REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 3759 OF 2004

IN THE MATTER OF THE ESTATE OF SANTAYIA NTUTU(DECEASED)

JUDGMENT

1. The deceased herein died on 23rd April 2001.

2. Representation to his estate was sought in a petition lodged in the cause in Narok SRMSC No. 9 of 2002, by Leseyio ole Ntutu, in his alleged capacity as a son of the deceased. The deceased was said to have been survived by a widow and four sons, being Nareyio Ntutu, Leseyio ole Ntutu, Kanoni ole Ntutu, Kuntai ole Ntutu and Talelo ole Ntutu. He allegedly died possessed of a property known as Cis-Mara/Lemek/727. A grant of letters of administration intestate was made to the petitioner on 9th September 2002.

3. The application for determination is the Summons for Revocation of Grant dated 14th December 2004, premised on Sections 27, 28, 29, 47, 48, 52 and 76 of the Law of Succession Act, Cap 160, Laws of Kenya. It is brought at the instance of Sapei ole Ntutu. He swore an affidavit on 14th December 2004.

4. The administrator applicant swore an affidavit on 26th October 2006 in response to the application. He avers that he had disclosed all the persons entitled to a share in the deceased's estate, adding that the applicant has even been given his share of the land. He asserts that he did not seek representation in secrecy and that the applicant was at all times aware of the process. He further states that the subdivision of the land was done in good faith. He states that the applicant had no beneficial interest in Cis-Mara/Lemek/727 as he had already been given his own land, being Mara/Ololunga/5051 which measures 42.09 hectares. He states that the application for revocation was not being made in good faith.

5. Further affidavits were sworn on 30th October 2008 by Yiale ole Ntutu, Talelo ole Ntutu and Tema ole Watoni. Yiale ole Ntutu avers to be the eldest member and head of the Santaiya Ntutu family. He says that the deceased was his uncle as he had been a brother of his father. He claims to have chaired the meeting where the distribution of the estate of the deceased was discussed. He identifies the sons of the deceased as including Leseiyio ole Ntutu, Sapei ole Ntutu, Leteila ole Ntutu, Leteila ole Ntutu, Talelo ole Ntutu and Kanoni ole Ntutu; and says that they were all at the meeting. It was agreed at the alleged meeting that Sapei ole Ntutu would retain the parcel of land in the Masantare Group Ranch which was the deceased's share and which the deceased had given him and had it registered in his name. Leteila ole Ntutu was to get the share given to him by the deceased in the Lemek Group Ranch, which belonged to the deceased but he caused it to be registered in Leteila ole Ntutu's name. Leseiyio, Talelo, Kanoni and Kuntai were left to share Cis-Mara/Lemek/727. As Leseiyio was managing Cis-Mara/Lemek/727, he was mandated to apply to the authorities for the subdivision of the land so that each of them gets their shares. All those in attendance were said to have been in full agreement. It is his case that Sapei ole Ntutu and

Leteila ole Ntutu were not entitled to a share in Cis-Mara/Lemek/727 for they had got their share from the deceased's estate from elsewhere.

6. On his part, Talelo ole Ntutu says that he is a son of the deceased. He confirms the alleged meeting that Yiale refers to. The purpose of the meeting was to discuss distribution of the estate. He confirms the distribution that Yiale has averred in his affidavit. Tema ole Watoni states that he was a committee member of the Masantare Group Ranch, where the deceased was a member. He avers that at the registration of members of the group, which subsequently led to the issuance of the land titles, the deceased had caused the registration of his son Sapei ole Ntutu to take his own share in the group. He asserts that it was on that basis that Sapei ole Ntutu got registered as the proprietor of Cis-Mara/Ololunga/5051. He further asserts that piece of land was the deceased's share in the Masantare Group Ranch.

7. To these affidavits Sapei ole Ntutu and Leteila ole Ntutu responded through affidavits that they swore separately on 23rd March 2009. Sapei ole Ntutu denies receiving land from the Masantare Group Ranch, being his father's share therein, as the deceased was himself not a member of the said group ranch. He asserts that it was he who was a member of the group, and that he got the land in his capacity as such. He concedes that the family held a meeting to discuss distribution of the deceased's estate, but he denies that it was unanimously agreed that he and Leteila ole Ntutu would not get a share in Cis-Mara/Lemek/727. He also alleges that there was no agreement that Leiseyo ole Ntutu would manage the estate. He asserts that at the meeting it was agreed all the children would get an equal share in Cis-Mara/Lemek/727. He states that the administrator did not disclose at the meeting that they had been granted representation to the estate. He denies that Yiaile ole Ntutu was his cousin, saying that he was a clansman. He asserts that the administrator had misled the court into granting him representation by stating that the parties had consented to his obtaining the grant. He has attached an extract from the register of members under the Land (Group Representatives) Act, which does not disclose the name of the group ranch. He has also attached handwritten minutes of a meeting allegedly held on 7th May 2004.

8. The affidavit sworn by Leteila ole Ntutu conforms in material particulars with the contents of the affidavit of Sapei ole Ntutu, which is recited above.

9. There is on record the joint affidavit of Kolesh Olepere and Raita ole Naibor sworn on 29th June 2011. They aver to have been officials of the Masantare Group Ranch. They confirm that Sapei ole Ntutu was a member of the group, but the deceased was not. There is also the affidavit of Rafael Pariken sworn on 29th June 2011. He avers to be the Secretary of the Lemek Group Ranch, and confirms that Leteila ole Ntutu is a member of the group. He confirms that the deceased was not a registered member of the group.

10. The hearing commenced on 29th June 2011. Four witnesses – Sapei ole Ntutu, Leteila ole Ntutu, Emmanuel Longisa Ntutu, Raphael Patit Rariken and Kolesh Olepere - testified for the applicant. Four witnesses – Oleseiya ole Ntutu, Yiale ole Ntutu, Tema ole Watoni and Talelo ole Ntutu - testified for the administrator. Their oral testimonies mirrored the contents of the affidavits they had sworn in support of the various sides of the dispute. Records from the ranch groups were produced, and it was confirmed that the deceased was a member of the Lemek Group Ranch with one of his sons. It was stated that the members were not allowed to have their share of the land allocated to someone else.

11. At the conclusion of the oral hearing, the parties were directed to file written submissions. Both sides complied with the directions. The applicant's submissions are dated 5th March 2015 and were filed in court on 24th March 2015. The respondents filed two sets of written submissions, dated 16th June 2015 and 3rd July 2015, respectively.

12. I have carefully gone through the record in Narok SRMSC No. 9 of 2002, as well as in this cause. It is common ground that not all the survivors of the deceased were disclosed in the application for grant of representation. Put differently, not all the survivors of the deceased were involved in the process. The deceased died a polygamist, yet the administrator only listed one side of the family in the schedule of survivors. Even the side of the family that was involved in the proceedings was not disclosed in full.

13. What ought to be contained in the application for grant of letters of administration intestate is stated in Section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules. Section 51(2)(g) states as follows: -

> *'An application shall include information as to – in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.'*

Rule 7(1)(e) states as follows: -

> *'…the application shall be by petition…supported by an affidavit…containing…the following particulars – in cases of total or partial intestacy (i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act.'*

14. These provisions are in mandatory terms. There must be a full disclosure of all the survivors of the deceased as set out in the two provisions, whether or not the said survivors were to take a share in the assets that the deceased died possessed of. The issue as to who is entitled, from amongst the survivors, to a share in the estate is a matter for determination at the confirmation of the grant. All the categories of survivors set out in Section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules must be disclosed. Failure to disclose would be fatal to the grant.

15. Then there is also Rule 7(7) of the Probate and Administration Rules, which states as follows:-

> *'Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant representation intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –*
>
> *a. renounced his right generally to apply for a grant; or*
>
> *b. consented in writing to the making of the grant to the applicant, or*
>
> *c. been issued with a citation calling upon him either to renounce such right or to apply for a grant.'*

16. Section 66 sets out the preference to be given to certain persons to administer where the deceased died intestate. The provisions states as follows –

> *'When the deceased has died intestate, the court shall...have a final discretion as to the person or persons to whom a grant of letters of administration shall...be made, but shall...accept as a general guide the following order of preference –*
>
> *a. Surviving spouse or spouses, with or without association of other beneficiaries;*
>
> *b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
>
> *c. …'*

17. By virtue of section 66, the surviving spouse of the deceased takes priority over every other survivor. The surviving spouse is followed in the order of priority by the surviving children of the deceased.

18. In the instant case, the deceased was a polygamist. There is evidence that he was survived by spouses

and children. Such spouse or spouses had, by virtue of Section 66, priority over the children of the deceased, including the administrator. A child applying for administration alone without the surviving spouse must comply with Rule 7(7) of the Probate and Administration Rules. None of the surviving children has a prior right over the other child. They are said to have equal right to administration, and therefore any child applying singly for administration ought to comply with Rule 7(7) of the Probate and Administration Rules. I have gone through the record and am satisfied that Rule 7(7) of the Probate and Administration Rules was not complied with.

19. The application I am called upon to decide is for revocation of the grant made in Narok SRMSC No. 9 of 2002. The jurisdiction to revoke a grant of representation is given by section 76 of the Law of Succession Act. The said provision states:-

> *'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. …'*

20. The facts presented indicate that certain persons were not disclosed in the petition as having survived the deceased. therefore there was concealment from court of material facts. It could also be said that there was reliance on an untrue allegation. The facts also reveal that Section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules were not complied with. That would mean that the proceedings in which the grant was made were defective..

21. I am satisfied beyond peradventure that the applicant has proved his case. I have no option but to allow the application dated 14th December 2004. The grant made on 9th September 2002 in Narok SRMSC No. 9 of 2002 is hereby revoked. The court file in Narok SRMSC No. 9 of 2002 shall be returned to the registry at the Narok law courts for the court there to appoint fresh administrators in a process that fully complies with the relevant law and procedure. The applicant shall have costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 10TH DAY OF JUNE, 2016.

W MUSYOKA

JUDGE