



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO. 70 OF 2018

IN THE MATTER OF THE ESTATE OF KALORI GITAKA LABORA ALIAS KARORI

NTETUKA ALIAS NDETUKA (DECEASED)

NASINKOI ENE NASIEKU.....APPLICANT

VERSUS

JEREMIAH KARORI NTETUKA.....1ST RESPONDENT

NELSON PARSALOI KARORI.....ND RESPONDENT

PATITIK KARORI.....3RD RESPONDENT

JUDGMENT

1. This is summons for Confirmation of Grant dated 22nd November 2019 and filed on 27th November 2019. The summons seeks confirmation for Grant of administration intestate for the estate of **Kalori Gitaka Labora alias Karori Ntetuka alias Karori Ndetuka**, who died intestate on 16th November 2006.

2. The deceased left behind 4 houses and the court issued a grant of administration of the estate to three administrators namely; **Jeremiah Karori Ntetuka alias Karori Ndetuka, Nelson Parsaloi Karori** and **Patitik Karori** on 21st June 2013. They have filed the summons for confirmation and proposed a mode of distribution of the deceased's estate and consent to the mode of distribution. The 2nd administrator and a few of the beneficiaries have opposed the proposed mode of distribution and filed an affidavit of protest sworn by the 2nd administrator, **Nelson Parsaloi Karori**, on 18th February 2020 and filed on 19th February 2020.

3. The protestors' contention is that the proposed mode of distribution includes persons who should not benefit from the deceased's estate. They attached a mutation showing sub-division of the only parcel of land forming the deceased's estate namely; **Kajiado/Kaputiei North/638** into three portions.

4. Joseph Siango Torinke, one of the beneficiaries of the estate, filed a replying affidavit to the protest. He contends that the mode of distribution proposed by the protestors omits children from the first house, thus disinherits two of the deceased's beneficiaries. The court ordered that the summons be disposed of by way of oral evidence.

5. **Nelson Parsaloi Karori**, the 2nd administrator and lead protestor, testified as **PW1** relying on his affidavits sworn on 18th February 2019 and 15th September 2020, that he was opposed to the mode of distribution proposed by the two administrators on how the deceased's estate should be distributed. He told the court that the estate should be distributed into three portions for three houses and not as the two administrators had proposed. He relied on the reasons contained in his affidavits. He was clear that he opposed the proposal that **Saitabao Ole Ntetuka**, a son of the deceased from the first house, should get a share of the estate. He argued that **Saitabao Ole Ntetuka** had been given land in the group ranch by the deceased during his life time and that is where he lives.

6. In cross-examination, he admitted that the deceased had four wives; that each widow had children who are children of the deceased and that the deceased's children have equal rights over their father's estate. He however told the court that **Saitabao** was given land by the deceased but he did not have evidence to prove his claim. He admitted that according to the consent filed in court on the mode of distribution, thirty three (33) beneficiaries had signed the consent except him and two other beneficiaries who are opposed to the mode of distribution.

7. **Joseph Siango Torinkei**, a grandson of the deceased, testified as **DW1** and told the court that the summons for confirmation of grant was filed after majority of the beneficiaries agreed on the mode of distribution of the deceased's estate. He urged the court to accept the mode of

distribution proposed by the two administrators.

8. In cross-examination, he told the court that he is grandson to the deceased, that the deceased's three houses reside on the parcel of land, **Kaputiei North/638**; that **Saitabao** lives on his parcel of land which he got from the ranch; and that he did not know who sub-divided parcel **No. 638** into three portions.

9. **Saitabao Karori** who testified as **DW2**, told the court that the estate belongs to his father; that the family had sat to discuss on the mode of distribution but three of the beneficiaries did not agree with the mode proposed. He testified that he never inherit any land from the deceased during his lifetime.

10. In cross-examination, he told the court that he does not live on the parcel of land left behind by the deceased; that he was an adult when the ranch was divided and that he got the parcel of land from the ranch and not from his late father because he was a member of the group ranch. He also told the court that his father was a member and got land from the same group ranch. He told the court that he is the only son from his mother's house.

Determination

11. I have considered the summons for confirmation of grant, the protest and the response. I have also considered the evidence adduced on behalf of the respective sides. The deceased died intestate and left behind only one parcel of land known as **Kajiado/Kaputiei North/638**, measuring approximately 154.8 hectares. The deceased was married to 4 wives and left behind several children and grandchildren of his deceased sons some of whom reside on the parcel of land left behind by the deceased.

12. The court issued a grant of administration intestate on 13th June 2013 at Machakos in this cause, formally Cause No. 555 of 2008. The cause was later transferred to this court and assigned the current number. Two administrators then filed the summons for confirmation and 33 beneficiaries agreed with the mode of distribution proposed by the two administrators and signed consent to that effect. That consent is attached to the affidavit in support of the summons for Confirmation of Grant.

13. A perusal of the consent on the mode of distribution, shows that 17 acres are to go to Nadupoi Ene Torinke and Joseph Siango who will hold in trust for the estate of Torunke Karori Ntetula, a deceased son of the deceased;

14. 17 acres to go to Saitabao Ole Ntetuka; 37 acres be registered in the names of Janet Shiroh and Daniel Koinet to hold in trust for Christine Nashipae Kailol, Ruth Tikuyiai Kailol; Mathew Kiranto Kailol; Esther Silantoi Kailol; Faith Lapot Kailol and Magdaline Yapaso Kailol.

15. Further distribution is as follows:

- 38.78 acres to Karori Ntetuka
- 36.78 acres to Amos Odupoi Karori
- 34.78 acres to Sirinkai Ole Karori
- 34.78 acres to Neweyai Ole Karori
- 34.78 acres to Evalyne Nation Maato and Ezekiel Torinke Matoto to hold on their own behalf and on behalf of Kelvin Munei Maato, Bernard Mopia Maato, Emily Namunyak Maato and Philip Suyianka Maato;
- 35.78 acres to Pititik Karori
- 34.78 acres to Regan Kikan Karori
- 10 acres to Nageli Karori Ntetuka
- 10 acres to Nchoonka Karori and
- 39.78 acres to Nelson Parsaloi Karori

16. As already adverted to, the consent is signed by all beneficiaries except Nchoonka Karori; Nelson Parsaloi Karori and Grace Simayiai Karori.

17. On the other hand, the protestor who relied on his affidavits in protest, argues that the estate should be shared out to only three houses and leave out the first house. It is argued that the house to be left out of the estate is that of the mother to Saitabao, the eldest widow who is deceased.

18. The protestor states in his further affidavit that Torinke Karori Ntetuke, a deceased brother and son of the deceased herein, was allocated land by the group ranch on which his children reside and should not get a share of the deceased's estate. According to the protestor, the mode of distribution he proposes takes into account the aspect of equality and fairness and should, therefore, be accepted by the court given that the deceased's family has lived harmoniously without any dispute since the deceased's demise.

19. There is no dispute that deceased left behind four houses each with children, a fact the protestor also acknowledges. He also admits that the deceased's children have an equal right to the deceased's estate. He argues, without evidence, that some of the children were given land by the deceased during his lifetime. What is however clear from the evidence adduced, is that those said to have been given land got the land as members of the group ranch and not from the deceased.

20. Section 42 of the Law of Succession Act provides that:

“Where -

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

21. The law is clear that where the deceased made a provision to a child, grandchild or house during his lifetime, that provision should be taken into account when distributing his intestate estate. Whether the deceased gave land to his other children during his lifetime is a question of fact to be proved by evidence and not speculation. The protestor opposes his step brothers getting a share of their father's estate on unsubstantiated claim that they were given land by the deceased during his lifetime. He was under duty to prove on a balance of probabilities that this was indeed the case. He has however not been able to do so.

22. All children of the deceased are entitled to a share of their deceased father's estate. No one should be excluded unless there is irrefutable evidence that the deceased had provided for them during his lifetime. Even then, the law is that that provision should be taken into account when distributing the estate but does not exclude the person from being considered for a share.

23. I have considered the summons for confirmation of grant and the evidence adduced. I have also perused the mode proposed by majority of the administrators. I am satisfied that the mode represents equity and that it takes into account all the children of the deceased in all the houses, unlike the protestor's mode which is exclusionist.

24. For the above reasons, the protest is declined and dismissed. Summons for confirmation of grant is allowed and the deceased's estate shall be distributed as proposed by the two administrators. No order as to costs.

25. Orders accordingly.

Dated, Signed and Delivered at Kajiado this 27th day of November, 2020.

E. C. MWITA

JUDGE