



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 977 OF 1998

IN THE ESTATE OF JOSEPHINE MUMBUA MEHLAFF – DECEASED

JUDGMENT

1. The application dated 8th June 2005 is for rectification of the grant made on 21st May 1999 to Jane Carol Mueni and Fredrick Muroki. The provisions of the law on which it is premised are not stated.
2. It is brought at the instance of the 2nd administrator Fredrick Muroki who swore an affidavit on 10th June 2005. He depones that he brings the application on his own behalf and that of this co-administrator, Jane Carol Mueni, who has donated power to him under a power of attorney dated 31st March 1999. His case is that three of the assets listed in the petition of the deceased, do not belong to her – that is to say Plots Nos. 67, 105 and 106 Kithendu Market. He asserts that they belong to him. He explains that he and the deceased were joint proprietors of the three plots. He argues that following her death the property became his by virtue of the principle of survivorship or *jus accretendi*: He states that the plots were listed as assets in the estate of the deceased by mistake.
3. To buttress his case, the applicant has attached copies of several documents to his affidavit. There is a copy of a certificate of confirmation of grant dated 21st May 1999. It lists Plot Nos. 67, 105 and 106 Kithendu amongst other the assets. They were devolved to Jane Carol Mueni. There is also a power of attorney dated 31st March 1999 executed by Jane Carol Mueni appointing the applicant, Fredrick Muroki Grieve, her attorney. There is also a letter dated 8th October 1996 from the Matuu Urban Council addressed to Jane Mumbua Nthenge approving transfer of Plots Nos. 105 and 106 from Josephine Mumbua to Fredrick Muroki Grieve and Josephine Mumbua Nthenge. The letter dated 2nd March 1994 is an application by Joel Matata Muinde in respect of Plot No. 67 Kithendu Market for transfer of the plot to Fredrick Muroki Grieve and Josephine Mumbua. Lastly, there are two letters dated 14th October 2004, one by the town clerk, Matuu Town Council, and the other by Karago S.N. & Co. Advocates, the advocates of the council. Both letters confirm the applicant, Fredrick Muroki Grieve, to be the owner of Plots Nos. 67, 105 and 106 Kithendu Market by virtue of the legal doctrine of *jus accretendi*.
4. The applicant also swore another affidavit on 4th October 2010 in compliance with orders that witness affidavits be filed. He explains how his relationship stated with the deceased in the 1980s, how they jointly acquired the plots and developed them, how they ran businesses on the plots jointly and shared the profits. He has also deponed on the acts of the assault committed against him by the deceased's relatives after her death, and especially after he filed the instant application.
5. Attached to the affidavit sworn on 4th October 2010 are various documents to support the applicant's case. There is a copy of the proceedings in **Yatta SRMC Cr. Case No. 258 of 2006**, where the applicant had been charged with stealing goods from the premises standing on Plots Nos. 67, 105 and 106 Kithendu market. The case terminated with the withdrawal of the charges by the prosecution. There is an order

made on 5th April 2006 in Machakos **HC Misc. Civil Case No. 36 of 2006**, where leave was granted to the applicant to commence proceedings to have the criminal case in Yatta **SRMC Cr. No. 258 of 2006** quashed. There is also Machakos **HCCC No. 115 of 2010**, where the applicant had sued the state and some relatives of the deceased for false imprisonment and malicious prosecution arising from the events surrounding the criminal case in Yatta **SRMC Cr. No. 258 of 2006**. There is also Machakos **HCCC No. 32 of 2007** by the applicant against his co-administrator, Jane Carol Mueni, and three of her relatives, in connection with his right to occupy and run businesses on Plots Nos. 67, 105 and 106 Kithendu Market. Lastly, there is a copy of sale agreement dated 10th February 1988 between Joel Matata Muinde, on the one hand, and the applicant and the deceased on the other, relating to the sale of Plot No. 67.

6. The applicant's proposed witness, Christopher O. Ilikor a town clerk with the Matuu Town Council, swore an affidavit on 13th October 2010. He depones that Plots Nos. 67, 105 and 106 Kithendu Market vested in the Urban Council of Matuu by virtue of the Trust Land Act. The records held by the council reflected the applicant and the deceased as the registered owners of Plot No. 67, the same having been transferred to their names in 29th July 1994 by the original owner, Joel Matata Muinde. The said records are also said to reflect the deceased and the applicant to be the registered owners of Plots Nos. 105 and 106. They were originally in the name of the deceased, but on 2nd March 1994 they were transferred to the names of the applicant and the deceased.

7. Attached to the affidavit of the Christopher O. Ilikor of 13th October 2010 is the application for transfer dated 2nd March 1994 by Joel Matata Muinde in respect of Plot No. 67 Kithendu market. There is also a letter dated 14th February 1997 from the Matuu Urban (Town) council to Joel Matata Muinde informing him of the approval of the transfer from himself to the applicant and the deceased. There is also the letter dated 2nd March 1994 by the deceased in respect of Plots Nos. 105 and 106 Kithendu Market, seeking transfer of the property from her name to that of the applicant and herself. Lastly, there is a letter dated 8th October 1996, from the Matuu Urban (Town) Council to the deceased informing her of the approval of the transfer sought in her application of 2nd March 1994.

8. To these affidavits, a reply was filed on 8th June 2011 by John Ndeto Nthenge, through an affidavit sworn on 8th June 2011. He depones to be is the attorney of the respondent, Jane Carol Mueni, by virtue of a power of attorney dated 15th March 1999. He asserts that the respondent is the owner of Plots Nos. 67, 105 and 106 Kithendu Market on account of the certificate of confirmation of grant dated 21st May 1999. He states that the respondent had revoked the power of attorney in favour of the applicant after it became clear to her that the applicant was plundering her property. He asserts that acquisition and development of the property was financed by a German man who was married to the deceased. He states that the documents from the Matuu Town Council attached to the applicant's affidavits were applications and did not provide any evidence of ownership. He also argues that the facts supporting the application do not establish a case for rectification within the meaning of rule 43(1) of the Probate and Administration Rules.

9. He then goes on to describe the relationship between the deceased and the applicant. He concedes that the applicant and the deceased had a close relationship which matured to a love affair. He agrees with the applicant's averments that when the deceased fell ill, it was the applicant who took her to hospital, but asserts that the hospital bill was settled with the deceased's money. He further deposes to the close relationship between the applicant and the respondent, adding that the coziness between ended when the applicant began to waste the respondent's property. He asserts that the businesses ran by the applicant on Plots Nos. 67, 105 and 106 Kithendu Market belonged to the deceased and were run by the applicant on her behalf.

10. He has attached a number of documents to his replying affidavit. There is a power of attorney executed on 12th October 2007 by the respondent in favour of the said John Ndeto Nthenge. There is the grant of letters of administration intestate in respect of the estate of the deceased made on 30th June 1998 in favour of the applicant and the respondent. There is also the certificate of confirmation of grant dated

21st May 1999 devolving the entire estate of the deceased to the respondent, including Plots Nos. 67, 105 and 106 Kithendu Market. There is also the power of attorney dated 31st March 1999 where the respondent appointed the attorney. There is a letter dated 11th May 1999 from the Chief of Kithimani Location confirming the respondent to be the deceased and therefore her sole survivor and therefore her sole survivor and heir to the estate of the deceased. The letter dated 23rd April 1999 is from the advocates who acted for the applicant and the respondent previously advising them about the confirmation application. There is a certificate of marriage serial number 10812 confirming the marriage between the deceased and one Dieter Mehlauff. There is a copy of ruling in Machakos **HCCC No. 32 of 2007** where the applicant's application for injunction was dismissed on the grounds that the certificate of confirmation of grant indicates the respondent to be the owner of Plots Nos. 67, 105 and 106. There is also a letter dated 28th March 2006 from the works officer for the Town Council of Matuu stating that Plots Nos. 67, 105 and 106 Kithendu Market initially belonged to the deceased. Finally, there is a patient's declaration signed by the deceased and witnessed by the applicant authorizing an operation on her.

11. Directions were initially given on 25th May 2011 to the effect that the application dated 6th June 2005 be concluded by way of written submissions to be highlighted. The parties did file submissions in obedience to the said directions. The applicant's submissions dated 6th June 2011 were filed in court on 6th June 2011. The respondent's submissions are dated 27th June 2011 and were filed in court the same day.

12. The directions of 28th May 2011 were revised on 27th June 2011, where it was ordered that the application dated 8th June 2005 and filed in court on 15th June 2005 be heard by way cross-examination of my deponent of the affidavits on record.

13. The applicant's case was heard on 28th February 2012, 8th October 2013 and 26th May 2014. He called three witnesses – himself, the advocate who handled this succession cause initially for the administrators and an officer from the Matuu Town Council. The respondent did not call evidence.

14. The parties put in their written submissions thereafter. The applicant's written submissions are dated 10th June 2014 and were filed in court on 11th June 2014. The respondent's written submissions are dated 25th June 2014 and were filed in court on 27th June 2014. I will consider both sets of written submissions those filed in 2011 and these filed later in 2014.

15. In his submissions of 2011, the applicant submits that his application is taken out under Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules. These provisions provide for rectification of grants to correct errors in names and descriptions, or in setting out of the time and place of the deceased's death. It is submitted that rectification is an equitable remedy to correct errors made in documents emphasizing that it rectifies mistakes in the way a transaction is expressed in writing.

16. On the facts, the applicant submits that the assets in question, that is to say Plots Nos.67, 105 and 106 Kithendu Market, were jointly owned by the applicant and the deceased. The property therefore did not belong exclusively to the deceased, so as to form part of her estate. It is further submitted that being jointly owned, the doctrine of survivorship or *jus accrescendi* applied. The principle is that on the death of one joint tenant or co-owner, the entire co-owned estate survives to the remaining joint tenant or co-owner, so that the surviving joint-tenant or co-owner becomes the sole owner. Consequently, the death of the deceased meant that her being survived by the applicant rendered the applicant the sole owner of Plots Nos. 67, 105 and 106 Kithendu Market. It was therefore a mistake to list the three plots as forming part of the estate of the deceased and to devolve them entirely upon the respondent.

17. The respondent submits in her 2011 papers that the rectification sought does not seek to correct an error on the document but rather to alter the order of distribution and it therefore goes beyond the scope of Section 74 of the Law of Succession Act. She relies on the decision of this court in *In the Matter of the Estate of Muniu Karugo (deceased)* Nairobi HCSC No. 2668 of 1991. It is further submitted that joint ownership of the plots does not arise as the deceased was still the registered proprietor thereof for transfer

had not yet been effected. She submits that the records merely demonstrate applications were made for transfer of the assets to the joint names of the applicants and the deceased for the annexures do not provide proof of transfer.

18. The applicant's submissions of 2014 are a replica of the 2011 submissions, save that the applicant has cited more recent decisions and has submitted on the evidence that was recorded at the oral hearing of the matter. He argues that if his application is found to fall outside the provisions of Section 74 of the Act and Rule 43 of the Rules, the court still has inherent jurisdiction under Rule 73 of the Rules to review its confirmation orders and exclude the three plots from distribution.

19. The respondent's written submissions of 2014 equally mirror her's of 2011. She reiterates that the application dated 8th June 2005 seeks orders that are not grantable under Section 74 of the Act and Rule 43 of the Rules. She further submits that the application cannot be granted either under Order 45 of the Civil Procedure Rules, for there are no errors on the face of the record of the sort envisaged under Order 45 nor has there been discovery of new and important matter that was not within the applicant's knowledge at the time the grant was confirmed. On the evidence adduced at the oral hearing, the respondent submits that the same fall short of establishing that there was joint ownership of the three plots. In her view the material from the local authorities merely shows that applications for transfer of the subject plots to the joint names of the applicant and the deceased, but there is no evidence that the transfers were effected nor that the plots got registered under the relevant land registration. It is further submitted that the matters raised are not suitable for determination in an application for rectification of the grant, but rather in a separate suit.

20. The application before me is a Summons for Rectification of Grant. Its prayer 1 seeks that the grant made on 21st May 1999 be rectified in accordance of Rule 43 (1) of the Probate and Administration Rules. Rule 43 (1) is a subsidiary provision made under Section 74 of the Law of Succession Act. The application is therefore premised on Section 74 of the Act. The issue then is whether the orders sought in the application dated 8th June 2005 can be granted under Section 74 of the Law of Succession Act.

21. Section 74 provides as follows:-

“Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court and the grant of presentation, whether before or after confirmation, may be altered and rectified accordingly.”

Rule 43(1) states –

“Where the holder of a grant seeks pursuant to the provisions of Section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons... for such rectification through the registry and in the cause in which the grant was issued.”

24. The two provisions provide for rectification of errors on the face of grants of representation, and not any other process in a succession cause. The application dated 8th June 2005 purports to seek rectification of the grant made on 21st May 1999. The grant herein was made on 30th June 1998 and not on 21st May 1999. The event which occurred on 21st May 1999 was the confirmation of the grant of 30th June 1998. What is being sought therefore is the rectification of the certificate of confirmation of the grant dated 21st May 1999. Yet Section 74 of the Act envisages only rectification of grant of representation, and not certificates of confirmation of grant. I therefore agree with counsel for the respondent that the application before me is not for granting under Section 74 of the Law of Succession Act.

25. I will not dismiss the application on that score for it raises serious issues. Rule 73 of the Probate and Administration Rules saves the inherent powers of the court and I shall examine the matter on its merit to

assess whether or not it is worth granting the orders sought. Rule 73 states –

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.”

26. Rule 41 (3) of the Probate and Administration Rules envisages that where an issue arises during confirmation of the grant on, among others, the issue of ownership of an asset, the probate court may set aside the asset in question and refer the matter for determination by the civil court under Order XXXV, rule 1 (now Order 37 rule 1) of the Civil Procedure Rules. The said provision states as follows-

“41(3). Where a question arises as to the identity share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXV, rule 1 of the Civil Procedure rules and may thereupon, subject to the provision to Section 71(2) of the Act, proceed to confirm the grant.”

27. The effect of rule 41(3) is that where issues relating to ownership of property listed as forming the estate arise, which cannot be dealt with within the probate suit ideally the property in question should be set aside, and confirmation orders granted on the remainder. The fate of the property set aside will be that the matter will be referred to the civil court for determination. Once a determination is made that such property forms part to the estate, then the probate court could proceed to dispose of it.

28. The language of Rule 41(3) is discretionary. The court may or may not set aside the property and refer the matter to the civil court. The reference depends on whether or not it is convenient to deal with the matter within the probate cause. Ordinarily, probate proceedings are not the most suitable for disposing of such issues given that they are not by their nature contentious. It would be more convenient for such issues to be determined in a suit properly commenced under the Civil Procedure Act and Rules, where evidence may be taken and witness testimony tested by way of cross-examination.

29. There is therefore force in the argument by the respondent that the issues raised in the instant application ought to have been raised in a proper suit filed at the civil courts. I note however that what was to be achieved by going to the civil court has been attained by the directions of the court that the instant application be disposed of by way of cross-examination of the deponents of the various affidavits. Witnesses were called and their evidence tested on cross-examination, and documents were presented and produced. The evidence that ought to have gone to the civil court has been placed before this court, I can quite properly deal with matter and determine the question relating to the ownership of the said assets.

30. The applicant asserts that Plots Numbers 67, 105 and 107 are his. Plot number 67 was purportedly bought from a Joel Matata Muinde. There is on record a sale agreement to that effect. The buyers are indicated in the agreement as the applicant and the deceased. The seller then applied to the Matuu Town Council to have the same transferred from his name to that of the two buyers. There is material on record to the effect that the said transfer was approved by the local authority.

31. I have looked the papers filed by the respondent and the submissions filed on her behalf very closely. There is no material upon which I can dismiss the sale agreement on record, the transfer application by the seller as well as the approval by the local authority. The advocate appearing for the respondent very closely examined the witnesses availed by the applicant on the matter of Plot Numbers 67 and I find that the testimony of the said witness was not shaken in anyway.

32. The material on record reveals that Plots Nos. 105 and 106 Kithendu Market initially belonged to the deceased, then 2nd March 1994 she applied to have two transferred from her sole name to the joint names of herself and the applicant. The witness from the local authority, Ms. Elizabeth Syombua Mutisya, produced minutes from the Matuu Town Council in respect of a meeting held on 29th July 1994 where the

application by the deceased to have Plots Numbers 105 and 106 Kithendu Market transferred to her name and to that of the applicant was approved. She reiterated that since then their records have reflected the two as the owners of the two plots.

33. The testimony of the council official was not shaken on cross-examination. There is also no material on record which contradicts the record by the council that there was indeed an application for the transfer of the two plots, that the application for transfer was approved and that the records of the council reflect the applicant and the deceased as co-owners of the two plots. I note too that the respondent did not testify at the full hearing of the application.

34. The respondent's core argument appears to be that the two plots were never registered under the repealed Registered Land Act, Cap 300, Laws of Kenya, and therefore the doctrine that the applicant is relying on does not apply.

35. The doctrine of *jus accrescendi* is of common law origin. It is described in Gray & Gray in *Elements of Land Law*, 5th Edition, at paragraphs 915 and 916, in the following terms-

“It has been said that the right of survivorship (or jus accrescendi) is the “grand and distinguishing” incident of joint tenancy. On the death of one joint tenant the entire co-owned estate “survives to” the remaining joint tenant or tenants. Ultimately, in the manner of the medieval tonting, the last surviving tenant becomes the sole owner – the winner takes it all.”

In Megarry and Wade, *The Law of Real Property*, 16th Edition, Chapter 9, it is written at pages 475-476:

“On the death of the joint tenant, his interest in the land passes to the other joint tenant by the right of survivorship. This process continues until there is one survivor who holds the land as sole-owner.”

36. This doctrine was legislated in Section 102 (1) of the Registered Land Act, now repealed, where it is provided as follows-

“102 (1). Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land and consequently,

(a) Dispositions may be made only by all the joint proprietors; and

(b) On the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.”

37. I must state in the outset that the provision in Section 102 (1) of the Registered Land Act cannot possibly apply to circumstances of the present case. The said provision only applied to property registered under the Registered Land Act. Plots number 67, 105 and 106 were not registered under the said Act and therefore the Act did not apply to them.

38. The notion of joint ownership however is not limited to registered property. It applies to all property regardless of its registration status. It should be of application to the circumstances of the case before me.

39. There is ample evidence that plots numbers 67, 105 and 106 were co-owned by the applicant and the deceased, going by the records from the Matuu Town Council. Those records do not indicate whether the two held the property as joint tenants or as tenants in common. The distinguishing feature as between the two types of co-ownership is that the tenancy in common would be stated in the records as owned in specified proportions. Where the nature of co-ownership is not indicated it is to be presumed that the property is jointly owned unless there is evidence to the contrary.

40. The records from the local authority are silent on the nature of the co-ownership of Plots Numbers 67, 105 and 106 Kithendu Market as between the applicant and the deceased. This exposes the matter to the presumption that the nature of the co-ownership was joint tenancy. The respondent has not furnished

any material or adduced evidence that would rebut that presumption.

41. The presumption to be made in this matter is that Plots Numbers 67, 105 and 106 Kithendu Market were jointly owned by the applicant and the deceased. As the nature of the co-ownership was a joint tenancy, the doctrine of *jus accrescendi* applied and following the demise of one joint tenant, the deceased herein, Josephine Mumbua Mehlaflaff, the property reverted to the ownership of the surviving joint tenant, the applicant herein, Fredrick Muroki Grieve.

42. Following the conclusion above, it is my holding that the three Plots, that is to Numbers 67, 105 and 106 Kithendu Market, did not form part of the estate of the deceased and therefore they ought not have been included in the schedule of assets nor distributed as part of her estate in the confirmation proceedings.

43. In the end, I make the following orders, in exercise of the inherent powers of this court as saved in Rule 73 of the Land of Succession Act

(a) that the said Plots Numbers 67, 105 and 106 of the Law of Succession shall be removed from the schedule of assets in the petition presented to this court in this cause on 12th May 1998;

(b) that the orders made on 21st May 1999 confirming the grant of 30th June 1998 are hereby reviewed so as to exclude Plots Numbers 67, 105 and 106 Kathendu Market from the list of the assets distributed in the said confirmation;

(c) that the certificate of confirmation of grant dated 21st May 1999 shall be awarded accordingly to remove the said Plots Nos. 67, 105 and 106 Kathendu Market from the schedule of distribution; and

(d) that there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF January 2015.

W. MUSYOKA

JUDGE