



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 265 OF 2004**

**IN THE MATTER OF THE ESTATE OF BETH MUTHEI MULILI (DECEASED)**

**MUNYASYA MULILI**

**PHILIP MULILI MUTETI**

**KATUMBI MULILI**

**MALINDA MULILI.....PETITIONERS**

**VERSUS**

**SAMMY MUTETI MULILI.....PROTESTOR**

**RULING**

**Introduction**

A grant of letters of administration intestate was issued on 22<sup>nd</sup> September 2004 to the Petitioners herein, with respect to the estate of Beth Muthei Mulili (hereinafter referred to as “the Deceased”). The Petitioners are sons and daughters of, and the Protestor a son of the Deceased. The Petitioners filed a Summons for confirmation of grant dated 17<sup>th</sup> September 2013, whereupon the Protestor filed an affidavit of protest he swore on 22<sup>nd</sup> May 2014, contesting the mode of distribution of the deceased’s estate sought in the said Summons.

This Court (Jaden J.) on 8<sup>th</sup> October 2014 directed that the said Summons and protest be heard by way of *viva voce* evidence. The Protestor and 2<sup>nd</sup> Petitioner testified as witnesses in Court.

**The Protestor’s Case**

The Protestor claims in his affidavit of protest and in the testimony he gave in Court that the 2<sup>nd</sup> Petitioner has unlawfully, unprocedurally and fraudulently processed and registered the deceased's properties in his own name, thus excluding all the other beneficiaries without a certificate of confirmed Grant. He produced as exhibits copies of the certificates of official search for title Number Mavoko Town Block 3 /1966 which showed that it was registered in the name of the 2<sup>nd</sup> Petitioner on 29<sup>th</sup> June 2005; for title Mavoko Town Block 3 /3010 which was registered in the name of the 2<sup>nd</sup> Petitioner on 15<sup>th</sup> August 2005; and for title number Mavoko Town Block 3 /1052 also registered in the name of the 2<sup>nd</sup> Petitioner. According to the Protestor, before any distribution is done, the 2<sup>nd</sup> Petitioner should be compelled by Court to reverse and restore the parcel of land in the deceased's name.

The following mode of distribution is proposed by the Protestor:-

Mavoko Town Block 3/3010

Munyasya Mulili	-13 acres
Philip Mulili	-13 acres
Sammy Muteti Mulili	-13 acres
Katumbi Mulili	-5 acres
Malinda Mutuku	-2 acres
Mumbua Kitonyi	-2 acres
Mwanzia Mutuku	-1 acre

Mavoko Town Block 3 /1966

Munyasya Mulili	-10 acres
Philip Mulili	-10 acres
Sammy Muteti Mulili	-10 acres
Katumbi Mulili	-5 acres
Malinda Mutuku	-5 acres

The Protestor alleged that the actions of the 2nd Petitioner amounted to intermeddling in the deceased's estate and should not be let to go unpunished, and denied consenting to sale of any of the deceased's assets as alleged by the Petitioner in the schedule of proposed distribution .The Protestor asked the Court to invoke its powers under the Law of Succession Act and recall all the title deeds that were illegally and fraudulently registered in the names of the Petitioner and third parties.

The Protestor gave evidence in Court during the hearing and confirmed that the deceased was his biological mothe and that she was registered as member no 20 at Lukenya Ranching and Farming Co-operative Society, as a result of which she allocated two plots no 480 and 348. He produced as his exhibits the allotment letters to the deceased for the two plots. Further, that plot 480 was registered as Mavoko Town Block 3/1966 and later sub-divided into 20 subtitles, and that plot348 was registered as Mavoko Town Block 3/3010. He also testified that the deceased had another plot at Kinanie known as Mavoko Town Block 3/1052 and whose title was also registered in the name of the 2nd Petitioner. He produced the copies of certificates of official search for the said titles as exhibits.

According to the Protestor all the titles were issued to the 2nd Petitioner without authority of the Court, and that he also did not agree to the alleged sale of Mavoko Town Block 3/1966 or alleged distribution of Mavoko Town Block 3/3010. He however did not oppose the proposed distribution of Mavoko Town Block 3/1052. The Protestor reiterated that he would like all the said titles and sub-divisions cancelled, and the same to revert back to the deceased for fresh distribution.

Upon cross-examination, the Protestor stated that he was not aware of the procedures of transfer of membership by Lukenya Ranching and Farming Cooperative Society of its deceased members shares, or the current registered member of share 20.

**The Petitioners' case**

The Petitioners filed a supporting affidavit and supplementary affidavit to the summons of confirmation of grant sworn by the 2<sup>nd</sup> Petitioner on 17<sup>th</sup> September 2013 and 31<sup>st</sup> August 2014 respectively. The said affidavits were relied on by the Petitioners in the testimony given in Court by Philip Mulili Muteti, the 2<sup>nd</sup> Petitioner.

According to the Petitioners, the deceased is survived by the following dependants:

1. Philip Mulili.
2. Munyasya Mulili
3. Katumbi Mulili
4. Malinda Mulili
5. Sammy Mulili
6. Mumbua Kitonyi

Further, that the deceased's estate is composed of the following properties;

1. Mavoko Town Block 3/1966 (Plot No. 480 Lukenya) -40 Acres.
2. Mavoko Town Block 3/3010 (Plot No. 384 Lukenya) -50 Acres.
3. Mavoko Town Block 31/1052 -0.450 Ha.

The Petitioners contend that the suit propertied were initially owed by their father by virtue of his membership at Lukenya Co-operative Sacco, and that the same was transferred to their mother as his next of kin. They attached a copy of their mother's membership card and allotment letter. Further, that pursuant to the provision of the Cooperative societies Act and the by laws of the said society, the 2nd Petitioner was appointed by his siblings to take over the position of their deceased mother as her next of kin, and all the said properties were transferred into his names in trust for all the beneficiaries and title deeds issued in his name. The 2nd Petitioner attached a consent letter by his siblings dated 27th December 2004. He denied fraudulently causing the transfer of the properties into his names, and asserted that the same was done legally pursuant to the provisions of the Co- operative Societies Act.

The Petitioners further averred that after the transfer of the deceased properties into the 2nd Petitioner's names, the beneficiaries did agree to dispose of some of the properties, and that MavokoTown Block 3/1966 was subdivided by consent as follows:

Sammy Muteti Mulili	-9 acres
Philip Mulili	-9 acres
Munyasya Mulili	-9 acres
Katumbi Mulili	-5 acres
Malinda Mutuku	-5 acres
Surveyor	-2 acres
Sub-division expenses	-1 acre

Further, the 2nd Petitioner in his affidavits proposed that the remaining properties be distributed as

follows:

Mavoko Town Block 3 /3010

Sammy Muteti Mulili	-23 acres
Katumbi Mulili	-10 acres
Malinda Mutuku	-2 acres
Mwanzia Mulili	-1 acre
Munyasya Mulili	-14 acres

Mavoko Town Block 3 /1052

To all beneficiaries in equal shares.

He further averred that it was agreed between himself and the Protester that the Protestor should get the 2nd Petitioner's portion of Mavoko Town Block 3/3010, and that the 2nd Petitioner would get the Protestor's portion in Mavoko Town Block 3/1966.

The 2nd Petitioner testified during the hearing and he produced as exhibits sale agreements dated 20th December 2003 and 31st July 2004 in which Munyasya Mulili, Katumbi Malili and Malinda Mulili agreed to sell Mavoko Town Block 3/1966. He also produced the annexures to his affidavits as exhibits. During his testimony, the 2nd Petitioner stated that he would now like Mavoko Town Block 3/1966 and Mavoko Town Block 3/3010 to be distributed equally among all beneficiaries, and for Mavoko Town Block 3/1052 to be sold and the sale proceeds to be distributed equally among all the beneficiaries. He also stated that the Court had the power to make orders as to the revocation of his titles. These statements were reiterated by the 2nd Petitioner during his cross-examination.

**The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Protestor and Petitioners. After the hearing, the parties agreed that the only contested issue is whether this Court has jurisdiction to cancel the titles deeds registered in the name of Philip Mulili Muteti and the persons who purchased the land from Philip Mulili Muteti, and filed submissions on this issue.

The Protestor's learned counsel, L.N Ngolya Company Advocates, filed submissions dated 22nd November 2016 wherein he urged that this Court is clothed with jurisdiction to reverse the illegalities committed against the deceased's estate by the Petitioner in violation of section 82 (b) (ii) of the Law of Succession Act. Further, that this Court's jurisdiction to order cancellation or recall of the titles is donated by section 47 of the Law of Succession Act, under which section, the Court is empowered to *inter alia*, determine any dispute under the Act and pronounce such decrees and make such orders as may be expedient.

It was further submitted that the Petitioner made an unequivocal admission of fraud with regard to the three titles in issue, and even went ahead to agree and accept that the Court has power to right the wrong he committed, and that any argument or submission to the contrary by the Petitioner's Counsel would be a sham and an academic exercise. Reliance was placed on the decision in **Elly Odhiambo Onyuka vs Ayub Odhiambo Migwalla, Nairobi Civil Appeal No. 81 of 2002.**

B.M Mung'ata & Company Advocates for the Petitioners filed submissions dated 30th January 2017, wherein it was contended that this Court is not vested with the requisite jurisdiction to deal with the issues raised herein and make orders. It was submitted that any illegalities or fraud alleged by the protestor can only be investigated through a legally established process in law, and a finding made on the facts and on

the basis of the evidence available. The said legal process can only be done before a court vested with jurisdiction and reliance was placed on **The Owners of Motor Vessel "Lillian S" versus Caltex Oil Kenya Limited, (1989) KLR 1** in this respect.

Further, that at the time of the deceased's demise, there only existed allotment letters and the title deeds to the three properties in question had not been processed, and it was after the deceased's death and transfer of membership into the 2nd Petitioners name that title deeds were issued with respect to the three disputed parcels of land. As the title documents were issued to the 2nd Petitioner herein and not the deceased, that this made the 2nd Petitioner the first registered owner and holder of the title documents to the three parcels of land.

The Petitioners contend that the main implication of first registration of the said title documents into the 2nd Petitioners name in this context, is that the said titles cannot be reversed by this court as reversing the registration only translates into cancellation of title, powers which this court does not have, and that it is only the Environment and Land Court that can cancel the title in question pursuant to section 80(1) of the Land Registration Act and Article 162(2) and 165(5) of the Constitution of Kenya . In addition, that the issues raised herein by the Protester are land disputes that can only be resolved by the Environment and Land Court, and that it is only after the first registration has been cancelled that the same parcels can possibly revert to the deceased's name and be said to be a succession matter and be argued to form part of the deceased's estate.

Reliance was placed on the decisions in **Salome Wambui Njau (Suing as an Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) vs Caroline Wangui Kiguru, [2013] eKLR**; and **Vijaykumar Shamji Patel v. Principal Secretary to the National Treasury & 5 others,(2016) eKLR**. for the position that the issues raised by the Protester herein as to the validity or legitimacy of the title deeds to the parcels of land can be well ventilated before a court with the requisite jurisdiction being the Environment and Land Court.

There are thus three issues before this Court:

1. What is the nature of the dispute before this Court?
2. Whether this Court has jurisdiction to revoke the title issued to the 2<sup>nd</sup> Petitioner and third parties.
3. If so, how the deceased property will be distributed between the beneficiaries of the deceased.

On the first issue, the dispute herein arose from a summons for confirmation of grant filed herein by the 2<sup>nd</sup> Petitioner in which he clearly stated that the deceased herein, who was the Petitioners' and Protestor's mother had the following properties:

1. Mavoko Town Block 3/1966.
2. Mavoko Town Block 3/3010 .
3. Mavoko Town Block 31/1052.

The parties herein do not dispute that the said properties belonged to the deceased having been allocated the same by Lukenya Ranching and Co-operative Society, and evidence of a letters of allotment was produced by both the Petitioners and Protestors. The Petitioners and Protestor claim to have a beneficial interest in the said properties as a result of being the deceased's children. In addition, the 2<sup>nd</sup> Petitioner in his pleadings and testimony claims to have been registered as owner of the properties as next of kin to the deceased, and to hold them in trust for the other heirs of the deceased. However, the Protestor who is one of the heirs, claims that the said properties were so registered without the authority of the Court as required by law.

It is thus evident that this is a dispute as regards the procedure and entitlement to a deceased's estate by and as between the heirs to the deceased, and is essentially a succession dispute. It is not a dispute as to title to land, as the 2<sup>nd</sup> Petitioner was not registered as absolute proprietor of the said properties, but as heir of the deceased. It cannot therefore be said that he has a full bundle of rights to the deceased's property which is independent and separate from the other heirs, and this is essentially therefore not a dispute as to his title to the disputed property, but one of his and other heir's succession to the deceased's properties.

The law that applies to matters and disputes of the nature raised by the Petitioners and Protestor is the Law of Succession Act whose application stated in section 2 of the Act as follows:

**“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.**

**(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.**

**(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that *in lieu* of such provisions the devolution of the estate of any such person shall be governed by Muslim law.**

**(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.”**

In *Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v. Caroline Wangui Kiguru*, Nairobi ELC suit NO. (2013) eKLR, which was relied upon by the Petitioners, I held that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the Constitution and the High Court as the Succession Court under section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.

Musyoka J. in this regard in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017]eKLR expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction as follows:

**“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.**

**27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through**

the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

*‘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 property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’*

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.

It is thus my finding that since the dispute herein is one between the personal representatives of the deceased and the survivors, beneficiaries and dependants of the deceased, it is a succession dispute to be determined solely within the framework of the Law of Succession Act. There was reference by the Petitioners to third parties who are involved and to whom title has been transferred, however the said third parties were not joined as parties to this succession cause, and their interest if any, will be determined when deciding on the issue of revocation of title.

On the second issue as regards this Court’s jurisdiction as a succession court to revoke title, this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. Section 47 of the Law of Succession Act provides as follows:

***The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient (Emphasis mine)***

***Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice***

Rule 73 of the Probate and Administration Rules provides as follows:

***“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 the court.”***

As to whether there are grounds for the Court to exercise these powers in relation to revocation of the 2<sup>nd</sup> Petitioners title to the disputed properties and any other third parties titles arising therefrom, the law that applies as to the disposition of a deceased’s person property is section 55 of the Law of Succession Act which provides as follows with regard to disposition of capital assets of a deceased persons estate:

**“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.**

**(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”**

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant. Any such distribution of the deceased’s properties before confirmation of grant whether by way registration of title, or sale is thus liable to revocation pursuant to the powers granted to this Court by section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

The grant of letters of administration Intestate with respect to the estate of Beth Muthei Mulili (the deceased) was issued to the Petitioners herein on 22<sup>nd</sup> September 2004. In the Petition for letters of Administration, the deceased’s estate was shown to be plots No 420 and 384 held in Lukenya Ranching & Co-operative Society.

The certificates of official search of produced as exhibits by the Protestor show that the titles for Mavoko Town Block 3/1966, Mavoko Town Block 3/3010 and Mavoko Town Block 3/1502 were issued to the 2<sup>nd</sup> Petitioner on 23<sup>rd</sup> June 2005, 12<sup>th</sup> August 2005 and 27<sup>th</sup> June 2005, after the succession proceedings had commenced and a grant of representation issued. It is notable in this respect that it is not disputed by the parties herein that the said properties originated from the plots owned by the deceased. In addition, the letter dated 27<sup>th</sup> December 2004 to Lukenya Ranching and Farming Co-operative Society consenting to the said plots to be registered in the name of the 2<sup>nd</sup> Petitioner was only signed by the administrators and not all the beneficiaries, and also attached and relied on the grant of letters of administration.

The 2<sup>nd</sup> Petitioner in this respect also produced evidence of sale agreements entered into on 20<sup>th</sup> December 2003 between Munyasya Mulili, Philip Mulili Katumbi Mulili and Malinda Mulili and an agent by the name of Julius Nzioka to sell and one dated 31<sup>st</sup> July 2004 between the said administrators and one Scholastica Muthoni Mande to sell portions of Mavoko Town Block 3/1966. Lastly the certificate of official search for Mavoko Town Block 3/1966 shows that the title for the said parcel of land was closed upon sub division on 4<sup>th</sup> April 2009 and new titles issues being Numbers 7909 to 7929. The said titles registered in the name of third parties were also produced as annexures.

It is evident that the said transfers, sales and registration of title took place before the grant of representation to the administrators had been confirmed, as the Petitioners summons for confirmation of grant on said grant was filed in Court on 17<sup>th</sup> September 2013, and is the subject of the present proceedings. The administrators therefore had no legal capacity to dispose of or sell any of the properties of the deceased, and such registration in the name of the 2<sup>nd</sup> Petitioner and sale to third parties was illegal and null and void. The third parties will have to follow up any claims with the administrators in the circumstances.

Lastly, on the issue of distribution of the deceased’s assets, the 2<sup>nd</sup> Petitioner has conceded to equal distribution of estate, which I find to be the most equitable and viable in the circumstances. The beneficiaries of the deceased are not disputed and are confirmed by the letter dated 5<sup>th</sup> May 2004 from Benedict M. Mweu, the then Chief of Lukenya Location. which was filed with the Petition for grant of letters of administration. They are as follows:

1. Philip Mulili.
2. Munyasya Mulili

3. Katumbi Mulili
4. Malinda Mulili
5. Sammy Mulili
6. Mumbua Kitonyi

The deceased properties are also not disputed and title documents produced by the parties indicate the particulars of the properties to be as follows;

1. Mavoko Town Block 3/1966 (formerly Plot No. 480 Lukenya) measuring 40 acres.
2. Mavoko Town Block 3/3010 (formerly Plot No. 384 Lukenya) measuring 50 acres.
3. Mavoko Town Block 3/1052 measuring 0.450 hectares.

I accordingly order as follows pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules:

1. Any and all registrations, transfers, sales and dispositions of the deceased's Beth Muthei Mulili's properties known as Mavoko Town Block 3/1966 , Mavoko Town Block 3/3010 and Mavoko Town Block 3/1052, and any sub-divisions arising therefrom and other subsequent dealings with the said properties and sub-divisions be and are hereby declared unlawful and null and void, are accordingly revoked, and all titles issuing therefrom shall be cancelled forthwith.

2. The title of properties known as Mavoko Town Block 3/1966 , Mavoko Town Block 3/3010 and Mavoko Town Block 3/1052, shall be registered forthwith in the names of the deceased Beth Muthei Mulili's

**3. The distribution of the said properties of the deceased Beth Muthei Mulili shall be as follows:**

A. Mavoko Town Block 3/1966 measuring 40 acres.

- |                                  |            |
|----------------------------------|------------|
| 1. Philip Mulili                 | -6.5 acres |
| 2. Munyasya Mulili               | -6.5 acres |
| 3. Katumbi Mulili                | -6.5 acres |
| 4. Malinda Mulili                | -6.5 acres |
| 5. Sammy Mulili                  | -6.5 acres |
| 6. Mumbua Kitonyi                | -6.5 acres |
| 7. Survey and sub-division costs | - 1 acre   |

B. Mavoko Town Block 3/1966 measuring 40 acres.

- |                    |          |
|--------------------|----------|
| 1. Philip Mulili   | -8 acres |
| 2. Munyasya Mulili | -8 acres |
| 3. Katumbi Mulili  | -8 acres |

- |  |           |
|--|-----------|
| 4. Malinda Mulili  | -8 acres  |
| 5. Sammy Mulili  | -8 acres  |
| 6. Mumbua Kitonyi  | -8 acres  |
| 7. Survey, sub-division and<br>other costs of the estate | - 2 acres |

C. Mavoko Town Block 3/1052 measuring 0.450 hectares shall be sold upon valuation, and the net proceeds of the said sale equally divided among all the above listed beneficiaries.

4. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 2<sup>nd</sup> May 2017.

**P. NYAMWEYA**

**JUDGE**