

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**SUCCESSION CAUSE NO 47 OF 2004**

**IN THE MATTER OF THE ESTATE OF THE LATE JACKSON MWANJA**  
**BUSOLO (DECEASED)**

**JOHN WABOMBA MWANJA.....1<sup>ST</sup>**  
**ADMINISTRATOR/APPLICANT**

**VERSUS**

**MARY NAKHANU MWANJA.....2<sup>ND</sup>**  
**ADMINISTRATOR/RESPONDENT**

**MILDRED NALIKA MWANJA.....3<sup>RD</sup>**  
**ADMINISTRATOR/RESPONDENT**

**Coram: Justice R. Nyakundi**  
**M/s Mukabane & Kagunza Advocates LLP**  
**M/s Mwinamo Lugonzo & Co Advocates**

**RULING**

- 1.** The Applicant herein filed Chamber Summons dated 15<sup>th</sup> September 2025 brought pursuant to section 47 of the Law of Succession Act, Rule 43(1), 49, 59, 73 & 74 of the Probate and Administration Rules and Article 159 of the Constitution of Kenya 2010 seeking the following orders: -
  - a. That the Certificate of Confirmation of Grant issued on 2<sup>nd</sup> October 2014 by Justice G.K. Kimondo in this cause rectified to capture the correct names of the beneficiaries and to give way for title processing in the names of the beneficiaries.
  - b. There be an excise of 6 acres from the shares allocated to each of the beneficiaries hereto to cater for road access and water catchment.

- c. The Honourable Court be pleased to order that the share of Beatrice Nafula Mwanja (deceased) be shared equally among the surviving beneficiaries hereto.
  - d. Costs of this application be provided.
- 2.** The Application is made on the following grounds on the face of it among others;
- a. Sufficient cause exists to warrant the grant of the orders sought.
  - b. The application has been made without unreasonable delay.
  - c. The Honourable Court has unfettered discretion to allow the instant application in the interest of justice.
- 3.** The application was supported by the annexed affidavit dated 15<sup>th</sup> September 2025 sworn by the Applicant herein who deponed as follows: -
- a. *That a Certificate of Confirmation of Grant was issued on 2<sup>nd</sup> October 2014 by Justice G.K Kimondo in this cause.*
  - b. *That following the issuance of the said grant, the estate was distributed and demarcated in line with the said grant on the ground where all the beneficiaries were shown their respective portions which they occupied, built homesteads where they live together their respective families and have been utilizing awaiting the title processing.*
  - c. *That on 2<sup>nd</sup> October 2024, this Honourable court issued an order directing parties to file a survey report within 30 days.*
  - d. *That in compliance with the order of 2<sup>nd</sup> October 2024, I engaged Thagishu & Associates surveyors who visited the ground on 14<sup>th</sup> October 2024 and prepared a report to that effect.*
  - e. *That during survey conducted by Thagishu & Associates, it has emerged that there are certain changes on the ground that would make implementation of the said grant difficult which reasons include:*

- a) *When the actual measurements were taken on the ground, it was discovered that there is need to curve 4.3 Acres from Land Reference No. Kolongolo Block 38 to cater for the access road/reserve which in essence means that 4.3 Acres should be excised from the shares allocated to each of the beneficiaries hereto for road access which is something that was not factored in the said grant. There is an access road which passes through the Land Reference No. Kolongolo Block 38 which was not indicated in the certificate of confirmation of grant of 2<sup>nd</sup> October 2014.*
- b) *It has also emerged that there are unpaid land rates owing to the municipal councils which must be cleared for titles to be issued to the relevant beneficiaries and the same needs to be factored as well.*
- f. *That any sub-division of immovable property as of necessity takes away some portions to create access or easement for the sale benefits of the beneficiaries hereto.*
- g. *That the very aspect of survey and sub-division does reduce the total acreage of land awarded to the beneficiaries hereto.*
- h. *That in the spirit of resolving the aforesaid emerging issues, I pray for the said grant to be rectified accordingly to provide for the adjustments as it will go a long way towards the expeditious disposal of this cause that has been in court for a very long time.*
- i. *That notwithstanding, on 2<sup>nd</sup> October 2024, Philip Busolo Mwanja, Joseph Khaemba Mwanja and the late Beatrice Nafula Mwanja (mother to the beneficiaries hereto) were allocated L.R No. Nzoia Moi's Bridge Block 1/3591 measuring "75 x 100 vide the said grant which parcel the late Beatrice Nafula Mwanja without consent and/or knowledge of Phillip Busolo Mwanja & Joseph Khaemba Mwanja illegally sold.*

- j. *That since Beatrice Nafula Mwanja (deceased) who is our mother and who was also a beneficiary hereto, we pray for an order that her share be distributed equally among the surviving beneficiaries hereto who are her children for expeditious disposal of this cause.*
- k. *That the Honourable Court has unfettered discretion to allow the instant application in the interest of justice.*

### **Analysis and Determination**

4. I have read and considered the chamber summons and the affidavit in support of the same. There are two central issues which arise for determination from the Chamber Summons in this Succession Cause: -
- a. Whether this Honourable Court should review the Certificate of Confirmation of Grant dated 2<sup>nd</sup> October 2014?
  - b. Whether the shares held by Beatrice Nafula Mwanja (deceased), who was one of the beneficiaries under the Certificate of Confirmation of Grant issued on 2<sup>nd</sup> October 2014 should devolve to the children?

### **Whether this court should review the Certificate of Confirmation of Grant dated 2<sup>nd</sup> October 2014?**

5. The jurisdiction of this court to order for a review of the certificate of Confirmation of Grant is granted by section 47 of the Law of Succession Act which provides as follows;

#### ***47. Jurisdiction of High Court***

*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.*

6. I take note that where a proposed amendment of a grant cannot be dealt with under the provisions of Section 74 of the Law of Succession Act, the applicant ought to approach the court under order 44 of the Civil Procedure Rules. A review under Order 44 of the Civil Procedure Rules may be sought upon discovery of new and important matter or on account

of some mistake or error apparent on the face of the record, or for any sufficient reason. The Applicant in this case should have moved the court under this Provision-Order 44 of the Civil Procedure Rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant.

7. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

*“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules*

*(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.*

*(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.*

8. In **John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR**, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows: -

*“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and*

*computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”*

9. Starting with the issue for Review, Order 45 provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court 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. Secondly, he must demonstrate to the court that there has been some mistake or error apparent on the face of the record and thirdly, an application for review can be made for any other sufficient reason. On the issue of an error or mistake apparent on the face of the record it is clear that, the error the subject of the application ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record (See ***Muyondi Vs Industrial and Commercial Development Corporation & Another (2006) 1 EA 243*** and ***Paul Mwaniki vs. National Hospital Insurance Fund Board of Management [2020] eKLR***).
10. The Court of Appeal when addressing the issue of discovery of new evidence as ground for allowing a review application had the occasion to pronounce itself in ***Rosa Kaiza Vs Angelo Mpanju Kaiza [2009] eKLR*** where the court quoting from a commentary by Mulla on similar provision

of the **Indian Civil Procedure Code 15<sup>th</sup> Edition at page 2726** stated;

*“Application on this ground must be treated with great caution and as required by Rule 4 (2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”*

- 11.** Upon a careful reading of the record and the affidavit in support of the present application, this Court notes that the Applicant relies heavily on the survey report prepared by Thagishu & Associates Surveyors dated 14<sup>th</sup> October 2024. The said report identifies certain discrepancies between the acreage and demarcations reflected in the Certificate of Confirmation of Grant dated 2<sup>nd</sup> October 2014 and the actual ground situation. In particular, the surveyors’ report establishes that approximately 4.3 acres of the land forming Land Reference No. Kolongolo Block 38 must be excised to create a lawful access road and water catchment area, a factor not captured or contemplated at the time of confirmation of the grant. In particular, the survey report indicated as follows: -

*As per the High Court of Kenya at Eldoret pursuant to section 29(a) of the Law of Succession declares that as per the survey findings done on*

*the 14<sup>th</sup> October 2024, there has been changes on the surveyed plots with the following differences in measurements:*

<b>PLOT NO</b>	<b>PREVIOUS ACREAGE</b>	<b>CURRENT ACREAGE</b>
<i>Ndivisi/Khalumuli/88</i>	<i>14.5 Acres</i>	<i>14.7 Acres</i>
<i>Nzoia Sisal Farm</i>	<i>9.8 Acres</i>	<i>9.1 Acres</i>
<i>Kolongolo Block 38</i>	<i>31 Acres</i>	<i>26.7 Acres</i>

**12.** These discrepancies in the Court's considered view constitute **new and material evidence** within the meaning of Section 80 of the Civil Procedure Act as read with Order 45 Rule 1 of the Civil Procedure Rules. The law on review provides that a party may seek review of a decree or order on 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 at the time when the decree was passed or order made. It is evident that at the time of issuance and confirmation of the grant in 2014, no formal ground survey had been conducted to ascertain the true topographical and physical realities of the estate land. The confirmation therefore proceeded on an assumption that the acreage and parcel boundaries reflected in the grant were accurate and capable of being implemented as drawn. It was only upon conducting the physical survey ten years later on October 2024 that it became apparent that a portion of the land previously allocated to beneficiaries must as a matter of public utility, be excised for access and easement purposes.

**13.** This Honourable Court is persuaded that the discrepancies revealed by the survey amount to material evidence because they fundamentally affect the execution and validity of the distribution plan contained in the original grant. In the absence of this new evidence, implementation of the 2014 grant would not only be impracticable but would risk overlapping boundaries, encroachment and conflict among beneficiaries. Therefore, the survey report introduces a new factual dimension that was

not discoverable at the time of confirmation despite due diligence satisfying the threshold for review or rectification under the law.

**14.** It therefore follows that the discovery of these discrepancies through the survey justifies the invocation of this Court's powers of review and rectification under Section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules and Section 80 of the Civil Procedure Act to ensure that the confirmed grant accurately reflects the true and current state of the estate property. The purpose of the law on rectification is not merely procedural but substantive to ensure justice and fairness in the administration of estates and to prevent hardship occasioned by reliance on inaccurate or outdated data.

**15.** From the above, the Court finds that the Thagishu & Associates survey report qualifies as new material evidence justifying review of the Certificate of Confirmation of Grant dated 2<sup>nd</sup> October 2014 to the extent necessary to align the record of distribution with the verified physical boundaries and to provide for the excision of land required for access and public utility. This review does not alter the underlying entitlements of the beneficiaries but ensures lawful, practical and equitable implementation of the confirmed grant.

**Whether the shares held by Beatrice Nafula Mwanja (deceased), who was one of the beneficiaries under the Certificate of Confirmation of Grant issued on 2<sup>nd</sup> October 2014 should devolve to the children?**

**16.** The second issue that emerges for determination is the devolution of the share of Beatrice Nafula Mwanja (deceased), who was one of the beneficiaries and the surviving spouse under the Certificate of Confirmation of Grant issued on 2<sup>nd</sup> October 2014. The Applicant has urged the Court to order that her share be distributed equally among the surviving beneficiaries. It is not disputed that Beatrice Nafula Mwanja

was both a beneficiary of the estate of the original deceased and later a deceased in her own right having passed away before her portion of inheritance could be fully transmitted. The question therefore arises: what becomes of a surviving spouse's share when he or she dies before completion of transmission of their entitlement under a confirmed grant?

- 17.** Under Section 35(5) and Section 38 of the Law of Succession Act, where an intestate leaves a surviving spouse and children, the surviving spouse is entitled to a life interest in the whole residue of the net estate, but upon the death of the surviving spouse, the property devolves upon the surviving children in equal shares. The rationale for this principle is that the life interest of the surviving spouse under Section 35 is personal and non-transferable and it does not create an absolute ownership right capable of alienation or inheritance. Upon the death of that spouse, the life interest ceases and the reversionary interest passes to the children as absolute proprietors. Specifically, Section 35 (5) of the Law of Succession Act provides as follows: -

***35. Where intestate has left one surviving spouse and child or children***

*(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*

- 18.** Applying the above legal framework to the facts before this Court, it is evident that Beatrice Nafula Mwanja who was a beneficiary and surviving spouse of the original deceased, held her allocated share under the confirmed grant subject to her life interest. Upon her demise, that life interest terminated automatically by operation of law and her portion reverted to her biological children who now stand in her place as direct

heirs to that share. The effect and/or the implication of section 35(1) of the Law of Succession Act is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. In **re Estate of David Mwangi Mwarangu (Deceased) [2023] eKLR**, the court stated; -

*"Since the only surviving widow of the deceased is still alive then she is entitled under the terms of section 35 of the Law of Succession Act to a life interest in the net estate. It would only be upon the demise or remarriage of the Administrator that the estate would be distributed equally amongst the surviving children of the deceased who include the objector herein."*

**19.** Consequently, in this case, the Court finds that upon the demise of Beatrice Nafula Mwanja, her share under the Certificate of Confirmation of Grant automatically devolved upon her surviving children in equal shares subject to the outcome of this rectification application and compliance with all outstanding administrative requirements such as settlement of land rates. It follows therefore that the prayer seeking redistribution of the share of the late Beatrice Nafula Mwanja among her surviving children is well founded both in law and equity. The Court must however clarify that this redistribution does not amount to re-opening the entire estate but it merely reflects the lawful transmission of a deceased beneficiary's entitlement to her rightful heirs.

**20.** The law does envisage that the administrator has the powers to focus on the administration of the estate and take full responsibility for proper administration within a set time frame of six (6) months for the failure to do so potentially leads to the courts intervention under Section 76 of the Law of Succession Act. The key duties of an administrator in intestate

estate like JOHN WABOMBA MWANJA, MARY NAKHANU MWANJA and MILDRED NALIAKA duly appointed by this court Under Section 66 of the Act include:

- a) **Represent the estate:** An administrator has the authority to enforce causes of action and take legal action for the estate, as demonstrated in the case of re-Estate of the Deceased.
- b) **Administer the Estate:** This includes a full and accurate inventory of all assets and liabilities and paying all debts and expenses from the estate's assets
- c) **Distribute Assets:** After paying debts, the administrator must distribute the remaining assets to the beneficiaries according to the law of succession
- d) **Account to the court:** The administrator must provide a full and accurate account of their administration to the court
- e) **Complete administration in a timely manner:** The administration must be completed within a specific timeframe (e.g six months) from the date the grant was confirmed. If this is not possible, the administrator can apply to the court for an extension.

**21.** The record shows that this estate dates way back to the year 2004 although a series of applications do demonstrate that the distribution of the entire assets is yet to be completed. It is the expectation of this court that the administrators will move in haste to transmit the estate without unreasonable delay.

**22.** Consequently, taking into context the discussed legal principles and in the interest of justice, the following orders shall abide: -

- a) That the Certificate of Confirmation of Grant issued on 12<sup>th</sup> June 2014 and confirmed on 2<sup>nd</sup> October 2014 be and is hereby reviewed and rectified.
- b) That the Administrators to apply the law on devolution of the shares entitlement of the widow Beatrice Nafula Mwanja (deceased) who was the surviving spouse and beneficiary in accordance with section 35 as read with section 40 & 41 of the Law of Succession Act.
- c) That the administrators of the intestate estate of the late Jackson Mwanja Busolo shall, within ninety (90) days from the date hereof complete the process of transmission of all the assets of the estate to the respective lawful beneficiaries in accordance with the confirmed grant and the Law of Succession Act.
- d) That the said parcels of land being Ndivisi/Khalumuli/88, Nzoia Sisal Farm & Kolongolo Block 38 shall be distributed to the beneficiaries as follows:

**SCHEDULE**

**a. L.R NO NDIVISI/KHALUMULI/88 - 14.7 Acres**

<b>BENEFICIARY</b>	<b>SHARE</b>
John Wabomba Mwanja	2.37 Acres
Mark Marauni Mwanja	1.79 Acres
Sarah Nabalayo Mwanja Mary Nakhanu Mwanja Salome Namarome Mwanja Caroline Namukhula Mwanja Everlyne Mukoya Mwanja Mildred Naliaka Mwanja Melsa Mulemia Mwanja	3.03 Acres to be shared equally
Joseph Khaemba Mwanja	1.77 Acres
Duncan Karani Mwanja	2.06 Acres

Peter Mukhone Mwanja	1.70 Acres
Philip Busolo Mwanja	1.98 Acres

**b. L.R NO NZOIA SISAL FARM/1953 - 9.1 Acres**

<b>BENEFICIARY</b>	<b>SHARE</b>
John Wabomba Mwanja	1.47 Acres
Mark Marauni Mwanja	1.16 Acres
Joseph Khaemba Mwanja	1.25 Acres
Duncan Karani Mwanja	1.31 Acres
Peter Mukhone Mwanja	1.17 Acres
Philip Busolo Mwanja	1.36 Acres
Beatrice Nafula Mwanja (Deceased)	1.24 Acres
Road Access	0.14 Acres

**c. L.R NO KOLONGOLO BLOCK/38 - 26.7 Acres**

<b>BENEFICIARY</b>	<b>SHARE</b>
John Wabomba Mwanja	4 Acres
Mark Marauni Mwanja	2.9 Acres
Sarah Nabalayo Mwanja	1 Acre
Mary Nakhanu Mwanja	1 Acre
Salome Namarome Mwanja	1 Acre
Caroline Namukhula Mwanja	1 Acre
Everlyne Mukoya Mwanja	1 Acre
Mildred Naliaka Mwanja	1 Acre
Melsa Mulemia Mwanja	1.2 Acres
Joseph Khaemba Mwanja	3 Acres
Duncan Karani Mwanja	2.9 Acres
Peter Mukhone Mwanja	2.9 Acres
Philip Busolo Mwanja	3.3 Acres

River Bank Reserve	0.5 Acres
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**d. MATUNDA MARKET PLOT NO 3591**

<b>BENEFICIARY</b>	<b>SHARE</b>
Beatrice Nafula Mwanja	To be shared Equally
Phillip Busolo Mwanja	
Peter Mukhone Mwanja	
Joseph Khaemba Mwanja	

**e. COMMERCIAL PLOT- L.R LANGAS/BLOCK 14/90**

<b>BENEFICIARY</b>	<b>SHARE</b>
Beatrice Nafula Mwanja	To get the permanent building
Sarah Navalayo Mwanja John Wabomba Mwanja Dancan Karani Mwanja	To share three semi-permanent six (6) doors equally
Mark Marauni Mwanja	To get the undeveloped portion

- e) That the matter shall be mentioned for a Status Conference on 16<sup>th</sup> January 2026 to confirm compliance with the orders above.*
- a) There shall be no order as to the costs*
- b) Orders accordingly.*

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 13<sup>TH</sup> DAY  
OF OCTOBER 2025**

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**R. NYAKUNDI**  
**JUDGE**