



REPUBLIC OF KENYA



IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO.24 OF 2015

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MERCY JUDITH AKINYI.....APPLICANT  
(SUING AS Administrator ad Litem for the estate of Wilson Otieno Opondo)

VERSUS

USHURU SACCO SOCIETY..... RESPONDENT

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**RULING**

This is a ruling to the application dated 17/12/2014. It is brought under Rule 11 of the Co-operative Tribunal (practice and procedure) Rules, 2009). The applicant is seeking orders:

1. Spent.
2. Spent.
3. Pending the hearing and determination of this application, the Respondent by itself, its agents, employees or servants be temporarily restrained by injunction orders from releasing, paying, transferring or liquidating shares held by WILSON OTIENO OPONDO hereinafter referred to as “the deceased” to any person.

4. Pending the hearing and determination of his claim, the respondent by itself, its agents, employees or servants be temporarily restrained by injunction orders from releasing, paying, transferring or liquidating shares held by the deceased to any person.
5. The costs of his application be in the cause.

The application is based on six grounds listed on the face thereof and affidavit sworn by MERCY JUDITH AKINYI.

The application was presented *ex parte* in the first instance and orders issued in terms of prayer no.3. The same was then set for hearing *inter partes*. On being served the Respondent filed a replying affidavit. On 4/4/2016 the parties agreed to file written submissions. On 31/5/16 it was confirmed that submissions had been filed.

I have considered the application herein. I have also considered the submissions filed. The applicant states that she is a widow of the deceased – WILSON OTIENO OPONDO and therefore the one who should be paid the deceased's shares, interests and dividends in the custody of the Respondent. She is the administrator of the estate. She is asking the tribunal to stop by way of injunction, the respondent paying out the money to nominees. The Respondent on their part stated that they are bound by the Co-operative Societies Act and their own by-laws to pay the nominee.

The issues for determination are;-

- (i) Whether the deceased had nominated beneficiaries
- (ii) Whether the deceased shares form part of the deceased's estate for purposes of the Law of Succession Act.
- (iii) Whether orders of injunction are merited.

On the 1<sup>st</sup> issue the Co-operative Societies Act provides as follows under section 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 his Act and any rules made thereunder; and
- (b) If there is no person so nominated, such person may appear to the committee of the society to be the personal representative of the deceased member; or
- (c) .....

It is contended by the respondent, a Co-operative society, that the deceased had nominated one Daniel Juma as his nominee in accordance with section 39(1) (a) of the Co-operative Societies Act. This is a fact known by the applicant and the reason for this application. The applicant was not named as a nominee.

The next question is whether the shares held by the society form part of the deceased estate considering the finding that he had given a nominee. A reading of section 39(1) and (b) shows that such shares will only be paid to a legal or personal representative if there is no person validly nominated as a nominee. I have benefited from the decision by Justice William Musyoka in Re the Estate of Nemwel Nyasagare Nyanabo (Deceased) (2013) eKLR and the one of Justice Gikonyo in Benson Mutuma Muriungi vs C.E.O Kenya Police Sacco & Another (2016) eKLR. In the first case Musyoka J observed, in obiter, that investments held in a savings and Co-operative society are usually not subject to the law of succession but to the law governing investment in co-operative societies as stated in the Co-operative Societies Act.

In Benson Mutuma case, Justice Gikonyo cited Musyoka J with approval in the matter of the Estate of Carolyne Achieng Waga (Deceased) Nairobi High Court succession cause No.1374 of 2004 when the judge said;

“ It is the law that funds the subject of the nomination do not form part of the nominators estate and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process and should be dealt with in accordance with the law. Nominations are statutory, in the sense of them being specifically provided for by a particular statute.”

Justice Gikonyo ruled that nomination under section 39 of the Co-operative Societies Act is one such nomination referred to as statutory nomination. That such nomination removes funds from such properties that can be dealt with under the law of succession whether testate or intestate. In our current case it is clear that the deceased made a nomination. The funds held by the respondent are therefore not subject to Law of Succession Act.

This means that the argument made by the applicant on whether she is the personal representative of the deceased estate or the beneficiary of his estate are not relevant to these funds. The said argument will be useful in a succession court.

The above findings lead me to the 3<sup>rd</sup> issue. Having found that the law is against including the funds in the estate then it cannot be possible to establish a prima facie case based on the argument that one is a legal representative. The rules and principals set out in Giella vs Cassman Brown Co. Ltd.(1973) E.A 358 cannot be satisfied. The application is without merit. It is hereby dismissed. Orders accordingly. Orders granted ex parte are hereby discharged. Costs to the Respondent.

**SIGNED  
ALEX ITHUKU  
CHAIRMAN**