



**In re Estate of the Late Simon Mutungi Nzioka (Deceased) (Succession Cause 31 of 2012) [2023] KEHC 24401 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 31 OF 2012  
MW MUIGAI, J  
OCTOBER 24, 2023**

**BETWEEN**

**MONICAH WAMBUA MUTUNGI ..... PETITIONER**

**AND**

**WILSON KIILU NZIOKA ..... OBJECTOR**

**RULING**

**Background**

1. By a petition received on 26th January, 2012, in which the petitioner Monicah Mumbua Mutungipetitioned this Court for a grant of Letters of Administration intestate of the estate of Simon Mutungi Nzioka(deceased) who died on 2<sup>nd</sup> September,2001 as per death certificate domiciled in Kenya at Lumbwa Location Machakos.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him:
  - a. Monicah Mumbua Mutungi- Widow
  - b. Kelvin Muthama Mutungi- Son.
  - c. Fidelis Mbaika Mutungi- Daughter.
  - d. Lilian Ndunge Mutungi- Daughter.
  - e. Damaris Mwongeli Mutungi- Daughter.



3. The Affidavit in support of Petition for Letters of Administration Intestate mentioned property left by the deceased at the date of his death as follows:
  - a. Title No. Machakos Konza North Block 1/508- measuring approximately 4.0 HA.
  - b. Ten shares at Konza Ranching Co-operative Society Ltd.
  - c. Plot No. 6 at Konza Co-operative Society Ltd.
4. The Chief's letter dated 6/5/2011 confirmed that Simon Mutungi Nzioka left heirs named in the affidavit in support of petition for letters of administration intestate.

### **The Notice of Motion**

5. Vide a Notice of Motion dated 23<sup>rd</sup> July, 2012, the Applicant sought inter alia orders to restrain the petitioner whether by herself, her servants, agents, employees, proxies or assignees from intermeddling with the estate of the deceased in any way at all and from occasioning acts of damage upon the parcels balloted as benefits in respect to share number 1177 at Konza Ranching & farming co-operative Society, pending the hearing and determination of the application.
6. The said application was supported by the affidavit dated and filed in court on 23<sup>rd</sup> July, 2012, sworn by Beatrice Mukethe Nzioka. The affiant deposed inter alia that the deceased was her son and left behind several assets which the deceased held in trust for herself and other dependants in particular the share number 1177 at Konza Ranching and Farming Co-operative Society Ltd and the benefits emanating therefrom. She deposed that the whole land held/ owned by the said Konza Ranching C-operative Society has since been subdivided and each share holder allocated two (2) separate parcels therefrom. The affiant deposed that she is apprehensive that the petitioner may proceed to have the said allocated plots registered under her name and subsequently liquidated and/ or sold to third parties and that if the Petitioner registers the allocated plot in her name the beneficiaries will suffer irreparable loss and considerable expenses in attempt to reverse those deeds.

### **Replying Affidavit by the Petitioner**

7. The Petitioner herein vide her replying affidavit dated 22<sup>nd</sup> October, 2012 and filed in court on 23<sup>rd</sup> October, 2012 opposed the application, deposing that the said application is based assumptions and anticipations that may engage in wanton destruction and/ or sale of the deceased's estate which she has not done; she deposed that the application was brought in bad faith based on mere fear as the Share No. 1177 is registered in the name of the deceased and that the Applicant/ objector was not at the time of the deceased death a dependent of the deceased and she has no business in the deceased estate.

### **Supplementary Affidavit by the Applicant**

8. The objector (Beatrice Mukethe) by her Supplementary Affidavit dated 15<sup>th</sup> January, 2014 and filed in court on 16<sup>th</sup> January, 2014, deposed inter alia that the share in dispute at all material times was registered in the names of Nzyoka Musa her deceased husband and the registration of the share into the deceased whose estate this cause relates, was done in trust for the rest of all the dependants to her husband. Deposing that sometime on 13/5/2011 as can be seen from her annexed BMN1, the Petitioner herein fraudulently and without consulting other family members caused the said share to be registered in her name; further that the in bringing this cause, the Petitioner herein did not disclose the interest of the other family members who all reside in the said property and only just if orders are issued to restrain her from intermeddling with this particular parcel of land.



9. On 15/7/2013 it is on record that parties agreed that the application dated 23/7/2012 be disposed off by way of written submissions and the issued directions in respect of the same.
10. On 6/5/2014 it is on record that court issued directions to explore settlement of the application dated 23/7/2012, which application on 17/6/2014 was withdrawn with no order as to cost and leave to issue to the objector to file an objection to the issue of grant. Court on the same date considered the application dated 23/7/2012 to be marked as withdrawn and the objector was at liberty to file an objection to the issue of grant.

### **Objection to the Making of Grant**

11. By objection to making of grant dated 11<sup>th</sup> September, 2014 and filed in court on 12<sup>th</sup> September, 2014, the objector (Beatrice Mukethe) objected the grant of letters of administration intestate on the grounds that:
  - a. The objector is the biological mother of the deceased.
  - b. Share No. 1177 held at Konza Ranching Company belonged to Philip Nzioka Mosa (Deceased) father to the deceased, the late Simon Mutungi Nzioka.
  - c. The late Philip Nzioka Mosa was husband to the objector.
  - d. The said share No. 1177 Konza Ranching was allocated all the properties listed in the petition for grant.
  - e. After the death of Philip Nzioka Mosa the deceased herein was registered as owner to hold in trust for the entire family the said share No. 1177 and the resultant plots allocated therein.
  - f. The Petitioner herein despite full knowledge that the deceased herein was only registered as trustee fraudulently caused the transfer of the said share No. 1177 and the resultant properties into her name.
  - g. The said share and parcels of land resulting therefrom do not form part of the deceased estate but the deceased held them in trust for the objector and her children.
12. On 7/10/2015 it is on record that parties by consent sought to call viva voce evidence having filed their written submissions and court on the same day directed that parties exchange their documents and witness statements within 30 days each and a hearing date was set for 26/1/2016.
13. The said directions were complied with in which the objector had filed their list of documents and witness statement on 26<sup>th</sup> October, 2015. On the other hand, Petitioner filed her list of documents and witness statement on 21<sup>st</sup> January, 2016

### **Hearing**

#### **Objector's Case**

14. O.B PW1 Beatrice Mutheka Nzioka, gave her sworn testimony and testified that Philip Nzioka Mosa was her husband and he was a member of Konza Ranch; she could not know membership number and that before her husband died, she was never told that the land was sold and that she did not sign anywhere to witness the transfer of shares; she told court that before Simon Mutungi died she had



- no problem with; that the property belonged to Nzioka Mosa her husband, should be given to her and she requested her son Simon Mutungi (deceased) to have. She told court that Monicah Mumbua Mutungi is the wife of Simon Mutungi. She claimed that it is not true she gave the land comprising the share number to Simon Mutungi and that she has other children. She testified that it is not true that Monicah Mutungi is leaved on the land alone and that if she goes to the land she shall take it back as it belongs to her.
15. In cross-examination by Mr. Mungata for the Petitioner, PW 1 told court that her husband did not sell Konza share to Simon Mutungi; that the land was given to her by her husband and she gave it to Simon to live on the land to take care of it while cultivating. she testified that she knows Laban as her son in law married to her daughter Kakova. Testifying that it is not true that her husband told them to sell the share to Laban or to Simon Mutungi to refund the money. She stated further that she is not aware Simon bought the share and it is not true that the share was sold to Simon. It was her testimony that her husband could not sell the share he gave it to her. She claimed her husband should have told her of any transfer if it did happen. She testified further that she was advised her children to come to court after the death of Simon and during the life of Simon, there was no problem with the deceased. She told court that it is not true that they have ganged up against her daughter in law as she came to court to claim what she was given by her husband and that it is true that the land was registered in Simon's name. that Simon settled on the land during the lifetime of Philip Nzioka, her husband and herself did settle on the land as the other children were small and the father asked Simon to go and settle on the said land .
  16. In re-examination, PW1 told court that it was her husband and herself who wanted Simon to go to the land and take care of it as there was nobody on the said land and that she gave him to cultivate and get food. She prayed that the children should also get a share to cultivate food there. Testifying that she has three Children Kiilu, Mutua and Simon the deceased.
  17. O.B PW2 Wilson Kiilu Nzioka gave his sworn statement and testified that the deceased herein was his late brother and that Philip Nzioka was his father. He claimed that he had recorded the statement and sought to adopt it as his evidence. He claimed that the objector herein was his brother's wife and that his father died in December 1993. Testifying that the administrator herein did not inform them that she intended to file this cause and that he has seen the objector's list of documents which he has seen as filed on 16/11/2015. He told court that the administrator did not invite them to agree on the nominee to be given Konza as requested by them. He claimed that the other four parcels of land are also to be shared; that his father got share 1177 on 21/7/1971 and that the transfer were purportedly done after demise of his father and his brother before the filing of this petition. He lamented that the chief's letter did not indicate some of the dependants; that they want all the benefits under share 1177 which should be shared by all members of the family. It was his testimony that the share should revert back to his father and then they shall sit as a family to deal with the distribution, claiming that he did not sign the printed transfer of shares from his father to his brother Mutungi. They are all forgeries, they are not his handwriting and that is late father was semi illiterate. He stated that the plot purported to be transferred is 342 and that he does not the chief who is said to have signed the transfer form dated 22/12/1987 and received by the Konza Society on 27/9/1989; that the receipt for transfer is dated 12/2/1990 and all this time his brother Mutungi resided on the Konza plot. Again he told court that the purported sale of the same was not signed and they are not aware of the alleged transfer and sale as the family members were not involved.
  18. In cross-examination, he testified that the first benefit from the share should belong to Mutungi and the rest be shared equally and that plot 1035 (10.8 acres) Konza Ranch belongs to his brother Mutungi; that is brother was occupying the initial plot 342 as the family agreed but he was not to own the entire



- share. He denied being aware of transfer in the absence of all the family members and that the chief was not to be involved in the transfer; that he did not know the chief of Kalama location and he maintained that the writings on the application for transfer are not his'; he told court that it is not true his father sold land to one Laban and that the officials at Konza Ranch to explain how the transaction was effected; he claimed that they do not intend to disinherit the Petitioner.
19. In re-examination, PW2 told court that his brother was only allowed to till the land and not to own it. He disowned the details on the purported transfer and that in early 1980's they had a meeting called by his late father and his father claimed that he had not sold the share to Mutungi.
  20. O.B PW3 Norman Mutangili, gave his sworn statement and told court that the matter herein is well known to him as he had been the area elder and that the objector raised the fact that she had been lacked out of inheritance of her late husband's estate. He lamented that the objector's son Kiilu was one of the clan members and that the deceased was a son to objector's husband and was per to go and reside in Konza. He adopted his statement dated 23/10/2015. He claimed that he did not manage to speak to the administrator and that the property should be shared equally.
  21. In cross-examination, PW3 testified that the Objector's family wanted the Konza shares to be equally shared and that he is not aware that the registered shareholder of shares had sold it to his son Mutungi. He told court that some of the parcels have the title deeds and it is the objector who raised the issue with them; that he is not a member of Konza.
  22. In re-examination, he told court that any sale transactions should be witnessed and the administrator prevented them from handling the dispute and preferred the court.
  23. O.B PW4 Musau Wanuru, gave his sworn statement and told court that Philip Nzioka was his cousin and Simon Mutungi is also known to him; he claimed that it is not true that the said Mutungi had bought shares from his father Philip Nzioka. Testifying that they all built home in Konza and Philip Nzioka was staying with his wife as he had married her earlier. He claimed that they had stayed for about three years when Philip got sick and went back to Kalama. He testified that this was a while back; that his son Mutungi came and demolished the house and erected his own. He stated that he also left for Kalama but still have shares there and his children are occupying the land. He lamented that he wants Philip Nzioka's properties to be shared equally among all children.
  24. In cross-examination, PW4 testified that he is a shareholder at Konza but have not sold the shares and that shares cannot be sold but only land; that shares can be transferred in the presence of all family members; that the shares still are in the name of Philip Nzioka. He denied that Philip had sold or transferred his shares to his son as Philip used to share with him his matters. PW4 did not know a person by the name Laban and that Mutungi was only allowed to cultivate the land.
  25. In re-examination he told court that Mutungi was given the shares card to attend meetings on behalf of his father.
  26. Mr. Nthiwa for the objector sought to call officials of Konza Ranching Company and further sought summons to issue to chairman, secretary and treasurer, as they should produce all originals of the share member register or any relevant document on the shareholding minutes pertaining to share 1177 and original share certificate, transfer or letters written to them by both Simon Mutungi Nzioka and Monicah Mutungi and the original of any other document pertaining to share 1177 and allotment letters of all parcels of land to the said share. The said persons to appear in person to testify.
  27. Mr. Mwongela for the Petitioner confirmed the same.



28. The court adopted the above consent vide an order issued on 26<sup>th</sup> May,2017, extracted the same as an order of the court and directed that it be served upon the concerned parties.
29. O.B PW5 David Muthoka Mutangili gave his sworn statement and testified that: he is the chairman of Konza Ranching and Co-operative Society and came in obedience to court summons. He told court that he do recall Philip Nzioka Mosa who was a shareholder; that the said Philip held share Number 1177 since 21/7/1971 and that a shareholder was at liberty to sell his plot and still remaining with his shares and that the standard form for transfer was transfer of shares. He told court further that a shareholder who sold plot would be required to come along with the sale agreement in company of the purchaser where a receipt for the transfer of the plot to the purchaser. He testified that a member could write a letter to the society requesting to sell his shares and he comes along with the purchaser; that the letter is placed before the Board for approval and there is a register to record all the transactions. Testifying that if a shareholder opts to sell shares and the plot he goes to their offices and pays 5/= for the transfer form and receipt therefore is issued. He told court that the receipt could not be traced but the serial number is 24559 of 27/9/1989 upon payment, the member proceeds to the clerk to issue the transfer form to be filled by the member then returned back to the society. He claimed that he saw the date 22/12/1987 and he also saw the society's official stamp. He told court further that once the form is duly filled it is taken to the society where the record is entered in the register to await the Board's deliberation. He testified that it was a requirement that the form be signed by a family member of the shareholder and once they see the chief's signature and stamp and a confirmation from their representative for the particular area, the Board then deals with it. It his Testimony that the family members did not lodge a complaint to stop the transfer; that the details of the shareholder indicate Luni sub location, Kalama Location; that they assumed the application form had been signed by the genuine shareholder and that they are responsible for the custody of society documents. He told court that he had seen the Board minutes as the same were only approved. Testifying that in 2011 they received a complaint from the family members of deceased and they referred them to court and that the record does not indicate exactly if the bearer of the transfer form was asked questions to establish his identity.
30. In cross-examination, PW5 testified that the transfer form of plot at the top has some error on date and that the form has the date receipts was issued for fees paid. Testifying that the transfer was approved and the chief of Kalama location stamped the form; that Philip Nzioka Mosa was a member of the society and that agreements were executed outside the society's offices. He claimed that the relevant chairman for the area appear in both Board Meetings and that the society had already transferred from Philip Mosa to his son and then the son's wife before the present complaint was raised.
31. In re-examination PW5 testified that the suspicious date on top of the transfer document is handwritten and that the name of the person who paid 50/= is not shown; that the membership card in regard to transfer from deceased's son to his wife is dated 9/2/2011 and that the transfer to the wife of the deceased's son is minuted as 24/3/2011 vide receipt No. 11447 of 3/3/2011 of 5000/=
32. The Objector's case was closed.

### **The Petitioner's Case**

33. PET. Monica Mumbua Mutungi gave her sworn statement and testified that she will adopt her statement she recorded and dated 26/1/2016. Testifying that she is the petitioner herein in the estate of her late husband. She sought to rely on the petition pleadings filed on 26/1/2012.
34. She also wished to rely on the list of documents filed on 20/1/2016. She stated that the deceased was her husband and her father in law is Philip Nzioka Mosa and was member of Konza Ranching and



- Farming Co-operative Limited; that he had a membership card as per list 6 of her documents (Pet exhibit of membership card FO Nzioka Mosa Konza Ranch).
35. Testifying that the membership No was 1177 and her father in law is deceased as he died in 1993 as per the chief's letter; that she did recall on 16/9/1979 her husband gave his father Ksh 2000 for the share in the Konza Ranch Society. They entered into an agreement and family members were involved in which her husband was to be the beneficiary of the shares in Konza Ranch (Pet MFI -2 Copy of acknowledgement dated 16/9/1997). DW1 maintained that her husband purchased the shares from his father and should not be shared by the family; that on 24/7/1988 her husband entered into a sale agreement with his father (Pet MFI 3- Copy of sale Agreement dated 24/7/1988). Testifying that agreement was witnessed and she confirmed she was present when the sum of Kshs 11,400/= was paid by her husband with a balance of Kshs 6,600/= which was later cleared by his husband. (Pet. MFI 4- Acknowledgement dated 21/5/1989); that after completing the purchase her husband proceeded to Konza Society for the transfer of the shares and that the requisite transfer form was collected by her father in law.
  36. She lamented that this is the said form which was to transfer the share and a plot, the relevant membership was 1177.; that the plot number was signed by Philip Nzioka Mosa, Wilson Kiilu Nzioka and Beatrice Mukethe Nzioka her brother in law and mother in law respectively, the objector herein. She told court further that the chief of Kalama location also signed the transfer documents and a fee of 50/= was paid vide receipt number 24559 of 27/9/1989, the transfer was later approved and her husband was issued with a card and form was stamped on 27/9/1989 (Pet. MFI 5- Application form for transfer of shares dated 22/12/1987); that her father in law had transferred the shares before he died; that her husband died in 2001 and she thereafter effected change of ownership to herself. She claimed that her husband bought the property for himself and not family members. She requested that the objection be dismissed.
  37. In cross examination by court, she testified the evidence of those who witnessed the transfer is not correct as they lied in disowning the issue of signatures and that her husband's siblings were given the opportunity to buy from his father in law but they agreed that her husband buys the shares from his father.
  38. In cross examination by Nthiwa for the Objector, Petitioner told court that she was not present when her father in law met his sons over his intention to sell the shares and that she was briefed later by her husband and father in law over the intended sale. Testifying that she did not know where her brother in law Wilson Kiilu Nzioka was working at the time; that the family then lived at Ithaeni area and that her father in law had two wives, her mother in law was the second wife. She lamented that the documents were stolen after the safe was broken in 2001. She told court that her husband left her with the agreement and title deed and that she went to Kijabe to make photocopies for safe keeping of the documents.
  39. She further testified that she could not vouch for the sale agreement between her husband and his father as she was not present and that she has not seen an agreement of the sale; she stated that her husband built a home in Konza as he worked in Nairobi and that her father in law and her husband used to speak in Kikamba language and that Pet MFI -2, was not signed by her the same not being signed by family members and she was present on 24/7/1988 when payment was made by her husband and those present were Maigwa Makoma who is still alive but declined to come and assist her in this case.
  40. Pet MFI -4 was signed by Nzioka Mosa alone and neither her husband nor family members signed it. She claimed that the Konza Ranch must have made mistakes in dating the transfer form since seller



could not transfer before getting the whole purchase price which took place on 24/7/1988 and that she had not called the assistant and the chief have since retired and cannot come to testify.

41. She testified that she did not know anything about the minutes validating the transfer of shares; that the transfer form was not signed by the chairman or secretary lack the said signature on the said transfer form she claimed was a mistake of Konza Ranch Society. Testifying further that she is not sure if the registrar of Co-operative Societies issued a letter sanctioning the transfer of the shares. She told court that as a woman she could not sign the agreement on 24/7/1988 but was present and the independent witness she claims was Maingi Makoma. Further that she has seen a copy of the transfer which shows transfer was effected on 13/5/2011 while she did the transfer on 24/3/2011 to herself and that it was not a requirement that the transferor and transferee of shares were required at the sale agreement at that time. She told court that the transfer form did not have a return stamp when the same was brought back; that the part of the chairman and the secretary in neither signed nor stamped and that there is only one stamp at the top of the transfer application form.
42. In re-examination, Petitioner testified that both houses of her father in law have ganged up against her and that the family members had agreed that her husband buys the shares from his father; that some of the documents got lost from her bag when she fainted while going to the hospital in Kijabe. Testifying that she does not have any other documents a part from the ones she produced in court, she told court that the documents marked as Pet MFI- 2 were made the same day 16/9/1997 and signed by her father in law and the agreement made on 24/7/1988 was witnessed by Mangwa Makoma whom she said has declined to be her witness as he does not want problems with her mother in law. She stated further that the assistant chief and the chief who witnessed the application form for transfer of shares are no longer in office. Finally, she lamented that the transfer form was officially stamped.

### **Summons For Substitution**

43. By summons for substitution dated and filed in court on 2<sup>nd</sup> August, 2022 the applicant sought orders that Wilson Kiilu Nzioka be substituted in place of Beatrice Mukethe Nzioka who is deceased and in consonance with the appointment of the applicant as an administrator granted by court on 14<sup>th</sup> July,2022. The court on 22/2/2023 granted the applicant (Wilson Kiilu Nzioka) to be substituted in place of Beatrice Mukethe Nzioka (deceased).
44. The matter was disposed by way of written submissions.

### **Submissions**

#### **Petitioner's Submissions**

45. The Petitioner vide her submissions dated 10<sup>th</sup> February,2022 and filed in court on 15<sup>th</sup> February,2022, in which Mr. Oduk counsel for the Petitioner raised the following issues for determination:
  - a. Whether the application has met the threshold for granting the orders sought.
  - b. Whether share No. 1177 forms part of the estate of the late Simon Mutungi Nzioka for purposes distribution.
  - c. Whether the objection as taken out is misconceived, bad in law and incompetent thus and abuse of the court process.
  - d. Cost.



46. Regarding the issue of Whether the application has met the threshold for granting the orders sought. Counsel submitted that the objector has not set forth the principles for granting the orders sought in the application. Reliance was made on *Giella Vs Cassman Brown* (1973) EA 358, to buttress his point.
47. It was the contention of the counsel that the objector has not proved on a balance of convenience how the Petitioner was to proceed to engage in acts of wanton destruction and/ or sale over the natural resources allocated on share No. 1177. Counsel relied on the case of *Re Estate of Karugu Nguru Succession Cause No. 324 of 2004*, to underscore his submission.
48. As to the issue of Whether share No. 1177 forms part of the estate of the late Simon Mutungi Nzioka for purposes distribution, Mr. Oduk submitted that the transfer was not out of a mere trusteeship agreement as alleged by the objector but was a transfer after sale of the shares by the late Philip Nzioka Mosa to the Deceased. It was averred that the chairman of *Konza Ranching and Farming Co-operative Society Limited* elaborately explained the standard procedure for transfer of shares after sale of a plot in the society.
49. Counsel averred further that the expected procedure was duly followed once transfer forms were purchased, the purchase amount deposited and the land duly transferred to the deceased. Reliance was placed on the list of documents dated 20<sup>th</sup> January,2016 to buttress his point. It was the Petitioner's case that the deceased was the rightful owner of share no. 1177.
50. Counsel submitted that to effect the sale, Philip Nzioka Mosa acknowledged the. Reliance was placed on list of documents dated 20<sup>th</sup> January,2016 under document 4&5. Further counsel quoted the case of *Titus Muraguri Warothe & 2 others Vs Naomi Wanjiru Wachira HCSC No. 1854 of 2005*, to substantiate his point on an acknowledgement of sale.
51. Similarly, counsel for the petitioner relied on Section 93 of the *Law of Succession Act* which validates all transfer of interest in immovable property made to a purchaser. Counsel urged that proprietary interest in share No. 1177 formed part of the deceased estate and to buttress his argument he relied on the case of *Re Estate of Joseph Mutua Munguti Succession Cause No. 865 of 2013*.
52. On the issue Whether the objection as taken out is misconceived, bad in law and incompetent thus and abuse of the court process, counsel relied on Section 68 of the *Law of Succession Act* which allows for application to object a grant, as the said objection needs to be proved on the balance of probability. Counsel relied on the case of *Re Estate of Karugu Nguru (Supra)*, submitting that no iota of evidence was adduced to disapprove the fact that a sale share No. 1177 was made from Philip Nzioka Mosa to the Deceased, urging that the objection was misconceived, bad in law and an abuse of the court process.
53. On cost, counsel submitted that costs are awarded at the discretion of the court as the petitioner has proved her case and established why this honorable court should not restrain her from enjoying her proprietary rights over share No. 1177 and dismiss the application with costs.

### **Objector's Submissions**

54. Objector by his submission dated and filed in court on 2<sup>nd</sup> May,2023, Mr. Mung'ata for the objector raised the following issue for determination:
  - a. Whether the late Simon Mutungi Nzioka held the suit property in trust.
  - b. Whether the inclusion of the whole land held in trust in the petitioner's petition for the grant of letters of administration intestate is unlawful and invalid.
  - c. Whether the registration of shares no 1177 in the petitioner's name was fraudulent and illegal.



- d. What orders should issue in the circumstances?
55. On the issue of Whether the late Simon Mutungi Nzioka held the suit property in trust, counsel opined that share no 1177 was originally acquired by Philip Nzioka Mosa, the father of the deceased and after the demise of Philip Nzioka Mosa, the share was registered in the name of his son as per the Society's by-laws to hold in trust for the estate of Philip Nzioka Mosa.
56. Counsel submitted that customary trust that was implicitly agreed upon during the transfer of share no. 1177 cannot be overstated in terms of its significance. According to counsel it served as an affirmation of the rightful ownership of the property by the family of Philip Nzioka Mosa, the original acquirer. It was the counsel's contention that since the objectors are also family members of the same family their claims to the property are not only legitimate but also supported by the customary trust agreement. Counsel relied on the case of *Kamau Njonge & Jane Njeri Mukuna vs Patrick Kagothio Njonge & Erastus Njoroge Kiarie (2022) eKLR*, to underscore is point on trust.
57. Counsel averred that customary trusts falls within the ambit of proviso to Section 28 of the Registered *Land Act* while the rights of a person in possession or actual occupation are overriding interests and fall within the ambit of Section 30 (g) of the Registered *Land Act*.
58. Further, counsel relied on the supreme court case of *Isack M'inanga Kieba vs Isaaya Theuri M'lintari & another (2018) eKLR*, to buttress his point on what needs to be proved for customary trust to ascertained.
59. Counsel averred that before the land was transferred to the petitioner the land was a family land and belonged to the estate of the late Philip Nzioka Mosa and that the Late Simon Mutungi was the eldest son of Philip Mosa and the customs dictates the first born automatically takes over the land after his father's death.
60. On the issue of Whether the inclusion of the whole land held in trust in the petitioner's petition for the grant of letters of administration intestate is unlawful and invalid, counsel submitted that the deceased was only a customary trustee of the land and his ownership interest in it was limited to just a portion and not whole of it hence the Petitioner's claim to the entire property is baseless and fraudulent.
61. Counsel urged the court to recognize the trust arrangement and determine the exact portion of the land that belongs to each beneficiary and the Petitioner's fraudulent transfer of share No. 1177 to herself should be avoided.
62. Regarding the issue of Whether the registration of shares no 1177 in the petitioner's name was fraudulent and illegal, on this limb counsel contended that the conduct of the petitioner in transferring the disputed land to herself prior to the grant of letters of administration is fraudulent and contravenes the provisions of the law. Reliance placed on the case of *Peter Gitonga Michira Vs Peter Njogu Wanjohi (2017) eKLR*, to buttress his point on what is at stake to dispose of estate of the deceased in the absence of the court's authority.
63. Counsel opined that the purported transfer of shares to the petitioner was nothing more than an instrument through which they intermeddled with the deceased's estate having been entered into in breach of the law and is illegal.
64. As to What orders should issue in the circumstances, Mr. Mung'ata averred that as it has been established, the late Philip Mosa had two wives and children who are entitled to benefit from the estate, hence in the case of this nature where the deceased died intestate and was polygamous man survived by two widows and children the anchor on distribution of his estate is Section 40 of the Laws of Succession Act. Reliance was placed on the case of *Rono Vs Rono Civil Appeal No. 66 of 2002*, to substantiate



the import of section 40 on distribution of the net estate in a polygamous marriage where the deceased died intestate.

### **Determination/ Analysis.**

65. The Court considered evidence on record heard by previous Trial Courts and written submissions filed before this Court.
66. The Petitioner filed Petition for letters of administration intestate to administer and distribute Machakos Konza North Block 1/508 (10) shares at Konza Ranching Co-op Society Ltd; Plot 603 at Konza Ranching & Farming coop Society Ltd.
67. The evidence of PW1, PW2, PW3, PW4 & PW5 & PW1-Petitioner is on record by the previous Trial Courts.
68. The Petitioner's case is that the Konza property wholly belonged to her late husband, Simon Mutungi Nzioka (deceased) who died on 2/9/2001. The Petitioner presented documents of sale, acknowledgement of payments and transfer of shares from the father-in-law to her late husband. She testified they built on the land and stated that the 2 families of her father in law were against her. The documents are;
  1. Application from Transfer of Share of 22/12/1997
  2. Letter in Kikamba of 24/7/1988- Payment of Ksh 11,400/-
  3. English translation of the letter of 24/7/1988
  4. Letter in Kikamba of 16/9/79- Ksh 2000/- and got Konza share
  5. Letter of 21/5/1989- Payment of Ksh 4,400/-
69. The Objectors, PW1 mother in law to Petitioner, stated that her late husband Philip Nzioka (who died in 1993) did not sell Konza land to his son Simon Mutungi but he requested him to stay on the land and take care of it. During his late son's life there was no problem until he died and it was said he bought the land/shares and that the land was transferred to Simon Mutunga. She has 3 children; Simon, Kiilu & Simon and she wished each of them would get a share of the land to cultivate. Her evidence /position was supported by Kiilu Objector PW2, PW3 Area Village Elder and PW4, her late husband's cousin.
70. PW5, Chairman of Konza Ranching & Cooperative Society confirmed Phillip Nzioka Mosa was a shareholder and held Share Number 1177 since 21/7/1971. He stated to sell and transfer land under share, one must produce Transfer Form and Agreement for Sale and Receipt for payment. There is also required Chief's signature & stamp and a family member's signature before the Board would consider and approve the same. The Minutes of the Board approved the sale. In 2011 the Konza Company received complaint from family members and referred them to Court.
71. The Objectors relied on the following documents;
  - a. Application Form for Transfer of Shares of 22/12/1987 and was/is not signed by Philip Nzoka but his names written and Pw2 names also not signed (PW2 alleged his signature/names were forged). The Sale Agreement of 24/7//1988 in Kikamba translated to English Acknowledgement of final Payment of money of 16/9/1979 & of 21/5/1989.



- b. Konza Ranching & Cooperative Society documents show letter of 17/7/2013; Membership 1177 initially belonged to Nzyoka Musa. In 1989 the shares were transferred to Mutungi Nzyoka and 2011 the shares were transferred to Monica Mumbua Mutungi.
72. Letter of 23/4/2011 to All Society members; the families of a deceased member are advised to nominate 1 family member whose name will replace the deceased's name in the Register. There must be family Members consensus of the nominee. The members to swear Affidavit indicating their choice of replacement of the deceased. All signatories to attach copies of ID cards and endorsement of the local Chief and Family members to obtain transfer forms to obtain transfer and pay necessary fees to assist the Board in processing transfer of shares to family's nominee.
73. Copy of Konza Ranching & Farming Cooperative Register depicts Member No 1177 Nzyoka Musa from 21/7/1971 undated insertion of Mutungi Nzioka and on 13/5/2011 Monicah Mumbua Mutungi.
74. Letter undated referring to Membership no 1177 confirms the Plots balloted and allocated to Membership 1177 as follows;
1. 2 acre Agriculture Plot No 21- Malili Konza
  2. 30x80 Commercial Plot No 183 – Kwa Mautio/Konza
  3. Commercial Plot No 871 – 2 acres Konza Ranch
  4. Agriculture Plot No 1035 ( 10.8 acres) Konza Branch.

### **Finding/Analysis**

75. The *Law of Succession Act* provides;
- An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.
76. The death of deceased kicks in the operation of *Law of Succession Act* in administration and/or distribution of deceased's estate. The assets that comprise of deceased's estate are determined not only by deceased's name on ownership titles/documents but also whether the asset(s) is/are available for distribution in light of proprietary rights claimed by Creditor(s), Purchaser(s) Financial Institution's claim(s), inter vivo gifts, nominations and any other deceased's action or decision during his/her lifetime over the said assets of the deceased's estate.
77. In the instant case, the Objectors widow/mother and sons of Philip Nzoka ; father to deceased's herein Simon Mutungi; claim they have a stake in the Konza property that belonged to the deceased Philip Nzioka father of the deceased Simon Mutungi Nzioka and PW1 his late mother confirmed that his father let/told the deceased herein to occupy and take care of the land in Konza. The intention being that he was to occupy and take care of the land for himself and his family but also the family of the father.
78. The Petitioner, widow of the deceased son to the 1<sup>st</sup> owner of the Konza land stated that the land in Konza was sold to her late husband and he paid for it and it was transferred to him by the Deceased.



79. This Court considered each party's position and documents produced and notes with concern the following;

- a. There was/is no sale Agreement executed by both Philip Nzioka (father of deceased)seller/Buyer Simon Mutunga(deceased herein)
- b. The annexed agreements do not depict the agreed purchase price and the actual property being sold against the balloted properties; 4 properties under Membership 1177 held by deceased's father, Philip Nzoka.
- c. The Petitioner filed Petition for Letters of Administration intestate for the estate of the deceased in 2012; the deceased Simon Mutungi Nzioka died on 2/9/2001, yet transfer of the properties that comprise of the estate of the deceased were transferred in her name in 2011as confirmed by Konza Society records.
- d. The undated document by Konza Ranching & Farming Cooperative Society Limited does not depict/confirm who when an how balloting and allocation was done to have the 4 properties under membership 1177
- e. The Register copy of Konza Ranching & Farming Cooperative Society Limited depicts membership 1177 entry was/is on 21/7/1971 in the name of Nzoka Musa the entry of Mutungi Nzioka is undated. Thereafter is the Petitioner's name Monicah Mumbua in 13/5/2011.
- f. The sale agreements by the Petitioner were to the effect that her late husband ; son of/to Objectors husband and father confirms payments made on 24/7/1988 of Ksh 11,400/- balance was Ksh 6,600 for sale of share at Konza and on 21/5/1989 paid balance of Ksh 4,400/-.If the sale was of whole of membership 1177 balloted properties they ought to have been outlined then and if it was purchase then transfer of share should have been after 1989 as deceased's father died in 1993 but the Petitioner did transfer in 2011and thereafter filed for grant of letters of administration intestate.
- g. The estate of father of the deceased was not processed , administered and/or distributed under the Law of Succession Act, an opportune time to contest or transfer membership 1177 properties to his son and or rest of the family.

80. From the above it is clear there are competing interests over the properties comprising of membership 1177, the Petitioner contends purchase of the same by her late husband from his father and the Objectors that the father of deceased allowed eldest son, the deceased herein to settle in Konza where he built and settled but it was not for ownership of all properties to the detriment of all other family members of Philip Nzoka Musa.

81. Each party who alleges ought to prove its allegation by the standard of proof on a balance of probabilities. There are assertions and counter assertions and competing legal claims/interests on the properties of membership 1177.

82. Section 108: Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



#### Section 109: Proof of particular fact

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.

83. To do justice, equity and fairness in the circumstances, this Court finds whereas any claim to title, ownership and use of land jurisdiction is in the Environment and Lands Court vide Section 13 of ELC Act and Article 162 of *the Constitution*.
84. In the case of Peter Moturi Ogutu v Elmelda Basweti Matonda & 3 others [2013] eKLR, It was stated that,
- “where a claim of trust has been raised, the Plaintiff had to establish the existence of a trust on which his case could be hinged or mounted.”

In the Court of Appeal cases of Muthuita .v. Muthuita (1982-88) 1 KAR 42 at 44 and Njenga Chogera .vs. Maria Wanjira Kimani & others [2005] EKLR, it was held that,

“customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.” The Court of Appeal noted in the above cases that though the High Court has unlimited original jurisdiction in Criminal and Civil Matters, it does not have jurisdiction to deal with matters that fall under the ambit of the Environment and Land Court.”

85. However, in the instant case, PW1 Objector was wife of father of the deceased, and she asserted her husband did not sell land but allowed and settled the deceased on the land membership 1177. The Objectors took the view that ALL properties in membership 1177 Konza outlined as properties of the deceased herein amounted to fraud and intended to disinherit the Objectors. On the other hand, the documents of alleged sale/purchase by Petitioner do not confirm sale. There is no Sale Agreement executed by the father and son on sale of property membership 1177 Konza but part payments made without indication of full purchase price and for what exactly. There was no transfer during the lifetime of the deceased's father of property sold/bought. There is no case to refer to ELC more so, PW1 is now deceased and substituted by her other son.

#### **Disposition**

1. From the evidence on record of PW1 PW2 PW3 & PW4 & PW5 no sale was proved and evidence by Petitioner and documents produced did not confirm sale and transfer of the property from father to son.
2. The Objection to making grant filed on 27/2/2015 is upheld that the properties under membership 1177 shall be available for distribution as property of deceased Phillip Nzioka Mosa, father to deceased herein.
3. The Deceased's family (Simon Mutungi Nzioka) shall remain on the portion where Phillip Nzioka Mosa allowed him to occupy develop and cultivate awaiting the administration and distribution of the estate of the deceased's estate.
4. The Grant of letters of administration intestate shall be granted to the Petitioner, Monicah Mumbua Mutunga for the family of deceased Simon Mutungi Nzioka & Wilson Kiilu Nzioka on behalf of the deceased Philip Nzioka Mosa.



**JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON  
24/10/2023. (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

NO APPEARANCE - FOR THE PETITIONER

NO APPEARANCE - FOR THE OBJECTOR

GEOFFREY/PATRICK - COURT ASSISTANT (S)

