



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**

**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. E185 OF 2021**

**IN THE MATTER OF THE ESTATE OF BONIFACE MUTINDA KABAKA (DECEASED)**

VASCOLINE KATANU MWANZIA.....APPLICANT

-VERSUS-

JENNIFER MUENI MUTINDA KABAKA.....RESPONDENT

**RULING**

1. The deceased Boniface Mutinda Kabaka died intestate on 11<sup>th</sup> December 2020. He was the senator for Machakos County, and an advocate of the High Court of Kenya whose firm was Kabaka & Associates Advocates. He left two families:- the family of his first widow Jennifer Mueni Mutinda Kabaka (the respondent) whose children are AWK, JKK and PNM; and the family of his second widow Vascoline Katanu Kabaka (the applicant) whose children are AKM and MYM. Then there is his mother Yala Kabaka Mbawa.
2. The deceased left several developed and undeveloped properties; vehicles and shares at Bunge Sacco and Parliamentarian Sacco; and Senate Group Life Insurance Benefits and Senate Death gratuity. He was a shareholder (the applicant says he was the majority shareholder) in Bonavacantia Properties (Kenya) Ltd that owned several properties. The company operated A/C No. [...] at Eco Bank Limited at Eco Bank Towers.
3. The applicant petitioned for the grant of letters of administration intestate and sent a citation to the respondent. On 2<sup>nd</sup> June 12021 Mr. C.N. Kihara for the applicant, Mr. Akoto for the respondent and M/s Matu for Mr. D. Musau for Kabaka & Associates Advocates agreed that the estate be gazetted.
4. The present application dated 10<sup>th</sup> March 2021 by the applicant sought that, pending the issuance of the grant of letters of administration, the court does provide for the education, housing, medial cover and basic maintenance for her children and herself to the tune of Kshs.3,383,000/=, and the money be withdrawn from the account of Bonavacantia Properties (K) Ltd at Eco Bank Limited. The amount was to cover one year. The second prayer was that the chairman of Bunge Sacco, one Peter A. Meikoki, does furnish the court with a detailed particularised statement of the shares and a true copy of the Nomination Form that provides the names of appointed nominees for the benefits and entitlements of the deceased; and that the Sacco be restrained from paying out and/or alienating in cash or shares or bonuses or any beneficiary that were due to the deceased. The application was based on the grounds and averments by the applicant that, since the death of the deceased, she and her children, both of whom were wholly dependent on the deceased, have been without financial support or income. This has materially comprised her welfare and that of the children, and therefore she seeks the orders to draw from the account. She had gone to the chairman of the Bunge Sacco who had advised that the deceased had left nominees to whom whatever benefits would go to, and that the benefits of the Sacco were not part of the estate of the deceased.
5. The respondent filed a response to oppose the application. He stated that indeed the family of the deceased had been to the chairman of Bunge Sacco who had informed them that the deceased had statutorily nominated persons to whom the benefits of the Sacco would go, and that such benefits were not the free property of the deceased that would pass or vest in the personal representative of the deceased. As for the money in the stated account, the response was that the account was operated by a limited liability company which was a separate entity from the deceased, although he was a shareholder in the company.
6. Counsel filed written submissions which I have carefully considered.
7. It is common ground that the deceased had, before his death, nominated the person or persons to benefit from his shares and benefits in the Sacco upon his death. It is now accepted that monies which are the subject of nomination under **section 39** of the **Cooperative Societies Act (Cap. 490)** and the Sacco By-Laws do not form part of the estate of the deceased that would pass or vest in the personal representative of a deceased to be distributed to the beneficiaries of the estate of the deceased (**Francis Gichuhi Kamau & Another –v- Kenya Railways Staff Retirement Benefits Scheme [2016]; In Re Estate of Faith Muita (Deceased) [2016]eKLR**). **Section 39** of the **Act** states as follows:-

**“39. (1) On the death of a member, a co-operative society may transfer the share or interest of the deceased member to—**

**(a) the person nominated in accordance with this Act and any rules made thereunder; or**

**(b) if there is no person so nominated, such person as may appear to the Committee of the society to be the personal representative of the deceased member; or**

**(c) if either of such persons is not qualified under this Act and any rules made thereunder or the by-laws of such society for membership, such person, specified by the nominee or personal representative, as the case may be, who is so qualified, or may pay to such nominee or personal representative, as the case may be, a sum representing the value of such member’s share or interest ascertained in accordance with any rules made under this Act or by-laws of the society:**

**Provided that—**

**(i) in the case of a co-operative society with unlimited liability, such nominee or personal representative, as the case may be, may require the society to pay him the value of the share or interest of the deceased member ascertained in the manner mentioned in this subsection; or**

**(ii) in the case of a co-operative society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee or personal representative, as the case may be, being qualified in accordance with this Act or any rules made thereunder or the by-laws of such society for membership of the society, or on his application within one month of the death, to any person specified in the application, who is so qualified.**

**(2) A co-operative society shall pay all other moneys due to the deceased member from the society to such nominee or personal representative, as the case may be.**

**(3) All transfers and payments made by a co-operative society in accordance with this section shall be valid and effectual against any demand made upon the society by any other person.”**

8. It would appear that the applicant has issues regarding the nomination that the deceased did at Bunge Sacco. Under **section 76 of the Cooperative Societies Act**, any dispute that she may have with Bunge Sacco over the nomination should be referred to the Cooperative Tribunal (**Paul Kanja Kamau –v- Stima Sacco Society Limited 2020**)eKLR). The Indian authorities referred to by Mr. C. N. Kihara do not relate to the **Cooperative Societies Act** and the jurisprudence developed by Kenyan courts on the same.

9. The other issue about the application is in regards to the sought restraining orders against the chairman of Bunge Sacco in relation to the benefits due to the deceased. He was not made a party to these proceedings, and therefore was not heard in the matter. The right to be heard is a valued right which is central to the rule of law, and the proper administration of justice. It is a principle of natural justice. The chairman of Bunge Sacco will be prejudiced by the orders restraining his functions, and therefore ought to have been brought into the matter for him to make his case before a decision is reached. (**Gulamhussein F. Gulamhussein –v- Imperial Bank Limited (In Receivership) and Another [2018]**)eKLR). In short, the injunction sought cannot issue against the chairman of Bunge Sacco, or any person acting under him, in respect of the benefits held by the Sacco for the deceased and his nominees.

10. The last question relates to whether the applicant and deceased’s children by her should get provision from the bank account of the limited liability company in which the deceased was a shareholder. It is basic that the properties, including bank accounts, of a limited liability company, are separate from the property of the company’s respective directors, shareholders or members (**Salomon –v- Salomon [1897]AC 78**). The Court of Appeal in **Victor Mabachi & Another –v- Nurtum Bates Ltd [2013]**)eKLR stated that –

**“A company is a body corporate, is a personal juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting or the veil.”**

There was no formal request to lift the veil of incorporation of Bonavacantia Properties (Kenya) Ltd, to be able to touch the money held by the company at Eco Bank Limited.

11. This is not to say that the children of the deceased are not entitled to benefit from the estate of the deceased regarding their education, medical expenses and upkeep. However, such benefit cannot come from Bunge Sacco, unless they were nominated by the deceased, or from A/C No. [...] at Eco Bank Ltd in the name of Bonavacantia Properties (Kenya) Limited.

12. The result is that I dismiss the chamber application dated 10<sup>th</sup> March 2021. I make no order as to costs as this is a family dispute.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2021.**

**A.O. MUCHELULE**

**JUDGE**