



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC. PET NO. 3 OF 2010

PONDENI FARMERS CO-OPERATIVE LTD.....1ST PETITIONER

NATHAN MUTALI MMAS.....2ND PETITIONER

VERSUS

THE COMMISSIONER FOR

CO-OPERATIVE DEVELOPMENT.....1ST RESPONDENT

FRANCIS O. KISIA

(SUED IN HIS CAPACITY AS LIQUIDATOR)....2ND RESPONDENT

LUKAS CHIRAKA SHITAL.....3RD RESPONDENT

PATRICK BOIYO.....4TH RESPONDENT

RULING

1. The petitioners herein filed an application dated **19/12/2018** seeking the following orders:-

- (1) That the court be pleased to grant orders for the substitution of the 2nd petitioner/applicant as a party to these proceedings.**
- (2) That the court be pleased to have the name of the 2nd petitioner substituted by one BENJAMIN J.S.S. SHAMALA IMBOGO.**
- (3) That any other order which the court may deem fit to grant in the circumstances.**
- (4) That the costs of this application be provided for.**

2. The petitioners' grounds for the application are that the 2nd petitioner died on the 7th November, 2018 and for continuity, the 2nd petitioner should be substituted and that the respondents will not be prejudiced by the said orders if granted.

3. The application is supported by the affidavit of **Benjamin J.S.S. Shamala, Executive Member of Pondeni Farmers Co-operative Society Ltd** sworn on **19/12/2018** which lays emphasis on the above grounds.

4. The respondents oppose the notice of motion on the following grounds:

- (1) That the notice of motion is incurably defective, incompetent, non-starter, untenable, frivolous and scandalous and devoid of merit and instituted in bad faith and should be dismissed with costs.**
- (2) That the notice of motion offends the provisions of Co-operative Societies Act on appointment of office bearers hence a nonstarter.**
- (3) That the application offends the provision of Law of Succession act.**

(4) That the orders being sought by the petitioners cannot be issued in view of the express provisions of Co-operative Societies Act and Law of Succession Act.

5. The respondents pray that application dated 19/12/2018 is misconceived, without merit and an abuse of the court process and the same should be dismissed with costs.
6. The applicants filed their submissions on **30/7/2019**. No submissions were filed on behalf of the respondents. I have considered the applicant's submissions.
7. This is an application for substitution of a deceased party and in normal circumstances the **Law of Succession Act Cap 160** requires that a person who is to deal in any manner with the assets of a deceased needs to take out letters of administration. In default thereof, he would be considered an intermeddler under the provisions of **Section 45** of the **Law of Succession Act Cap 160**.
8. Before considering the provisions of that Act the record must be examined to discover the capacity in which the 2nd petitioner was enjoined in this suit.
9. The petition filed on 23/11/2010 appears to have had three petitioners and five respondents whereas the application at hand names only two petitioners. No explanation has been given as to how **James Wamukota Sifuma** the 3rd petitioner was dropped from these proceedings but that is an issue for another day.
10. What concerns this court is the description of the 2nd petitioner. In **paragraph 2** of the petition dated **23/11/2010** that paragraph reads as follows:

“That the 2nd and 3rd petitioners are shareholders contributories and managers of the 1st petitioner at all material times.”
11. Of interest and relevance to the issue at hand is also **paragraph 4** of that petition which reads as follows:

“That the objects of the 1st petitioner where the purchaser (sic) of the agricultural land and settlement of its members who were substantial squatters in Turbo estate and whose resident (sic) had been taken by Pan Africa Paper Mills Webuye.”
12. It is safe to presume that the words “shareholders” contributories and “members” are based interchangeably in this litigation.
13. Lastly, I must also examine whether any of the prayers in the petition relate to the person of the deceased 2nd petitioner. None of those prayers address any specific interest unique or peculiar to the deceased and the question arises as to why there is need to have him substituted while the 1st petitioner is still in existence. I find no proper explanation for the expressed need to substitute him.
14. It is clear that the deceased was only a member of the 1st petitioner who had been enjoined to the petition for an unclear reason. I state that it was for an unclear reason because many other shareholders and committee members of the 1st respondent had not been similarly enjoined and were deemed to be represented by the 1st petitioner.
15. The applicants' submission is that the present proceedings are instituted by a corporate entity but not an individual and in the circumstances the **Law of Succession Cap 160** cannot apply, for the suit does not relate to the personal estate of the 2nd petitioner.
16. In the same breath the applicants aver that the “*present cause of action is not hinged on the survival or otherwise of the deceased.*” Without citing any specific provisions of law, they further state that according to the governing law relating to Co-operative Societies in Kenya he should be replaced by the 2nd applicant and further, that a resolution was made by the 1st petitioner's management committee on 24/5/2019 to the effect that the 2nd petitioner do replace the deceased. I have examined the record and found that no such resolution is attached to the application on the record. That leaves the court with only the provisions of the **Law of Succession Act Cap 160** to consider.
17. If any prayers related to the deceased's personal estate this court would have upon production of letters of administration to his estate issued in the 2nd applicant's name, have given consideration to the prayers sought in the application. However failure to demonstrate that he had any peculiar personal interest separate from the 1st petitioner's interest lends credence to the applicant's own submission that “*the present cause of action is basically not hinged on the survival or otherwise of the 2nd petitioner.*”
18. Two crucial questions arise in respect of the instant application.
19. First, if the cause of action is not hinged on the survival or otherwise of the deceased, was there any need to enjoin him in the first place? The answer is clearly “No.” Is there then any need for the substitution application while the 1st petitioner still exists? In my view no such need would arise in the circumstances.
20. Secondly, if it were to be assumed, which is not the case that the deceased had a unique and peculiar claim which only he could pursue as a person, does any person substituting him in the petition need to bear letters of administration issued under the Law of the Succession Act? In my view the answer is “Yes.” However no grant of letters has been exhibited in the application.
21. For the above reasons I find that the application dated **19/12/2018** is incompetent and an abuse of court process and I dismiss it with

costs to the respondents.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Oduor holding brief for Maosa for Petitioners

Mr. Kuria for the Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019