



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 3 OF 2013**

**IN THE MATTER OF THE ESTATE OF NASON MUSEMBI MUSOMBA (DECEASED)**

**1. PRISCILLAR KAKUVI MUTUA**

**2. ERNEST MUNGUTI MAILU.....PETITIONERS**

**VERSUS**

**MUTISYA MUSYOKI.....OBJECTOR**

**RULING**

**The Application**

A grant of letters of administration intestate was issued to the Petitioners herein on 10<sup>th</sup> April 2013 with respect to the estate of Solomon Mutua Musyoki (hereinafter referred to as “the Deceased”). The said grant was confirmed on 13<sup>th</sup> June 2013. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioner are wife and nephew of the Deceased respectively.

The Objector subsequently filed a summons for revocation of grant dated 6<sup>th</sup> November 2015 as amended on 10<sup>th</sup> December 2015 seeking injunction orders pending the hearing of the application and that the confirmed Grant of Letters of Administration issued to the Petitioners be revoked and/or annulled.

The grounds for the application are on the face of the said summons and affidavits sworn by the Objector on 6<sup>th</sup> November 2015 and 10<sup>th</sup> December 2015. The Objector is a brother of the Deceased, and he claims that he is entitled to ½ share of all the property owned by the Deceased by virtue of the Deceased being a member or shareholder of Lukenya Farming & Ranching Co-operative Society Ltd. Share No 96. However, that despite the Petitioners being aware that the Objector was so entitled to such ½ share, they did not include the Objector as one of the beneficiaries of the Deceased’s estate, and are thus guilty of non-disclosure of material particulars.

The Objector explained that he co-owned one share with the Deceased which they jointly equally distributed to purchase, and since only one person could be registered to be a member, the Deceased was registered as member with the understanding that any benefits accrued from the share would be equally shared with the Objector, and that indeed initially the Deceased shared such benefits with the Objector.

However, that the Deceased later refused to share the said benefits leading to proceedings before the Co-operative Tribunal; Assistant Commissioner for Co-operatives Development; the clan and in the Machakos High Court Civil Case No. 146 of 2014 which decision the Objector claims were in his favour. The Objector attached copies of the proceedings, decisions and pleadings. The Objector contended that despite the said decisions, the Deceased did not agree to share out the properties .

According to the Objector, the Deceased was allocated the following parcels of land resulting from his shareholding at Lukenya Farming & Ranching Co-operative Society Ltd to which he is entitled ½ share:

1. Title No. 888 Commercial Plot
2. Commercial Plot No. 48 (without title)
3. Title No 300 approximately 5 acres
4. Title No. 3369 approximately 20 acres

5. Title No. 2500 of approximately 40 acres that was divided and created the following titles:

- (a) Mavoko Town Block 3/5550
- (b) Mavoko Town Block 3/5551
- (c) Mavoko Town Block 3/5552
- (d) Mavoko Town Block 3/5553
- (e) Mavoko Town Block 3/5554
- (f) Mavoko Town Block 3/5555
- (g) Mavoko Town Block 3/5556

The Petitioners responded by way of a replying affidavit sworn by the 2<sup>nd</sup> Petitioner on 27<sup>th</sup> November 2015 and another by the 1<sup>st</sup> Petitioner on 25<sup>th</sup> February 2016. The Petitioners denied that the Deceased owned a joint share with the Objector in Lukenya Farming & Ranching Co-operative Society Ltd and that the said share was owned solely by the Deceased. Further that this was the decision reached by the Commissioner of Co-operatives in the proceedings referred to by the Objector, which award was not challenged by the Objector.

The Petitioners also alleged that the proceedings by the clan took place after the Deceased's death and the 1<sup>st</sup> Petitioner never signed the decision of the clan to signify her acceptance of the same. In addition, that the said decision by clan elders cannot annul the findings and decision of the Commissioner of Cooperatives which is a tribunal authorized by law to act. Lastly, that the Petitioners were never served with copies of the pleadings in and the interlocutory judgment entered against them therein is illegal.

#### **The Evidence**

This Court (Muriithi J.) on 21<sup>st</sup> January 2016 gave directions that the Objector's application proceeds to hearing by way of *viva voce* evidence. The parties were also directed to file and exchange witness statements. At the hearing the Objector called one witness and the Petitioners two witnesses to testify.

The Objector's witness (OW 1) was Jones Mutisya Kithome, who testified that the Objector had authorized him to be his representative in this case, and he produced a registered Power of Attorney to this effect signed by the Objector on 2nd May 2016 as his Exhibit 1.

OW1 in his testimony stated that he was the Objector's step-brother, and that he did not know the 1<sup>st</sup> Petitioner, but knew the 2<sup>nd</sup> Petitioner. He relied on the Objector's affidavits and his witness statements in which the Objector's case as summarized in the foregoing was reiterated. He produced as exhibit 2 a letter from Lukenya Farming & Ranching Co-operative Society Ltd dated 4<sup>th</sup> March 2015 which according to him showed that the the Objctor was amember and his membership number. Further that the Objector's was registered as the first member after having paid the membership dues with one cow, and that the Deceased had his name entered as a member after he helped the Objector finish the said payments.

OW1 also produced a document dated 21<sup>st</sup> October 1993 as Exhibit 3, which he stated was the ruling of the Co-operatives Tribunal, as well as the minutes of the clan meeting held on 15<sup>th</sup> February 2011 together with a translation thereof as his Exhibit 4. Lastly, he produced the judgment by the Commissioner of Cooperative dated 1<sup>st</sup> August 1995 as his Exhibit 5.

On cross examination, OW1 stated that the Objector is ailing and paralysed that that is why he authorized him to be his representative He however stated that he did not know how much the Objector later paid for the share after the first payment of a cow, neither did he know how much the Deceased paid. He also confirmed that his name was not in list of the persons who attended in minutes of the clan's meeting that he produced as an exhibit. He stated that he knew the land was owned by both the Objector and Deceased.

The Petitioners' first witness was Ernest Munguti Mwilu (PW 1), the 2<sup>nd</sup> Petitioner herein. He stated that he is aware of the cases involving share 96 of Lukenya Ranching Co-operative Society which he said belonged to the Deceased. That after the Commissioner of Cooperatives gave an award in favour of the Deceased, the Deceased was given title deeds of all the plots represented by his share, and that the Objector started to claim the land after the Deceased died. On cross examination PW1 ststaed that he was not a member of the Deceased's clan nor at the clan meeting held on 15<sup>th</sup> February 2011, and he denied that share 96 should be equally divided between the Objector and Deceased.

The 2<sup>nd</sup> Petitioner, Priscillar Kakuvi Mutua, testified as PW2, and stated that the Deceased did not own land jointly with the Objector. Further, that she was not called by the clan for any meeting upon the Deceased's death. She stated that she was not aware of any case filed by the Objector. and that it is the Deceased who bought the plots at Lukenya. PW2 reiterated these averments upon cross-examination.

#### **The Determination**

The counsel for the Petitioners and Objector filed written submissions upon conclusion of the hearing. Matata R.M & Co Advocates for the Objector submitted in this regard that the 1<sup>st</sup> Petitioner should have included the Objector's name as entitled to a share of all the benefits that flowed from share No. 96, and that the Objector's consent was required before the grant could be confirmed. It was submitted that due to the

foregoing, the Objector was entitled to half the share.

The Objector sought to distinguish the decision given by the Commissioner of Co-operatives in favour of the Deceased on the ground that the bone of contention before the Commissioner was not that of contribution towards acquisition of membership and shares, but rather on whether or not the Deceased was the *bona fide* member of the Society following the removal his name as a member. Further, that the Commissioner did not address his mind to the issue of contribution by the Objector.

The Petitioners' Advocate, Manthi Masika & Company Advocates, on the other hand submitted that a grant cannot be revoked by a party who claims a share of the deceased property. It was further contended that the document which was signed in presence of the chief is dubious since it was not signed by 1<sup>st</sup> petitioner and that the elders cannot overturn court's decision.

I have read and carefully considered the pleadings and submissions made by the Petitioners and Objector. The issues to be decided are whether the Objector is a beneficiary of the Deceased, and whether confirmed grant issued to the Petitioners should be revoked. The Objector seeks to be included as a beneficiary of the Deceased on account of being a co-owner with the Deceased of share number 96 of the Lukenya Farming & Ranching Co-operative Society Ltd.

For the Objector to succeed in this regard, he needed to bring evidence of such co-ownership of share number 96 and the nature of the co-ownership. The Objector relied on various proceedings and decisions by the Co-operative's Tribunal, the Commissioner of Cooperatives, his clan, and the Machakos High Court in this regard. I have perused the said proceedings and decisions. The proceedings and decision dated 21<sup>st</sup> October 1993 made by an arbitrator pursuant to section 80(4) of the Co-operative Societies Act which was produced by the Objector as his Exhibit 3 found that the Objector contributed to, and was entitled to share the benefits of share 96 of the Lukenya Farming & Ranching Co-operative Society Ltd equally with the Deceased.

A similar finding was made by the Objector's clan at a meeting held on 15<sup>th</sup> February 2011 whose minutes were produced by the Objector as his Exhibit 4. However it is noteworthy that the said meeting took place in the absence of the Deceased who died on 25<sup>th</sup> October 2010, and without the participation of the Petitioners as confirmed by the minutes and the testimony of PW1 and PW2. It cannot therefore bind on the Deceased or Petitioners.

On appeal from the Arbitrator's award, the Assistant Commissioner of Co-operatives in a judgment dated 1<sup>st</sup> August 1995 (which was produced by the Objector as his Exhibit 5) allowed the Deceased's appeal and ordered that share 96 reverts back to the Deceased, and set aside the ruling of the arbitrator. The Objector then moved the High Court at Machakos by way of an amended Plaint dated 6<sup>th</sup> May 2014 in Civil Suit No. 296 of 2014. He sought orders with respect to of his proprietary rights in LR. Mavoko Town Block 3/5550, which he claimed the 1<sup>st</sup> Petitioner is holding in trust for him arising from his contribution to the acquisition of share 96 in Lukenya Farming & Ranching Co-operative Society Ltd. No order given by the High Court in Machakos Civil Suit No. 296 of 2014 as regards the ownership of the said parcel of land was produced in evidence by the Objector.

The current position therefore appears to be that the Deceased was reinstated as and is the owner of share 96 Lukenya Farming & Ranching Co-operative Society Ltd. In addition, the Objector produced as his Exhibit 2 a letter dated 4<sup>th</sup> March 2015 from the Liquidator of Lukenya Ranching and Farming Co-operative Society Limited, stating that the registered name of member 96 is Solomon M. Musyoki (the Deceased) and that he as a result received titles no 888, 300, 3369 and 2500 which were processed in his name.

Furthermore, the Objector did not produce any evidence of the contribution he alleges to have made to the acquisition of share 96 of Lukenya Farming & Ranching Co-operative Society Ltd during the hearing of his application, and this Court cannot in the circumstances make a finding as his entitled to a half of the share. In any event, as the Objector claims that his half share is a share to various parcels of land currently registered in the name of the Deceased, this Court would also not be the proper forum to decide the issue of his co-ownership of the said parcels of land.

Disputes primarily and solely concerning ownership and title to land fall within the jurisdiction of the Environment and Land Court as provided by Article 162 (2)(b) of the Constitution and section 13(1) and (2) of the Environment and Land Court Act. This Court will also need to operate outside the framework of the Law of Succession Act and apply other laws to determine the Objector's claim, which makes his claim not appropriate for determination by this Court sitting as a succession Court.

On the second issue, the grounds for revocation of a grant is provided in section 76 of the Law of Succession as follows:

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-**

**(a) that the proceedings to obtain the grant were defective in substance;**

**(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-**

**(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has**

ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

The Objector argued that being entitled to a half share of share 96 in Lukenya Farming & Ranching Co-operative Society Ltd, the confirmed grant should be revoked on account of his non-participation in the Petition for, and confirmation of the grant. However, given the findings in the foregoing that the share 96 in Lukenya Farming & Ranching Co-operative Society Ltd is in the Deceased's name, and that this Court is not the proper forum to determine the Objector's interest in the said share or the parcels of land it represents, this Court cannot make a finding at this stage as to any concealment of material facts by the Petitioners.

Arising from the foregoing, this Court finds that the Objector's application has no merit. The properties in dispute will therefore continue to vest in the Petitioners pending resolution of the Objector's claim in the appropriate forum. The Objector will also need to move the appropriate forum with respect to any conservatory orders he may need.

I accordingly strike out the Objector's Summons for Revocation of Grant dated 6<sup>th</sup> November 2015 as amended on 10<sup>th</sup> December 2015. As this is a family dispute there shall be no order as to costs.

Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JUNE 2018**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT MACHAKOS THIS THIS 31<sup>ST</sup> DAY OF JULY 2018**

**G. V. ODUNGA**

**JUDGE**