



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 616 OF 2005

IN THE MATTER OF THE ESTATE OF MUSYOKA KANGULE MUMO (DECEASED)

MUIA MUSYOKA.....1ST PETITIONER/RESPONDENT

JOEL MUENDO MUSYOKA.....2ND PETITIONER/RESPONDENT

VERSUS

JOHN KASYONI MAKENZI *Alias* JOHN MAKENZI MAILU.....OBJECTOR/APPLICANT

RULING

1. A grant of representation to the estate of **Musyoka Kangule Mumo** was issued to **Muia Musyoka** and **Joel Muendo Musyoka** on the **17th February 2006** and confirmed on the **5th day of February 2007**.

The two (2) legal representatives were authorized to hold properties that belonged to the estate of the deceased in trust for the beneficiaries.

2. On the **31st day of July 2008** the applicant, **John Kasyoni Makenzi** alias **John Makenzi Mailu** a nephew to the deceased filed an application seeking to have the grant of letters of administration issued on **17th February** revoked and/or annulled on grounds that: it was obtained fraudulently by making of a false statement or by concealment of material facts; the proceedings to obtain the grant were defective in substance; the grant was obtained by means of untrue allegations not withstanding that the allegations were made in ignorance; the grant was obtained without prior knowledge and consent of the applicant.
3. In the alternative he sought an order that the grant be cancelled and/or amended as regards **Mavoko Town Block 3/2200** such that **6¼ acres** be allocated to **John Kasyoni Makenzi**; **6¼ acres** to **Julius Matheka Mailu** a brother to the applicant and **12½ acres** to **David Mailu**.
4. In an affidavit in support of the application **John Kasyoni Makenzi**, the applicant deponed that the respondents/petitioners herein are sons to the deceased while he is the nephew. The petitioners petitioned for letters of administration without obtaining consent from him. That the assets subject to the Succession Cause were jointly acquired and owned by **Mailu Kangule**, his father, **Mundia Kangule** his grandmother and **Ndile Kangule** his grandmother but registered in the name of **Musyoka Kangule Mumo** as a joint owner and Trustee.
5. Failure to seek his consent was an intention to deprive him and his step-brother **David Mailu** their entitlement of **Lukenya No.322** (Now Mavoko Town Block 3/2200) measuring 25 acres. He attached a sale agreement showing that the land should be shared among the three.
6. In response thereto **Joel Muendo Musyoka** deponed a replying affidavit. The agreement relied upon by the applicant is dated the **10th day of September 1999** when the deceased died on the

26th day of **December 1998**. The deceased having not executed the agreement there was no evidence of joint ownership of land as alleged.

7. The application was disposed off by way of viva voce evidence. The 1st applicant/objector testified that **Kangule Mumo** his paternal grandfather acquired land, part of **Lukenya Ranching Co-operative Society** but was unable to pay for it. He invited his sons **Mailu** (the applicant's father) and **Musyoka** to assist in paying off the same. They paid the difference which enabled **Kangule Mumo** to acquire a total of 65 acres of land. The land was subdivided between the three as follows:

- i. Mailu Kangule – 25½ acres
- ii. Kangule Mumo – 10 acres
- iii. Musyoka Kangule – 5 acres

The title deed was however issued in the name of **Musyoka Kangule**, the one that appeared in the register. In the year 1999 the clan met and deliberated over the issue. It was resolved that the land belonged to the three (3) people aforementioned.

8. **Phillip Makau Kioko**, the first witness called by the Objector, a clan member acted as the secretary at the clan meeting. Parties concerned disagreed. **Musyoka's** family representatives refused to sign the agreement.

9. **Harrison Mwinzi David** a second witness called by the Objector stated that the land was shared among the three persons who contributed towards payment namely:

- i. John Kasyoni Makenzi
- ii. Musyoka Kangule
- iii. Kangule Mumo.

10. **Muia Musyoka** the Petitioner and the surviving administrator of the estate of the deceased stated that **Musyoka Kangule Mumo** his father was survived by beneficiaries as follows:

- i. Joel Muendo
- ii. Major Musyoka
- iii. Jones Musembi
- iv. Jackson Ndambuki
- v. Mbevi Musyoka

It was his evidence that his father held membership **No.343**. He was allocated land in 1991 and a title deed was issued in 2006. He denied the averment that the deceased owned the land jointly with his sibling and father. He disowned the agreement that was made some eleven (11) years after the demise of his father.

The Petitioner called his sibling as a witness who corroborated in material particular what he stated.

11. I have duly considered rival submissions filed by both counsels for the Objector/Applicant and Petitioner/ Respondent.

12. It is argued by the applicant that the deceased acquired land parcel **No. Mavoko Town Block 3/2200** jointly with his father and another. Therefore failure to state the same was concealment of material facts from the court. Establishment of that material fact would mean that the land should be shared amongst the children of the three persons.

13. It is submitted by counsel for the applicant that it is common knowledge that land may be acquired by several persons but be registered in the name of one of them. The court was called upon to reach a finding that it was an issue of trust. Although the averment was made by the applicant no evidence was tendered to demonstrate that indeed the land was acquired jointly. The land in issue belonged to **Lukenya Ranching Co-operative Society**. No evidence was adduced from the officials of the said society as to what transpired.

14. The applicant relied on an agreement purported to have been drafted in the year 1998 approximately ten (10) years after the demise of the deceased. The agreement was made by a clan that was not party to purchase of the land in issue. Those who were to sign it were sons to three (3) named deceased persons who purportedly owned the land jointly. Such an agreement cannot be admissible in evidence. Such a document cannot bind persons named therein who are deceased.
15. Evidence was adduced of an allotment letter from **Lukenya Ranching and Farming Co-operative Society Limited** dated **1991** in the name of **Musyoka Kangule**.

Had the land belonged to three persons then it would have been expressly stated. No evidence was adduced to prove joint ownership of the parcel of land.

16. The deceased herein died intestate. **Section 38** of the **Law of Succession Act** provides thus:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

17. His property can only revert to his children. Had the deceased left no children and wife then the applicant would have been entitled to a share of his estate. In the instant case the applicant cannot benefit from the deceased's estate.
18. From the foregoing, it is apparent that the consent of the applicant was not necessary. The children of deceased did not have to notify the applicant of their intention to institute the petition for letters of administration in this Cause.
19. In the premises the application lacks merit. Accordingly, it is dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at MACHAKOS this 27TH day of NOVEMBER, 2014.

L.N. MUTENDE

JUDGE