



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**SUCCESSION CAUSE NO. 9 OF 2018**

**IN THE ESTATE OF THE LATE LETUK OLENKOLIA**

**TALENGO NKOLIA.....APPLICANT/OBJECTOR**

**VERSUS**

**SAMUEL TAISWA OLOPARAKI.....1<sup>ST</sup> RESPONDENT**

**SIMON LEPARAKWO PARAKI.....2<sup>ND</sup> RESPONDENT**

**MICHAEL OLOINYEIYE PARAKI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The objector has applied for the revocation of the confirmed grant dated 6<sup>th</sup> March 2009 in favour of the first respondent and his mother on the basis that they did not disclose all the beneficiaries to the court in Kilgoris PM'S Court, Succession Cause No. 2 of 2008 and that that magisterial court lacked monetary jurisdiction to entertain and determine the succession cause.

2. The respondents have opposed the application on the basis that the objector is not a beneficiary.

**The case for the objector**

3. The objector called three witnesses including himself. The objector called Korinko Nkoliani (Pw 1), who is his cousin. Pw 1 testified that the deceased had two wives (two houses). In both houses there were six children. It was his evidence that the objector lived with his late mother on the subject suit land being land reference number Transmara/Meguara/56, which upon subdivision gave rise to land reference numbers Transmara/Meguara/173, 174 and 175. It was also his evidence that the objector planted cypress trees on the suit land, which are still there; but does not know when he planted them. Furthermore, Pw 1 testified that the objector does not own land at Oloborsoito. Pw 1 continued to testify that he did not know when the deceased died and that in the first house there were five children. The mother of the objector, the objector himself and four of his siblings moved out of Meguara to another location during the land demarcation.

4. Furthermore, the objector called Nkodedia Olenkoirieni (Pw 2), who is also his cousin. It was the evidence of Pw 2 that the objector lived with the deceased at Oltumaro and that during the dry season the objector used to move to Masurura area. It was also his evidence that the objector moved to Oloborsoito, where he bought land. In doing so he left behind his mother. He also testified that the children of the second house refused to sub-divide the suit land. Pw 2 continued to testify that the objector moved to his brother's place at Masurura. Finally, he testified that the objector planted trees and built a house at Meguara.

5. Talengo Olengoliai, the objector testified as Pw 3. He testified that he belonged to the first house of the deceased and was a resident of Oloborsoito. He planted eucalyptus (blue gums) trees and maize on the suit land at Meiguara in 1998, before emigrating to Masurura. He then moved from Masurura to his son's place at Nangwenyi. It was his evidence that he was not told by the mother of the first respondent that she had filed a succession cause at Kilgoris magistrate's court. It was also his evidence that he wants the suit land to be subdivided into two equal shares for their two houses. He continued to testify under cross examination that his late mother's house is still on the suit land. He also testified that he returned to the suit land to plant trees in 1980. Finally, the objector testified that he filed a suit against the respondents, among others, in respect of the same suit land in the Environment and Land Court at Kisii, being ELC Case NO 251 of 2013 and that he now lives on a one-acre parcel of land of his son at Oloborsoito.

**The case for the respondents.**

6. The respondents called four witnesses in support of their case. They called Kipteng Olenaponga (Dw 1). DW 1 testified that he is a resident of Meiguara and a neighbor to the deceased. It was of his evidence that he was a member of the adjudication committee. He testified that the mother of the third respondent was not registered as the owner of the suit land, because this would have gone against the Maasai

customs. As a result, her husband was instead registered as the owner of the suit land. The deceased used to live at Olororsoito before moving to Meiguara. It was his evidence that the mother of the objector of her free will permanently moved from Meiguara to Masurura with her children and heads of cattle. He also testified that the mother of the objector never returned to Meiguara. It was also his evidence that the objector did not plant trees at Meiguara. Finally, he testified that the mother of the objector did not built a house at Meiguara and that at one time the objector wanted a share of the suit land; as result it was resolved he was not entitled. Additionally, he was told not to come to Meiguara to take peoples' property. Finally, while under cross examination DW 1 testified that the suit land was not registered in the name of the mother of the 3<sup>rd</sup> respondent since her deceased husband was alive.

7. The respondents called Michael Oloinyeiye (DW 2). Dw 2 is the third respondent, who adopted his replying affidavit dated 28<sup>th</sup> August 2018 as his evidence. DW 2 deponed to the following major matters. He has averred that the subject suit land was allocated to his mother and the house of the objector were allocated land elsewhere. Additionally, they have been in occupation of the suit land, which now is registered in their names. He has further averred that upon the death of their deceased father, the suit land was transferred to their late mother as their late father held the same land in trust for their mother and her siblings. He has also averred that none in the house of the objector is seeking to have a share in the subject suit land, except the objector who is greed. He has also averred that the objector and the entire first house have their parcels of land elsewhere and that is why the area chief issued a letter enumerating only the children of our mother namely Kiramatisho En Ole Paraki as the only beneficiaries of the subject land, a matter that is well known in the village. DW 2 has further averred that no one in their second house is complaining and *"neither is anyone left out as we were in agreement as a family that the land be shared out in the manner we did and the applicant should pursue his greed without purporting to be fighting for my sisters who have no complaint."*

8. DW 2 also averred that the deceased did not leave behind any estate capable of being inherited and therefore the confirmed grant should be upheld by this court. He also has averred that the objector has not placed any material before the court to show that the monetary value of the suit land was in excess of Kshs. 100,000.

#### **Submissions of both counsel.**

9. Counsel for the objector Mr. Morintat submitted that the suit land was the property of the deceased and was therefore available for distribution; since it was registered in the name of the deceased. He also submitted that that there were six children in each of the two houses, who should have been listed as beneficiaries. Furthermore, counsel submitted that the mother of the third respondent and the first respondent secretly commenced and finalized the succession cause proceedings in Kilgoris PMCC Succession Cause No. 2 of 2018 and should therefore be revoked. He also cited a number of authorities. He therefore urged the court to subdivide the suit land equally between the two houses.

10. Counsel for the respondents Mr. O.M. Otieno also made written submissions. He submitted that this court does not have jurisdiction entertain and determine this matter by virtue of section 150 of the Land Act of 2012 and articles 162 and 165 of the 2010 Constitution of Kenya. He also cited a number of authorities.

#### **Issues for determination.**

11. I have considered the entire evidence, the submissions of both counsel and the applicable law. As a result, I find the following to be the issues for determination.

1. Whether or not this court has jurisdiction to entertain and determine this matter.
2. Whether or not Kirimatisho Enoloopalaki and Samuel Taiswa as the administrators of the estate of the deceased Letuk Olenkolia followed the Law of Succession in obtaining the confirmed grant.
3. Who bears the costs of this application?

#### **ISSUE 1.**

12. It is alleged that the two administrators fraudulently obtained a confirmed grant in respect of the suit land in Kilgoris PMCC Succession Cause No 2 of 2008 by failing to disclose all the names of the beneficiaries and by failing to disclose that the value of the estate was in excess of Kshs 100,000. I have considered both the evidence of the objector and his witnesses and that of the respondents in this regard. I find the evidence of the objector and his witnesses to be incredible for the following reasons. First, the objector (pw 3) testified that he does not have any land and that he lives on a one-acre land of his son at Olororsoito. In this regard, Nkodedia Olenkoirieni (PW 2) testified that the objector bought land at Olororsoito. I find this to be a material contradiction, which has not been explained. Second, the objector testified that he planted blue gums in the suit land. His own witness namely Korinko Nkoriani (Pw 1) contradicted him in testifying that the objector planted cypress trees in the suit land at Meiguara. This is another material contradiction. Furthermore, the objector contradicted himself in testifying that he planted blue gum trees in the suit land in 1998 and in the same vein testified that he planted them in 1980. He impressed me as witness who was not telling truth.

13. Furthermore, I find the evidence of the respondents to be consistent, cogent and credible. Kipteng Olenaponga (DW 1) testified that the mother of the respondents was not registered as the owner of the suit land because Maasai customs forbade that course of action. Finally, DW 1 testified that the objector had bought land at Olororsoito and Shartuk, which supports the evidence of Nkodedia Olenkoirieni (PW 2), who is the objector's witness. The evidence of DW 1 is that the deceased was holding the suit land in trust for the benefit of the respondents, which is supported by that of Michael Oloinyeiye (DW 2).

14. The objector in his evidence testified that he wants half share of the suit land for their house, which is the first house. The respondents through their evidence testified that the first house are not entitled to any share in the estate of the deceased. I find from their evidence that the deceased held the suit land on trust for the benefit of the respondents, who alone are the only beneficiaries of the estate. The deceased

being a trustee did not own any share of the property of the estate. In equity, the mother of the 3<sup>rd</sup> respondent became the owner of the suit land before and after the deceased was registered as a trustee. The maxim of equity that: “ *equity regards as done, that which ought to have been done,*” is clearly applicable in the instant application. In the instant application, the mother of the 3<sup>rd</sup> respondent ought to have been registered as the owner of the suit land, were it not for the maasai custom that forbade it. It therefore follows that the administrators were not duty bound to list the objector and all members of the first house as beneficiaries of the estate. It is true that they did not disclose to the court that their sisters were beneficiaries of the estate. DW 2 has explained by way of evidence that the failure to do so was because as a family they agreed to do it that way. Their intention was not to defraud any beneficiary. It therefore follows that this was an error on their part for failing to do so. It is a harmless error. This ground as a basis for revocation of the grant hereby fails and is hereby dismissed.

15. The objector also sought to have the grant revoked on the basis that the respondents as administrators failed to disclose to the court that the estate was in excess of Shs. 100,000. In this court the objector failed to produce a valuation report as a proof that the estate was in excess of Kshs 100,000. This ground as a basis for revoking the grant also fails and is hereby dismissed.

16. The upshot of the foregoing is that the matter before this court concerns the revocation of the confirmed grant and the mode of distribution of the estate of the deceased. The issue in dispute has nothing to do with the environment, use and occupation of the suit land. **Section 150 of the Land Act of 2012 and articles 162 and 165 of the 2010 Constitution are not applicable in the instant succession cause.** It therefore follows that this court has jurisdiction to determine the matter and has done so.

17. In view of the foregoing findings, it is clear that the administrators identified the beneficiaries in terms of section 38 of the Law of Succession Act (Cap 160) Laws of Kenya and proceeded to share and distribute the estate in terms of that section.

## **ISSUE 2.**

18. The administrators therefore followed the procedural requirements of the Law of Succession Act (Cap 160) Laws of Kenya in having the grant confirmed.

## **ISSUE 3**

19. As regards costs I make no order as to costs, since the parties are members of the same family.

20. The upshot of the foregoing is that the objection fails and is hereby dismissed with no order as to costs.

21. Ruling dated and signed at Narok this 29<sup>th</sup> day of January 2019 in the presence of Ms Nchoe holding brief for Mr. Morintat for the objector and in the absence of Mr. O. M. Otieno for the respondents but in the presence of the 3<sup>rd</sup> respondent.

**J M BWONWONGA**

**JUDGE**

**29/1/2019**