



**In re Estate of Paul Maingi Wamae (Deceased) (Succession Cause 160 of 2017)  
[2023] KEHC 26022 (KLR) (Family) (1 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26022 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 160 OF 2017  
MA ODERO, J  
DECEMBER 1, 2023**

**IN RE ESTATE OF PAUL MAINGI WAMAE (DECEASED)**

**BETWEEN**

**THERESA MUTHONI WAMAE ..... 1<sup>ST</sup> APPLICANT**

**DR. JOSHUA WAMUGO WAMAE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FRANCIS KINUNGI WAME ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the summons for rectification of Grant dated April 25, 2022 by which the Administrators Theresa Muthoni Wamae and Dr Joshua Wamugo Wamae seek the following orders:-

- “ 1. Spent.
2. Spent.
3. That the Certificate of Confirmation of Grant issued to the said Theresa Muthoni Wamae and Francis Kinungi in this matter on the 2<sup>nd</sup> day of February 2022 be rectified in the following aspects as provided by rule 43 (1) of the *Probate and Administration Rules*:
  - a) That the Confirmed Grant be issued to Theresa Muthoni Wamae and Dr. Joshua Wamugo Wamae pursuant to the mediation and settlement agreement



dated January 10, 2022 and filed in court January 2022.

b) That the full names of the beneficiaries are as follows:

- i) Theresa Muthoni Wamae
- ii) Sarah Naomi Njoki Wamae
- iii) Gideon Maingi Wamae
- iv) Francis Kinungi Wamae
- v) Ruth Wamuyu Wamae
- vi) Daniel Thige Wamae

4. THAT costs of this application be borne by the Respondent in any event.”

2. The application which was premised upon section 74 of the *Law of Succession Act* Cap 160 and rule 43(1) of the *Probate and Administration Rules*, section 3A of the *Civil Procedure Act* and all other enabling provisions of law was supported by the Affidavit of even date sworn by the Applicants.

3. The respondent/objector Francis Kinungi Wamae opposed the application through is replying Affidavit dated October 14, 2022. The application was canvassed by way of written submissions. The Applicants filed the written submissions dated March 8, 2023 whilst the Respondent relied upon their written submissions dated 9<sup>th</sup> March 2023.

## Background

4. This Succession cause relates to the estate of the late Paul Maining Wamae (hereinafter ‘the Deceased’) who died intestate on May 14, 2016. A copy of the Death Certificate Serial No. 0xxx appears as Annexure ‘FKW-1’ to the Affidavit dated July 9, 2018. The Deceased was survived by the following persons:

- a) Theresa Muthoni Wamae - Widow
- b) Sarah Naomi Njoki - Daughter
- c) Gideon Maingi Wamae - Son
- d) Francis Kinungi Wamae - Son
- e) Ruth Wamuyu Wamae - Daughter
- f) Daniel Thige Wamae - Son

5. The estate of the Deceased comprised of several assets.

6. Following the demise of the Deceased Grant of letter of Administration Intestate was on July 25, 2017 issued jointly to the widow and Dr. Joshua Wamugo Wamae (a brother to the Deceased). The Grant was duly confirmed on February 2, 2022.

7. Following a dispute over distribution of the estate the matter was referred to Mediation and the parties reached agreement *vide* the Mediation settlement Agreement dated January 10, 2022. Thereafter on 2<sup>nd</sup> February 2023 this court adopted the Mediation Report as well as the Amendment thereto dated January 24, 2022.



8. The Administrators then filed this application seeking to rectify the confirmed Grant. The application for rectification was premised upon the grounds:

“(a) That the confirmed Grant was obtained fraudulently by the making of false statements, misrepresentation and by the concealment from the court of material facts pertaining to the case.

(b) That the said Grant was obtained by means of providing a false Mediation Agreement and submitted by the Mediator”

9. It is very ironic that the Administrators are accusing themselves of obtaining a Grant Fraudulently and they now wish to have the Mediation Agreement recused on grounds that it is a false document.

10. 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.”

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.

11. 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.”

In Re estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013]eKLR where the court stated:

“The law on rectification or alteration of grants in section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules.....what these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out of the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general...”

12. The Applicants in this matter seek to have the name of the objector Francis Kinungi Wamae removed as an administrator ad to have a fresh Grant issued in their own names. This is a major alteration as it effectively changes the entire grant. Such an amendment cannot be covered under Section 74.



13. The Applicants further claim that the Grant issued was obtained fraudulently. They accuse the Mediator of replacing their genuine settlement agreement with fake agreement. It has not been shown what interest the mediator had in this estate to warrant her introducing a fake agreement for adoption by the court.
14. In any event such allegations of fraud are substantive and would require that the Applicants file a summons to have the entire Grant revoked.
15. Allegations of fraud cannot be dealt with under section 74 of the Act. Such allegations are substantive and must be proved by way of evidence. In the case of Urmila W/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR it was stated that:

“... Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as it require proof beyond reasonable doubt. Something more than a mere balance of probabilities is required...”

16. The Court of Appeal in the case Kuria Kiarie & 2 others v Sammy Magera (2018) eKLR also confirmed standard of proof for fraud as follows:-

“25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Own emphasis].

17. As regards the standard of proof, this Court in the case of Kinyanjui Kamau v George Kamau [2015] eKLR expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that:-

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.’

As was said by this Court’s predecessor in *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314, 317:

“There is one preliminary observation which we must take on the learned judge’s treatment of this evidence: he does not anywhere... expressly direct himself on



the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.”

18. It is trite law that “he who alleges must prove.” The applicants have alleged fraud and have effectively accused the mediator of intermeddling in the estate. These are vey serious allegations which require proof. The amendments which the Applicants are proposing are not mere ‘errors’. They are amendments which go to the root of the management of the estate and its distribution.
19. Such amendments cannot be made by way of summons for rectification of Grant. The Applicants must apply to have the entire grant revoked.
20. Finally, I find no merit in this application. The summons dated April 25, 2022 is hereby dismissed in its entirety costs will be met by the Applicants.

**DATED IN NAIROBI THIS 1<sup>ST</sup> DAY OF DECEMBER, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

