



REPUBLIC OF KENYA



KENYA LAW
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**Mbithi v Musyoka & another (Environment and Land Appeal
17 of 2022) [2025] KEELC 234 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 17 OF 2022**

**A NYUKURI, J
JANUARY 22, 2025**

BETWEEN

MBITHI MUTISYA MBITHI APPELLANT

AND

NDUNDA THYAKA MUSYOKA 1ST RESPONDENT

MARY MUTISYA MBITHI 2ND RESPONDENT

*(Being an Appeal from the Judgment of Senior Principal Magistrate at Machakos Honourable
A. Lorot, delivered on 28th May 2019 in Machakos CMCC Case No.1187 of 2010)*

JUDGMENT

Introduction

1. Mbithi Mutisya Mbithi, the appellant in this case, filed this appeal against the judgment of Honorable Abdul Lorot, Senior Principal Magistrate delivered on 26th April 2019 in Machakos CMCC Number 1187 of 2010. In the impugned judgment, the learned trial magistrate allowed the plaintiffs' (respondent herein) claim and ordered that share number 574 held at Konza Ranching and Farming Co-operative Society Limited be restored to the name of the deceased Thyaka Musyoka as had been the case prior to the transfer of the said share into the name of the defendant. The trial court further held that the subsequent dealings in the suit property were rendered null and void to the extent that they were not done on the basis of any grant of representation through succession. The defendant (appellant herein) was ordered to pay costs of the suit.

Background.

2. The plaintiffs before the lower court who are now the respondents herein, filed suit by way of plaint dated 25th September 2010 seeking the following orders;



- a. An order that the defendant lacks capacity to enter into any transaction to sell or dispose of or act in any way over the estate of Thyaka Musyoka and any agreement entered between the defendant and any party over the deceased estate is null and void.
 - b. An order that the estate of Thyaka Musyoka be preserved pending subjecting the same to proper succession process in the proper court of law.
 - c. A perpetual order restraining the defendant by himself, his agents and servants from intermeddling or interfering, or entering into any transaction, disposing of or acting in any way prejudicial to the preservation of the estate of Thyaka Musyoka.
 - d. Costs and interest.
3. The plaintiffs averred that they were son and daughter-in-law respectively and administrators of the estate of the late Thyaka Musyoka (deceased), who died intestate on 11th September 1990, having obtained grant of letters of administration in that regard. They stated that the deceased, who had been a polygamous man married to two wives, was, at the time of his death survived by two sons and two daughters in law and that the defendant is not one of the sons of the deceased, and therefore, not a beneficiary of his estate as he is a grandson of the deceased. They further stated that the deceased was member number 574 within Konza Ranching and Farming Co-operative Society Limited (hereinafter referred to as Konza) and in July 2010, the plaintiffs discovered that the defendant had wrongfully and unlawfully purported to sell the deceased's share number 574 to a third party and applied to Konza to effect transfer through misrepresentation. They maintained that the purported sale was unlawful, null and void for want of grant of letters of administration and lack of authority to dispose the deceased's estate.
 4. In his defence dated 4th October 2010, the defendant denied the plaintiff's claim and stated that he is the bona fide owner of Membership Number 574 at Konza and that the plaintiffs have no claim. He further stated that the membership was given to him by the deceased in her lifetime and that he has rights over the suit property. He stated that he sold the said share to a third party and the entire action is overtaken by events.
 5. According to the defendant, the dispute was between persons claiming through members in a cooperative society and that jurisdiction of such matters is the preserve of the Cooperative Disputes Tribunal. He also stated that having acquired title by way of a gift inter vivos, then he legitimately sold the land which is not part of the estate of the deceased. He sought for the dismissal of the plaintiff's claim.
 6. The suit was heard by way of viva voce evidence. The plaintiff presented three witnesses while the defendant presented one witness.

Plaintiffs' Evidence.

7. It was the plaintiff's case that the late Thyaka Musyoka was the owner of share number 574 at Konza which consisted of the suit property and that the defendant unlawfully transferred the said share to himself and sold the suit property to a third party.

Defendant's evidence

8. The defendant testified that share number 574 at Konza originally belonged to Thyaka Musyoka the deceased, who was his grandfather, who died in 1990, leaving behind his wife, Mulekyo Kaindi Musyoka, also now deceased, and that share number 574 passed to her by virtue of the fact that she



was the wife of Thyaka Musyoka. That she later passed the said share to the defendant in her lifetime voluntarily and the same was witnessed in writing. He maintained that share number 574 was lawfully passed to him, which he sold to a third party and did it openly and in good faith. He expressed surprise that the plaintiff had taken so much time to file the proceedings in court which he stated as having been brought in bad faith and having been overtaken by events. He sought for the dismissal of the suit.

9. Having considered the pleadings, evidence and submissions, the trial court found that share number 574 at Konza should be restored in the name of the deceased Thyaka Musyoka as was the case before the transfer into the defendant's name and that the subsequent transfer and dealings in that share is rendered null and void to the extent that the same was done without grant of representation.
10. The appellant being aggrieved with the decision of the trial court filed a Memorandum of appeal dated 17th May 2022 listing eight grounds of appeal as follows;
 - a. The learned trial magistrate erred in law and in fact in rendering himself as having jurisdiction to entertain a matter which the trial court did not have jurisdiction.
 - b. They learned trial Magistrate erred in law and in fact by failing to consider the evidence of the appellant and therefore meeting a decision that is both illegal and unfair to the appellant.
 - c. The learned trial magistrate erred in law and in fact in failing to appreciate that the share number 574 held at Konza Ranching and Farming Co-operative Society was not part of a deceased's person estate known as Thyaka Musyoka.
 - d. The learned trial magistrate erred in law and fact by disregarding in totality the evidence, submissions and authorities tendered on behalf of the appellant and therefore arrived at the wrong decision.
 - e. The Learned trial Magistrate erred in law and fact by making a finding that the respondent had proved their claim against the appellant.
 - f. The learned magistrate erred in law and fact by failing to make a finding that the evidence presented by the respondent could not sustain the pleaded claim.
 - g. They learned Magistrate erred in law and fact by wholly disregarding submissions tendered by the appellant before arriving at his decision.
 - h. The learned Magistrate erred in law and in fact in meeting out a decision that was extremely harsh to the appellant without having due regard to the intervening factors and the circumstances of the matter before him.
11. Consequently, the appellant sought the following orders;
 - a. The court does allow the appeal, set aside the judgment of the trial court and all subsequent decrees and /or orders nullifying the transfer of share number 574 from the name of the deceased to that of the appellant herein.
 - b. The Secretary, Konza Ranching and Farming Co-operative Society, does register the appellant herein as the rightful owner of share number 574.
 - c. The court do award the appellant costs of this appeal and costs in the trial court.
12. The appeal was disposed by way of written submissions. On record are the appellant's submissions dated 5th August 2024 and the respondent's submissions dated 18th September 2024.



Appellant's submissions.

13. Counsel for the appellant reiterated the appellant's submissions made before the trial court and argued that the role of the first appellate court is to subject the entire evidence to a fresh scrutiny and make its own conclusions bearing in mind that it had no opportunity to see or hear the witnesses. To buttress this argument, reliance was placed on the case of *Selle and Another v Associated Motor Boat Co. Ltd* (1968) EA 123.
14. On the question of jurisdiction, counsel relied on the cases of *Owners of the Motor Vessel "Lilian S v Caltex Oil (Kenya) Ltd.* (1989) and *Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour Travel* (2016) e KLR and submitted that jurisdiction is everything and a court cannot determine a matter where it has no jurisdiction. While referring to section 76 of the *Co-operative Societies Act*, counsel submitted that disputes among members or past members and persons claiming through the members or past members and deceased members of a cooperative society are subject to the Cooperative Dispute Tribunal and therefore, that the court should have found that it had no jurisdiction to determine this matter. In the same vein counsel referred to the case of *Abeid Mwamburi v Sokoro Savings & Credit Cooperative Society Limited* [2021] e KLR to buttress their position on jurisdiction.

Respondents Submissions.

15. Counsel for the respondent relied on section 78 of the *Civil Procedure Act* and the case of *Ephantus Mwangi & Another v Duncan Wambugu* [1984] e KLR and submitted that the role of this court is to re-evaluate, re-assess and re-analyze the trial court record and draw its own conclusions. Counsel argued that the appellant was intermeddling with the estate of the deceased by selling the suit property before taking out grant of letters of administration. It was further submitted for the respondent that the appellant did not demonstrate any error in the trial magistrate's decision. Counsel also argued that the evidence of the area chief demonstrated that the appellant was intermeddling with the deceased estate as he had approached the area chief seeking him to sign the transfer forms of the land that belongs to the deceased, which the chief declined. Counsel therefore argued that the appellant lacked capacity to enter into any transaction over the estate of Thyaka Musyoka and that any such transaction entered into was null and void as the appellant had no grant of letters of administration. Reliance was placed on the case of *Ezekiel Wanjohi v Leba Inyangala & Others* *CA No. 44 of 2002* [2002] e KLR for the proposition that the appellant failed to discharge his burden of proof.
16. The court was also referred to the case of *Mkube v Nyamuro* [1983] LLR, 403-415 for the proposition that an appellate court ought not interfere with the trial court's decision unless it is shown that the court's finding was based on no evidence or on a misapprehension of the evidence or where the court acted on wrong principles of fact or law in reaching its conclusions. Further reference was made to the case of *John Njue Nyaga v Nicholas Njiru Nyaga* (2013) e KLR upon which the respondent contended that equity frowns on underhand dealings which the appellant had committed by selling the deceased's property without authority.
17. On costs, counsel relied on section 27 of the *Civil Procedure Act* and argued that costs must follow the results. Counsel submitted that the appellant ought to pay costs of the appeal.

Analysis and determination.

18. The court has carefully considered the appeal, the entire record and the submissions filed by the parties. Two issues arise for this court's determination, namely;



- a. Whether the trial court had jurisdiction to try the dispute filed before it by the respondents, and;
 - b. Whether the respondents proved their case to the required standard to warrant the findings by the trial court.
19. Jurisdiction is the power of the court to determine a matter. Jurisdiction is everything, and a court must first be satisfied that it has the jurisdiction to determine a matter before embarking on determining the same. Jurisdiction is conferred by *the Constitution* or statute or both and a court cannot arrogate itself jurisdiction it does not have. (See Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others SC Application No. 2 of 2011 [2012] e KLR).
20. In the case of Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989), the court stated as follows;

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

21. In the instant appeal, the appellant argued that by dint of section 76 of the *Co-operative societies Act*, the trial court lacked the jurisdiction to try the dispute herein which ought to have been heard and determined by the Co-operative Tribunal.
22. Section 76 of the *Co-operative Societies Act* provides as follows’;

Disputes

1. If any dispute concerning the business of a co-operative society arises: —
 - a. Among members, past members and persons claiming through members, past members and deceased members; or
 - b. Between members, past members or deceased members, and the society, its Committee or any officer of the society; or
 - c. Between the society and any other co-operative Society;

It shall be referred to the Tribunal.
2. A dispute for the purpose of this section shall include—
 - a. A claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
 - b. A claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not.



- c. A claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

23. Therefore, disputes concerning the business of a co-operative society which are disputes between members of the society or between members and the society or between the society and another society, whether they are claims for debts by members against the society or by the society against members or a challenge by the co-operative society on refusal of being granted a licence, are disputes that ought to be determined by the Co-operative Tribunal. Therefore, the issue that this court must determine at this stage is whether the dispute herein is a dispute between members of a co-operative society and/ or between a member and a co-operative society.
24. From the record, it is clear that the suit property represented in share number 574, held at Konza; a co-operative society, was owned by Thyaka Musyoka who was married to two wives, namely Mulekyo and Wandi. Mulekyo had five children, while Wandi had two children. The appellant is a son of Mbula a daughter from the house of Mulekyo, while the 1st respondent is the widow of Kisilu; a son of Mulekyo. The 2nd respondent is the first son of Wandi. The appellant claimed to have been given the suit property by Mulekyo on the basis that he took care of her and that Mulekyo was given the land by the late Thyaka Musyoka. The fact that Succession had not been done in respect of the estate of Thyaka Musyoka at the time the appellant allegedly acquired the suit property and had it transferred to him at Konza, is not disputed. However, the appellant argued that the suit property was not subject of succession but nomination as required in cooperative societies upon the death of a member and that the same did not form part of the estate of the late Thyaka Musyoka. The respondents' contention on their part was that the suit property belonged to the estate of Thyaka Musyoka, whose estate had not been succeeded as per the law and therefore the acquisition of the suit property by the appellant was fraudulent and unlawful and ought to be nullified. Therefore, it is clear that the parties herein are not members of Konza, neither is there a dispute between any of them and Konza.
25. Hence the dispute before the trial court was whether the appellant lawfully acquired the suit property, which was originally owned by the late Thyaka Musyoka. It is clear that the dispute before the trial court was not a dispute between members of a co-operative society and therefore, it is the finding of this court that the said dispute is outside the purview of section 76 of the *Co-operative Societies Act*. In the premises, I find and hold that the trial court had the jurisdiction to hear and determine the dispute filed before it.
26. On whether the respondents proved their case, section 107 of the *Evidence Act* places the burden of proof in a case on the plaintiff. As I understand it, the respondents' case before the trial court was that the suit property belonged to the late Thyaka Musyoka who died in 1990, and that the appellant fraudulently and unlawfully acquired the same without grant of letters of administration. In response, the appellant conceded that the suit property and share No. 574 belonged to the late Thyaka Musyoka as of 2010 when he is alleged to have acquired it. He however stated that the late Thyaka Musyoka gave the suit property to his wife Mulekyo and that it is Mulekyo who gifted him the same. He insisted that the question of succession did not arise as what was applicable was that the share of a deceased member of a co-operative society would devolve to the nominee.
27. Section 39 of the *Co-operative Societies Act* provides as follows;

Transfer of share or interest of deceased members

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 the by-laws of the society:

Provided that:—

- a. 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
- b. 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.

28. Therefore, where a member of a co-operative society dies, their share or interest in the co-operative society may in the first instance be transferred to the person that the deceased member had nominated for that purpose, and where the deceased did not have a nominee, their share and interest shall then be transferred to the legal representative of the deceased member's estate. But where the nominee or the personal representative, as the case may be, is disqualified under the law to have the deceased members share or interest transferred to them, then they can choose a person who can have the said share or interest transferred to them.

29. Section 82 (b) (ii) of the *Law of Succession Act* provides as follows;

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—



ii. no immovable property shall be sold before confirmation of the grant...”

30. Therefore, land belonging to a deceased person cannot be lawfully sold before confirmation of a grant issued in regard to their estate. Section 45 of the [Law of succession Act](#) terms interference with the property of a deceased person by persons who are not administrators of the deceased’s estate as intermeddling with such estate.

31. In Re Estate of Jamin Inyanda Kadambi (Deceased) [2021] eKLR it was stated as follows;

A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(b)(ii) of the [Law of Succession Act](#). Clearly, the sale transaction that was carried out by the administrators was contrary to sections 45 and 82(b) (ii) of the [Law of Succession Act](#), and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.

32. In the instant case, although the appellant insisted that the suit property was not subject to provisions of the [Law of Succession Act](#), and that the same was only subject to nomination as per the provisions of the [Co-operative Societies Act](#), he did not present any evidence to show that either him or his grandmother Mulekyo were nominated by the late Thyaka Musyoka as beneficiaries of the deceased’s share upon his death. In addition, there is no evidence that the late Thyaka Musyoka nominated anyone to take over his shares at Konza upon his death. That being the case, it therefore follows that the suit property was part of the estate of the late Thyaka Musyoka and therefore subject to succession as per the provisions of section 82 (b) (ii) of the [Law of Succession Act](#) which requires that the immovable property of a deceased person cannot be sold before the grant in respect of their estate is confirmed. In the instant case, as the appellant did not have a grant of letters of administration in regard to the deceased’s estate, and there being no evidence that the deceased passed the suit property to Mulekyo, it is clear that Mulekyo had no authority to pass the suit property to the appellant and therefore I find and hold that the appellant acquired the same unlawfully as he was neither a nominee of the deceased, nor a personal representative of the deceased’s estate as at the time he allegedly acquired the suit property.

33. There being no dispute to the fact that the suit property originally belonged to the late Thyaka Musyoki, and the suit before the trial court having been filed for the benefit of the deceased’s estate, and the appellant having failed to demonstrate acquisition of the suit property through nomination or grant of representation, it is clear that the appellant’s actions of dealing in the suit property amounted to intermeddling with the estate of the deceased. Therefore, I find and hold that the respondents indeed proved that the suit property belongs to the estate of Thyaka Musyoka, and the appellant’s actions of interfering with the same was contrary to the provisions of sections 82 and 45 of the [Law of Succession Act](#) and therefore the trial court was justified in its findings that the suit property belongs to the estate of the deceased. The trial court did not err in ordering that the suit property be restored to the deceased and that the appellants dealings thereof are a nullity.

34. In the premises, I find no merit in the appeal before me, which I hereby dismiss with costs to the respondents.

35. It is so ordered.



**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF
JANUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

In the presence of-

Ms Nzili for the Appellant

Mr. Mutua for the Respondent

Court Assistant: M. Nguyayi

