



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 2 OF 2010

IN THE MATTER OF THE ESTATE OF ANNAH HENCHUNGEI KOIKAI (DECEASED)

FRANCO NAURORI KOIKAI.....1ST APPLICANT
LUCIA NANTOTI KOIKAI.....2ND APPLICANT
JOHN PURKO KOIKAI.....3RD APPLICANT
MICHAEL KOILEKEN KOIKAI.....4TH APPLICANT
VERONICA NASEI PARMUAT.....5TH APPLICANT
CATHERINE SOPIATO KOONYO.....6TH APPLICANT

VERSUS

SIRERE OLE KOIKAI.....PETITIONER/RESPONDENT

RULING

Annah MENCHUNGEI Koikai died intestate on 7/10/2005. Grant of letters of administration were issued to Sirere Ole Koikai on 9/3/2010. Sirere Ole Koikai had petitioned the court for letters of administration as the sole surviving heir of the deceased. By an application dated 2/11/2010 the applicants namely; Franco Naurori Koikai, Lucia Nantoti Koikai, John Purko Koikai, Michael Koileken Koikai, Veronica Nasei Parmuat and Catherine Sopiato Koonyo filed a summons for revocation of grant under **Sections 47 and 76**. The applicants sought the following orders:-

- (i) That pending the hearing of this application, this honourable court be pleased to issue an order of prohibition to prohibit any dealings in respect of parcel No. CIS MARA/OLOLULUNGA/74.***
- (ii) That pending the hearing and determination of this application, this honourable court be pleased to issue an order restraining the respondent from leasing out, cultivating, subdividing, selling or howsoever dealing with parcel Nos. CIS MARA/OLOLULUNGA/74, 181 and 3486.***
- (iii) That the grant of letters of administration made to SIRERE OLE KOIKAI made on 9th March 2010 be revoked.***
- (iv) That upon the grant of prayer (ii) above, this honourable court be pleased to make an order reversing the transfer of parcel No. CIS MARA/OLOLULUNGA/74 to the petitioner and to order that the same does revert back to the deceased's name for purposes of appropriate distribution to the beneficiaries.***

The grounds upon which the applicants rely are found on the face of the application and the supporting affidavits of Franco Naurori Koikai. It is the applicants' case that the grant was obtained fraudulently by the respondent making false statements and concealing material facts that in fact, there are other 6

beneficiaries of the deceased's estate. They exhibited the Chief's letter (FNK2) which lists the names of the deceased's beneficiaries. It was deponed that the respondent secretly petitioned for grant of letters of administration and it was discovered when the family agreed that three of them petition the court as administrators. They found that the respondent had commenced subdivision of parcels of the land forming part of the deceased's estate and had transferred some land to himself (FNK7 a & b) a certificate of search in relation to CIS MARA/OLOLULUNGA/74 which had now changed to the respondent's name was exhibited. It was also deponed that the respondent has been leasing out the deceased's land CIS MARA/OLOLULUNGA/181 and 3486 and that is why the other beneficiaries request that the court prohibit any dealings with the land until this matter is concluded.

Mr. Kurgat, counsel for the applicants urged that the prayer for revocation was not contested but the cancellation of title, prayer 5, was. He urged that though the respondent claims that the land was transferred to him in 1992 and exhibited copies of application for consent and consent of the Land control Board, a copy of the transfer was not exhibited. In any event the transfer was effected in 2010 after this case was filed. It was also submitted that since the property was given as a gift *inter vivos*, it was an incomplete gift since it was not performed at death, it had to be subject to distribution. Counsel relied on **HALSBURYS LAWS OF ENGLAND VOL. 48 pg 396 Para 755**, which states that for a gift to be valid, it has to be done during the lifetime. He urged the court to order the land to revert back to the estate for distribution. Counsel also relied on the case of **RE ESTATE OF WANGUI MUIRURI Succession Cause No. 794/1990** where the court made a similar order. Counsel was of the view that the respondent will not suffer any prejudice if indeed the deceased had given the land to him. It can still be given to him on distribution. Counsel dismissed the allegation that elders distributed the land because upon death of the owner, the land could only be done by this court.

The application was opposed only as regards prayer 5 that seeks cancellation of the title and the land reverting back to the deceased's estate. According to the respondent, he was mandated by elders to act as the heir of the deceased. He exhibited the minutes of the meeting dated 30/1/2010 (9SOK1) and that the applicants were present at the meeting and that the Chief's letter of 16/10/09 was issued in the presence of John Purko Koikai and the others were William Koikai, in a meeting that 1st, 2nd, 4th and 6th applicants attended. He deponed that the other applicants had been given their share of inheritance in accordance with Masai customary law, and since he was the youngest son he had to inherit all his late mother's estate. He denied ever transferring Plot 74 in his name as a result of the letters of administration but that he had been given the transfer forms in 1992 but they had been misplaced and only found later. He deponed that he had been in possession of Plot 3486 till 1996 when the 4th applicant evicted him but that he still has Plot 3486 in his mother's name. At paragraph 22 of his affidavit, he set out how the father distributed his property in the 1970s. The 3rd applicant disassociated himself from the applicants and swore an affidavit dated 15/11/2010 in which he deponed that their mother distributed her assets to all of them and they have no claim to Plots 74, 181 and 3486.

Mr. Ogolla, counsel for the respondent urged that mere inclusion of the parcel number in this petition does not make it part of the deceased's estate. He relied on the consent dated 29/7/92, letter of consent and Land Control Board consent for transfer and urged that the gift was completed in 2010 upon transfer. Counsel argued that this court can only reverse a transfer if it was made pursuant to a grant. He urged that it was not a transmission from the confirmed grant and the transfer can only be challenged by filing a suit for protection of the assets of the estate. The respondent urged the court to dismiss the application as it lacks merit. Counsel distinguished this case from **NRB Succession Case No. 794/1990 RE ESTATE OF EDITH WANGUI MWIRURI** where the court dealt with a transmission effected pursuant to confirmation of a grant.

After hearing both the applicants' and respondent's counsel on the affidavits herein, it is not in dispute that the deceased was not survived by the respondent alone but by all the beneficiaries named in the letters of the chief of Ololulunga dated 6/10/2010 filed with the affidavit of Franco Koikai (FNK2). They are:-

1. Franco Naurori Koikai
2. Lucia Nantoti Koikai

3. John Purko Koikai
4. Michael Koileken Koikai
5. Veronica Nasei Parmuat
6. Catherine Sopiato Koonyo
7. Sirere Ole Koikai

I find that the Chief's letter obtained by the respondent in support of the petition (FMK4) which states that he was the only surviving beneficiary of the deceased to be false. That falsehood was further perpetuated by the respondent when he indicated in the affidavit in support of the summons for confirmation that he was the only surviving beneficiary of the deceased.

It seems to be the respondent's case that when he filed the petition, he had been so directed by the elders on 30/1/2010. The respondent exhibited the minutes of the meeting of 30/1/2010. However, it is evident from the court record that by 7/1/2010 the respondent had already petitioned this court for letters of administration. The contention that he was mandated to administer the deceased estate by elders with the consent of the rest of the beneficiaries cannot be true.

It is the respondent's contention that the deceased had already distributed her property before her death and that in fact the deceased had transferred, signed the transfer from and signed the necessary consents before her death and that is why the transfer of Plot 74 was made even before the confirmation of the grant. The respondent exhibited the application for consent from Land Control Board approved on 4/8/92 (SOK A) and dated 29/7/92. The Board gave its consent to transfer at a meeting of 4/8/92 (SOK AII). The receipts in respect of these transactions were also exhibited. However, the said transfer was not executed until 4/2/2010 as evidenced by the title issued to the respondent (SOK IIIa). One wonders why the respondents filed the succession proceedings if the transfer could be effected without coming to court.

Upon the death of the deceased on 7/10/2005, her estate became subject to the **Law of Succession Act. Section 2** provides for the application of the Act. It states:-

***“1. Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and the administration of estates of those persons.*”**

2. The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

By the time of the deceased's death, this Act was in operation. Masai customary law does not apply. In the instant case, the principles applicable to the deceased's estate are contained in **Section 38** of the Act which apply where an intestate has left a surviving child or children but no spouse. That section reads as follows:-

“where an intestate has left a surviving child or children but no spouse, the net estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

Section 41 provides that the property devolving to a child be held in trust, whereas **Section 42** provides that during the distribution of the estate, previous benefits or gifts *intervivos* be taken into consideration when determining the share of each child. My understanding of these provisions is that whatever property belonged to the deceased, and which had not yet been transferred to the individual children during the deceased's lifetime, had to be subject to the provisions of this **Act** and the court would then take cognizance of the gifts given during the deceased's lifetime. If indeed the deceased had already given the other beneficiaries their share, then that would be taken into account at the time of distribution. **Halsburys Laws of England 3rd Ed. Vol. 18 Par 755** dealing with incomplete gifts, states

as follows:-

“Where a gift exists merely in promise (written or verbal) or unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under law, to complete or perfect it If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

In the instant case, the deceased may have intended to transfer the land to the respondent but by the time of her death, that was not complete. The intention had been expressed in 1992, about 12 years before the death of the deceased. Why the long delay in effecting the transfer when all had been done, it is not clear because a report of the alleged loss of the documents was made by the deceased on 2/2/05 not by the respondent and the report was that the title got lost in 1993. The respondent's version of the events does not seem to tally with what is on record. The sum total of this is that since the gift to the respondent had not been perfected by the time of the deceased's death the property in question (gift) was subject to these succession proceedings and it could not be transferred to the respondent without due process in this succession cause. The whole process of transferring the property into the respondent's name when these proceedings were pending is a nullity and was done by concealment of material facts. The manner in which the respondent approached the court, the applicants were not recognized as beneficiaries and they would not have been consulted in any event. The obtaining of title by the respondent during the pendency of these proceeding in respect of the deceased's property is fraudulent, a nullity and the court grants the defendants' prayer 5, that the title in respect of No. CIS MARA/LOLULUNGA/74 do revert to the deceased's name for purposes of distribution to all the beneficiaries of the deceased. Prayer 4 had been allowed by consent and the court directs that the letters issued to the respondent on 9/3/2010 be revoked and the beneficiaries do agree on who they want to administer the deceased's estate and forward the names to the court. It is also directed that all the deceased's property which had not been given out to the beneficiaries during her lifetime, be listed in the schedule for purposes of distribution. Costs will be in the cause.

DATED and DELIVERED this 23rd day of March 2010.

**R.P.V. WENDOH
JUDGE**

PRESENT:

Ms Muchiri holding brief for Kurgat for the applicants

N/A for the respondent.

Kennedy – Court Clerk.