



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE 231 OF 2007

IN THE MATTER OF THE ESTATE OF SELENKIA OLE MPAPI (DECEASED)

LOISE SELENKIA.....OBJECTOR/APPLICANT

VERSUS

GRACE NANEU ANDREW.....1ST RESPONDENT

EMMANUEL MEMUSI.....2ND RESPONDENT

JUDGEMENT

PLEADINGS

The deceased died on 5th October 1999 as shown by the copy of death certificate attached.

On 6th February 2007, the Petitioners Grace Naneu Andrew and Emmanuel Memusi filed petition for letters of administration intestate for the deceased's estate.

The died intestate and left the following beneficiaries surviving him. They include;

- 1) Edwin Seruni
- 2) Christine Nairisha
- 3) Cicilia Neema
- 4) Jacinta Meyanik
- 5) Eugene Sankori
- 6) Jacob Ikoyo
- 7) Joseph Tikwa
- 8) Daniel Saitoti

The asset that comprises the deceased's estate is Land Title Number Loitoktok/Rombo' A' 86.

On 5th June 2008 the Objector Loise Selenkia filed Objection to making of grant on the following grounds;

a. The Petitioners are not wife/widow and brother of the deceased;

b. The Petitioners have no grant of representation and are not beneficiaries of the deceased's estate;

c. The Petitioners/Respondents filed the Petition and made false statements and concealed material facts;

The Objector/Applicant stated in her Supporting affidavit of Objection to making grant application of 5th June 2008; that she was married by deceased in 1987 under Masai customary law; they cohabited and lived as man and wife and formalized their marriage in 1996 at Rombo Catholic Church as shown by the copy of marriage certificate attached and letter from the said Church annexed as LS-2 (a) & LS-2 (b). They had 5 children namely;

1) Jacob Ikoyo Selenkia

2) Joseph Tikau Selenkia

3) Christine Nairisha Selenkia

4) Daniel Saitoti Selenkia

5) Sisilia Neema Selenkia

and lived in their matrimonial home until death of the deceased. She did not live with the 1st Petitioner as she lives at her father's land to date. Her father is called Andrew Samali.

The Objector stated that the 1st Petitioner was not married by the deceased, she did not live with the deceased, she did not attend and or participate at the deceased's funeral. The 1st Petitioner's 3 children are not the deceased's as the Petitioner obtained their birth certificates in 2006 long after the deceased died.

The Objector contended that the 2nd Petitioner was not brother to the deceased and had no blood relationship with the deceased and should not be Petitioner to the deceased's estate. According to her, the deceased had only 1 sibling a sister Sabina Mpapi who is married and lives in Tanzania.

The 2nd Petitioner is not brother to the deceased, as the deceased had only 1 sibling his sister who resides in Tanzania.

For the above reasons the Objector sought dismissal of the petition and grant issued to her.

The 1st Petitioner stated in her Replying affidavit filed on 30th June 2008 that the petition filed is valid and she was the 2nd wife/widow of the deceased and the 2nd Petitioner is related to the deceased, in that his father and the deceased's father were brothers.

The deceased's father died when the deceased was very young and he was brought up by the 2nd Petitioner's father. The deceased was given land by his adopted father; Memusi Ole Kisopia the suit property Loitoktok/Rombo A 86.

The 1st Petitioner deponed that she was married under Masai customary law by the deceased in 1990 and they had 3 children;

1) Edward Saruni

2) Jacinta Meyanik

3) Eugene Sankori

As shown by the birth certificates attached. They lived together at Bomani; the deceased herself and the 1st Petitioner each in their own house but in the same homestead. In 1996 they moved to the suit property Loitoktok/Rombo A 86. The deceased built the 1st house which they both shared with the Objector. There are attached photographs marked **GNN4** of 5th May 1996 depicting the same. The first photograph she was taken with the Objector in her bedroom; and **the second photograph at her** bedroom with the deceased and the third one the whole family of the deceased, both wives and all children.

Differences arose between the 1st Petitioner and the Objector and she moved back to her home in 1999 so that the deceased could build her home and the deceased died before he built a house for her. Her son attended the deceased's funeral as shown by photograph marked **GNN5**. The whole family and clan recognized her as wife/widow of the deceased following a meeting held on 8th November 2005 as per the minutes of the meeting marked **GNN6** attached to the affidavit of 30th June 2008.

The 1st Petitioner reiterated that the Objector/Applicant was not married in Church but just like herself she was married under Masai customary law. The certificate of marriage attached to her affidavit is not a marriage under the African Christian Marriage Act as the certificate does not show the same. It is a certificate of marriage of the Church Sacrament. The union was celebrated in the said church for the purpose of Holy Sacrament and not validity of marriage.

The 1st Petitioner attached Witness Statements to the affidavit of 30th June 2008 of the following witnesses to support her case;

a. Memusi Ole Kisopia

b. John Magelo Sarone

c. Emmanuel Memusi

On 19th September, 2008 the Objector/Applicant filed Supplementary Affidavit and deposed that the suit property Loitoktok/Rombo/A86 was given to the deceased by adoptive father Memusi Ole Kisopia was false and misleading. Instead the suit property was from the deceased's biological father at first registration. The deceased was not adopted by Memusi Ole Kisopia and instead he was brought up by his sister.

The Objector/Applicant challenged the paternity of the 1st Petitioner's children as not being from the deceased on the basis their birth certificates were presented after they were obtained after the deceased's death in 1999. They were dated as obtained in 2006.

The Objector attached to the said Supplementary Affidavit, Witness Affidavits of the following witnesses to fortify her case;

a. Thomas Otuma Memusi

b. Salaash Ole Liamisi

c. Daniel Panai Loishiro

PROCEEDINGS

According to the Court record, proceedings commenced in 2007 and was by various judges on various applications and hearing. Previous proceedings of 2009 -2010 and later 2010- 2015 were typed and copies availed to the parties and their respective Counsel. Between February -September 2015 the matter stalled

awaiting the typed proceedings and they were availed on 3rd November 2015. Messrs Solonka & Company Advocates and Messrs. Punja & Kagongona Advocates signed Consents on 27th May 2016 filed on 15th June 2016 that this Court delivers judgment based on evidence on record.

The hearing interpartes through viva voce evidence commenced before Hon. Justice Onyancha on 23rd February 2009 with testimony of the Objector PW1 Loise Selenkia who reiterated contents of her pleadings as per the original record. In a nutshell, her late husband was offered the suit property by the Group Ranch in Rombo and not from Memusi Ole Kisopia whom she knew as a neighbour and not the deceased's brother. She testified that the deceased had only a sister who lives in Tanzania.

The Objector stated that the 1st Petitioner was not married to the deceased and she did not live on their land /suit property. She was shown photographs and confirmed that the 1st Petitioner was a nurse and she visited their home but the photographs did not confirm her marriage to the deceased.

From typed proceedings, before Hon. Justice Nambuye PW2 Daniel Panai Loishoru relied on his witness Statement that the deceased was his age-mate and lived in his father's boma. He married Loise Solanka. He did not marry Grace Nanewu. He confirmed that the Petitioner was not married by the deceased despite being shown the photographs that showed Grace and Loise together, he said that the photographs did not confirm marriage. He also told the Court that Grace did not attend or participate in the deceased's funeral and she did not appear in any photographs.

PW3 Thomas Memusi based on his witness statement stated his father Memusi Ole Kisopia had 4 wives and 2nd Petitioner, his stepbrother is the son of his father's wife called Martha and not a brother to the deceased. He knew Loise as the only wife of the deceased. He did not know if his father and the deceased's father were brothers. If the deceased married Grace he would not know.

PW4 Salaash Ole Liamisi stated that he knew the deceased and recanted his Witness statement and stated that the deceased had 2 wives Loise Solanka and Grace Nanewu. The deceased lived with 2 wives in one house, then the 1st Petitioner left to live with her father waiting until the deceased built her house. They had 3 children with the deceased. He did not attend a clan meeting to discuss this matter. Loise had 5 children with the deceased and now had another child since the death of the deceased.

DW1 Memusi Kisopia stated he was brother to the deceased's father who pre deceased them. He brought up the deceased and he had been left land by his father and he gave the deceased 30 acres. The deceased married the 1st wife Loise and he paid dowry. Later, the deceased married Grace and the deceased took him to the 1st Petitioner's parents and they discussed the matter.

The deceased did not inherit any land from his father apart from the land he gave him 30 acres which is the suit property. The deceased died before he divided the said land among the wives. The witness later gave Grace 4 acres of the said land to cultivate and the 1st wife, Loise refused. They held a family meeting and Loise did not attend the meeting. Loise refused to the division of the land into 2 equal parcels of land. Then the matter was filed in court. He said that the children should be given a share of their father's land.

In cross-examination, he confirmed he paid dowry for the second wife 4 heads of cattle, 6 goats and Ksh 15,000/- to the family of the 1st Petitioner.

DW2 John Mogelo Olesarone stated and relied on his Witness Statement that the deceased was his brother, his father and the deceased's father were brothers. The deceased's mother remarried and lived in Tanzania. The deceased lived with them. His father DW1 Memusi Kisopia gave the deceased land. He built his house and married Loise under Masai customary law. At the time he was in Mombasa. His father informed him that the deceased married Grace and they paid dowry 8 goats, 8 heads of cattle and Ksh 15,000/- to the 1st Petitioner's family.

Problems arose when the deceased moved to the shamba with both Loise and Grace and they lived in one house. Grace moved back to her home awaiting the deceased to build her a home. The deceased died

thereafter before he built her house. During the funeral, Grace's children attended the funeral but Grace came much later.

After the funeral, the family held a meeting and decided that Grace should have part of the land to bring up the children of the deceased. They divided the land equally between the 2 widows, Grace begun to build her house and Loise demolished the same.

In cross examination, he confirmed he witnessed payment of dowry for Grace as the 2nd wife to the deceased, he took the money but he was not present when the 8 goats and 6 head of cattle were taken.

During the deceased's funeral, Grace attended the funeral although she was not in any of the photographs. As an elder of their clan, as eldest son of his father, he confirmed Grace as second widow of the deceased.

DW3 Grace Naneu Andrew testified before Hon. Justice L. Kimaru on 30th July 2014. She relied on her pleadings she stated that she was married as 2nd wife to the deceased in 1990 and they had 3 children. She presented birth certificates.

She knew Loise as 1st wife of the deceased and they lived together on the suit property Loitoktok/Rombo A 86 and attended the same church Rombo Catholic Church. They all moved to the land in 1993 and lived in the same house and differences arose, she left and went back to her parents home and lived there and waited for the deceased to build her home but before he did so, he died.

The 1st petitioner reiterated that she was married as dowry was paid to her parents. She does not know the exact amount, livestock or gifts brought as she was not supposed to be present during the discussions.

1st Petitioner objected that the Objector was married in church, she claimed the wedding ceremony was conducted to allow parties partake the Holy Communion and it was not a marriage under the African Christian Marriage Act (repealed)

Although she got her children's birth certificates 15 years after the deceased's death she did not have any other child after the deceased their father died. She explained it took long to get the certificates as it was difficult. She said all the children were born during the deceased's lifetime. She did not get any other child or children after the deceased died. However, the Objector has since the death of the deceased given birth to another child.

The 1st Petitioner stated that she was married by the deceased, they had 3 children, the clan and family of the deceased recognize her as 2nd widow of the deceased. The suit property Loitoktok/Rombo A 86 is family land given to the deceased by the clan and she is entitled to a share of the land so as to take care of her children.

SUBMISSIONS

Both Counsel filed written submissions on behalf of their clients. The petitioners filed on 19th January 2015 and the Objector on 31st October 2014.

The Objector relied on the following cases/authorities;

DOLLY WANJA NGITI VS IRENE GAKII SUCCESSION CAUSE 537 OF 2004 where the court held, the Petitioner failed to prove consent to marry by the alleged husband, negotiations and payment of dowry to constitute Kimeru customary law marriage. Photographs per se were held not to be proof of marriage.

IN THE MATTER OF ESTATE OF JAMES MBERI KENYATTA SUCCESSION CAUSE 2269 OF 1998; where the court held the fact that a party approached a witness to testify that the traditional ceremony took place means that it is possible that the ceremony did not take place.

NDELE OLE KIMITI VS MOTESIA OLE KORES CIVIL APPEAL 75 OF 1973; the court considered what constituted a Masai customary law marriage.

ISSUES

- 1. Is the 1st Petitioner Grace Nanew Andrew widow of the deceased Selenkia Ole Mpapi?**
- 2. Are the children of 1st Petitioner Grace Nanew Andrew, children of the deceased?**
- 3. Is the 2nd Petitioner Emanuel Memusi brother to the deceased and entitled to grant of representation of the deceased's estate?**
- 4. Who is entitled to benefit from the deceased's estate, who is to obtain a grant to the estate how is the distribution of the deceased's estate to be done?**

DETERMINATION

At the outset it is this Court's view that this matter ought to have been heard throughout by a single judge. However, it was not possible due to exigencies of duty. This Court has tried its best to collate all evidence from these proceedings and pleadings filed.

It is not in dispute or contested that the Objector Loise Selenkia was married under Masai Customary Law by the deceased Selenkia Ole Mpapi and they had 5 children. All witnesses by their statements and testimony agree to this fact.

The Objector stated that in 1996 they solemnized their marriage in Rombo Catholic Church as per the documents attached to her affidavit and the letter from the church dated 10th April 2007. The Objector objected that the 1st Petitioner was married to the deceased in a monogamous marriage under the African Christian Marriage Act (repealed) and in her view, they were both married under Masai Customary law.

This is the crux of the dispute pertaining to the deceased's estate. Section 3(5) of Law of Succession Act Cap 160 stipulates;

Notwithstanding provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman; nevertheless a wife for purposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

This issue was canvassed in **CIVIL APPEAL 313 OF 2001 PHYLLIS NJOKI KARANJA & 2 OTHERS VS ROSEMARY MUENI KARANJA & ANOTHER.**

This Court is bound to apply Law of Succession Act whose Preamble outlines its purpose that is to administer deceaseds' estates whose deaths were after 1981.

The Law of Succession Act recognizes a marriage under a system of law that permits polygamy even if the party contracted a monogamous marriage.

Therefore since marriage of the Objector to the deceased is not contested, she is recognized as wife of deceased whether under Masai customary law of church wedding or both; with regard to the 1st Petitioner, she must prove marriage to the deceased under a system of law that allows polygamy so as to be a beneficiary of the deceased's estate under **Section 3(5) of the Act.**

Was there a Masai customary marriage between the deceased Selenkia Ole Mpapi and Grace Nanew Andrew?

RESTATEMENT OF AFRICAN LAW OF MARRIAGE AND DIVORCE by Eugene Cotran on

Masai Customary marriage in Chapter 15 Page 155 outlines process of Masai Customary marriage as follows;

- 1) Formation of marriage: Marriage negotiations**
- 2) The standard procedure for negotiating the formation of marriage [under Masai Customary law] with different groups is as follows;**
- 3) Some begin negotiations when the parties are young, the boy identifies the girl and the boy's parents smear butter on her forehead (esirata)**
- 4) The Boys parents provide gift of honey to the girl's parents(esiret-enkoshoke)**
- 5) After the negotiations ceremony the amount of marriage consideration follows with payment of dowry in terms of livestock (isayieta) which consists of cattle goats and sheep and then non livestock gifts as agreed. The dowry maybe paid before or after the marriage.**

In the instant case, the evidence on record by DW1 and DW2 confirmed that the deceased paid dowry under Masai customary law and took to the parents of Grace Nane Andrew cattle, goats and Ksh 15,000/-. There was no evidence on record rebutting these facts.

For all intents and purposes the marriage under Masai customary law was confirmed. Under the said provision **Section 3 (5) of Law of Succession Act Cap 160** the 1st Petitioner is married under Masai Customary law.

The Objector contended that she was married under African Christian Marriage Act (repealed) but the documents produced from Rombo Catholic Church show that the certificate of marriage was not under the said law. Secondly, the church ceremony was in 1996 between the deceased and Objector. By this time the deceased had paid dowry for the 1st Petitioner in 1990. The church wedding conducted by Rombo Catholic Church allowed the marriage for the purpose of the parties accepting Holy Communion but this marriage did not negate the customary marriage by the deceased of the 1st Petitioner going by the provisions of Section 3(5) Law of Succession Act. Further even if it was a wedding under the African Christian Marriage Act (repealed) strangely if the deceased contracted a customary marriage which is potentially polygamous, for purposes of Succession, the party married under customary law and children would be beneficiaries of the estate.

With regard to the second issue; whether the children of the 1st Petitioner were children of the deceased;

The children of the 1st Petitioner were born during the lifetime of the deceased. There is evidence by PW4 on record that the children and 1st petitioner lived with the deceased and Objector from 1993-1999 together in one house on the suit property. When differences arose the 1st Petitioner went back to her home awaiting the deceased to build her house.

The Objector contested paternity of the children due to production of birth certificates dated 2006 while the deceased died in 1999. The parties would have to undergo DNA sibling testing for all the children born by 1st Petitioner and the Objector to confirm paternity. So in spite of the fact birth certificates were obtained 15 years later in 2006, in the absence of cogent evidence that the 3 children were not the deceased's and parties did not pursue DNA testing at the time; the fact of the deceased having lived with the second family and children at some time in his lifetime, this Court infers the deceased was their father in terms of the definition of the child under **Section 3 of the Succession Act Cap 160** as he provided voluntary parental responsibility over the children at the time he lived with them. Although the Objector contested this fact, the evidence of PW4 who recanted his written statement and stated he would speak the truth, evidence of DW1 confirms that the 1st Petitioner lived on the suit property and with the 3 children during the life of the deceased.

The third issue is whether the 2nd Petitioner is/was brother of the deceased. There is contested evidence,

by the Objector Loise Selenkia and PW 3 Thomas Otuma Memusi, the 2nd Petitioner is the son of Memusi Kisopia with his wife Martha. They are members of the same clan but not brothers and have no blood relationship.

The evidence of Memusi Ole Kisopia DW1 is that the deceased was his late brother's son and he brought him up and gave him land the suit property Loitoktok/Rombo A 86.

This confirms that the deceased was not brother to deceased as deponed in the Petition but a cousin at most. He was not the appropriate person to be appointed as administrator of deceased's estate as prescribed under **Section 66 of Law of Succession Act Cap 160**. He is not a beneficiary to the deceased's estate.

The application to petition for letters of administration intestate ought to in compliance with **Section 66 of law of Succession Act Cap 160** been filed by the 2 widows of the deceased jointly each representing their respective houses and including their children as beneficiaries of the deceased's estate. The Objector was listed only as beneficiary and not as Administrator yet as surviving spouse she ranked in priority. Secondly appointment of administrators was not conducted with written consents of all beneficiaries. Thirdly, if the Objector refused, she would have been served with the citation and the issue of appointment administrators of the estate resolved first. Therefore, to that extent the Objector's objection to making a grant is upheld.

With regard to distribution of the estate of the deceased this Court considered the following;

Although the Objector is first wife of the deceased, the evidence of Objector, PW2 and PW3 was that the deceased married only the Objector and the 1st Petitioner was not married and she did not have the deceased's children. On the other hand, the evidence of PW4, DWI & DWII who recanted his witness statement, confirmed the 1st Petitioner as wife/widow of the deceased and that she lived with the deceased and Objector in the same house on the suit property before differences arose between the Objector and 1st Petitioner and she left to her parents home.

There are photographs of the Objector and 1st Petitioner together and with their children and the deceased in their homestead produced in court that suggests they were friends and lived together and it is reasonable to infer the Objector knew the 1st Petitioner as co-wife.

The family members and clan seemed to recognize the 1st Petitioner as 2nd wife/widow of the deceased. They did not contest that the Objector is first wife of the deceased and her children are the deceased's.

From the totality of the evidence on record this Court finds that under **Section 3(5) of Law of Succession Act** the 1st Petitioner is 2nd wife/widow of the deceased and therefore entitled to a share of the deceased's estate.

Since the deceased was polygamous the distribution of the estate is provided by **Section 40 of Law of Succession Act**, not equal but equitable distribution as per the Units. The 1st wife was married from 1987 and the 2nd wife from 1990. The 1st wife has 5 children and the 2nd wife 3 children of the deceased as provided by **Section 3(2) of Law Of succession Act Cap 160**. These are pertinent factors to distribution of the deceased's estate.

This matter has been in Court for 10 years since 2007 and therefore determination of the same is imminent.

DISPOSITION

- 1. The Objection to making grant of 5th June 2008 is upheld to the extent the Objector 1st wife/widow of Objector was left out as Co administrator of the deceased's estate.**
- 2. A grant shall be issued in the names of the 2 widows of the deceased namely; Loise Selenkia**

and Grace Nanew Andrew.

3. The suit property Loitoktok/Rombo/A86 shall be distributed as follows;

a) The 1st family of the deceased-Objector/widow and 5 children shall have 2/3 of the land estimated at 20 acres

b) The 2nd family of the deceased 1st Petitioner and 3 children shall have 1/3 of the land estimated at 10 acres.

4. The administrators shall file summons for confirmation of grant with the above distribution of the suit property.

5. Any aggrieved party may apply or exercise right to appeal.

6. Each party to bear own costs.

DELIVERED DATED & SIGNED IN OPEN COURT ON 27TH FEBRUARY 2017

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

No Appearance