



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Succession Cause 124 of 2006

(ORIGINALLY NAIROBI SUCCESSION CAUSE NO. 1299 OF 1992)

IN THE MATTER OF THE ESTATE OF MESHACK PARTASIO OLE NAMPASO (Deceased)

WANGUI NAMPASO ..... APPLICANT

VERSUS

DAVID OLE NAMPASO ..... 1<sup>ST</sup> RESPONDENT

JOHN OLE NAMPASO ..... 2<sup>ND</sup> RESPONDENT

VERCKYS TIKOISHI OLE NAMPASO ..... 3<sup>RD</sup> RESPONDENT

JAMES SAMPOTI NAMPASO ..... 4<sup>TH</sup> RESPONDENT

JOHN OLOLCHOKI ..... 5<sup>TH</sup> RESPONDENT

JUDGMENT

Letters of administration in respect of the estate of the late **Meshack Partasio Ole Nampaso** were issued to **David Ole Nampaso, John Ole Nampaso, Verckys Tikoishi Ole Nampaso** and **John Ololchoki** on *3<sup>rd</sup> June 1993*. The grant was confirmed and the certificate of confirmation was issued on the *12<sup>th</sup> July 1996*.

**Wangui Nampaso** filed the summons for revocation of the grant on *20<sup>th</sup> June 2001*. Directions were given that the summons for revocation be determined by way of oral evidence for the reason that It was denied by the petitioners that the objector (**Wangui**) was a wife of the deceased. Hearing of this matter commenced on *2<sup>nd</sup> June 2004* in Nairobi before me, but before I concluded the hearing, I was transferred from Nairobi to Nakuru. The file was subsequently transferred to Nakuru on *11<sup>th</sup> April, 2006* so that I could conclude the hearing of this matter which was partly heard before me.

The objector challenged the grant which was issued to the petitioners and raised several grounds in support of her application as follows: -

- 1. That the grant was obtained fraudulently by the making of false statements, misrepresentation and by the concealment from the court of material facts pertaining the case.**

2. That the said grant was obtained without any citation being served neither upon the applicant nor upon her children.
3. That the beneficiaries named in the schedule describing the properties known as Eorrenkitok ranch, namely *Musuni Ole Nampaso, Lopore Nampaso, Saitabao Nampaso, Lenkanoni Nampaso and Saiyalele Nampaso* have never been in possession of the suit land. That I have had in exclusive possession thereof together with my children.
4. That the administrators have now subdivided Narok Cis-Mara/Eor-Enkitok/34 into eleven parcels namely Narok Cis-Mara/Eor enkitok 178 to 188 without my consent or consultation with me.
5. That the administrators have sold LR. Narok/Cis-Mara/Eor-Enkitok/178 to the fourth respondent – John Ololchoki.
6. That the administrators are hell bent on selling all the parcels carved out of Narok/Cis-Mara/Eor-Enkitok/34 unless restrained by an order of this Honourable court.

These grounds in support of the application for revocation of the grant have been further supported by **Wangui's** affidavit sworn on *18<sup>th</sup> June 2001*. According to **Wangui**, she married the deceased in 1963 and as at the date when the deceased died, her marriage was still subsisting. She contends that she was the fifth wife of the deceased, and in the cause of her marriage she had the following children;

1. **Florence Retoi Nampaso,**
2. **Elizabeth Maisiai Nampaso**
3. **Bernard Tuta Nampaso**
4. **Johnson simiren Nampaso**
5. **Elijah Parmorde**
6. **Raphael Salaton**
7. **Dominic Leposo**
8. **Seneiya Nampaso**

According to **Wangui**, the deceased settled her, and her children on a parcel of land known as **Eorrenkitok Ranch** where she lived peacefully with her children until she was disturbed by the events that led to her filing this application. She told the court that the deceased had seven other wives who occupied the deceased's other parcels of land but she and her children remained on this parcel of land where they have never been interrupted until sometime in the year 2001, when **John Ololchoki**, the 5<sup>th</sup> respondent herein attempted to fence some of this property. It is then that **Wangui** discovered letters of administration in respect of her late husband's estate had been issued. Her curiosity was raised further when her first daughter **Retoi Nampaso** died and she claims that the petitioners buried her at an inconspicuous place instead of burying her at her homestead. Later on, as **Wangui** was contemplating on placing a caveat on this parcel of land, she started seeing people who looked like surveyors visiting her land. When she visited the land's office with a view of placing a caution, she realized the land had been subdivided and upon further enquiries, she realized a grant of letters of administration had been issued and confirmed. She complained that she was never notified by the petitioners of their intention to apply for the letters of administration nor was she served with a citation to apply for the same. **Wangui** further contended that she was married under the Masaai Customary law, her marriage was never dissolved and she, together with her children, have been disinherited by the petitioners who have even disposed of the land where she and her children have been living.

Her evidence was supported by **Simel Ole Nampaso**, an elder brother of the deceased. This witness confirmed that **Wangui** was one of the eight wives of the deceased. And that the deceased had settled **Wangui** and her children at a parcel of land known as **Eorrenkitok Ranch**. This witness told the court that when the petitioners who are the sons of his late brother applied for letters of administration, he was never consulted.

Another elder by the name **Ole Sangok** gave evidence in support of **Wangui's** case, he said that he belongs to the clan of the deceased and they were neighbours. He knew the deceased had eight wives and **Wangui** was one of them and the deceased had settled her at **Eorrenkitok Ranch**. He said he was familiar with the deceased and even the land that was occupied by **Wangui** as well as her children whom he said he regularly visited.

**Emily Kantai** is a neighbour of **Wangui** at this **Eorrenkitok Ranch**. She told the court that she has been her neighbour since 1965 when the deceased cleared the land and built a house for **Wangui**.

**Bernard Nampaso**, a son of **Wangui**, also testified and the gist of his evidence was that he knew the deceased as his father and they have lived with his mother and his other siblings on this parcel of land **Eorrenkitok Ranch**. Even after his father died about fourteen years ago, they continued living in this land until when his step brothers purported to have sold part of the land to the 5<sup>th</sup> respondent without involving his mother. He said that he was about fourteen years old when his father died and his step brothers never called him to discuss the estate of his late father. When he saw a surveyor on the land, he conducted a search at the Land's office and realized that the land had been transferred pursuant to a grant of letters of administration that was issued to the petitioners. He said that he has four other brothers and three sisters and his mother were left out of their father's estate. The only person who was provided for was his late daughter, the late **Florence Retoi** who passed away in 2000.

On the part of the petitioners, they relied on evidence by five witnesses; **Samson Kapeen**, a clan elder told the court that when the deceased died and after the burial, they held a meeting of elders which was also attended by the deceased sons and wives and the estate of the deceased was distributed according to a schedule of distribution which he produced as an exhibit. He told the court that he was the secretary of the meeting which was attended by the deceased three brothers namely, **Simel Ole Nampaso**, **Semenkur Ole Nampaso** and **Samson Ole Nampaso** as well as other elders. The elders also agreed that the letters of administration would be applied for, by the sons of the deceased. He said the clan did not recognize **Wangui** as one of the seven widows of the deceased because **Wangui** had been chased away by the deceased in 1973 when **Wangui** fell in love with the deceased brother. This witness told the court that **Wangui** and the deceased brother called **Simel** were both chased away from the deceased main home at **Ololunga** and they therefore went away so the clan decided to only allocate a parcel of land to **Wangui's** daughter by the name **Retoi**.

According to **Samson**, the deceased did not have any other children with **Wangui** apart from **Retoi**. And if **Wangui** has other children, they must be those children born out of the wedlock.

The next person to testify on behalf of the petitioners was **Semenkur Ole Nampaso**, a brother of the deceased. The gist of his evidence was that the deceased had seven wives and about nineteen sons. He also knew that the deceased had a wife called **Wangui** whom he had married and they had one child called **Retoi**. The deceased chased away **Wangui** in 1973 because **Wangui** was sleeping with his brother called **Simel**. The clan held a meeting after the deceased had died and they divided his properties among the children and the wives according to the Masaai Customary Laws.

The second wife of the deceased by the name **Nkisokoi Nampaso** gave evidence to the court that the deceased had eight wives namely;

(a) *Nariku Enole Nampaso*

(b) *Nkiroukoi Enole Nampaso*

- (c) *Nalakiti Enole Nampaso*
- (d) *Kitiringa Enole Nampaso*
- (e) *Nalangu Enole Nampaso*
- (f) *Ntoorian Enole Nampaso*
- (g) *Naropil Enole Nampaso*
- (h) *Wangui Nampaso*

She said that **Wangui** lived with them for sometime after which she was chased away for befriending the husband's brother. By the time **Wangui** was chased away, she had one child with the deceased called **Retoi**. When the deceased passed away, this witness told the court that they performed a Masaa tradition of slaughtering a bull and smearing the fat on the deceased body. This ceremony is done by the deceased sons and **Wangui's** sons were not allowed to take part in this ceremony. After two months since the burial of the deceased, they performed a further ceremony of cleansing the home when all the family members of the deceased including the brothers were present and **Wangui** was not present because she was not recognized as a widow of the deceased.

Two of the petitioners also **Tikoishi Ole Nampaso** and **James Sampoti Nampaso** gave evidence in support of their petition. They denied that the grant of letters of administration was obtained fraudulently or that they left out **Wangui** and her children from benefiting from the estate of their late father. They said all the procedures of obtaining the grant of letters of administration were followed and after the grant was confirmed the estate of the deceased was distributed to the beneficiaries according to an agreement reached by members of the family.

According to the petitioners, **Wangui** was divorced by their late father long ago and she had only one child by the name **Florence Retoi** whom they recognized as one of their sisters. They have provided for her a parcel of land measuring 18 acres which they still hold in trust for Retoi's children. **Retoi** passed away in the year 2000. They buried her on this **Eorrenkitok Ranch**. The petitioners told the court that all the deceased wives lived together at **Ololunga Ranch** but **Wangui** lived away because she had been separated and divorced from their father. Their father died without making a Will and elders met and divided his assets among the children and the wives. After they distributed the estate to the beneficiaries, they filed a statement of account with the court to signify the completion of distribution.

As regards the land known as **Eorrenkitok Ranch**, the 4<sup>th</sup> petitioner said that he entered into sale agreement with **John Ololchoki** in July 2000 and transferred the land to him. This parcel of land was sub-divided into ten equal portions which were sold except for the portion reserved for **Retoi's** children.

The 5<sup>th</sup> respondent who was named as an interested party in these proceedings also gave evidence of how he bought the several parcels of land known as **Cis-Mara/Eorroenkitok**. He produced copies of title deeds for **Cis-Mara/Eorroenkitok/179, 180, 181, 182, 184, 185, 186, 187** and **188**. These transactions took place on the 27<sup>th</sup> February 2001, 28<sup>th</sup> February 2001, 12<sup>th</sup> March 2003, 3<sup>rd</sup> April 2003 and 12<sup>th</sup> December 2003, according to the title documents and the certificate of search that were produced by the petitioners as exhibits to support their evidence. He said before he entered into a sale agreement, he had been shown a copy of the letters of administration and he dealt with the administrators of the estate. Thus he entered into an agreement before an advocate called **Mr. Wainaina** who effected the transfer of the title and he paid the purchase price. Subsequently, he was sued by **Wangui** in another suit namely; **H.C.C.C No. Nairobi 507 of 2002** which suit was later withdrawn on 27<sup>th</sup> October 2005 by the same person who had instituted it. The 5<sup>th</sup> respondent urged this court to uphold the sale of the parcels of land which he said he bought from the administrators and other beneficiaries in their capacity as beneficiaries.

During cross examination, the interested party admitted that he visited the land and he saw one house

which is located on **Plot Number 187**.

That was the summary of the evidence from which the following issues arise for determination.

1. *Is Wangui a widow of the deceased?*
2. *Are her children the deceased children?*
3. *Was the grant of the letters of administration irregularly or fraudulently obtained, should it be revoked?*
4. *What is the fate of the parcels of land purchased by the 5<sup>th</sup> respondent?*
5. *How should the deceased estate be distributed?*
6. *Who should pay the cost of this litigation?*

I have considered the evidence in this matter and one issue that is not in dispute is that **Wangui** married the deceased and they had one child called **Retoi**. It would also appear that there is no dispute that **Wangui** has been occupying the deceased parcel of land that **Eorrenkitok Ranch**. What is in dispute, is whether she was chased away or divorced and whether the other seven children of **Wangui** were the deceased children.

The evidence led by **Wangui** and her witnesses is that she married the deceased in 1963 and the deceased settled her at **Eorrenkitok Ranch** where she has lived with her children without any interruption until the events that led to her applying in this court for the revocation of the grant.

The petitioners contended that **Wangui** was divorced and the evidence of the 3<sup>rd</sup> respondent went as far as to say that the deceased performed a customary divorce proceedings to signify divorce against **Wangui**. However the elders who testified on the part of the petitioners did not offer any evidence of divorce proceedings between **Wangui** and the deceased. These elders were the deceased brother, **Semenkur Ole Nampaso** and **Samson Kapeen**. It is to be noted that even the evidence of the deceased second widow; did not give any evidence regarding these masai customary divorce proceedings. The 3<sup>rd</sup> petitioner is a child of the deceased. It is not clear how the divorce proceedings under the Masai Customary law would be within his knowledge and not that of the elders and the deceased other wife. Similarly, no evidence was led regarding divorce proceedings on Masai Customary Marriage. What constitutes divorce under the Masai Customary Law.

Upon further evaluation of the evidence, it is clear that Wangui has been occupying the deceased parcel of land until the respondents attempted to dispossess her by way of sale. The issue that arises from these facts is that **Wangui** was being maintained by the deceased prior to his death. He had kept her at his parcel of land which is consistent with the fact that the marriage was not dissolved. If the marriage was not dissolved, **Wangui's** children are entitled to inherit. Under **Section 29** of the **Law of Succession the Act** provides as follows: -

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*

*(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

Thus under the above provisions of the Law, **Wangui** and her children qualify to be treated as dependants of the deceased. This matter should be considered further because **Wangui** contended that she was a wife and she had her children should be considered and the property of the deceased should be distributed equally amongst all the deceased beneficiaries. Having found that **Wangui** was not divorced and was probably chased away and was maintained by the deceased, the next issue to consider is the status of her children, whether her children were born out of wedlock. Under **Section 118** of the **Evidence Act**, the law provides that

***“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”***

Having found that **Wangui** was a widow of the deceased, it follows that the petitioners ought to have notified her when they applied for letters of administration as provided for under **Rule 26 (1 & 2) of the P & A Rules**. It was also necessary for the petitioners to obtain a renunciation or consent by **Wangui** as a person who was entitled to the letters of administration in equal priority to the petitioners. This was not done and the result was **Wangui** had her children have been left out of the estate of the deceased.

I find that **Wangui** was justified in bringing this application for revocation of the grant so that her interests can be addressed. The grant of letters of administration in this estate was issued in *June 1993* and the same was confirmed in *July 1996*. The petitioners filed a certificate of completion of the administration of the estate on *18<sup>th</sup> April 2001* yet during the hearing of this matter, the petitioners admitted that some properties have not been transferred.

As regards the interests of the 5<sup>th</sup> respondent, he contended that he was an innocent purchaser for value without notice of any defect in the title. His argument could be justified as he even produced bank statements to prove that he purchased the parcels of land from the beneficiaries. Under **Section 93** of the **Law of Succession**,

***“A transfer of a property to a purchaser by a personal representative to a purchase shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”***

In this case, it will not be in the interest of justice to invalidate the sale transactions to the 5<sup>th</sup> respondent. However, the parcels of land that have been sold by some beneficiaries should be taken into account when the estate of the deceased is re-distributed as here below;

I have considered whether to revoke the grant with considerable anxiety. However, I am of the view that revoking the grant may also not be in the interest of justice. The grant was issued to the four sons of the deceased. The deceased had eight households and the law clearly says that a grant can only be issued to four administrators. Even if this grant was to be revoked, I do not think it would serve the interest of justice. What has prejudiced the objector herein is the certificate of confirmation where she has been left out and the property that she has been in occupation has been sold. In this regard, it is the confirmed grant that should be revoked. The petitioners should file a fresh schedule of distribution as provided for under **Section 40** of the **Law of Succession Act** which provides how an intestate estate of a polygamous person should be distributed.

As noted above, those beneficiaries who have benefited from the sale of **Eorrenkitok Ranch** this should be taken into account and the share they have taken should be considered in the new schedule of distribution.

Accordingly, the confirmed grant of letters of administration issued on *12<sup>th</sup> July 1996* and the account of

completed administration dated *18<sup>th</sup> April 2001* are hereby revoked and all consequential transactions effected by virtue of the said confirmed grant are *null void* except in respect of the parcels transferred to the 5<sup>th</sup> respondent. This being a family dispute each party shall bear their own costs of this litigation.

It is so ordered.

**Judgment read and signed on this 8<sup>th</sup> day of December 2006.**

**MARTHA KOOME**

**JUDGE**