



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 659 OF 2012

IN THE MATTER OF THE ESTATE OF JOHN MUEMA MASILA (DECEASED)

ANTHONY MUTUKU MUEMA)

EVERLINE MWELU MBITHI).....ADMINISTRATORS

VERSUS

**KONZA RANCHING AND FARMING CO-OPERATIVE SOCIETY
LTD.....PROTESTER**

RULING

1. **Anthony Mutuku Muema** and **Everline Mwelu Mbithi** petitioned for grant of letters of administration intestate of the Estate of **John Muema Masila** (deceased) in their capacity as the son and widow of the deceased respectively on the **28th June, 2012**.
2. A notice of application for the grant inviting objectors thereto to be made within thirty days was published in the Kenya gazette on the **7th September, 2012**. Prior to the gazette, on the **5th of September, 2012**, **David Muthoka Mutangili** filed an affidavit of protest pursuant to the provisions of **Rule 40(6)** of the **Probate and Administration Rules** drawn by **O. N. Makau and Company Advocates**. In the said affidavit he averred that he was pretesting in his capacity as the chairman of the **Konza Ranching and Farming Co-operative Society LTD (Society)**.
3. Opposing the confirmation of the grant, he deponed that the deceased was a member of the Society **No. 423** and was entitled to a two (2) acre plot, one commercial and the other agricultural, which was **No. 167** located at **Konza/Kwa Katheke**.
4. Prior to his demise the deceased sold the plot to meet his medical expenses. After his death his son, **Bernard Makau Muema** went to the society's offices in 2010 and through deceit made the farm manager issue him with Ballot Card No. 10 in respect of the two (2) plots which he sold off to one **Stephen Muli Kilau** who constructed a building thereon and interred his mother thereon.
5. Despite repeated requests by the society, **Bernard Makau Muema** offered no explanations. Consequently the society made a decision to retain ownership of the two (2) acre plot No. 1414 that the deceased was entitled to.
6. That the share indicated as the asset of the deceased is No. 423 includes plot No. 1414. His request

was that it be excluded from the confirmed grant as it does not form part of the deceased's Estate.

7. The matter was canvassed by way of written submissions which the court in exercise of its discretionary power has duly considered.

8. First and foremost, it is important to note that notice inviting objections from any interested party who wished to object to the grant being issued having been gazette, **David Muthoka Mutangili** (Protester) should have lodged a notice of objection with the court pursuant to the provisions of **Rule 17** of the **Probate and Administration Rules**. This is a matter where a temporary grant (letter 41) has not been issued.

9. The Protester invoked the provisions of **Rule 40(6)** of the **Probate and Administration Rules** which states thus:

“Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.”

No application for confirmation of the grant has been filed. The protest filed was immature and indeed incompetent.

10. That notwithstanding, it is alleged that the son of the deceased, a beneficiary to his Estate, committed some fraud at the society and subsequently sold the plot to one **Stephen Muli Kalo**. The only asset the deceased had is indicated as share No. 423 at Konza Ranching and Farming Co-operative Society. His entitlement at the society is not denied by the Protester but it is alleged that part of it was interfered with.

11. According to the law when a member of the co-operative society dies, his shares are transferred to a person nominated in accordance with the law as provided by statute and any rules made thereunder. In case there is no nomination, a personal representative of the deceased is the one entitled to the shares. **(See Section 39 of the Co-operative Societies Act Cap 490 Laws of Kenya)**.

12. It is alleged that **Bernard Makau Muema** a beneficiary of the Estate of the deceased by fraud caused the society to issue him with a ballot card. The question to be posed would be how he did so without evidence of being either a nominee or a personal representative of the deceased. The duty would be upon the Protester to adduce evidence of the alleged fraud and the society would be required to take necessary steps in law to sue him. If there is any interest in the Estate of the deceased, the person with specific interest would be the right person to protest in case of a proposal to have the Estate distributed.

13. From the foregoing, it is apparent that the affidavit of protest lacks merit. It is therefore struck out with costs to the Petitioners.

14. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of JUNE, 2015.

L. N. MUTENDE

JUDGE