



REPUBLIC OF KENYA



**In re Estate of Marko Vushuru Kakai alias Marko Kakai (Deceased) (Succession Cause 566 of 2013) [2025] KEHC 526 (KLR) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 526 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 566 OF 2013**

**S MBUNGI, J**

**JANUARY 27, 2025**

**IN THE MATTER OF THE ESTATE OF MARKO  
VUSHURU KAKAI ALIAS MARKO KAKAI (DECEASED)**

**IN THE MATTER OF**

**JOHN AMBULWA ..... 1<sup>ST</sup> PETITIONER**

**FRANCIS MULABI BUSHURU ..... 2<sup>ND</sup> PETITIONER**

**RULING**

1. The applicants who are the administrators of the estate of the deceased, filed summons for rectification of Certificate of Confirmation of grant dated 02.10.2020.
2. The application was supported by an affidavit sworn by the applicants who stated that there was an error in distribution as the Certificate of Confirmation of grant showed that WBM and BI (minors at that time) each got 5.36 Acres, instead of jointly getting 5.36 Acres to share from land parcel Kakamega/BUSH/509 hence making it difficult to transfer the parcel as required to the rightful beneficiaries.
3. They averred that the supporting affidavit to the summons of confirmation showed that in their proposal on the mode of distribution WBM and BI were to be allocated 5.36 Acres jointly and that their share to be held in trust by Amos Mwombe and Enock Shiundu.
4. An affidavit of protest was filed by WB and BMB who stated that they were grandsons to the deceased and that their father was the first born son to their grandmother. The protestors stated that the acreage occupied by their father is 8 acres, and not 5.3 Acres as indicated by the administrators who are their uncles. They prayed that the said share be allocated directly to them since they are not minors.
5. Witness statements and affidavits were filed by the parties, however they both agreed not to have viva voce evidence. The court directed that the application for the rectification of the certificate of confirmation of grant shall be canvassed by oral submissions based on the affidavits filed.



6. The counsels gave oral submissions in respect to the application for the rectification of the certificate of confirmation of grant, as per the directions of the court.
7. Mr. Athung'a, counsel for the petitioners/applicants told the court that there was an error on page 2 of the certificate of confirmation of grant, as the bracket only states the name of WB to have been allocated 5.36 Acres, instead of both him and BI being allocated 5.36 Acres jointly to share. He submitted that both were minors at the time, and further, if the certificate is not rectified, for the two beneficiaries to share, the total acreage as per the grant will be 38 Acres which is bigger than the land on the ground hence impossible to implement vis à vis the acreage as per the survey report which showed the land was 34.8 Acres. Counsel also submitted that the protestors/objectors had not shown any reason why they believed their father was entitled to 11.72 Acres and not 5.36 Acres as his other two brothers.
8. In rebuttal, Mr. Abok, counsel for the protestors submitted that the beneficiaries were not minors at the time the succession cause was filed. He also referred the court to a survey report dated 03.10.2022, filed in accordance with the court orders of 27.06.2022. Counsel submitted that the parties agreed that each party was to get a surveyor to measure the size of the whole land, but the petitioners never filed a report in court, nor did they oppose the report filed by the protestors in court.
9. He further submitted that the beneficiaries were not requesting for a joint share of 11.72 Acres, but rather 8.8 Acres to be divided between them since the survey report showed that the land is bigger than what is reflected on the registry map.

#### **Analysis and Determination.**

10. I have looked at the application, the affidavits, and considered the submissions by both counsels.
11. The application filed in court seeks to have the confirmed grant issued by this court in 2014 to be rectified, owing to an error present in page two of the certificate of confirmation of grant. Counsel for objectors has also brought forth to this court the fact that the objectors want more land since the survey conducted shows that the estate is larger than what is reflected on the registry map.
12. Rectification of grants is provided for in section 74 of the *Law of Succession Act*, Cap 160, Laws of Kenya and Rule 43(1) of the *Probate and Administration Rules*. Section 74 provides as follows:
  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."
13. Rule 43(1) 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."
14. From the language of section 74 of the *Law of Succession Act* and Rule 43(1) of the Probate and Administration Rules, the scope of rectification of grants of representation is limited to 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. I may add that such other minor errors in that genre could also be rectified.



15. From the record, upon hearing the parties on 27.06.2022, this court, while presided by Hon. Justice P.J.O Otiemo directed that the parties each appoint a surveyor and that the two surveyors visit the land jointly to confirm the total acreage of the land of the deceased, confirm what each beneficiary and family members occupy as demarcated by any marks and file a joint report in court entailing their findings.
16. On 24.10.2022, this court while presided over by the Hon. Justice P.J.O. Otiemo, again ordered that the parties each have a surveyor to visit the land and file a report in court. The court directed as follows:

“ Let both sides instruct a surveyor to visit the land, survey the portion occupied by the family of the late Boaz Matete, Enock Bushuru and Amos Mwombe, determine the total acreage occupied then divide the same equally in accordance with the certificate of confirmation dated 11.12.2014 sharing that portion equally among the three. The visit be done on 01.11.2022. Let the two surveyors file a joint or separate report not later than the 22.11.2022. Mention on 19.12.2022”
17. Counsel for the objectors has submitted that the objectors want 8.8 Acres. In rebuttal, the counsel for the petitioners has submitted that doing so will put the total acreage of the land at 38 Acres, which is more than what is on the ground. This issue can easily be addressed by the survey report. The objectors filed a survey report dated 02.07.2021 in court which showed that the total acreage of the land was 34.8 Acres.
18. To me, the issue of sharing and mode of distribution has already been addressed by this court. As stated in paragraph 16 of this ruling, the court’s orders were clear and unambiguous. The Hon. Judge ordered that after confirming the acreage, the land be distributed equally among the three brothers, in accordance with the certificate of confirmation of grant dated 11.12.2014.
19. That court was presided by a Judge of the High Court, like myself. The law does not allow a judge of the high court to act as an appellate court over a decision rendered by another high court judge for they are sized of similar jurisdiction. If the objectors are not agreeable to the mode of sharing and distribution ordered by the court, they should proffer an appeal against it since this court’s hands are tied.
20. On the issue of rectification, an affidavit sworn by the administrators (petitioners herein) on 22.07.2014 and filed in this court on 23.07.2014 clearly shows the proposed mode of distribution of L.P No. Kakamega/Bushu/509 as follows:
  1. John Ambulwa - ID No. xxxxxxxx - 4.67 acres
  2. Kalibo Mark - ID No. xxxxxxxx - 2.72 acres
  3. Jafred Nyongesa Bushuru - ID No. xxxxxxxx - 2.96 acres
  4. John Luther Barasa - ID No. xxxxxxxx
  5. Reuben Lumbasi Barasa - Minor 3.20 acres
  6. LKB - Minor
  7. Solomon Soita Mark - ID No. xxxxxxxx - 2.06 acres
  8. Elisha Burudi - ID No. xxxxxxxx - 1.88 acres
  9. WBM - Minor
  10. BI - Minor - 5.36 acres



11. Enock Shihundu Bushuru - ID No. xxxxxxxx - 5.36 acres
12. Amos Mwombe - ID No. xxxxxxxx - 5.36 acres
21. From the above consent , it is evident that the objectors were to entitled to a share of 5.36 acres jointly as indicated by the bracket.
22. There is also a draft copy on the record, of the initial Certificate of Confirmation of grant that was prepared in court. This unsigned draft also shows that the objectors herein were to jointly share 5.36 Acres since their names are covered under a joint bracket.
23. In the issued Certificate of Confirmation of grant, the bracket only states the name of WB to have been allocated 5.36 Acres, instead of both him and BI being allocated 5.36 Acres jointly to share. From the analysis above, this court believes that this was a slight typing error. Moreover, it would be impossible to execute the grant as is, since the acreage would be greater than the actual land on the ground, as correctly submitted by the petitioners' counsel.
24. Therefore, I do find that the application for summons of rectification of the certificate of confirmation of grant dated 02.10.2020 has merit and issue the following orders:
  - i. The certificate of confirmation of grant be rectified for the protestors BI and WB to share equally the portion of the land due to their late father Boaz Mateche Bushuru pursuant to the Hon. Justice Otieno's orders dated 24.10.2022.
  - ii. This being a family matter, each party to bear its own costs.
25. It is so ordered.
26. Right of appeal 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF JANUARY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Petitioners/Applicants – absent

Protestors/Objectors– absent

Mr. Athung'a for the Petitioners/ Applicants – present

Mr. Abok for the Protestors/ Objectors – present

Court Assistant – Elizabeth Angong'a

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