



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAROK
SUCCESSION CAUSE NO. 15 OF 2017
IN THE ESTATE OF LETOYA OLE LENJOKI.....DECEASED
PETER LOLCHOKI OLE LOLCHOKI.....PETITIONER
VERSUS
VERONICA SEIN LETOYA.....RESPONDENT/OBJECTOR
RULING

Introduction

The objector has filed this application in which she seeks revocation of the grant issued to the petitioner on the basis that the grant was obtained fraudulently and is defective. Additionally, she has claimed that the grant was obtained by concealment of material facts and other beneficiaries were excluded.

Counsel for the objector filed written submissions in support of the revocation

The revocation is opposed mainly on the basis the objector was not the wife of the deceased.

Counsel for the petitioner has also filed written submissions in opposition to the revocation.

The case for the objector

The objector testified as Pw 1. Her son, Francis Sankale Letoya (Pw 2) was the only witness called by the objector.

Pw 1 testified as follows. That her maiden name is Veronica Sein. When she got married, she took the names of the deceased. She also testified that she knows Peter Letola Lochoki (the petitioner) as the first born of the first wife of the deceased. Rachel Wangari Letoya was the first wife of the deceased with whom she stayed with on a ten care shamba. Rachel Wangari Letoya is also now deceased.

It was her evidence that each wife of the deceased was allocated a portion of the land to cultivate. Before the deceased married her, Pw 1 had her four children. When the deceased married her, he took care of these children and educated them. It was also her evidence that the deceased paid dowry to her parents. She then got two children with the deceased.

It was her further evidence that the deceased did not discriminate between her four children and the two children she got with the deceased. Pw 1 filed this objection, because when she went to the lands office she found the petitioner had obtained the title deed to the subject land. She was at that time keeping the original title deed in the name of the deceased, which the deceased had given her.

Furthermore, Pw 1 testified that the deceased died on 11th April 2001, while his first wife died in 2005.

She also testified that she wants a half of the subject land.

She further testified that the deceased married her in 1982. Before this she was married to one Njenga. She disagreed with Njenga and as a result, she returned to her parents' home; before she was married by the deceased. She had not divorced Njenga in court. She went on to testify that she went to the office of the DO Lelei over this dispute.

Pw 1 testified that she was sued in court by one Joram in Narok court.

It was also her evidence that she did not tell the panel of elders that she left Njenga in 1983. She told the panel that the deceased married her in 1982; after several years of staying at her home.

Pw 1 further testified that she was not married to Njenga formally in church or AG. She also testified that she does not know how long she had stayed with Njenga. She finally testified that the area chief wrote a letter recognizing her as the wife of the deceased.

Pw 1 called Sankale Letoya (Pw 2), who is her son as a witness. Pw 2 testified that he does not know his biological father. He got to know the deceased when his mother got married to the deceased (Letoya Ole Lenjuki). He also testified that the deceased educated him up to KMTC. The deceased had another family. In 1978 he was staying with his grandmother. He was born before his mother was married by Njenga. His mother has five children with the deceased. And he moved to the homestead of deceased in 1982.

Furthermore, he testified that he has an aunt called Wamuhu. Wamuhu leased land from the deceased. By the time they were going to the home of the deceased, Wamuhu had already leased the land of the deceased. He denied that his mother rented a house of the deceased.

The submissions of the objector.

Messrs Githui Advocates, counsel for the objector filed written submissions in support of the revocation. Counsel submitted that the objector filed this application for revocation after the petitioner filed eviction proceedings against the objector. It was the evidence of the objector that the deceased was a polygamist with her being the second wife. It is the submission of counsel that the issues for determination are as follows.

- 1) Whether the objector was married to the deceased.
- 2) Who are the dependants of the estate?
- 3) What is the mode of distribution?

In respect of issue No. 1, based on the evidence, counsel for the objector has submitted that the objector was married to the deceased; as a second wife. Before being married to the deceased, the objector had her own four children. She also had two children with the deceased. After the marriage she took the names of her deceased husband. The son also took his national identity card in the names of the deceased.

In respect of issue No. 2, counsel submitted that the objector has six children and herself being counted as one unit, making a total of seven dependants. All the dependants are entitled to inherit the estate of the deceased. Section 29 of the Law of Succession Act [Cap 60] Laws of Kenya, sets in hierarchical form as to who are the dependants. The wife or wives of the deceased rank first followed by the children.

In respect of issue No. 3, counsel submitted that the net estate of the deceased comprises of LR Narok/Cis-Mara Nairege Enkare/118, which measures 3 acres, plot No 278 and plot No 39 Kojonga.

The first house has three children and their mother is dead. The family of the objector has six children and objector is the seventh unit.

The estate ought to be shared among the two houses in the ratio of the number of children and adding each of the wives as an extra unit. By virtue of this formula, the objector's house will get 7/10 of the net estate; while the first house will get 3/10 of the net intestate estate. Counsel has therefore urged the court to uphold the objection.

The case for the petitioner

The petitioner is the son of the deceased. His mother was the late Rachel Wangari. It was his evidence that his late father leased land parcel No 118 to a lady called Wamuhu to till. Wamuhu requested to be allowed to build a house there to house her workers. She was allowed. She then brought her sister (the objector) to live with her. The objector was married to Njenga Kamwenje and they were staying at Elonkumeoi. Njenga is alive. The objector left the land and went to stay at Nairege Enkare town. Wamuhu left later. When the objector came to stay with Wamuhu she came with her six children.

Wamuhu destroyed the houses before she left. The objector was not married by the deceased. The deceased built rental houses on plot 118. The objector came and rented the houses that the deceased built. The objector was still there when the deceased died. When the petitioner went to the suit land, the sons of the objector became violent. The sons claimed that the objector was the wife of the deceased. The petitioner then reported the incident to chief Samuel Leposo Kodonyo. This chief called elders, family members and witnesses. The chief found that the objector was not the wife of the deceased and had no claim to the suit land. The chief then gave the petitioner a letter to enable him to file a petition. The chief later sided with the objector and allocated her part of the suit land. After the petitioner filed the petition, the objector filed an objection. The objector did not pursue the objection. The chief wrote a letter to the petitioner to confirm that the objector had a husband, which letter was put in evidence as exhibit DW-A.

After the succession cause ended, the petitioner went to the DO asking the DO to remove the objector; since he had obtained the grant. The DO called summoned all family members, the assistant chief and the chief. The matter was heard and it was resolved that the objector was not a beneficiary. A copy of the proceedings before the DO were then put in evidence as exhibit DW0 B.

In 2009 the son of the objector came to the suit land and cut 111 trees. The petitioner reported this matter to the chief and the police. He was charged in court. The petitioner then produced a copy of the proceedings as exhibit D Exhibit C. This is when the objector filed the instant objection. The petitioner had in the meantime filed a suit for her eviction.

The petitioner further testified that the objector is not his step mother and she had no child with the deceased.

While under cross examination, the petitioner testified that the chief wrote a letter that the deceased had one wife, which the petitioner used to file the petition. He also testified that the objector and Wamuhu quarrelled before they parted. Wamuhu was saying that the objector had stolen her money. He also testified that Francis Sankare Letoya is also called Francis wa Kibe Njenga. The petitioner also testified that he went to school with Francis wa Kibe Njenga.

The petitioner called Kairimo Punyua (Rw 1) as his witness. Rw 1 was like a nephew to the deceased and was his neighbour. He testified that the deceased had four children with his wife, whose names he could not recall. He also testified that the objector is not in any way related to the deceased. The objector had a husband whose name he could not recall. He also testified that the deceased did not have any children with the objector and that she was not the wife of the deceased. RW 1 did not know whether the objector was christened Letoya after being married. He also did not know that there was a case before the chief of Ntulele, between the objector and the children of Rachel Wangari Letoya.

While under cross examination, Rw 1 testified that in his affidavit which he adopted as his evidence in this court, he had stated that the objector was the wife of Njenga. He also testified that he was told that Njenga had 8 children. He finally testified that as part of the family of the deceased, he knew that the objector was not the wife of the deceased.

Finally, the petitioner called Gathuku Ole Kesei (Rw 2). Rw 2 testified as follows. He is a neighbour of the deceased. He knows his wife and children. The objector was not the wife of the deceased. He came to know her when the deceased moved to Kojonga from Nairege Enkare. Wamuhu, the sister of the objector leased the land of the deceased at Nairege Enkare. The deceased allowed Wamuhu to build a house for her workers on his land. Wamuhu then brought the objector onto her leased land. Wamuhu disagreed with the objector. As a result, the objector moved to Nairege Enkare. The deceased built houses in his rural home, which he rented to the objector. The deceased did not marry the objector.

Furthermore, the objector had her children and a husband called Njenga. The deceased never had any child with the objector. When the deceased died, the objector was living in the rented house of the deceased in the rural area. Later the objector claimed to be the wife of the deceased. The objector went to the office of the DO, after the court ruled that she should vacate the rental house of the deceased. RW 2 attended the case before the DO. All the elders who went to the office of the DO testified that the objector was not the wife of the deceased. The deceased told RW 2 that he had rented his house to the objector.

It was also his evidence that the objector was employed by her sister as her worker. The objector moved to Nairege Enkare after she disagreed with her sister, Wamuhu. He did not know that the chief wrote a letter that the objector was the wife of the deceased. RW 2 testified that the objector was married by Njenga and they lived as a husband and wife at Kojonga.

The submissions of the petitioner.

Counsel for the petitioner has submitted that Rule 44 (2) of the Probate and Administration Rules requires the affidavit in support of the revocation of the grant to be commissioned and to be signed by the deponent. The said affidavit has not been signed by the deponent and for that reason the application should be struck out on account of being defective.

Counsel has also identified the following to be the issues for determination. 1) whether the objector was the wife of the deceased. 2) Whether the petitioner obtained the grant fraudulently without the consent of the objector. 3) Who bears the costs of this application?

In respect of issue No. 1, based on the evidence, counsel submitted that the objector did not prove that she was married to the deceased under customary law, Christian or civil law. Counsel proceeded to submit as follows. She called no witness from the family to support her claim. Only her son (Pw 2) claimed to have recognized the deceased as his father. Based on section 66 of the Law of Succession Act, counsel for the petitioner submitted that those who are entitled to apply to administer the estate of one who has died intestate are the following. First, surviving spouse or spouses. Second, beneficiaries with priority according to their respective beneficial interest. The Public trustee and fourth the creditors. By virtue of this, counsel submitted that since the objector was not a wife, she was not entitled to apply for a grant of letters of administration. She similarly did not have the right to participate in the instant succession proceedings.

On the second issue, as to whether the petitioner obtained the grant fraudulently, counsel submitted that since the objector was not a wife; the petitioner did not commit any fraud by excluding her from participating in the process of applying for letters of administration of the estate.

On the issue of costs, counsel submitted that the objector should bear the costs of this objection as her application is not merited and is an abuse of the court process.

Counsel has therefore urged the court to dismiss the objection.

Issues for determination

I have considered the evidence of both parties and their submissions and the applicable law. I find the following to be the issues for determination.

- 1) Whether the objector was the wife of the deceased.
- 2) Whether the children of the second house are beneficiaries of the estate.
- 3) Who bears the costs of this application?

ISSUE 1.

It is important to point out that the objector, her son and the petitioner testified before Hon. Mr Justice Muchelule and only the petitioner's witnesses namely Kasirimo Ole Punyua (Rw 2) and Gathuku Ole Kesei (Rw 3 testified before me.)

The evidence of Pw 1 was that she was married by the deceased in 1982. Before this, she was the wife of one Njenga. She also testified that she had not divorced Njenga in court, before she was married by the deceased. She further testified that she had four children with Njenga. She further testified that she did not tell the panel that was resolving the dispute between her and Peter Letoya (the petitioner) that she left Njenga in 1983. She also testified in re-examination that Njenga had not formally married her in church or AG (civil marriage). She further testified that she did not know how long she stayed with Njenga. In other words, she did not know when she was married by the said Njenga. These pieces of evidence collectively clearly point to her as an incredible witness. I find that it is incredible for the objector not to remember how long she had stayed with the father of her four children. She did not bring evidence under which law she was married to the deceased. If it was customary law, which customary law? She did not call any witness to testify as how the dowry was paid and who received it from her family.

Furthermore, I further find that the objector initially filed objection proceedings and thereafter abandoned them. She only filed this objection after the petitioner filed eviction proceedings against her. Her evidence lacks a ring of truth. I therefore reject her evidence that she was married by the deceased.

The son of the objector, Pw 2 testified that he was born before his mother got married to the deceased. He testified that his mother had five children with Njenga; while his mother testified that she had four children. This is a material contradiction. I also find that the evidence of the objector's son is incredible. He merely repeated what her mother told the court. It is important to point out that the objector's son was in court when her mother was testifying.

I find the evidence of the petitioner and his witnesses to be cogent and credible. The petitioner testified that the objector was not married to his father. He further testified that Wamuhu, who was a sister to the objector employed the objector as a care taker of her property. Wamuhu disagreed with her after she stole her money. Additionally, the petitioner further testified that the objector lived as a tenant of his deceased father.

The evidence of the petitioner is supported in rich detail by that of Gathuku Ole Kesei (Rw 3), who was a neighbour to the deceased. Rw 3 also testified that the objector was the wife of Njenga. She was never the wife of the deceased. Rw 3 further testified that he is a Kikuyu, living among the Maasai.

I also found the evidence of Kasirimo Ole Punyua (Rw 2) to be credible. It supports that of the petitioner.

Furthermore, I find as credible that the dispute resolution of the issue between the petitioner and the objector before the DO found that the objector was not a beneficiary according to the petitioner's exhibit DW0 B. I also find that a similar dispute resolution between the same parties before the chief found that the objector was not a beneficiary.

In addition to the foregoing, I have also drawn an adverse inference from the fact the objector failed to call the chief who wrote a letter that she was the wife of the deceased.

I further find that the objector is not consistent for she abandoned the first objection which she had filed only to re-start the current one after eviction proceedings were filed against her by the petitioner.

On the totality of the evidence I find that the objector was not the wife of the deceased and that her children were sired and brought up by Njenga. They are not the children of the deceased and they are therefore not the beneficiaries of the estate of the deceased.

ISSUE 2

I have found that the objector was not the wife of the deceased and that her children are not the beneficiaries of the estate of the deceased.

ISSUE 3

Each party will bear its own costs.

Judgement signed, dated and delivered in open court at **Narok** this **27th day of May 2020** in the absence of both counsel vide their e-mail addresses and in the presence of the Court assistant, Mr. Kigotho

J M BWONWONG'A

Judge

27/05/2020