REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKMEGA

SUCCESSION APPEAL NUMBER E021 OF 2023

IN THE MATTER OF THE ESTATE OF ALFRED MUTOKA ILOTI(deceased)

AND

MARY LINDAH ITAMBO----------APPELLANT

VERSUS

FRIDAH ALAKA MUTOKA----------RESPONDENT

(Being an appeal arising from Kakamega Chief Magistrate's Court Succession no. 335 of 2017 delivered by Hon. V. Amboko on 15th November, 2023)

JUDGMENT

1. The matter refers to the estate of Alfred Mutoka Iloti, who died on 22/04/2005. According to the chief's letter dated 12/06/2017, the deceased was survived by 6 beneficiaries, being;
   i. Ruth Andeso Mutoka(widow)
   ii. Mabel Ayuma Mutoka (daughter)
   iii. Abigael Otembo Mutoka(daughter)
   iv. Florida Alaka Mutoka (daughter)
   v. Mary Linda Itambo (Daughter-in-law)
   vi. Kennedy Milimu Mutoka (Grandson)
2. The deceased estate comprised of Isukha/Shirere/2845 measuring 1.325 Ha; Isukha/Shirere/2850 measuring 0.69 Ha; Isukha/Shirere/2849 measuring 0.86 Ha; Isukha/Shirere/2848 measuring 0.73 HA.
3. The deceased widow, Ruth Andeso Mutoka, applied for grant of letters of administration on 19th June, 2017, which were issued on 05th October 2017.

4. The administrator, Ruth Andeso Mutoka, later filed a summons for confirmation of a grant dated 19th December,2017, together with a proposed mode of distribution as follows;
   i. Plot No. 7 Shirere Market- wholly to Ruth Andeso Mutoka
   ii. Isukha/Shirere/2845- Mabel Ayuma Mutoka------ 0.633 Ha
   Floridah Alaka Mutoka------0.633 Ha
   iii. Isukha/Shirere/2848---------- Kennedy Mulimu Mutoka
   iv. Isukha/Shirere/2849---------- Abigael Otsembo Mutoka
   v. Isukha/Shirere/2850---------- Mary Linda Itambo
5. Upon the demise of the administrator's widow, Ruth Andeso, on 13/1/2018, her daughter, Floridah Alaka Motoka, applied to be substituted as the administrator, and the estate that was initially for their mother, plot No. 7, was to devolve to her daughters, Mabel Ayuma Mutoka, Abigael Otsembo, and Floridah Alaka Motoka. The substitution was allowed, and the grant was confirmed on 9th August 2018
6. The appellant/applicant, the deceased daughter-in-law, filed for summons for rectification of the grant in succession cause No.335 of 2017, where she sought the following orders;
   a) That the certificate for confirmation of grant be rectified in the following terms;
      i. L.P. NO. Plot 7 Shirere Market to be shared equally among Mabel Ayuma Mutoka, Abigael Otsembo Mutoka, Floridah Alaka Mutoka, and Mary Linda Itambo.

      L.P.No. Isukha/Shirere/2850 Mary Linda Itambo---------- whole
   b) That the acreage of L.P. Isukha/ Shirere/2850 be demarcated according to mutation registration on 16th July 1991, which is 0.85 ha

      Boundaries
   c) That the boundaries existing between all the parcels being Isukha/Shirere/2845,2848,2849, and 2850 be maintained.

7. On 16th January 2023, the applicant, Mary Itambo, filed a second application seeking that the letters of administration issued to Floridah Alaka Mutoka and confirmed be revoked and the same be issued in her name.
8. She claimed that the administrator failed to involve her in the process and further that she did not sign the consent documents, which prompted her to file the application dated 5th October 2022. She claimed that the administrator wanted to interfere with the set boundaries, which were already mapped out, and further that the administrator went ahead and fenced all the parcels of land using goons without involving the other beneficiaries, the land registrar, or the surveyor, and that the petitioner was not interested in the just administration of the estate.
9. The trial court, upon analysing the pleadings of the parties and their affidavit, stated that the issues raised by the applicant were outside the parameters of section 74 of the Law of Succession Act about rectification. The court noted that the issues raised by the applicant were not minor errors and, as such, the applicant ought to have applied for a review of the confirmed grant.
10. They court declined to entertain the prayer to interfere with the boundaries as requested by the applicant. Citing section 18 (2) of the Land Registration Act, stating that they lacked the jurisdiction to interfere with the boundaries. Thus the application dated 5th October, 2022 was dismissed by the lower court for lack of merit.
11. The appellant, being aggrieved by the decision of Hon. V.O. Amboko in Kakamega succession Cause Number 335 of 2017 delivered on 15th November 2023, appealed on the whole decision based on the following grounds;

a) That the trial magistrate erred in law and fact by failing to find that the appellant herein had met the threshold required for rectification of a grant, therefore dismissing the applicant's application.

b) *That the trial magistrate erred in law and fact by failing to find that the respondent herein had administered the land through fraud.*

c) *That the trial magistrate erred in law and in fact by failing to find that the respondent had illegally fenced off the estate of the deceased, thus affecting the acreage of the portion allocated to the appellant.*

d) *That the trial magistrate erred in law and in fact by failing to find that the respondent herein administered the estate of the deceased Alfred Mutoka Iloti without involving the beneficiaries.*

e) *That the trial magistrate erred in law and in fact by failing to find that the applicat had proven that the petitioner had administered the deceased's estate through fraud.*

f) *That the trial magistrate erred in law and fact by failing to find that the application dated 23rd January 2023 for the revocation of the grant is merited.*

12. The appellant prays that this court set aside the ruling of the trial court and allow the application dated 23rd January 2023.

13. The appeal was canvassed by way of written submissions.

14. The appellant filed submissions on 11th February 2025 and raised two issues for determination. On the first issue of whether the Respondent distributed the estate through fraud, she stated that the application at the lower court sought to rectify the acreage of parcel No. Isukha/Shirere/2850, which should have been in line with the mutations registered on 16/7/1991, and the boundaries be maintained, for the respondent went ahead and fenced off the entire deceased estate without involving the other beneficiaries, the land registrar, and the surveyor.

15. She avers that the respondent's actions were fraudulent for not including the beneficiaries and further she administered the estate in an unscrupulous manner , made the transfer without the appellant's consent to any process or gave any indication that she had reported the loss of the title deed, which she claimed were lost.

16. She cited section 76, claiming that the respondent failed to administer the estate diligently. She cited the case of **Albert Imbuga vs. Recho Kavai (2016) eKLR** and submitted that the administrator's failure to involve other beneficiaries and the act of fencing the estate in the absence of the land registrar and failure to administer the estate diligently demonstrated her incompetency and prayed that the court allows the appeal and set aside the ruling issued by the trial magistrate.

17. The respondent in her submissions dated 29th September 2025, stated that the appeal lacked merit and that the 6 grounds raised by the appellant were not supported by any evidence on record.

18. They submitted that the appellant failed to prove grounds under section 76 of the Law of Succession Act and that their similar applications in the lower court had been dismissed, and further, there was nothing to warrant a rectification of the grant under section 74.

19. They stated that the appellant had failed to provide evidence that the respondent had fenced off her land for which she had a problem with the boundaries demarcation, and further that this court lacked the jurisdiction to determine matters of boundaries.

20. They further relied on their lower court submissions and pray that the same be adopted.

Analysis and determination.

21. Having considered the pleadings, submissions, and record of appeal, the issues for determination are:

a) Whether the trial court erred in declining rectification of the grant under section 74 of the Law of Succession Act.
b) Whether the appellant proved grounds for revocation of the grant under section 76 of the Law of Succession Act.
c) Whether the trial court erred in declining to entertain boundary disputes.
d) What orders should be issued in this appeal?

22. Section 74 of the Act provides that errors in names or descriptions or clerical errors in grants may be rectified. The Court of Appeal in **the Matter of the Estate of Charles Kaguru Njuki (Deceased) [2016] eKLR** held that rectification is only available for minor errors and not for redistribution of the estate.

23. In **re Estate of Lekinyot Ole Lanke (2024) KEHC 2486,** the court distinguished between clerical errors that can be rectified and substantive alterations requiring full review, holding that misdescription of property that does not alter the core of the grant may be rectified, but changes involving addition of beneficiaries or redistribution require formal review proceedings.

24. Similarly, in **Re Estate of John Kamau (Deceased) [2020] KEHC 456 (KLR), the High Court at Eldoret (Githinji, J.)** dismissed a rectification application seeking to redistribute shares among beneficiaries, holding that such changes require revocation or review under Section 76.

25. In this appeal, the appellant sought rectification of boundaries and acreage that fundamentally alter the grant's distribution terms. Such issues transcend clerical errors, falling instead within the realm of substantive disputes. The lower court correctly held that the issues raised were not minor errors amenable to section 74 relief but required a substantive review or appeal. This is consistent with jurisdictional practice, where the court must guard against using rectification as a backdoor to substantive challenges.

26. The case of **in the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (2013)** further reinforces that rectification is inappropriate for substantive disputes, which must be pursued by review or appeal.

27. The Appellant's prayer to include herself in Plot No. 7 Shirere Market fundamentally alters the confirmed distribution, which allocated the plot to Mabel Ayuma Mutoka, Abigael Otsembo Mutoka, and Floridah Alaka Mutoka. This goes beyond the scope of Section 74, as it seeks to reallocate the estate rather than correct a

clerical error. The trial court correctly found that these issues were outside the parameters of rectification.

28. On the second issue raised, the appellant alleges that the Respondent administered the estate fraudulently by fencing off parcels without involving beneficiaries, the land registrar, or a surveyor, and failing to report the loss of title deeds. Section 76 of the Law of Succession Act allows revocation of a grant where it was obtained fraudulently, through concealment, or where the administrator fails to proceed diligently.

29. In **Albert Imbuga v Recho Kavai [2016] eKLR**, cited by the Appellant, the High Court at Kakamega (Sitati, J.) revoked a grant where the administrator excluded beneficiaries and misrepresented facts to obtain confirmation. The Court emphasized that fraud includes "*deliberate acts of exclusion or misrepresentation that prejudice beneficiaries' rights.*" However, the burden lies on the applicant to prove fraud with cogent evidence, as held in **Re Estate of John Mwangi Njoroge (Deceased) [2019] KEHC 234 (KLR),** where the High Court at Nairobi (Musyoka, J.) dismissed a revocation application for lack of evidence supporting allegations of concealment.

30. The appellant alleged that she was excluded from the confirmation process and that the administrator fenced off the estate without consultation. However, beyond her assertions, no documentary evidence was presented to show non-participation, fraudulent transfers, or concealment. The record shows that the confirmed grant was issued by the court after due process. The Appellant admits she used to attend court when the matter came before the court and also admits she was even called by the area chief and informed of the process.

31. As observed in **Samuel Wafula Wasike v Hudson Simiyu Wafula [1993] eKLR,** revocation is a drastic remedy, and the burden of proof lies on the applicant. The appellant failed to

discharge this burden. The trial court was therefore justified in finding no basis for revocation

32. In the instant case, the Appellant's claims of fraudulent fencing and exclusion are unsupported by affidavits from other beneficiaries, surveyor reports, or land registrar documentation. The trial court noted the absence of evidence demonstrating that the Respondent altered boundaries or encroached on the Appellant's parcel (Isukha/Shirere/2850).

33. Allegations of fraud must be pleaded and strictly proved to a standard higher than a balance of probabilities but lower than beyond a reasonable doubt, as was stated in **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR.**

34. The appellant did not produce evidence such as forged documents, false consents, or irregular transfers to substantiate her allegations of fraud. The trial court cannot be faulted for dismissing these claims

35. Without such proof, the allegations remain speculative and do not meet the threshold for fraud or concealment under Section 76.

36. On the claim of boundary raised by the appellant, Section 18(2) of the Land Registration Act, 2012 provides that the court has no jurisdiction to determine boundary disputes, which fall under the Land Registrar. The trial court correctly declined jurisdiction on this matter.

37. The Court of Appeal in **Azzuri Limited v Pink Properties Ltd [2018] eKLR** reiterated that disputes over boundaries must first be referred to the Land Registrar before judicial intervention. It is my view that the trial magistrate acted in accordance with this settled principle.

38. From the foregoing analysis, I find that:

i. The application before the trial court went beyond the scope of rectification under section 74 of the Law of Succession Act.

ii. There is no sufficient evidence to invoke revocation under section 76, allegations of fraud were unsubstantiated.

iii. The trial court was correct in holding that it lacked jurisdiction over boundary disputes.

Orders

a) Accordingly, I find no merit in the appeal. The appeal is hereby dismissed.
b) Given the family nature of succession disputes, each party shall bear their own costs.
c) Right of Appeal 30 days.

DATED SIGNED, and DELIVERED in open court at KAKAMEGA THIS 8th DAY OF OCTOBER , 2025.

S.N. MBUNGI

JUDGE

In The Prescence of;

CA: Angong'a

Mr. Nyikuli for the Respondent, present.

Mr. Mondia holding brief for Mr. Magina for Appellant present.