



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 813 OF 2009

IN THE MATTER OF THE ESTATE OF KULIENTA NASHERO OLE KOPAI (DECEASED)

P OLE K K.....APPLICANT/ADMINISTRATOR

VERSUS

D M OLE K.....1ST RESPONDENT/ADMINISTRATOR

O OLE K.....2ND RESPONDENT/ADMINISTRATOR

JUDGMENT

1. The deceased K N Ole K died intestate on 7th October 1982. He had married three wives who were N E K, K E K and N E K. They are deceased. He left five sons as follows:-

- a. D M Ole K (1st respondent/administrator) born of N E Ku but adopted by N E K who had no biological child;
- b. the applicant/administrator P P Ole K born of N E K;
- c. the deceased L Ole K born of N E K;
- d. O Ole K (2nd respondent/administrator) born of K E K; and
- e. L Ole K born of K E K.

2. On 27th July 2009 a grant of letters of administration intestate was issued to the applicant and respondents jointly. The grant was confirmed on 26th May 2010. The 1st respondent was to get 1/3 of the estate; the 2nd respondent and L Ole K were to jointly share 1/3 of the estate; and the applicant and L Ole K were to share the remaining 1/3 of the estate. Because L Ole K died his name was substituted with his widow S E L. There is no dispute that before the confirmation of the grant, all the sons of the deceased entered into agreement on 20th June 2008 in which they sold 200 acres of the estate to James Kioi Muhuri for Kshs.6,295,250/= which was paid and they shared the proceeds. The deceased had left LR Kajiado/[particulars withheld] measuring [particulars withheld] hectares as his only estate. After the sale what was left was [particulars withheld] acres. This is what the sons were sharing.

3. The applicant filed the present application dated 5th April 2012 seeking the rectification of the certificate of confirmation, although what he was seeking was to challenge the distribution of the estate. He was asking that the estate be shared afresh so that each son gets an equal share in the [particulars withheld] acres. There is no dispute that the grant was confirmed on the basis of a consent signed and filed by all the sons on the mode of distribution. The applicant's case was that he had not wilfully consented to the mode of distribution. He stated that as a result of the distribution he had come out with a smaller allocation of the estate. The respondents' response was that the distribution and confirmation followed an agreement that each party signed; and that each party, including the applicant, was present in court during the confirmation; and that each party had confirmed the agreement.

4. The applicant was represented by Ms Omungala and the respondents by Mr Ndegwa. Each side filed written submissions which the court has considered.

5. The applicant and the respondents were the joint administrators of the estate of the deceased. The joint administration had been agreed upon by them and by the deceased Le Ole K and L Ole K in a consent document filed on 7th April 2009. On 5th March 2010 the applicant and the respondents filed an application for the confirmation of the grant that had been issued to them on 29th July 2009. In the joint affidavit that they swore in support of the application they identified the beneficiaries as themselves and L Ole K and L Ole K. They identified the estate to be LR Kajiado/[particulars withheld] which they agreed to share as follows:

a. 1st respondent..... 1/3

b. 2nd respondent and L Ole K.....1/3; and

c. the applicant and L Ole K1/3

All the five brothers went before Justice Nambuye (as she then was) on 26th May 2010 for the confirmation of the grant. Each was asked and he confirmed the distribution. Each had an identity card whose number was recorded. The grant was thus confirmed. The applicant now states:

“13. THAT I will maintain that I did not with full information, wilfully consent to the distribution as much as I could have been present in court at the time confirmation of grant was taking place.”

He wants that each son should get equal share. His counsel relied on **section 35(5)** as the **Law of Succession Act (Cap 160)** and the decisions **In Re The Estate of T.K.G. (deceased) [2004]eKLR** and **In Re Estate of John Musambayi Katumanga (Deceased) [2014]eKLR**. It should be noted that the applicant is a literate man. He can read and write. When he testified on 23rd June 2014 before Judge Kimaru he stated that he was a Revenue Officer. He was cross- examined to state as follows:-

“Grant was issued on 27th July 2009. We prepared the application for confirmation of grant. I was in court. I did not raise objection in court.....”

He then went on to say that he later on found that he had been cheated; otherwise he was entitled to equal share in the whole piece of land.

6. A decision based on the consent of the parties is binding to each one of them, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement (**Chanel Ltd .v. F.W. Woolworth and Co. Ltd [1981] 1WLR 185 at 189; Brooke Bond Liebig Ltd .v. Mallya [1975]EA 266, 269; Flora Wasike .v. Wamboko [1988] KLR 429**). In **Kasmir Wesonga Ongoma and Another .v. Ismael Otoicho Wanga, Civil Appeal No. 25 of 1986 ([1987]KLR 159)** the Court of Appeal observed that the purpose of a consent judgment is for the parties to inform the court that they

have compromised all their differences in a manner suitable to themselves without asking the court to make any further decision. The principle is that the parties know best how to conduct their own affairs, and that by entering into the consent judgment they have entered into a contractual agreement to compromise their differences to their satisfaction.

7. I have looked at the history of this family dispute, and considered the various times the parties were before elders and clan to resolve the same. I have come to the firm conclusion that the applicant was alive to all the issues relating to the distribution of the estate when he, together with the respondents, applied to have the grant confirmed. He, together with the respondents, proposed the mode of distribution and went to court to support it. He cannot be allowed to resile from that which he had agreed upon. These are the reasons why I dismiss the application dated 5th April 2012 with costs.

DATED and DELIVERED this 22nd day of **September 2015**.

A.O. MUCHELULE

JUDGE