



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 80 OF 2011**

**IN THE MATTER OF THE ESTATE OF TUMBO LAVU (DECEASED)**

**PETER TUMBO LAVU.....1<sup>ST</sup> PETITIONER**

**DAVID TUMBO LAVU.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**ALEXANDER MUTUA WATHOME.....OBJECTOR**

**RULING**

1.This matter relates to the estate of **Tumbo Lavu** the deceased who died intestate on 3.8.1979.The Petitioners applied for letters of administration intestate in the estate of the deceased. A grant was issued on 10.2.2012.

2. 5<sup>th</sup> March, 2019, an application was made by B.M. Mungata and Co Advocates for confirmation of grant. In the application for confirmation of grant the proposed mode of distribution was as follows:

<b>PROPERTIES</b>	<b>BENEFICIARY</b>	<b>SHARES</b>
Mavoko Town Block 3/1992	To be registered in the names of the petitioners pending the determination of ownership	
Mavoko Town Block 3/760	To be distributed equally among all the beneficiaries	equal
Plot no 45, Lukenya Ranching and Farming Co-operative Society Limited	To be distributed equally among all the beneficiaries	equal

3. Before the grant was confirmed, an objection was filed, by the **objector** on 26.6.2019 who claimed that Mavoko Town Block 3/760 had been sold to him and Joseph Kivuva Mutisya and could not be distributed. He claimed that plot 45 Ndovoini had been sold to him and could not be distributed. He claimed that Mavoko Town Block 3/1992 should not be registered in the names of the petitioners.

4. In response to the objection filed on 26.6.2019, Peter Tumbo Lavu averred that Mavoko Town Block 3/760 does not belong to the estate of the deceased and is the subject of Machakos ELC 288 of 2012. It was averred that Mavoko Town Block 3/1992 was not available for distribution as was indicated in the ruling of the court on 7.2.2019. The deponent prayed that the protest be dismissed.

5. The protestor's submissions reiterated the fact that all the properties listed in the application for confirmation are not available for distribution.

6. The petitioner's submissions placed reliance on Section 40 of the Law of Succession Act and argued that the estate of the deceased be distributed equally. On 4.7.2019, the court directed that Mavoko Town Block 3/1992 be expunged from the list of assets of the deceased pending the determination of ownership issues in the ELC court.

7. The parties adduced evidence in Court vide their affidavits that were filed. I have considered all the evidence adduced. There are three issues which arise for determination:

-Who are the beneficiaries entitled to the estate of the deceased?

-What is the free estate of the deceased?

- How should the estate be distributed?

### **8. Who are the beneficiaries?**

The undated affidavit in support of the summons for confirmation indicated that the deceased was survived by 3 wives namely:

- Mathembo Tumbo (deceased)

- Nduku Tumbo (Deceased)

- Muneo Tumbo (deceased)

He was survived by the following children

- David Tumbo
- Francis Mutisya Tumbo
- Peter Tumbo
- Musyimi Tumbo (Deceased)
- Mulei Tumbo(deceased)
- Muia Tumbo (deceased)
- Munyiva Tumbo (Deceased)
- Syokau Kiilu (deceased)
- Philip Tumbo (deceased)
- James Tumbo (Deceased)
- Kativi Tumbo (Deceased)
- Mutua Tumbo
- Willy Tumbo
- Syomiti Tumbo
- Rose Mwelu Tumbo
- Juliana Ngii Tumbo
- Mbula Tumbo
- Ndeto Tumbo

**Section 29** of the **Law of Succession Act** provides:

**“For the purposes of this Part, “dependant” means –**

**(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

Thus, the children of the deceased are dependants whether or not they were maintained by the deceased prior to his death. The above named are dependants who are entitled to the estate of the deceased.

8. This brings me to the second issue on the estate of the deceased. According to Section 3 of the Law of Succession Act “estate” means “the free property of a deceased person” while “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.” **Section 34** of the **Law of Succession Act** provides:

**“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”**

9. The evidence on record indicated that Mavoko Town Block 3/760 does not belong to the estate of the deceased and is the subject of Machakos ELC 288 of 2012. Further that Mavoko Town Block 3/1992 was not available for distribution as it is also the subject of three ELC matters. It was alleged by the petitioner that Plot no 45, Lukenya Ranching and Farming Co-operative Society Limited was available. However the objector claimed that Plot 45 Ndovoini was sold and this was confirmed in the evidence of Peter Tumbo Lavu that was given on oath.

10. In the case of **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 Others [2012] eKLR** in which the court stated as follows:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

11. From the foregoing, it is patent that Plot no 45, Lukenya Ranching and Farming Co-operative Society Limited is not available for distribution and so is Mavoko Town Block 3/760 that as per the unchallenged statement on oath is the subject of Machakos ELC 288 of 2012.

12. With regard to the **distribution of the Estate**, having found as above, the court cannot make any decision as to the distribution of the estate.

13. I am of the view that the distribution of estate of the deceased should await the outcome of the various suits that have been filed in the ELC court.

14. Confirmation of grants is provided for by section 71 of the Law of Succession Act, Cap 160, laws of Kenya. At confirmation of grant, the court is expected to make orders relating to confirmation of the administrators and distribution of the assets. The applicants must therefore place material before the court that would facilitate the making of the orders envisaged in section 71 of the Act. Section 71(2)(a) of the Act, states as follows:-

‘(2) subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-

(a) If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or...’

15. According to that provision, the court ought to consider whether the administrators were properly appointed, and if so convinced that they were, proceed to confirm them in their positions as such. The purpose of the grant is to give the administrator the legal power necessary to deal with the assets and also the administrator has the power to sue or prosecute any suit, or otherwise act as representative of the deceased, until the probate or letters of administration has or have been recalled or revoked (see section 71 to 84 of The Law of Succession Act). An administrator of a deceased person is his or her legal representative for all purposes.

16. Protection of the interests of those beneficially interested is of paramount importance. This responsibility is left to the administrators to discharge.

17. In light of the need for the due and proper administration of the estate and bearing in mind the interests of the parties beneficially entitled thereto I can see no other good reason why the Court should not confirm the grant. The court has stayed the element of distribution of some properties of the estate but however is of the view that the administrators appointed will properly and fully administer the estate of the deceased. The court also in line with Section 71 of the Law of Succession Act has identified the beneficiaries and proceeds to confirm the grant as it awaits the determination of ownership in the ELC court after which the distribution shall commence.

18. The petitioners have indicated that the three properties namely Mavoko Town Block 3/760, Mavoko Town Block 3/1992 and Plot No. 45 Lukenya Ranching and Farming Cooperative Society Ltd have suits lodged against them before the ELC court and are yet to be determined. Indeed this court vide the ruling dated 7.2.2019 isolated parcel Mavoko Town Block 3/1992 to await determination by the ELC. The affidavits recently filed in response to the summons for confirmation leaves no doubt that these properties are still subject of determination by the ELC. It is therefore appropriate to make an order that the said properties shall be shared equally among the beneficiaries once a determination is made in favour of the administrators by the ELC court.

19. In the result the summons for confirmation of grant dated 1.3.2019 is allowed to the extent that the grant dated 10.2.2012 is hereby confirmed and that the estate of the deceased comprising the three properties listed in the schedule of distribution shall be shared equally between the beneficiaries once a determination is made in favour of the administrators by the ELC. As parties are members of one family I order that each to bear their own costs.

It is so ordered.

**Dated and delivered at Machakos this 23<sup>rd</sup> day of January, 2020.**

**D. K. Kemei**

**Judge**