 (KLR), the court held:

“It is now well settled that once service is alleged and demonstrated by affidavit, the burden shifts to the party denying service to disprove it with clarity and specificity.” [Emphasis added]

25. The grounds for review are limited to those stated hereinbefore. From the arguments made, there is no proof that: either there is an error apparent on the face of the record; or that there is discovery of new evidence that could not have been produced earlier. However, this is a discretionary relief and the guiding law provides for review for any other sufficient reason.

### **Conclusions and Disposition**

26. In this case, service is alleged to have been effected in person upon Alabina Wanja Mugo and Josphine Njoki Macemo who both deposed that they were not served. This is a serious matter since service is the only way to comply with the rules of natural justice in any event. It appears that on the one hand, ideally, the process server may need to be cross-examined on oath before a decision can be made as to whether or not to review the court’s order. This would achieve justice. On the other hand, that should have been done and concluded at the trial hearing wherein the process server should have testified and his evidence tested by cross examination.

27. Ultimately however, it is absolutely in the interest of justice to have the rectification order set aside now because the trial court erred in allowing an additional beneficiary through rectification proceedings. This is outside the limited scope of the application of Section 74 of the *Law of Succession Act* and Rule 43(1) of the Probate and Administration Rules which give guidance on rectification of a grant. I view that action as an error on the face of the record and I hereby treat it as such.

28. Accordingly, in exercise of this court’s discretion and supervisory power to ensure justice, the amended certificate of confirmation of grant issued on 04<sup>th</sup> April 2019 is hereby set aside. The respondent is ordered to file fresh summons for confirmation of grant. An order is also made that any transactions already made in the estate pursuant to the amended certificate of confirmation of grant issued on 04<sup>th</sup> April 2019 are hereby rendered null and void and the property is hereby reverted to the name of the deceased pending redistribution.

29. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 15<sup>TH</sup> DAY OF OCTOBER, 2025.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Ms. Ndambiri for 1<sup>st</sup> Respondent Alabina

Mwangi for 1<sup>st</sup> & 2<sup>nd</sup> Applicants

Nyaga holding brief for Maina for Respondent Michael Njagi

Francis Munyao - Court Assistant

