



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 609 OF 2008

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

JOHN MUSYOKA MUSEMBI.....PETITIONER/RESPONDENT

-VS-

DAVID MUEMA MUSEMBI.....1ST OBJECTOR/APPLICANT

BENJAMIN MAKENZI MUSEMBI.....2ND OBJECTOR/APPLICANT

AND

HENRY MULI KISENGA.....INTERESTED PARTY

RULING

Introduction

1. By Summons for Confirmation of Grant dated 27th May, 2017, the Petitioner herein, **John Musyoka Musembi**, seeks the following orders:

(1). That the Grant of Letters of Administration Intestate made to John Musyoka Musembi on December, 2008 be confirmed.

(2). That costs of this application be costs in the cause

The Petitioner/Administrator's Case

2. According to the Petitioner, the grant of letters of administration of the said estate was made to her in December, 2008 and though the same was confirmed and he was issued with a Certificate of Confirmation of Grant on 14th May, 2010, this Court revoked the same vide its ruling dated 7th March, 2017. According to the Petitioner, the deceased was survived by 8 children; four sons and four daughters. It was his deposition that there is no application for provision for dependants pending and that the deceased's estate was comprised of **LR No. Machakos/Konza/North Block 1/1125; Agricultural Land Aimi Ma Kilungu being Plot No. 1402; Commercial Plot at Aimi Ma Kilungu being Plot No. 1134; and Shares at Aimi Ma Kilungu being share certificate no. 3510.**

3. The Petitioner proposed that the said properties be shared amongst all the beneficiaries equally excluding any part of the estate that may have been lawfully and validly administered under the revoked Certificate of Confirmation of Grant.

4. It was averred by the Administrator/Petitioner that the Objectors were his brothers and the sons of the deceased and beneficiaries of his estate. According to him the full list of the deceased's children/beneficiaries was made in his affidavit and that **Henry Muli Kisenga** is not a member of the deceased's family and neither is he a creditor to the deceased's family. Since the said **Henry Muli Kisenga** alleges that he bought one of the assets of the deceased's estate from members of the deceased's family long before the Letters of Administration were taken out, the purported sale was both unlawful and invalid in view of the mandatory provisions of the **Law of Succession Act** and he can only recover whatever money he paid pursuant to the said sale and from those whom he paid.

5. According to the Administrator, in or about May, 2011, the said **Henry Muli Kisenga** wrongfully and unlawfully entered the deceased's said **Land Parcel No. Machakos/Konza/Block 1/1125**, demolished his farm servant quarters hereon forcing him to institute ELC Suit No. 141 of 2011 in which the Court while finding that the parties were intermeddling in the estate of the deceased however dismissed the same purely on the equitable principle of clean hands based on the fact that the Administrator was one of the members of the deceased's family who had purported to sell a deceased's property without capacity. However the said Court ordered the Administrator to deposit in Court Kshs 200,000/= being the purchase price paid by the said **Henry Muli Kisenga** which order he complied with. It was his deposition that the suit is still pending hearing and determination. It was therefore his view that the said **Henry Muli Kisenga's** purported protest to the distribution of the deceased's estate has no basis in law and should be dismissed.
6. The Administrator denied that he had intention of disinheriting the beneficiaries of the deceased's estate and averred that the protestor is free to place before this Court any property of the deceased which is not included in the inventory of assets presented to this Court by himself. According to him, the deceased was, during his lifetime a member of **Kiu Ranching & Farming Co-operative Society Ltd** and **Konza Ranching & Farming Co-operative Society Limited** as well as **Aimi Ma Kilungu Company Limited** from where he had bought 8 shares instead of the required 25. After the death of the deceased, the Administrator and his three brothers, (**Eliud Makosi Musembi, David Muema Musembi and Benjamin Makenzi Musembi**), met and agreed on how to share their father's estate. According to him it was agreed that **Benjamin Makenzi Musembi** and **David Muema Musembi** would assume membership of **Kiu Ranching & Farming Co-operative Society Ltd** in place of their father and would receive any benefit and/or property flowing from such membership in future. On the other hand the Administrator and **Eliud Makosi Musembi** would assume membership of **Konza Ranching & Farming Co-operative Society Limited** in place of their father and would receive any benefit and/or property flowing from such membership in future. According to him an agreement was signed to that effect which he undertook to place before this Court.
7. It was the Administrator's case that as at the time of the deceased's death the only property that had accrued from his membership to the two Co-operative Societies was **Land Parcel No. Machakos/Konza/Block 1/1125** which is registered in the name of the deceased and which is the land that the protestors want given to the said **Henry Muli Kisenga**. The Administrator averred that the deceased's ancestral land at Kilungu was, upon his death, surveyed/demarcated in favour of the Administrator and his three brothers based on the said agreement/consensus. As regards the membership to **Kiu Ranching & Farming Co-operative Society Ltd**, the Administrator believed that **Benjamin Makenzi Musembi** and **David Muema Musembi** have been allocated pieces of land, some of which they had sold. As regards **Konza Ranching & Farming Co-operative Society Limited** he averred that he and the said **Eliud Makosi Musembi** were allocated a 2 acre plot as accrued benefit which they jointly sold. However his name has since been entered into the register of members of **Konza Ranching & Farming Co-operative Society Limited** with **Eliud Makosi Musembi** being a shadow member and he has since bought shares on the basis of the same. The Administrator however lamented that the protestors have not availed any documents regarding the deceased's membership to and/or shares and properties in **Kiu Ranching & Farming Co-operative Society Ltd**.
8. Regarding the deceased's shares in **Aimi Ma Kilungu Company Limited** the Administrator deposed that the deceased had, at the time of his death been allocated Agricultural Plot No. 1402 (10 acres) and Commercial Plot No. 1134 (50 x 100 feet) which were listed in the revoked confirmed grant. However upon confirmation of the said Grant, the Administrator and his three brothers sold the said Agricultural Plot at Aimi Ma Kilungu and shared out the money amongst themselves. Similarly he undertook to avail documents to support this.
9. It was therefore the Administrator's case that the Protestors deliberately misled this Court and concealed material facts. To him any properties allocated to him by **Konza Ranching & Farming Co-operative Society Limited** and which are in his name do not form part of the deceased's estate and cannot be distributed as such. Likewise any properties allocated to the Protestors by **Kiu Ranching & Farming Co-operative Society Ltd** and possibly sold by them does not form part of the deceased's estate. Therefore the only properties of the estate of the deceased that are currently available for distribution are **LR No. Machakos/Konza North/ Block 1/1125**; and **Commercial Plot No. 1134 (50 x 100 feet) at Aimi Ma Kilungu Company Ltd**.
10. It was the Administrator's case that the purported consent by beneficiaries filed by the Protestors was highly suspect and questionable.
11. It was submitted on behalf of the Administrator that sometime *after* the death of the deceased the Petitioner assumed membership to **Konza Ranching & Farming Co-operative Society Limited** in the place of the deceased and thereupon bought shares in the said society and was issued with a membership card and a share certificate, becoming a fully paid up member of the society, a position that has never been disputed. On the basis of that membership the Petitioner was allocated some parcels/plots of land which according to him were personal property and hence do not form part of the deceased's estate.
12. As to the legal effect of revocation of a confirmed Grant the Petitioner relied on section 82(b)(ii) and 93(1) of the **Law of Succession Act** and submitted that the import of the said provisions is that any property/land sold after 14th May, 2010 when confirmation of the grant held by the Petitioner was made is not affected by revocation of the said Certificate of Confirmation on 7th March, 2017.
13. It was submitted that the interested party herein is not a member of the deceased's family and is not an heir to the deceased's estate. He however alleges to have bought **Land Parcel No. Machakos/Konza North/ Block 1/1125** long before a grant was issued and confirmed. It was submitted, based on section 45(1) and (2) of the **Law of Succession Act**, that by claiming to have bought and occupied the deceased's aforesaid land from persons who did not hold a grant of representation of the deceased's estate, the interested party is confessing to having committed an offence.
14. It was submitted that in **Machakos ELC Case No. 141 of 2011**, the Court found that the parties to the sale agreement were intermeddling in the estate of the deceased. It was the Petitioner's case that the interested party's redress, if any, lies in the recovery of his Kshs 200,000/-, the purported purchase price from the persons to whom he paid it, which money has already been deposited in ELC. It was therefore urged that the interested party's protest should be dismissed with costs.
15. It was submitted that the Objector, on the other hand listed properties acquired by the petitioner long after the deceased passed away on the basis of the deceased's shareholding in the said Co-operative Society. It was the Petitioner's case that membership to a society (organisation) is not *per se* a property, free or otherwise and that what eventually becomes property is any material gain that accrues from

such membership, at the time when it does. It was therefore submitted that any property acquired by the petitioner in Konza Ranching & Farming & Co-operative Society after he became a member thereto and bought shares therein is not part of the deceased's estate and cannot therefore be the subject of distribution.

16. According to the Petitioner he has demonstrated that the deceased's two (2) acre land in Konza (Agricultural Land No. 545) and Agricultural Land No. 1402 at Aimi Ma Kilungu, were lawfully sold after confirmation of the grant and sale proceeds therefrom shared amongst the beneficiaries of the deceased's estate. Accordingly, the deceased's **LR No. Machakos/Konza North/ Block 1/1125**; and **Commercial Plot No. 1134 (50 x 100 feet) at Aimi Ma Kilungu Company Ltd** and any property of the deceased shown by the Objectors to be existing in Kiu Ranching & Farming Co-operative Society Limited should be distributed equally amongst all the children of the deceased as listed by the Petitioner in the affidavit in support of the summons for confirmation of grant.

17. It was submitted that the Objectors cannot purport to oust mandatory provisions of the law by annexing purported consents by some beneficiaries asking the court to give out properties of the estate to a stranger to the estate.

18. It was therefore submitted that the protests herein have no merit and should be dismissed with costs. Further, the aforementioned properties of the estate should be distributed as aforesaid.

Objectors/Protestors' Case

19. To the instant application was filed an Objection filed by the 1st and 2nd Objectors herein supported by an affidavit of protest by the 1st Objector herein, **David Muema Muemi**. According to them, the deceased was survived by the children as deposed by the Petitioner. However, the Petitioner/Administrator with the sole intention of disinheriting them and their siblings only disclosed a fraction of the deceased properties. According to the Objectors, vide a search conducted at Konza Ranching & Farming Co-operative Society Ltd, the following properties belonged to the estate of the deceased but in an attempt to deny them their inheritance on 2nd August, 2006 the Administrator swore a false affidavit and proceeded to cause a transfer of the following properties to himself:

- a) Konza share membership No. 1554.
- b) Financial benefits accruing from the share in terms of dividends/travelling allowances.
- c) Commercial plot of 30 x 80 (yet to be balloted).
- d) Agricultural plot No. 996 (10.8 acres).
- e) Agricultural plot No. 545 (2 acres Malili – Konza Ranch).
- f) Commercial plot No. 1262(2 acres) both within Konza Ranch.

20. In support of the said averment, the deponent annexed a letter from Konza Ranching Ltd which in his view showed the above listed properties. It was further deposed that other properties of the deceased which have been conspicuously left out with the sole proposed of disinheriting them are:

- a) Kiu Ranching & Farming Co-operative Society Ltd share No. 784 (shares).
- b) Kiu Ranching & Farming Co-operative Society Ltd Agricultural plot No. 0795- (5 Acres).
- c) Kiu Ranching & Farming Co-operative Society Ltd Agricultural plot No. 457-2.3 Acres.

21. Similarly the deponent exhibited a letter from Kiu Ranching & Farming Co-operative Society which according to him confirmed the same.

22. According to the deponent, he and his brothers had unconfirmed reports that most of these properties could have been disposed of to third parties and are not available for distribution, an allusion which the administrators deposed to in his affidavit.

23. The Objectors therefore urged the Court to order the Administrator to make a full disclosure of all the deceased's properties and to also disclose the properties he has illegally disposed of to avoid disappointments after confirmation of grant.

24. It was disclosed that vide an agreement dated 26th October, 1994 a copy of which was attached the property L.R No. Machakos/Konza North Block 1/1125 was sold in agreement by the deponent and his three brothers to one **Henry Muli Kisenga** and full consideration was received. However, at the time of sale, they were ignorant of the consequences of disposing of a deceased property prior to confirmation of grant. They however disposed of it under extreme needy situation to meet the medical expenses of their late mother. Consequently, as a sign of good faith they surrendered the original title deed and occupation/possession of the land to the said purchaser and made a promise to effect transfer upon obtaining letters of Administration. However, despite the promises made to the said purchaser, the administrator went behind their back and obtained letters of administration and thereafter sued the said purchaser for eviction and for injunction orders respecting the said land in High Court Civil Suit No. 141/2011. According to the deponent, were it not for the said purchaser they would not have known about this succession cause whose sole aim was to disinherit them.

25. It was the deponent's averment that it is within his knowledge that the said suit is still pending and all his siblings (in exclusion of the

administrator) and himself have deliberated on the matter and have agreed that their share of land in the said property be transferred to the said purchaser **Henry Muli Kisenga**.

26. It was deposed that their late father was a pastor who instilled in them the spirit of fairness, good faith justice and most of all the fear of God and with all honesty, their intention at the time of sale of the aforementioned property to **Henry Muli Kisenga** was to pass a good title to him, hence the Objectors urged this Court, even if the administrator is not ready to complete the transaction, to transfer the other beneficiaries' respective portions of the land parcel to the purchaser upon confirmation of grant. In this regard the deponent attached copies of affidavit by some of the other beneficiaries to that effect.

27. The Objectors therefore proposed that the deceased's properties distributed as here below:

PROPERTY DESCRIPTION	PROPOSED BENEFICIARIES
<p>1. a. Konza Share No. 1554</p> <p>b. financial benefits/allowances accruing from Konza No. 1554.</p> <p>c. Konza Commercial plot of 30 x 80 (yet to be balloted).</p> <p>d. Konza Agricultural plot No. 545 2 acres.</p>	<p>To be shared equally between</p> <ol style="list-style-type: none"> 1. John Musyoka Musembi 2. Eluid Musembi 3. David Muema Musembi 4. Benjamin Makenzi Musembi
<p>2. a. shares at Kiu Ranching & Farming Co-operative Society Ltd (share No. 784)</p> <p>b. Kiu Ranching Agricultural Plot No. 0795(5 Acres)</p> <p>c. Kiu Ranching Agricultural Plot No. 457(3 Acres)</p>	<p>To be shared equally between</p> <ol style="list-style-type: none"> 1. John Musyoka Musembi 2. Eluid Musembi 3. David Muema Musembi 4. Benjamin Makenzi Musembi
<p>3. L.R.No Machakos/Konza North Block 1/1125</p>	<p>To be transferred to HENRY MULI KISENGA</p>

<p>4. a. Shares at Aimi Ma Kilungu</p> <p>b. Aimi Ma Kilungu Agricultural Land No. 1402</p>	<p>To be shared equally between</p> <ol style="list-style-type: none"> 1. John Musyoka Musembi 2. Eluid Musembi 3. David Muema Musembi 4. Benjamin Makenzi Musembi
<p>5. Aimi Ma Kilungu Commercial Plot No. 1134</p>	<p>To be shared equally amongst</p> <ol style="list-style-type: none"> 1. Rodah Mwikali Katunga 2. Susan Nzisa Muoki 3. Grace Mukenyi Mutie 4. Rose Benard Nzioka
<p>6. Konza Commercial Plot No. 1262</p>	<p>To be shared equally amongst</p> <ol style="list-style-type: none"> 1. Rodah Mwikali Katunga 2. Susan Nzisa Muoki 3. Grace Mukenyi Mutie 4. Rose Benard Nzioka

28. According to them the beneficiaries had agreed to the proposed mode of distribution as confirmed in the attached consent.

29. In his further affidavit, the deponent averred that the beneficiaries of the estate of the late **Nason Musembi Musomba** are wholly to blame for having sold one of the deceased properties **Machakos /Konza North Block 1/1125** without proper documents of administration. He however reiterated that at the time of sale, their late mother was seriously sick and needed urgent medical attention and they had no funds and this is what prompted them to look for a serious buyer of the land in question to enable them get funds for her treatment. According to him, at the time of sale they were acting in good faith and were desperate for funds and it is on this basis that they surrendered the original title deed to the said buyer awaiting formal transfer. But it is clear now that the current administration had other intentions and ill will as demonstrated by the current proceedings and the proceedings in the ELC case. According to the Objectors, it is therefore not correct for the administrator to allege that the said purchaser entered the said parcel of land wrongly. To the contrary, the purchaser had their blessings and legally speaking, they are the beneficiaries of the said land and all along intended to pass a good title to the purchaser. According to the Objector, the administrator herein went ahead and secretly instituted ELC case No. 141 of 2011, and none of their siblings support his ill-intentioned move.

30. The deponent reiterated that as contained in the beneficiaries individual affidavits annexed to the affidavit of protest, their siblings and themselves are ready and willing to transfer their shares of the said parcel of land **Machakos/Konza North Block 1/1125** and they urged this court to uphold their wish when delivering its judgment and award the purchaser, **Henry Muli Kisenga** their various shares to cushion him against the bad faith displayed by the administrator.

31. It was deposed that the administrator cannot attempt to portray the purchaser herein as the wrongdoer, yet he was not even interested in the purchase, but due to the fact that they desperately needed funds, the purchaser agreed to come to their rescue hence it was the beneficiaries who sought to intermeddle with their late father's estate.

32. According to them the affidavits sworn by the Administrator is false and is intentionally calculated to deny the beneficiaries their legal entitlement as the administrator has not substantiated the allegations contained therein. They asserted that the administrator never involved the rest of the family in the initial petition for grant, but kept all of them in the dark and has sold the larger deceased estate hence he should come out clean instead of making wild and unsubstantiated allegations.

33. The deponent denied that there was an agreement between the family members as alleged by the Administrator hence the reason why none has been exhibited.

34. According to the deponent, the ancestral land at Kilungu was subdivided amongst themselves by the deceased long before he passed on. He however insisted that the administrator fraudulently caused the deceased shares and properties at **Konza Ranching Ltd** to be registered into his name, a fact which the society has clearly indicated that using a false affidavit, the administrator caused a transfer into his name of all the deceased assets at Konza Ranching. The deponent contended that the administrator, for his own selfish reasons has selectively chosen the assets to disclose to this Court because he has illegally sold all the rest to unsuspecting buyers and wouldn't want the court to pursue and punish those buyers he has illegally sold the assets to but instead wants the court to punish the only buyer who purchased one of the deceased asset with the consensus of other family members, **Henry Muli Kisenga**.

35. According to the deponent there is nothing suspect or questionable about the consents by the beneficiaries since they just want to do things right and the administrator is free to call them to confirm whatever information he may require from them since they are his siblings.

36. It was submitted on behalf of the Protestors that the petitioner herein in 2008 filed the current succession cause naming himself the sole beneficiary. The succession cause concluded and he went ahead and caused to be registered into his name most of the properties of the deceased. By sheer luck, the other siblings got wind of the petitioner's actions and successfully had the confirmed grant revoked prompting the current summons for confirmation now before court. According to the Objectors, it is apparent from the 1st Objector's affidavit that the petitioner has left out a bulk of the deceased properties yet the Petitioner has by design conspicuously chosen to omit the following properties from the list of assets owned by the deceased.

- a) **Kiu Ranching & Farming Co-operative Society Ltd Share No. 784 (shares).**
- b) **Kiu Ranching & Farming Co-operative Society Ltd Agricultural plot No. 0795- (5 Acres).**
- c) **Kiu Ranching & Farming Co-operative Society Ltd Agricultural plot No. 457-2.3 Acres.**
- d) **Konza share membership No. 1554.**
- e) **Financial benefits accruing from the share in terms of dividends/Travelling allowances.**
- f) **Commercial plot of 30 x 80 (yet to be balloted).**
- g) **Agricultural plot No. 996 (10.8 acres).**
- h) **Agricultural plot No.545 (2 acres Malili – Konza Ranch.**
- i) **Commercial plot No. 1262 2 acres) both within Konza Ranch**

37. According to them, it cannot be said that the petitioner was not aware of these properties because vide the letter from **Konza Ranching Society Ltd** and the affidavit by the petitioner sworn on 2nd August, 2006, the petitioner was fully aware of the existence of these properties and in an attempts to defeat his siblings right to inherit their father's properties, made a false affidavit purporting to show that his brothers had relinquished their rights to him over the said properties. However, the averments contained in the affidavit of protest by the objectors on the additional properties have not been disputed by the petitioner and the letters from the two cooperative societies where they are held are conclusive evidence as to their existence.

38. The Court's attention was drawn to the fact that six (6) of the beneficiaries, save for **Eluid Makosi Musembi** and **Susan Nzisa Muoki**, have executed a consent on the mode of distribution proposed in the affidavit of protest by the objector **David Muema Musembi**. However, **Eluid Makosi Musembi** subsequently did sign a consent on distribution as confirmed by the consent dated 20th December, 2017 and filed in this court on 29th January, 2018. Therefore out of the eight beneficiaries six (6) are in agreement as to the mode of distribution proposed by the 1st objector while **Susan Nzisa Muoki** one of the daughters of the deceased has not offered her proposed mode of distribution. It was therefore submitted that the Court should go with the majority who have sat down together and come up with a mode of distribution which they consider fair to all.

39. While reiterating the contents of their affidavits as to the circumstances leading to the sale of **L.R No. Machakos/Konza North Block 1/1125** to the interested party, it was submitted that an attempt by the petitioner to evict the purchaser through interlocutory proceedings was thwarted by the High Court and the Court of Appeal in Civil Appeal No. 95/2012 whereby the three (3) judges of Appeal in their well reasoned findings *inter alia* found that the petitioner/applicant's assertions that he had no authority to sell the land lacked veracity since he did not deny the sale of the land or receiving the money from the purchaser/respondent.

40. Be that as it may, it was submitted that the **Law of Succession Act** prohibits sale of a deceased's property prior to confirmation of grant. However there is a unique scenario that has been presented by the current case since six (6) of the beneficiaries are ready and willing to have this parcel of land transferred to the purchaser and have sworn independent affidavits confirming their commitment to have their portions

(that is if the remaining two (2) beneficiaries are not willing) be transferred into the purchasers name.

41. The Objectors submitted that the existence of the ELC case is detrimental to the purchaser because unless the purchaser is able to bring all the beneficiaries to court, to testify in his favour, he may lose his entire interest in this land. However, based on the content of the affidavits by these beneficiaries who are ready and willing to transfer their portion to the purchaser, the Succession Court may in its judgment capture the interests of the purchaser as committed by the individual beneficiaries and have an order to the effect that the portions meant for the benefit of the said beneficiaries be transferred directly to the purchaser. In the Objectors' view, the provisions of the law of succession does not bar this court from helping the realization of the wishes of the beneficiaries. And since six of the beneficiaries are in agreement that parcel of land No. Machakos/Konza North Block 1/1125 be transferred to the purchaser, they urged the court to uphold that consent.

42. The Court was urged to reject the Petitioner's argument that he is now the sole beneficiary of the share No. 1554 at Konza Society and all accruing assets since the only reason why he is the registered owner of this share is because he caused the same to be illegally registered into his name after a succession process where he named himself a sole beneficiary in exclusion of his other 7 siblings. Similarly the allegations by the administrator that Agricultural plot No. 545 measuring 2 acres (Konza) and plot No. 1402 situate at Aimi Ma Kilungu were sold on the strength of the revoked grant and that the said sales and purchasers are protected by S. 93(1) of the **Law of Succession Act** is defecting in itself and should not be entertained by this Honourable court for reasons that the administrator has not demonstrated the said sale took place and the properties complained of were not captured in the revoked grant. The Court was therefore urged to reject the arguments advanced by the administrator that the two properties were sold vide the revoked grant and are thus protected.

43. Be that as it may, it was submitted that considering the fact that the primary intention of the administrator in omitting his siblings from the revoked grant was to disinherit them; if the court does find that indeed the said properties were indeed sold by the strength of the revoked grant and the sales are indeed protected by S. 93 (1) of the **Law of Succession Act**, the court should apply S. 94 of the Act and find the administrator liable for misappropriation of the deceased assets and he be ordered to make good the loss occasioned to the estate and to the beneficiaries. He should also not benefit from the other assets of the deceased as he will have an undue advantage over his siblings.

44. It was reiterated that the administrator and his siblings are the ones who approached the purchaser herein way back in the 1980's and pleaded with him to make the purchase so that they could take their ailing mother to the hospital. They even surrendered to him the original title deed as a sign of good faith that they were going to complete the transfer. This property was then valued at about KSh.200,000/-. In 2011 when a valuation was conducted for purposes of the ELC case No. 141/2009 the property was valued at about KSh.3.9 Million and clearly 7 years after that valuation the property should now be approaching the KSh.10 Million mark based on the fact of its proximity to the proposed Konza City. While appreciating that the said sale was not sanctioned by the **Law of Succession Act**, it was however submitted that six (6) beneficiaries of Eight (8) have demonstrated their willingness to have their shares of this property transferred to the said purchaser because according to them which is the right thing to do. The Court was urged not to be used to advance selfish interests and that in view of the administrators position if he is not ready to honour his promise to the purchaser the Court should order a current valuation of the land and a refund be done to the purchaser based on the current value and the argument that he is only entitled to refund of what he paid should be dismissed. To the Objectors, his Court is a court of justice and the administrator has demonstrated his selfish desires, he broke the law by making a sale without authority and is now using the same law to deny the purchaser justice. Pursuant to Article 159 of the Constitution which provides for amicable dispute resolution, the Objectors urged the court to uphold the wishes of the 6 beneficiaries who want to do the right thing and if that is not possible order compensation to the purchaser based on the current value of this land.

45. On the remaining properties, the Court was urged to order an equitable distribution of the same but the administrator should be made to account for all the properties of the deceased as enumerated by the objectors.

The Interested Party's Case

46. The Interested Party herein, **Henry Muli Kisenga**, deposed that on or about 9th June, 1994 he purchased all that parcel of land plot No. 1/1125 Konza for a consideration of Kshs. 200,000/- from the sons of the deceased herein. Prior to the said purchase all the children of the deceased had consented to the sale, which was solely intended to raise funds towards meeting hospital expenses and upkeep for their late mother and to show their commitment to the said sale transaction they gave him actual occupation and possession of the land and handed to him the original title deed which is still in his possession and apart from the institution of ELC No. 141/2011 he has enjoyed peaceful occupation all these 23 years. According to him, since he purchased this land and today its value is in excess of Kshs. 5 million based on the valuation report conducted in 2011 by Zanconsult valuers placing the value then at Kshs. 3.9 million.

47. It was the interested party's case that despite the opposition by the administrator to transfer this land to him, most of the beneficiaries are in agreement and have no objection to have their portions of this land transferred directly to him. However, there is pending before the Machakos ELC Case No. 141 of 2011 wherein the administrator has sued him seeking to recover this land and it is important that the issues herein be addresses by this Court.

48. According to the interested party, the administrator was desperate when he approached him 23 years ago to purchase this land so that he could secure treatment for his ailing mother, and now he has turned around after he has realized that the land is now more valuable hence is purely acting out of greed. It was his case that he stands to lose immensely and urged the court to either give him this land as initially intended by the beneficiaries, and or as proposed by the objectors/beneficiaries herein and or in the alternative make an order that he be paid the current value of this land.

Determination

49. I have considered the issues raised in this matter. The main issue for determination here is what were the assets of the deceased available for the purposes of distribution and in what manner should they be distributed.

50. According to section 3 of the 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.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated.

51. In **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the Learned Judge observed that :

“This Court’s view before distribution of the estate of the deceased under Section 71 of the *Law of Succession Act Cap 160*; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased’s estate and are available for distribution after settling all liabilities and having the net estate for distribution.”

52. It is not in dispute in this case that by the time of death of the deceased, ***Land Parcel No. Machakos/Konza/Block 1/1125*** was registered in the name of the deceased. It was therefore free property which the deceased was legally competent freely to dispose during his lifetime, and in respect of which his interest had not been terminated by his death. The said property therefore formed part of the estate of the deceased. Section 82(b)(ii) of the ***Law of Succession Act*** provides that no immovable property shall be sold before confirmation of the grant while section 45(1) thereof provides as hereunder:

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

53. In this case it is clear that ***Land Parcel No. Machakos/Konza/Block 1/1125*** was purportedly disposed of to the interested party herein, **Henry Muli Kisenga**, before the grant was confirmed. It is also not controverted in these proceedings that the purported disposition was done with the knowledge and consent of the beneficiaries to the estate of the deceased. In those circumstances it is clear that the interested party cannot successfully make a claim to that property as against the estate of the deceased. However it is arguable whether the Administrators of the Estate of the Deceased and the beneficiaries thereof cannot be liable to the Interested Party in those circumstances. In other words can there be an agreement by all the beneficiaries of an estate that subject to the issuance and confirmation of grant the estate would be entitled to settle certain debts incurred for the benefit of the estate as a whole? That is a matter which regrettably I cannot deal with in these proceedings since the determination of the interested party’s interest in the estate is the subject of ELC Suit No. 141 of 2011. It is therefore clear that at this stage ***Land Parcel No. Machakos/Konza/Block 1/1125*** cannot without prejudicing the outcome of ELC Suit No. 141 of 2011 be said to be part of the estate of the deceased. Though, all things being equal, it was free property at the time of the death of the deceased, the beneficiaries thereof by their own conduct, seems to have relinquished their interests therein to the interested party. Whether that relinquishment can be lawfully upheld is a matter to be determined before the ELC.

54. It is therefore my view that it would not be right at this stage to include that property as part of the estate of the deceased.

55. The next property is ***Agricultural Land Aimi Ma Kilungu being Plot No. 1402***. According to the Administrator, at the time of his death the Deceased had been allocated this parcel of land measuring 10 acres which was listed in the revoked confirmed grant. However upon confirmation of the said Grant, the Administrator and his three brothers sold the said Plot and shared out the money amongst themselves. On the part of the objectors, they urged the Court not to entertain the allegations by the administrator that the said plot was sold on the strength of the revoked grant and that the said sellers and purchasers are protected by S. 93(1) of the ***Law of Succession Act*** for reasons that the administrator has not demonstrated the said sale took place and the properties complained of were not captured in the revoked grant. The Court was therefore urged to reject the arguments advanced by the administrator that the two properties were sold vide the revoked grant and are thus protected. I have perused the Certificate of Confirmation of Grant dated 14th May, 2010 and the same lists the properties of the Deceased as ***LR Machakos/Konza North Block 1/1125, Aimi Ma Kilungu Agricultural Plot No. 1402, Aimi Ma Kilungu Commercial Plot No. 1134*** and ***Aimi Ma Kilungu Ltd Shares Share Certificate No. 3510***. Clearly ***Agricultural Land Aimi Ma Kilungu Plot No. 1402*** and ***Commercial Plot No. 1134*** were both listed in the said Certificate. Therefore it is erroneous for the Objectors to aver that they were never listed. As to whether the said properties were actually sold and whether there was an agreement between the Administrator and the three brothers to sale the same is another matter altogether. Suffice it to say that none of the parties has adduced any evidence to support the allegation of sale and since it was the Administrator who was alleging that it was sold under section 109 of the ***Evidence Act***, the burden was upon him to prove this fact. In fact it seems that he was aware of this burden since he undertook to adduce evidence in support of this contention. He however did not do so. Without such proof it must therefore be concluded that ***Agricultural Land Aimi Ma Kilungu being Plot No. 1402*** and ***Commercial Plot No. 1134*** are still part of the Deceased’s free property which are liable for distribution amongst his beneficiaries.

56. The next properties are the ***Shares at Aimi Ma Kilungu***. According to the Administrator, the Deceased, during his lifetime owned 8 shares. Since nothing has been said about these shares the same fall for distribution to those who are entitled to the estate.

57. It was however contended that that the petitioner left out a bulk of the deceased properties yet from the list of assets owned by the deceased and these were stated as:

- a) **Kiu Ranching & Farming Co-operative Society Ltd Share No. 784. (shares).**
- b) **Kiu Ranching & Farming Co-operative Society Ltd Agricultural plot No. 0795- (5 Acres).**
- c) **Kiu Ranching & Farming Co-operative Society Ltd Agricultural plot No. 457-2.3 Acres.**
- d) **Konza share membership No. 1554.**

- e) **Financial benefits accruing from the share in terms of dividends/Travelling allowances.**
- f) **Commercial plot of 30 x 80 (yet to be balloted).**
- g) **Agricultural plot No. 990 (10.8 acres).**
- h) **Agricultural plot No.545 (2 acres Malili – Konza Ranch.**
- i) **Commercial plot No. 1262 2 acres) both within Konza Ranch.**

58. According to the Objectors, the allegations by the administrator that Agricultural plot No. 545 measuring 2 acres (Konza) was sold on the strength of the revoked grant and that the said sellers and purchasers are protected by section 93(1) of the *Law of Succession Act* is self-defeating and should not be entertained by this Honourable court for reasons that the administrator has not demonstrated the said sale took place and the properties complained of were not captured in the revoked grant. On his part the Administrator contended that he had demonstrated that the deceased's two (2) acre land in Konza (Agricultural Land No. 545) was lawfully sold after confirmation of the grant and sale proceeds therefrom shared amongst the beneficiaries of the deceased's estate. It is however clear from the foregoing that Agricultural plot No. 545 was not itemised in the revoked Grant. Its sale if at all (and no evidence of the same has been adduced) cannot be protected by section 93(1) of the *Law of Succession Act*. It follows that Agricultural plot No. 545 must similarly form part of the estate of the deceased that ought to be distributed amongst the beneficiaries of the estate.

59. With respect to the properties the subject of **Kiu Ranching & Farming Co-operative Society Ltd**, the Administrator's position was after the death of the deceased, the Administrator and his three brothers, (**Eliud Makosi Musembi, David Muema Musembi and Benjamin Makenzi Musembi**), met and agreed on how to share their father's estate. According to him it was agreed that **Benjamin Makenzi Musembi** and **David Muema Musembi** would assume membership of **Kiu Ranching & Farming Co-operative Society Ltd** in place of their father and would receive any benefit and/or property flowing from such membership in future. It was his belief that the said **Benjamin Makenzi Musembi** and **David Muema Musembi** had been allocated pieces of land, some of which they had sold. Though he undertook to place the said agreement before this Court none was adduced. Therefore the Court cannot state with certainty if the said agreement existed and at what stage was this property distributed. If the alleged distribution took place before the Grant was confirmed, the beneficiaries of the same would legally be in the same position as the interested party herein. However without evidence of that distribution, the said property was part of the estate of the deceased hence liable to be distributed amongst the beneficiaries of his estate.

60. That position must similarly apply to the properties acquired by virtue of the Deceased's membership of **Konza Ranching & Farming Co-operative Society Limited** which were allegedly agreed to be taken by the Administrator and **Eliud Makosi Musembi**. With respect to the other properties acquired by virtue of the said membership of **Konza Ranching & Farming Co-operative Society Limited**, the Administrator averred that sometime *after* the death of the deceased the Petitioner assumed membership to **Konza Ranching & Farming Co-operative Society Limited** in the place of the deceased and thereupon bought shares in the said society and was issued with a membership card and a share certificate, becoming a fully paid up member of the society, a position that has never been disputed. On the basis of that membership the Petitioner was allocated some parcels/plots of land which according to him were personal property and hence do not form part of the deceased's estate and cannot be distributed as such. While he claims that membership to a society (organisation) is not *per se* a property, free or otherwise and that what eventually becomes property is any material gain that accrues from such membership, at the time when it does, it is clear that there were benefits accruing to the members of the said **Konza Ranching & Farming Co-operative Society Limited** to which the Deceased was entitled and the Administrator was under obligation to account to the beneficiaries for the same. His action of unilaterally replacing the Deceased thereat before confirmation of the Grant must, in my view, amount to intermeddling with the estate of the Deceased and he cannot now claim that whatever was acquired by him in **Konza Ranching & Farming Co-operative Society Limited** by virtue of him having substituted the Deceased is his personal property.

61. The Objectors have exhibited letters from **Kiu Ranching and Farming Co-operative Society Ltd** and **Konza Ranching & Farming Co-operative Society Ltd** confirming the properties owned by the Deceased by virtue of his membership to the said Societies. No serious evidence has been adduced by the Administrators to challenge the same save for bare denials and legally untenable contention that the properties are his personal properties and not part of the estate of the deceased.

62. In the foregoing premises I find that the following properties were as at the time of the death of the deceased herein his free properties that devolve to his Estate.

- a) **Agricultural Land Aimi Ma Kilungu being Plot No. 1402.**
- b) **Commercial Plot No. 1134.**
- c) **Land Parcel No. Machakos/Konza/Block 1/1125.**
- d) **Shares at Aimi Ma Kilungu.**
- e) **Kiu Ranching & Farming Co-operative Society Ltd Share No. 784. (shares).**
- f) **Kiu Ranching & Farming Co-operative Society Ltd Agricultural plot No. 0795- (5 Acres).**
- g) **Kiu Ranching & Farming Co-operative Society Ltd Agricultural plot No. 457-2.3 Acres.**
- h) **Konza share membership No. 1554.**

i) Financial benefits accruing from the share in terms of dividends/Travelling allowances.

j) Commercial plot of 30 x 80 (yet to be balloted).

k) Agricultural plot No. 990 (10.8 acres).

l) Agricultural plot No.545 (2 acres Malili – Konza Ranch.

m) Commercial plot No. 1262 2 acres) both within Konza Ranch

63. However, as Land Parcel No. Machakos/Konza/Block 1/1125 is still under dispute, the same is to be left out pending the determination of the said dispute. As regards the mode of distribution, in the absence of a valuation of the said properties, the same are to be registered in the names of the Administrator herein to hold in trust for himself and for the benefit of the beneficiaries listed hereinbelow pending valuation and distribution.

1. John Musyoka Musembi

2. Eliud Makosi Musembi

3. David Muema Musembi

4. Benjamin Makenzie Musembi

5. Rhoda Mwikali

6. Susan Nzia

7. Grace Mukenyi

8. Rose Ndumi

64. There will be no order as to costs.

65. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzei for Mrs Nzei for the Petitioner

Miss Michuki for the Protestors and Interested Party.

CA Geoffrey