



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**SUCCESSION CAUSE NO 4 OF 2017**  
**(CORAM: F.M. GIKONYO J.)**

(Formerly Nakuru High Court Succession Cause No 457 of 2012)

**IN THE MATTER OF ANNAH NENCHUNGEI KOIKAI (DECEASED)**

**SIRERE OLE KOIKAI.....1<sup>ST</sup> APPLICANT**

**VERONICAH NASEI PARMUAT.....2<sup>ND</sup> APPLICANT**

**JOHN PURKOKOIKAI.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**FRANCO NAURORI KOIKAI.....1<sup>ST</sup> RESPONDENT**

**LUCIA NANTOTI KOIKAI.....2<sup>ND</sup> RESPONDENT**

**MICHAEL KOILEKEN KOIKAI.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Removal of administrator**

[1] Before me is an application dated 14<sup>th</sup> July 2021 expressed to be brought under Sections 76 (d) (ii) & (e) of the Law of Succession Act, and rule 44 of the Probate and Administration Rules and all enabling provision of the law. The significant orders sought in the application are: -

- i. THAT a temporary injunction do issue restraining the respondents jointly and individually from dealing with properties of the estate of the deceased pending hearing and determination of this application.**
- ii. THAT this honourable court be pleased to issue a declaration that the respondents have violated the terms of the grant and that they have not diligently administered the estate.**
- iii. THAT this honourable court be pleased to revoke or annul the grant of letters of administration issued to the respondents on the 21<sup>st</sup> September 2013 and new administrators appointed.**
- iv. THAT cost of the application be borne by the respondents.**
- v. Any other orders the honourable court may deem fit to grant and just to grant.**

[2] The application is premised upon the affidavit of SIRERE OLE KOIKAI, the grounds set out in the application and oral submissions on behalf of the applicant.

[3] Briefly, the applicant has argued that: - Annexure **SOK1** sets out the mode of distribution. They are particularly interested in the sub division of No. 348b. The seven beneficiaries were to get 1.6457 HA each. Annexure **SOK2a** shows that the subdivision but **SOK2b** show that Michael received 1.9 HA. **SOK2c** shows distribution. **SOK2b** shows parcel no. 1.94 HA in the name of Lucy Koikai. The administrators took more land than allocated which is contrary to the order of distribution by the court.

- [4] In response to the said Summons, the respondents filed replying affidavit sworn on 18<sup>th</sup> august 2021 by **Franco Naurori Koikai**.
- [5] The respondent's counsel Mr. Andama relied on the affidavit filed and submitted that there are two pending applications seeking similar orders. He urged the court to determine this aspect.
- [6] Mr. Andama went ahead to state that the counsel is not properly on record as he did not seek consent from previous advocate or applied to come on record.
- [7] On merit, Mr. Andama submitted that Ngenda Ranching Company has not received 100 acres. The transfers were not launched with the registrar. The intention was there but did not materialize.
- [8] On 3486, he submitted that all beneficiaries have received 1.94 HA except administrators. The applicant failed to cooperate and did not pay fees for sub division.
- [9] He argued that Veronicah renounced her right. The respondents did not supply evidence but given time they will supply. He argued that his clients have diligently administered the estate on equal shares.
- [10] In a rejoinder, Mr. Masikonde stated that Veronicah has not renounced her share. Nothing shows otherwise. No agreement whatsoever.
- [11] Mr. Masikonde submitted that Section 76 of LSA provides for revocation of grant on failure by administrators to proceed diligently with administration of the estate administrators cannot use their power contrary to the grant lest they should be violating their authority.
- [12] According to the applicants it was not indicated that roads would consume shares of some beneficiaries and not others. It must be evenly distributed. They sought change of the administrators.
- [13] The applicants denied the claim that veronica donated her portion as nothing shows she donated her land.
- [14] SOK3 is an executed transfer in favour of Ngenda Ranching Company for parcel no. 18671 which was subdivided from no. 181. 100 acres were given to the ranching company. All beneficiaries are affected. The ranching company is not a beneficiary of the estate. He urged the court to revoke the grant. He cited the case of estate of *M'ikiara Kangetu (Deceased) [2018] eKLR*
- [15] Discrimination in distribution is being seen here. Exhibited discrimination in distribution.
- [16] Documents for Ngenda Ranching Company were duly executed by an advocate and were presented for registration. See number has been indicated on the transfers which shows the land was sub divided.
- [17] Civil Procedure Order 9 Rule 9 is not applicable as S.76 LSA does not require counsel applying for revocation of grant to comply with order 9 rule of C.P.R.
- [18] The earlier application prayed for status quo of beneficial shares and not revocation of grant. It was made by another advocate in any case.
- [19] On 20/9/2021, this court directed that meanwhile, the transfer in favour of Ngenda Ranching Company shall not be registered as counsel for the respondent has stated that there is no further intention to register it.

#### **ANALYSIS AND DETERMINATION.**

[20] Upon careful consideration of the application and the rival submissions of the parties, I take the view that parties intend the court to determine:

**a) Whether Order 9 Rule 9 is applicable in this case.**

**b) Whether or not the grant herein should be revoked.**

#### **Of Order 9 Rule 9 of CPR**

[21] Order 9 Rule 9 provides as follows.

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—**

**(a) Upon an application with notice to all the parties; or**

**(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

[22] Rule 63 (1) of Probate and Administration Rules provides the provisions in the Civil Procedure Rules which apply to succession proceedings as follows:

**“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”**

[23] Order 9 Rule 9 of the Civil Procedure Rules is not one of the rules directly imported into and applies to succession cases. Nevertheless, order 9 rule 9 of the CPR serves a special and important purpose in litigation. But, care should be taken not to deny remedy or defeat the purpose of succession proceedings; preservation and distribution of the estate of the deceased; on account of non-adherence to the rule. The nature and objects of succession causes is that administration of the estate continues after confirmation until final accounts thereof are filed in court. Again, issues may arise during that process, which may require quick intervention by the court either on its own motion or on application by any or any interested party for orders or directions of, say, revocation of grant, and or preservation of the estate property. These special characteristics spins a succession proceeding and in its rotating motion, it is difficult to state when the proceeding has concluded for purposes of order 9 rule 9 of the CPR. All these are important considerations in dealing with application of order 9 rule 9 of CPR thereto. I will therefore hesitate to lay as a peremptory rule that failure to adhere to the said rule will deny a party or beneficiary remedy in a succession proceeding. I will therefore, determine the application on merit. The objection fails.

### **Revocation or annulment of grant**

[24] I wish not to re-invent the wheel. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

**76 Revocation or annulment of grant a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—**

***a. that the proceedings to obtain the grant were defective in substance;***

***b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—***

***i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***

***ii. To proceed diligently with the administration of the estate; or***

***iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***e. that the grant has become useless and inoperative through subsequent circumstances.***

[25] Under section 76 of the Law of Succession Act, revocation or annulment of grant may be *suo moto* by a court or on the application of any interested party. It is, however, worth noting that it is not every situation where transgressions or failings by the administrator, will lead to revocation of grant. The court still retains the power to make orders as are fit to meet the ends of justice. See the suggestion by **Muigai, J** in **Mary Wangari Kihika vs. John Gichuhi Kinuthia & 2 Others [2015] eKLR**, that in exercising its discretion the Court ought to take into account the effect of either revoking the grant or relieving all the administrators of their duties and where more injustice would be caused by such action to instead opt for an alternative that would ensure that the estate is properly administered.

[26] The applicants appear to anchor their case on the general ground that the administrators have failed to diligently administer the estate.

### **Attempts to give estate to stranger**

[27] The administrators conceded that they had intentions of transferring 100 acres to Ngenda Ranching Company. But, the intentions were not realized. Such action was clearly not in accordance with the law and the confirmed grant. It may also be a basis for personal or criminal liability of such belligerent administrator.

[28] This matter was initiated in 2012 and grant was issued on 21<sup>st</sup> September 2012 and confirmed on 6<sup>th</sup> June 2019. Since that time, beneficiaries of the estate have not been able to enjoy their fruits because the administrators think the land should be divided in a particular manner and not as per the confirmed grant. Any attempt to transfer land to parties who are not beneficiaries of the estate i.e. the ranching company is not only a violation of the law but assured way to earn you the wrath of the law; such would be self-inflicted pain. This seems to be the case here.

[29] From the material placed before the court, it is clear that the administrators have, for reasons best known to them, designed a formula for distribution of the estate which is contrary to the distribution ordered by the court.

[30] Nevertheless, despite the offensive nature of the actions, it will be prudent not to set the case on a backward mode or re-open the proceedings to the detriment of the beneficiaries.

[31] The intention of the law is to move the process of distribution of the estate forward rather than backwards, just as was observed by **Mutende, J in Eric John Mutemi & Another vs. Agnes Mumbanu Kinako [2016] eKLR** .

[32] Accordingly, such transgressions may be remedied by calling the administrators to order or removing some or all of the administrators and accordingly appointing others.

## **Roads**

[33] It is a requirement that every subdivision must provide access roads to all the subdivisions. The roads are curved out of the land being sub-divided. Therefore, the beneficiaries share the land after provision of the roads. Thus, it is wrong to suggest that access roads will be curved out of some of the beneficiaries' share and not others. The administrators herein violated their obligations in attempting to charge the land for access roads to the share of some only of the beneficiaries.

## **Renunciation of right to inheritance**

[34] Right to inheritance is provided in law. However, the Law of Succession Act is largely silent on instances where a beneficiary or dependant may choose to renounce the right. The law only touches on lapse, forfeiture of inheritance by the murderer of a testator or renunciation of executorship. *See* Section 23, 96 and 59 Law of Succession Act Cap 160 Laws of Kenya.

[35] In the absence of statutory provision, the subject of renunciation of right to inheritance has been left to jurisprudence and the discretion of the court.

[36] According to W. Musyoka, *Law of Succession*, Law Africa Publishing Ltd, Chapter 21, p.317 (2006), a beneficiary may effect a disclaimer by informing the personal representative of his intention to disclaim either orally or in writing.

[37] **Ang'awa J** in the Matter of the *Estate of Mariko Marumbi Kiuru (Deceased) Nairobi HCSC No. 201 of 1997* observed that under the Law of Succession Act, in intestacy, daughters are taken into account in the distribution of the estate unless they have issued a disclaimer to their right to inheritance.

[38] Further worthy jurisprudence; in the case of *Mary Wangari Kihika v John Gichuhi Kinuthia & 2 others [2015] eKLR* , **Muigai J** observed that in the absence of oral or documentary evidence from the Respondents to suggest renunciation of a person's right to inheritance from the deceased's estate the court can make a finding on a balance of probabilities that the Applicants are still entitled to inherit from the estate of the deceased.

[39] I will not stop there. Similarly, **Matheka J** noted that *Re Estate of Muthoni Kanyua (Deceased) [2018] eKLR*:

**“The fact of the matter is unmarried or married, that is neither here nor there. The only ground [for inequality] would be a renunciation of the right to inherit. And that applies equally to both the males and the female children.”**

[40] The above recapitulation of relevant jurisprudence justifies a conclusion that renunciation of right to inheritance is a serious matter of property right as the person gives up his or her share of the estate property. Accordingly, it should be declared voluntarily and unequivocally-orally or through formal document. It must not be procured through fraud, duress, coercion, threat or inducement of any kind or any other unlawful manner. Notable element in majority of the cases I have encountered is that renunciation of right to inheritance has been claimed to disinherit women. Thus, bringing loathsome patriarchy and traditional practices over rights of women to property, which is unfortunate, unlawful and unconstitutional tendency. I may even call it stealth suppression of or force upon right of women to inheritance. Any such kind of “renunciation of right” should be suppressed with the mighty force of the law; using the sledge hammer; article 27 of the Constitution which prohibits any form of discrimination, *inter alia*, on the basis of gender, sex or status.

[41] There is no evidence of renunciation of right to inheritance by the applicant which has been presented in court. In any event, renunciation of right to inheritance does not arise in this case as the applicant had already been identified as a beneficiary and given a share of the estate. Upon confirmation, the identifiable share belongs to the beneficiary and may deal with it as an owner would, say sell, charge or transfer etc. etc.

## **Mode of Distribution not in dispute**

[42] The sharing and distribution of the estate of the deceased was confirmed by this court on 6<sup>th</sup> June 2019. A certificate of confirmation was accordingly issued. The said mode of sharing and distribution of the deceased's estate to the respective beneficiaries by the court is not in dispute. The only issue is the breach of the mode of distribution by the administrators of the estate of the deceased. They have designed their own mode of distribution which is said to be tainted by an element of discrimination and introduction of strangers to the estate. They have therefore failed to administer the estate in accordance with the grant confirmed herein.

[43] Nevertheless, in the circumstances of this case, the court should be careful not to re-open proceedings- such action will only be a

source of delay and untold prolonged suffering to the beneficiaries. It must be avoided.

[44] The applicants have prayed for orders that the grant be revoked and new administrators appointed to finalize the administration of the estate.

[45] The office of the administrator of estate of a deceased person is an office which is built on the foundation of trust and goodwill. Breach of their position will invite court's intervention to ensure that justice is done to the beneficiaries and to protect the estate property.

[46] Evidence shows blatant flouting of the law and trampling of rights of beneficiaries. I also see incidents of exploitation of situation for individual gain, and attempts to disinherit the beneficiaries of the estate of the deceased.

[47] The court will draw upon section 47 of the Act and Rule 73 of the Probate and Administration Rules. The latter rule provides tapping of inherent power of the court as follows:

**“Nothing in this rule 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 court”.**

[48] The applicants have made out a good case for the removal of the administrator on account failure to diligently carry out and complete administration of the estate of the deceased in accordance with the grant as confirmed by the court.

[49] In the upshot, I make the following orders:

- i) The appointment of **Franco Naurori Koikai, Lucia Nantoti and Michael Koileken Koikai** as administrators of the estate is hereby revoked. They cease to be administrators of the estate and are not eligible for re-appointment in (ii) below.
- ii) Parties herein shall, within 14 days, each file names of two people for consideration for appointment as administrators of the estate of **Annah Nenchungei Koikai**. The court shall appoint two persons out of the beneficiaries or persons proposed hereinabove. Except, however, parties may agree by consent on the two persons to be appointed administrators. Upon such appointment, a grant and an amended certificate of confirmation of grant shall be issued to the two administrators.
- iii) For the avoidance of doubt, upon such appointment. the new administrators shall administer the estate of the deceased in the manner stated in the amended certificate of confirmation of grant herein.
- iv) In the meantime, there shall be no further execution of the certificate of confirmation herein except in accordance with (iii) above.
- v) Given the history of this matter, within 6 months of this order, the newly appointed administrator shall render the final account of the completed administration of the estate of the deceased.

[40] This being a succession cause and which involves family members, each of the parties should bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 26TH DAY OF OCTOBER, 2021**

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**F. GIKONYO M.**

**JUDGE**

**IN THE PRESENCE OF:**

**1. MASIKONDE FOR APPLICANTS**

**2. ANDAMA FOR RESPONDENTS**

**3. MR. KASASO – CA**

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**F. GIKONYO M.**

**JUDGE**