

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 245 OF 2012

**IN THE ESTATE OF THE MATTER OF THE LATE KIMEU
MUTHEMBWA MBITHI (DECEASED)**

**JOSEPH MUTUKU KIMEU...1ST
PETITIONER/ADMINISTRATOR**

**PENINAH WANZUU
MAKAU.....2ND
PETITIONER/ADMINISTRATOR**

VERSUS

**MUSAU MWANIAINTERESTED
PARTY**

RULING

1. Before this Court for determination are two Summons applications and a Preliminary Objection. The first is a Chamber Summons dated 7th March 2025 filed by the Interested Party. It seeks to have the orders of confirmation of grant issued on 22nd February 2024 and the distribution of the estate of the late Kimeu Muthembwa Mbithi as outlined in the affidavit of distribution dated 21st July 2023 be reviewed and/or set aside. The Interested Party further prays that, upon such review and/or setting aside of the

orders of 22nd February 2024, a fresh certificate of confirmation of grant be issued excluding Land Parcel Number Konza/South Konza South Block 5 (Konza)/360, registered in the name of Musau Mwanja, on the grounds that the property does not form part of the deceased's estate.

2. The application is supported on the grounds stated on its face and the supporting affidavit sworn by the Interested Party. The Interested Party asserts that he is a member of Konza Ranching and Farming Cooperative Society Limited, holding Membership No. 1523. Following a balloting process, he was issued with an allotment letter for Agricultural Plot No. 137 and Commercial Plot No. 388 on 10th May 2012. He further avers that he was subsequently issued with a title deed for Land Parcel Number Konza South/Konza South Block 5 (Konza)/360 on 7th July 2017 (hereinafter "the subject property"). He contends that it was only in October 2023, upon being served with Court summons, that he learned the subject property had been listed as forming part of the estate of the deceased pursuant to the orders of 22nd February 2024. He maintains that the property belongs to him and argues that the dispute over its ownership falls outside the jurisdiction of this Court and should be adjudicated by the Environment and Land Court. Accordingly, he prays for the review of the orders confirming

the grant and that a fresh certificate be issued excluding the subject property from the schedule of distribution.

3. The Interested Party also filed a Notice of Preliminary Objection dated 7th March 2025, contending that the Court lacks jurisdiction to determine the dispute concerning the subject property. He argues that the Court's jurisdiction under Section 47 of the Law of Succession Act is limited to matters arising under the Act, and that disputes involving ownership of land falls within the exclusive jurisdiction of the Environment and Land Court.
4. In response to the application dated 7th March 2025 and the Preliminary Objection, the 1st Administrator filed a Replying Affidavit sworn on 27th May 2025. He explains that between 1964 and 1967, Konza Ranch, which was then owned by a European, was offered to the public to be purchased by the Kenyan Government. During this period, he and his father (the deceased) bought shares by each contributing Kshs.100. He further avers that the share capital was later increased to Kshs.250 per person. In 1967, the society's management resolved that all members were required to increase their share capital by an additional Kshs.500, bringing each share to a total of Kshs.750. At that time, his father had funds available but was to be refunded his earlier contribution. He states that he accompanied his mother to the Konza Society offices, where she had funds to top up his share. A mutual agreement was then reached

between his parents, since both names appeared separately in the main register, to consolidate the two entries into one share of Kshs.750 as required by the society. He adds that his name remained on the register for future reference by the family because no refund had been issued, and that his father later died in 1996. He further explains that he revisited the society offices in 1997 to verify the records, and the consolidated position was confirmed as earlier explained. He also discovered that the share capital was to be increased incrementally up to Kshs.2,500 for a member to qualify for land allocation, and that he ceased receiving dividends until the required capital threshold was fully achieved.

5. The 1st Administrator further averred that the subject property arose from Share No. 1523, which had originally been held separately under the names of Kimeu Muthembwa Mbithi and himself but was consolidated in 1967 to form a single share under the name of the deceased. He contends that the agreement relied upon by the Interested Party served a different purpose, and that the alleged transferee was the 2nd Respondent. He asserts that no formal transfer form was issued and that the share card was confiscated by the society's manager under the pretext of acting on instructions from higher authority. He avers that the letter addressed to the Interested Party by the Secretary of Konza Ranching and Farming Cooperative

Society was misleading and the product of a syndicated scheme.

6. The 1st Administrator further states that the Interested Party was misled to believe that one Mrs. Francisca Mueni Kimeu had completed an application form purporting to transfer Share No. 1523 which belonged to the deceased. He notes that the application appeared to have been endorsed by the Chief of Kimutwa Location. He explains that during the confirmation of the grant, it emerged that the Interested Party had been issued with a transfer letter by the Chairman of the Society. As a result, the Court summoned the Interested Party to explain the circumstances under which he allegedly acquired the deceased's property without a Certificate of Confirmation of Grant, but he failed to honour the summons.
7. The 1st Administrator maintains that the Certificate of Confirmation of Grant was lawfully issued and can only be challenged by demonstrating the existence of another valid grant obtained through due legal process. He asserts that Konza Ranching and Farming Cooperative Society lacked authority to transfer property belonging to the deceased without a grant issued by the Court. He further argues that the Interested Party's contention that the High Court lacks jurisdiction to entertain land disputes is misguided. He points out that he has participated in proceedings related to

this matter for over twelve years, during which the Court has on numerous occasions addressed land related disputes arising in succession causes.

8. Accordingly, the 1st Administrator prays that the Court issues orders directing Konza Ranching and Farming Cooperative Society to revoke and reinstate Share No. 1523. He also seeks a declaration that the Interested Party's membership in the Society was obtained illegally, fraudulently, corruptly, and deceitfully, amounting to criminal conduct.
9. The second Summons application dated 2nd May 2025, filed by the 1st Administrator, seeks rectification of the Certificate of Confirmation of Grant issued on 26th February 2024. The rectification aims to exclude Land Reference Number Machakos/Konza North Block 1/1352 and Machakos/Konza North Plot No. 575 from the estate of the deceased, Kimeu Muthembwa alias Kimeu Muthembwa Mbithi (deceased). The application is premised on the ground that distribution of the estate cannot proceed unless and until the said properties are removed from the schedule. It is further supported by the consent dated 4th February 2025, adopted by the Court on 18th March 2025, wherein all parties agreed that one Patrick Mwanza Jones is the rightful owner of the said properties.

10. The application dated 2nd May 2025 was not opposed.

11. When the matter came up on 8th May 2025, the Court directed the parties to file submissions in respect of both Summons applications and the Preliminary Objection. As at the time of preparing this Ruling, only the Interested Party had filed his written submissions dated 20th May 2025, which are on the court record.

Interested Party's written submissions

12. The Interested Party submits that the subject property, Land Parcel Number Konza South/Konza South Block 5 (Konza)/360, is registered in his name. He asserts that he is neither a beneficiary, a dependant, nor a creditor of the estate of the deceased. Citing Section 47 of the Law of Succession Act, he argues that this Court lacks jurisdiction to adjudicate disputes regarding ownership of the subject property, as such disputes do not fall within the scope of the Act. He cites Articles 162(2)(b) and 165(5)(b) of the Constitution, Section 13 of the Environment and Land Court Act, Sections 2 and 101 of the Land Registration Act, and Sections 1 and 150 of the Land Act to support his position. He contends that the Environment and Land Court is the proper forum to hear and determine disputes between personal representatives and third parties over ownership of land.

13. He further submits that, pursuant to Rule 41(3) and (4) of the Probate and Administration Rules, this Court should set aside the subject property pending the outcome of any proceedings that may be instituted by the Administrators under Order 37 Rule 1 of the Civil Procedure Rules. He argues that, given that a certificate of confirmation of grant has already been issued, the Court ought to invoke the said provisions of Rule 41(3) and (4) because the subject property does not constitute free property of the deceased. He reiterates that where questions arise regarding the identity, share, or estate of any person claiming to be beneficially entitled, and such questions cannot conveniently be determined at the confirmation stage, the Court is empowered subject to Section 82 of the Act to set aside the disputed property.
14. The Interested Party therefore urged the Court to allow the application dated 7th March 2025.

Analysis and Determination

15. Having carefully considered the two Summons applications, the Preliminary Objection, the affidavits on record and the submissions filed by the Interested Party, the following issues arise for determination:
- a) Whether this Court has jurisdiction to determine the dispute relating to Land Parcel Number Konza South/Konza South Block 5 (Konza)/360.

- b) Whether the order of confirmation of grant issued on 22nd February 2024 should be reviewed and/or set aside in respect of the subject property.
- c) Whether the certificate of confirmation of grant issued on 26th February 2024 should be rectified to exclude LR Machakos/Konza North Block 1/1352 and Konza North Plot No. 575.
16. Given that the first two issues revolve around the subject property, Land Parcel Number Konza South/Konza South Block 5 (Konza)/360 and are challenged through both the Summons and the Preliminary Objection, they will be consider together.
17. The Interested Party's challenge is anchored on two main arguments: first, that the subject property does not form part of the deceased estate but belong to him; and second, that this Court lacks jurisdiction under the Law of Succession Act to determine the question of land ownership involving third parties. He relies on the constitutional and statutory framework establishing the Environment and Land Court (ELC) as the specialised court mandated to hear and determine disputes concerning title, use and occupation of land.
18. The starting point is the is the constitutional delineation of jurisdiction. Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act

unequivocally confer on the ELC the power to hear and determine disputes relating title to land.

“13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes -

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

19. In parallel, Article 165(5)(b) restricts the jurisdiction of High Court in matters reserved for courts of equal status. This jurisdictional boundary is reinforced by Sections 2 and

101 of the Land Registration Act and Sections 1 and 150 of the Land Act, which collectively vests disputes over proprietary interests within the remit of the ELC.

20. In contrast, this Court exercises jurisdiction under the Law of Succession Act. The role of a succession court is circumscribed: it identifies the free property of a deceased person, ascertains the beneficiaries and oversees distribution of the estate. Section 3 of the Act defines “free property” as property of which the deceased was legally entitled at the time of death and which is not subject to any encumbrances that would limit transmission. Therefore, when a third party asserts an adverse proprietary claim over a listed asset, the succession court must interrogate whether the property is indeed part of the estate.

21. Where the dispute is centered solely on ownership and requires evidentiary evaluation beyond the scope of a probate court, Rule 41(3) and (4) of the Probate and Administration Rules provides the appropriate mechanism. These provisions empower the court, in cases where ownership is uncertain or contested, to set aside the disputed property pending the outcome of appropriate proceedings, before the relevant forum in this case the Environment and Land Court (ELC).

22. In the present case, the Interested Party claims ownership of the subject property based on alleged membership in the Konza Ranching and Farming Cooperative Society and a

subsequent allocation that led to registration in his name. Conversely, 1st Administrator contends that Share No. 1523 belonged to the deceased, that any purported transfer was fraudulent, and that the Interested Party's title is invalid. These diametrically opposed claims that cannot be resolved through affidavit evidence alone. Determining whether the Interested Party's title was lawfully issued, whether the deceased's share was transferable, or whether fraud occurred involves questions of fact and law that fall squarely within the jurisdiction of the Environment and Land Court.

23. The succession court, therefore, lacks the mandate to confirm ownership in favour of either party. Jurisdiction is fundamental to the exercise of judicial power. Without jurisdiction, the court cannot act without violating the principles of rule of law and legality. See the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR.**

24. A probate court must refrain from making determinations that effectively adjudicate title disputes between the estate and third parties. Accordingly, the Preliminary Objection challenging this Court's jurisdiction is merited. Issuing a ruling on the ownership of the subject property would exceed the Court's jurisdiction.

25. Nevertheless, the Court retains power to set aside, review or correct a confirmation of grant where it included

property that does not constitute free property. Given the Interested Party's claim predates the confirmation, and in light of the current bona fide dispute over ownership, the continued inclusion of the property in the certificate of confirmation is improper. The appropriate remedy is to invoke Rule 41(3) and (4) by removing the subject property from the schedule of confirmation, and allowing either the Administrators or the Interested Party to seek a substantive determination of ownership before the ELC.

26. Once a determination is made, the Administrators may return to this Court for further directions regarding distribution of the property.

27. Accordingly, the application dated 7th March 2025 is allowed to the extent that the subject property shall be excluded from the confirmed schedule pending determination by the ELC. However, it is declined to the extent that it seeks a definitive declaration that the property does not form part of the estate, as such determination lies outside this Court's mandate.

Whether the certificate of confirmation of grant issued on 26th February 2024 should be rectified to exclude LR Machakos/Konza North Block 1/1352 and Konza North Plot No. 575.

28. The second application dated 2nd May 2025 and brought by the 1st Administrator, seeks rectification of the

certificate of confirmation of grant to remove two properties that the parties have agreed belong to one Patrick Mwanza Jones. The court notes that a consent dated 4th February 2025 to that effect was adopted by the Court on 18th March 2025 and there is no opposition to the application. Rectification of a certificate of confirmation is provided for under Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules. It is appropriate where an error has occurred in the describing or inclusion of property in the grant.

29. Since both properties were erroneously included and their ownership is uncontested, the rectification is merited. The application is therefore allowed as prayed.

30. In light of the foregoing, I direct as follows;

- a. The Preliminary Objection dated 7th March 2025 is upheld to the extent that this Court lacks jurisdiction to determine the ownership of Land Parcel Number Konza South/Konza South Block 5 (Konza)/360.
- b. The Summons dated 7th March 2025, filed by the Interested Party, is allowed to the extent that the grant of confirmation issued on 22nd February 2024 is reviewed to exclude the Land Parcel Number Konza South/Konza South Block 5 (Konza)/360 (subject property) from the schedule of distribution, pending the determination of ownership by the Environment

and Land Court pursuant to Rule 41(3) and (4) of the Probate and Administration Rules.

c. The Summons dated 2nd May 2025 filed by the 1st Administrator is allowed.

d. The Certificate of Confirmation of Grant issued on 26th February 2024 shall be rectified to exclude LR Machakos/Konza North Block 1/1352 and Konza North Plot No. 575, in accordance with the consent adopted on 18th March 2025.

31. This being a family succession matter, each party shall bear their own cost.

32. Orders accordingly

Signed, dated and delivered at Machakos this 20th day of November, 2025.

RHODA RUTTO
JUDGE

In the presence of;

.....for 1st Administrator

.....for 2nd Administrator

.....for the Interested Party

Selina Court Assistant

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