



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 471 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE EDWARD KIPROTICH

BIRIR (DECEASED)

WILSON BIRIR.....1ST OBJECTOR/APPLICANT

AGNESS TURNER.....2ND

OBJECTOR/APPLICANT

- VERSUS -

NEDDY JEPNGETICH KIPROTICH.....

RESPONDENT

RULING

1. Before me is a Summons dated 28th February, 2023 expressed to be brought under **Sections 47 and 76** of the Law of Succession Act and **Rule 44 (1) (2) and 73** of the Probate and Administration Rules.

The application seeks:-

i) Spent

ii) That this Honourable Court be pleased to order cancellation of all dealings, transfer of title deed of LEMBUS/KISOKON/39 arising from and based on the execution, enforcement or implementation of the confirmed grant dated 21st October, 2022.

iii) That the Confirmed Grant dated 21st October, 2022 be rectified and amended to state as follows:

<u>NAME</u>	<u>DESCRIPTION OF PROPERTY</u>	<u>SHARE</u>
AGNES TURNER & WILSON BIRIR	LEMBUS/KISOKON/39	WHOLE

iv) That costs of this application be borne by the Respondent

Applicants' Case

2. The Application is supported by the affidavit sworn by **Wilson Birir** on 10th September, 2022 where he states that the Applicants are step siblings of the deceased herein and **LEMBUS/KISOKON/39** was distributed or given out by mistake or fraudulently to the Respondent yet the property was only registered to the name of the deceased and that the deceased never actually owned it.
3. The Applicant contends that the grant was obtained by concealment of facts and that the deceased entered into an exchange agreement with the Applicants' mother **Tumutwol Birir** (Junior) for her parcel of land known as Plot No. 265 currently **Baringo Sabatia 103/177** which was resisted under her then. The agreement was that he takes the plot and give their mother **Lembus /Kisokon/39**.
4. That the Applicaan'ts mother transferred her property in 1973 to the deceased herein but the deceased herein did not transfer his property since it had a charge to Agricultural Finance Cooperation, that he had

no funds to clear the loan and since the title was encumbered, therefore it was not available for transfer. The loan was later cleared by the 2nd Applicant in its entirety.

5. That a complaint was lodged at the Land Disputes Tribunal at Koibatek concerning ownership. That the Respondent made an application for confirmation of grant which they protest.
6. That the beneficiaries of **Tumutwol Birir** (Junior) have made attempts in the past to have the property registered in their names but the beneficiaries of the deceased herein conceded that the wait for conclusion or upon confirmation of grant of letter of administration being issued to the administrator be confirmed as their claim was premature.
7. That they have been occupying **Lembus/Kisokon/39** from when they were young and the application by the Respondent was an indication of sheer dishonesty and greed. That the generosity of the Respondent to give the 2nd Applicant 5 acres should be an eye opener.
8. It was further stated that in the meeting held at the chief's office in Mogotio the deceased herein agreed to give back the property to the children of the **late Tumutwol Birir** (Junior) and signed against the minutes when he was still alive.

Respondent's Case

9. The Respondent by way of Grounds of Opposition dated 29th May, 2023 opposed the application on the following grounds:
 - a) ***That the parcel LEMBUS/KISOKON/39 does not form part of the estate of the deceased***
 - b) ***That the land was registered in the name of the deceased.***
10. The matter proceeded by *viva voce* evidence on 23rd January, 2024 and 11th July, 2024. The Applicants availed two witnesses in support of their case while the Respondent availed one witness to adduce evidence. Parties were directed to file written submissions and at the time of writing this Ruling, only the Respondent had complied.

Respondent's Submissions

11. The Respondent submitted that there is no error to be rectified in the grant through the current application as contemplated under **Section 74** of the Law of Succession Act and the grant can only be annulled or revoked under **Section 76** of the **Law of Succession Act**.
12. Reliance was placed in **Estate of Muniu Karugo (deceased) Succession Cause No. 2669 of 1997** where the Court held that *“rectification only delas with obvious errors and it cannot be used to fundamentally change the grant..”*
13. Further reliance was placed in the case of ***re Estate pf Jane Waithegenyi Nderitu (Deceased) [2022] eKLR*** to submit that the present application is seeking rectification and amendment of the confirmed grant to distribute parcel Lembus/Kisokon/39 to persons

who are not beneficiaries of the above estate and the same title is already registered in the name of the Respondent.

14. It was further submitted that this was not the right forum for the Applicants to lay their claim and that her claim lay with the Environment and Land Court. Reference was made to ***in the matter of the estate of Chege Njuguna (Deceased) Succession Cause No. 832 of 1993*** where the Court opined that a party with an interest in the property making up the estate , and who is not entitled in intestacy to the estate should bring a separate suit for determination of his rights to the property.
15. It was submitted that this cancellation of titles owned by the deceased is not subject to this Court's jurisdiction that can only be dealt with by the Environment and Land Court and not this Court.

Analysis and Determination

16. I have looked at the Application, the Affidavits in support and against and the submission by the administrator, the Application is essentially seeking rectification of grant and cancellation of titles that emanated from the said grant.
17. The issues for determination therefore, are
 - i) Whether this Court had jurisdiction to cancel title to Lembus/Kisokon/39 arising from the Confirmed Grant dated 21st October, 2022.***
 - ii) Whether the Court should order rectification of the Confirmed Grant dated 21st October, 2022.***

18. The Respondent has challenged the jurisdiction of this Court to determine this matter most specifically cancellation of title to **Lembus/Kisokon/39** owned by the deceased herein and transmitted to the Respondent by operation of a Confirmed Grant. She argued that the determination of such issues that is the use and occupation of and title to land is the reserve of the Environment and Land Court. That the deceased was the registered owner and the subject property was listed as amongst the assets of the deceased.
19. The Applicants herein are laying claim to **Lembus/Kisokon/39** not as beneficiaries to the estate of the deceased herein but by alleging that the property although registered in the name of the deceased does not form part of the estate. That the property was to be transferred to their deceased mother following an exchange agreement with the deceased herein.
20. PW1 and PW2 adduced evidence with supporting documents in support of the Applicants' claim. The Applicants' mother is said to have honoured her end of the agreement before her demise but the deceased did not. The Respondent in her testimony disputed those allegations and even the allocation of 50 acres to the 2nd Applicant is said to be out of the wishes of the deceased and the fact that the 2nd Applicant paid of the loan taken by the deceased.
21. Without delving further on the evidence before Court, I have looked at the circumstances revolving around this matter and noted that this is a matter that revolves around title and dispute to land ownership.

22. I am guided by **Articles 162(2)** and **165(5)** of the **Constitution** which address matters touching on title to and occupation of land. I am also guided by **Section 13** of the **Environment and Land Court Act**, which sets out the jurisdiction of the Environment and Land Court. It provides that:-

13. Jurisdiction of the Court

(1)The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2)In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

23. There is a plethora of decisions on this issue of disputes or questions or issues that which revolve around, registration or ownership of land of a deceased person and whether such disputes fall within the jurisdiction of the High Court of the Environment and Land Court.
24. As to the question of jurisdiction to entertain the issue of whether the subject was indeed owned by the deceased herein or the Applicants' mother, the ownership documents on record indicate that the deceased herein as the owner of the disputed property.
25. With the circumstances of this case, this Court lacks the jurisdiction to make a finding one way or the other with regard to a challenge as to the ownership and title to land.
26. The question on the dispute as to how the deceased owned the property and how the Applicants get a stake in the estate as result of ownership by their deceased mother is also not for determination by this Court. A Succession Court can order for the cancellation of a title deed if a deceased's property is at risk of being illegally or fraudulently taken away by third parties not beneficiaries of the estate and not to cancel the title of a deceased person's property in favour of the third parties.
27. The Applicants have indeed raised valid grounds with documentation in support of their claims including the complaint that was lodged at the Land Disputes Tribunal at Koibatek on ownership and the complaint with the Chief. There are serious allegations warranting

scrutiny by the Court. In as much as this Court finds that there may be need to analyse the issues raised by the Applicants, such analysis is not for this Court to make.

28. The Applicants are better placed in raising the issue of ownership of the subject parcel with the Environment and Land Court against the estate.

29. As to rectification of grant, the applicable law is provided for under **Section 74** of the **Law of Succession Act** and **Rule 43(1)** of the **Probate and Administration Rules** provides as follows:

Section 74. Errors may be rectified by court:

“Errors in names and descriptions, or in setting forth 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.”

Rule 43(1) of provides as follows:

“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 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, he shall apply by summons in Form 110 for such rectification through

the registry and in the cause in which the grant was made.”

30. It is clear that there is provision under the Law of Succession Act to rectify errors on a grant before or after the confirmation of grant without changing the substance of the grant. The question that is therefore pending for this Court to determine whether correcting the names on the subject grant from ***“Agnes Tuner and Neddy Chepngetich Kiprotich”*** to ***“Agnes Tuner and Wilson Birir”*** will affect the substance of the grant.
31. In seeking to amend the grant to include the Applicants is to have **Lembus/Kisokon/39** redistributed since the Respondent who gets a portion of it will be left out and in turn introducing the 1st Applicant. Such an amendment would bring substantial changes to the Certificate of Confirmation of Grant dated 21st October, 2022 and the distribution of the estate would also be affected.
32. In ***re Estate of Nderi Munyi (Deceased) [2023] KEHC 20687 (KLR)*** the Court held that:-

“...As I have pointed out it is only the errors which this court can correct. A rectification is not a review. No redistribution or adjustment of shares can be dealt with in an application for rectification of grant. This court gave a Judgment and ruled on how the estate would be distributed. This court as submitted by the respondent is functus officio. It is a doctrine which gives the expression to the principle of finality. This doctrine is to the effect that

a person who is vested with decision making powers may as a general rule, exercise those powers only once in relation to the same matter. This court has no power to revisit its decision and the party not satisfied has the right to appeal to the Court of Appeal...

33. The error that is for rectification that the Applicants are attempting to bring out goes to ownership of the property. The rectification also goes to redistribute the shares of the **Lembus/Kisokon/39** which cannot be addressed by an application of rectification of grant.
34. Without confirmation that the title belongs to the Applicants' deceased mother, there are no errors that have been shown in the judgment of the Court or the Confirmed Grant to warrant rectification.
35. To this end this Court had demonstrated enough that there is no merit in the application dated 28th February, 2023 and is accordingly dismissed with costs to the estate.
36. The Applicants are at liberty to move the Environment and Land Court for appropriate orders.
37. Any aggrieved party has liberty to move the Court of Appeal appropriately, within thirty days.

It is so ordered.

Dated, Signed and Delivered at Nakuru

On this 18th November, 2025

Mohochi S.M.

JUDGE