



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION NO. 292 OF 1991

IN THE MATTER OF THE ESTATE OF KAPAITO OLE PARIMBAI (DECEASED)

MARY WANJIKU KAPAITO APPLICANT

VERSUS

TERESIA NASIEKU KINEIA RESPONDENT

J U D G E M E N T

One Kapaito ole Parimbai died on 27th October, 1990 at Ngong. I shall hereinafter refer to him as the deceased. Teresia Naiseku Kineiya (hereinafter referred to as “the petitioner”), applied for letters of administration intestate to the estate of the said deceased. This estate mainly comprised a number of parcels of land and/or plots which are all listed in the affidavit of Mary Wanjiru Kapaito (hereinafter called “the widow”) to support her application for injunction filed in this court on 27th March, 1991.

The petitioner who made her application on behalf of a number of beneficiaries as will become clear as this judgement progresses, described herself as the daughter of the deceased. These letters were issued to her on 2nd September, 1991 and confirmed on 20th March, 1992.

The petitioner had filed the application for letters of administration intestate as aforesaid on 14th March, 1991 and on 27th March, 1991 the widow filed her own application and grant of probate to the estate of the deceased on grounds that she had been appointed the executrix of his will made on 6th April, 1989.

This is when notice of objection was filed in this court on 7th June, 1991 by Hanna Simeon Kineiya (the first objector) John Mutungei, Simeon Kinaiya; Grace Tete Kinaiya, the petitioner and Cecilia Mirisn Julius

The objection gave rise to proceedings heard by this court from 19th January, 2000, 26.9.2000, 24.10.2000, 30.1.2001, 5.3.2001, 20.3.2001 and 3.4.2001, hence the present judgement.

It was a case of objection and Anne Simon Kineiya started it all. She said the deceased was her husband. Simon Kinaiya Kabetu’s father who had died in 1964 before the deceased died.

She also said the petitioner was her real daughter. That when her husband died, he left her the land known as NGONG/NGONG/4100 and that she was not aware the petitioner had been given authority to administer this land after the deceased changed it to his name.

According to her, after the petitioner obtained letters from the court to administer the deceased estate, she the 1st objector, disagreed on the mode of subdivision of the deceased estate.
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That the petitioner was not willing to attend meetings called to share out the deceased estate – hence this objection thought the former had a hidden agenda, hence this objection case so that the court can share out the land of the deceased and give this objector her share through her husband's brother whom she said was still alive. During cross examination, it came out that this objector had left the deceased boma in 1963 and though the petitioner put it to her that she had left her husband that year she stated that it was the deceased who had chased her husband and herself away from his shamba.

According to the objector the deceased had told her husband to go to his shamba otherwise known as NGONG/NGONG/11 but that since her husband had no money to put up a house on that shamba they decided to go and settle on the shamba of the objector's father.

It was also revealed during cross examination that in fact after the objector left the deceased home she went to work at Kuwinda – Langata where she gave birth to an illegitimate child in 1966.

That she left Kuwinda Langata and went to work at Ngando Lenana where she gave birth to another illegitimate child in 1971. Then she went to work at Gateiguru where she gave birth to another illegitimate child in 1974.

That from Gateiguru, she went to work at Wathioki where she gave birth to another illegitimate child. Apparently all these children were of different father but she did not them or father's names.

This objector then told the court she came back to the land NGONG/NGONG/11 in 1979 and stayed there until when the petitioner charged its title to her name after obtaining letters of administration to the deceased estate.

According to this objector this land number NGONG/NGONG/11 is 24 acres and had names of her children Grace Tete, the petitioner, Meresh, Mutungei, Kioko, Kyalo and Mututwa.

She called a witness Samwel Kapaito, the deceased son and objector's brother-in-law.

He testified that he was one of those who consented and allowed the petitioner to apply for letters of administration to the deceased estate.

He supported the first objector that the deceased estate had not been subdivided because who never meetings are called for this purpose the petitioner fails to turn up.

This witness only referred to the shamba NGONG/NGONG/4100 which was intended for Mutungei, Kyalo, the petitioner and Mereso but he said he had no interest himself in the deceased estate; though he knows there are other property apart from NGONG/NGONG/4100.

During cross examination by the petitioner, this witness disclosed that when the petitioner's father died, the land known as NGONG/NGONG/4100 which was in his name was on loan with A.F.C. and that the deceased was allowed to sell part of it to repay this loan – about Kshs.86 – 87,000/- and that this is when this land was transferred from the petitioner's father to the deceased.

That apart from the portion sold to repay the A.F.C loan, the deceased also sold portions of this land to other people.

In re-examination he clarified that plot number NGONG/NGONG/11 had previously been NGONG/NGONG/4100 but that when portions thereof were sold the remaining portion was named NGONG/NGONG/11.

Another witness Ziporah Naenku is the daughter of the deceased and petitioner the daughter of her brother. She testified that though the petitioner had been allowed to apply for letters of administration in respect of the deceased estate but that instead of holding this property in trust for family members she had started selling portion thereof and that even parcel number NGONG/NGONG/10249 which the deceased

had given her as a gift had been sold by the petitioner without her consent or that of the family. That out of the sale price of Kshs.300,000/= the witness was only given Kshs.100,000/= and that she was asking for the balance of Kshs.200,000/=.

All the above evidence was adduced on 19th January, 2000. Unfortunately counsel for 3rd objector was not present but was on 29.9.2000, allowed to cross examine all the witnesses who had testified on 19th January, 2000.

Another witness, said to be that of the 3rd objector testified on 24th October 2000. He talked of a document he signed at the lawyers' office in Nairobi. I think he was talking about the will which was produced in these proceedings by the third objector's lawyer as her exhibit 1.

The evidence of the third objector was recorded on 30th January, 2001.

There was also an advocate, Kaai, who testified about drawing the will, exhibit 1, which had appointed the 3rd objector as the executrix of the whole of the deceased estate.

Then the 3rd objector Mary Wanjiru Kabaito testified about marrying the deceased after his wife Elizabeth died and that she was married in a piece of one (1) acre land, NGONG/NGONG/10247 and that this is where her house is. That is at Olololua.

That the deceased had 3 more shambas in this area, one, a 2 acre parcel, whose number was not given was given to one of her sons Paul Lepilo, another NGONG/NGONG/10260 (2acres) had one acre thereof sold to a third party who could not complete the purchase price for both and the agreement was revoked and the third party refunded his money. That this parcel of land is still in the deceased name and nobody lives there. That it had been given to the deceased son Peter who did not settle thereon. He died without a wife or children.

The third objector testified that the third parcel of land in the same area NGONG/NGONG/10249 1 acre had been given to Ziporah Naeku but that it had been sold by the petitioner. The third objector testified about another piece of land at Kibiku which is 24 acres which was occupied by the children of Simon Kinaiya – including the petitioner eve before the deceased died. She did not give the number of this land but that at the time of the deceased death, it was in his name.

She also spoke of a 20 acre piece of land at Oloitokitok whose number she did not give but said that at the time the deceased died nobody was staying there though the title was in his name.

That the Oloitokitok land was in total 30 acres but that while 20 acres were in the deceased name, the other 10 acres were in the name of deceased son Paul Lepiro who works in Nakuru.

The third objector agreed that the Kibiku farm had a loan on it at the time Simon Kineiya died and that to avoid it being repossessed the deceased was allowed to sell a portion of it to repay the loan and this is how he registered the remaining portion in his name.

As for the 4 roomed house in Ngong Scheme 305, the 3rd objector said she had applied for the plot and built the house thereon, but that she put it in the deceased name because her and the deceased were one.

She talked of shares at Barclays Bank, Kenya Commercial Bank and Kenya Breweries for which she had share certificates at home.

That money which was in the bank or banks was withdrawn by the petitioner but she did not give the amount.

The third objector married the deceased under customary law in 1968 but this marriage was confirmed in 1975. That he was sick on and off from 1985 and he died in 1990. She had 4 children with the deceased, 3 sons and one daughter. Each of the sons was given 2 acres of land at Olololua.

Then she testified about the will which appointed her as sole executrix of the deceased estate and how she was given everything except NGONG/NGONG/10258 but that when the petitioner took out letters of administration she changed titles to all assets into her name, withdrew money from the bank and she sold NGONG/NGONG/10249/

That it is now the petitioner collecting rent from the Scheme Plot 305/105.

About the Kibiku land which I think is NGONG/NGONG/4100 the 3rd objector said after the deceased sold a piece of it to repay the loan, he gave the remainder to John Mutungei – 2nd objector who never testified.

She prayed that the court orders that she be given all the property named in the will then she can discuss the rest at home with her children.

In cross examination by counsel for the objectors, the 3rd objector said though the children of Simon live on NGONG/NGONG/4100, this land should be registered in her name and only transferred to those children after they fulfil payment to certain items promised to the deceased. In answer to the petitioner's questions she said the former was not the deceased daughter, was married with her own children and had no right to ask about the deceased property.

In another answer in the petitioner's question the third objector said she has her own land in her name number NGONG/NGONG/10248 (4acres) and others in her own name NGONG/NGONG/10251, 10252 and 10253 were sold by the deceased before his death.

That she also owns NGONG/NGONG/1054(3/4 acre). That NGONG/NGONG/10255, 10256 and 10257 are all in her names but for her 3 sons. She said after deceased was buried the objectors invaded her home, beat her up and took away the titles to the deceased estate. After the evidence of the 3rd objector the petitioner testified saying she was the administrator of the deceased estate and listed all such estate as well as the property in the name of the 3rd objector. According to her evidence problems started immediately the deceased was buried when she and others discovered the 3rd objector did not want them in the boma where the deceased had been buried and called an elders meeting to try and resolve the matter on 28.12.90 but the dispute was not resolved. This was because though the elders to make some decision the 3rd objector said she did not want to meet anybody until when they do so in court. That this is when she met some relatives who allowed her to take up the matter and follow the deceased estate, hence her institution of P&A number 292 of 1991.

Then the petitioner called a meeting of 8.8.92 and then decided to share out the estate as follows:-

1. NGONG/NGONG/4100 to Simon Kinaiya's family but in petitioner's name.
2. NGONG/NGONG/10248 to Paul Kapaito's family.
3. NGONG/NGONG/10260 to Peter Kapaito.
4. NGONG/NGONG/10247 – to petitioner – also to look after the grave on 10248.
5. NGONG/NGONG/10249 to Ziporah Naiegu Loitokitok/Engaro (Rongena/789 to the family of Simon Kainaiya – because it was bought with proceeds from Simon Kinaiya.
6. Scheme 305/105 – to petitioner to be collecting rent.
7. 200 KCB shares to petitioner
8. 300 Barclays Bank shares to Miriam Naiswagu
9. 22 Kenya Breweries shares to Selina Matano

In cross examination she agreed to have taken letters of administration to the deceased estate and also agreed she sold parcel number 10249 for Kshs.350,000/= but gave the owner of it only Kshs.100,000/=.

That she was aware of the will but that she had objected to it. She also said she could not have mentioned the 3rd objector's name in the distribution of the estate because the latter had already been provided for.

The petitioner called 2 witnesses, namely Benson Wakaba and Paul Lepiro ole Kapaito – Wakaba attempted to explain how he attempted to solve this dispute between Samwel and Paul, deceased sons and the petitioner on the one hand and the third objector on the other hand on the instructions of Ngong District Officer. That the dispute between the two sides was over the shamba at Oloolua.

That this witness and 2 elders decided that the third objector would only retain the properties which had been registered in her own name while these still in the deceased name would be shared out to the children of his first wife.

Paul Lepiro testified as to how his father, the deceased, subdivided his Oloolua farm to all his children before he died. That each child got 2 acres except the second wife who had no child – was given 3 acres and the third objector 4½ acres.

That while land belonging to the 3rd objector and her children had titles issued in the name of third objector, those given to children of the first wife was left in deceased name. Title of land given to the second wife was registered in her own name.

He agreed that the Kibiku farm belonged to Simon Kineiya who stayed there with his wife – the first objector. That when Simon died the first objector disappeared from the home and that since this land was bought with a loan from AFC, the deceased had to sell part of it – he said it was 3 acres, to repay the balance of the loan and then registered the remaining land to his own name. However, that her children lived and still live thereon after deceased sold part of it leaving only 24 acres from the original 62 acres. That this land was given back to the children of Simon subject to them given to the deceased certain items but that they had not done so to date.

The witness testified further that proceeds of portions of land sold from Kibiku farm more used to purchase the Oloitokitok farm – which the family decided should be shared out to Simon's family members.

That efforts by the family to resolve the dispute involving the deceased assets reached a deadlock even with the intervention of the area chief when the third objector declared that this would be resolved in court and actually filed P&A number 348 of 1991 in court. That thereafter this witness with other members of the deceased family appointed the petitioner to act for them in the matter and this is how she ended up obtaining letters of administration to the deceased estate.

I have stated on page 6 of this judgement what the petitioner did with the deceased property after obtaining letters of administration.

Two major issues have arisen in this application; namely whether the deceased died testate or intestate and if the latter is the case, who of the petitioner and the third objector was entitled to letters of administration to his estate.

As regards the first issue, an advocate called Stephen Kaai testified and said he drew a will on behalf of the deceased on 6th February, 1989 which the deceased signed together with his witnesses. This is the 3rd objector's exhibit 1. It was witnessed by one Mutende ole Suyanka (the first witness for the 3rd objector, who thumb printed it and one Ndungu Mugo).

In this will the deceased appears to have bequeathed all his property, movable or immovable except a

piece of land known as NGONG/NGONG/10258 to the third objector absolutely. This will was not seriously contested except for the petitioner who testified that the will was forged because if the deceased intended to give all his property to the third objector he would have registered all in her name before he died and not do it in respect of some and not others, or that this will was made on arrangement by the said third objector. Wills are never published for obvious reasons when drawn. They are kept only for their existence to be known when the testator has died.

After the deceased was buried, it became known, through the third objector, that he had written a will but that the said third objector did not know the contents of course she could not know.

It was drawn by a lawyer who testified in this court and properly witnessed over one year before the deceased death.

The 3rd objector had formally married the deceased in 1975 and had been living with him at parcel of land NGONG/NGONG/10248 since 1968 up to the time he died on 27.10.90.

For about 22 years, none of the objectors and/or the petitioner in this application had questioned such stay. They wait after he has died to come to the home, in fact hardly 5 days after burial, to begin asking the third objector about the deceased property. There was evidence that they invaded the home and took from her all the documents including all title deeds for the parcels of land, both in the names of the deceased and the third objector.

They the petitioner, agreed daughter of the deceased moved with lightning speed to apply for and process the letters of administration in June 1991 and these were confirmed in March 1997 and all property in deceased name transferred to her name.

Once the petitioner had heard from the 3rd objector that there existed a will over this matter she had an obligation to wait until the issue over this will was resolved. But to take the action she did was to circumvent the law which, I am afraid, I do not support.

In my view, save what I shall say hereinafter, the will made by the deceased on 6th April, 1989 was valid and I rule that he did not die intestate.

Even if he had died intestate the provisions of Sections 35 to 41 of the Law of Succession Act give priority to a surviving spouse on an intestacy and the petitioner would not both proper person to make an application for letters of administration in respect to the deceased estate.

Even in the absence of the spouse, there were children to make such an application in preference to the petitioner who was only the grand daughter of the deceased.

In those circumstances, I would direct the revocation of the letters of administration issued to the petitioner in this regard.

As regards the will, though the deceased had included the parcel of land NGONG/NGONG/4100 in the assets he bequeathed to the 3rd objector absolutely, its history shows that this land was previously allocated to Simon Kineiya but that after his death it was discovered that there was an outstanding loan thereon which had to be paid if the same was to be by the Agricultural Finance Corporation which had facilitated its allocation to Simon.

That the deceased was allowed to sell part of it to be able to repay this loan but that before he did so he had to have the land registered in his name.

Now that he did this and sold a portion thereof to repay this loan and that Simon left behind children – including the petitioner, who live on this land, it was a misapprehension on the part of the deceased to include it in his will as part of his assets and to bequeath it to the third objector absolutely. Both parties conceded to this history.

As regards Anne Kineiya who appeared in these proceedings as the first objector, I was surprised by her history.

Firstly I did not understand whether she was objecting to letters of administration issued to the petitioner her own daughter, or the application by the 3rd objector based on the will.

During cross examination, she hinted that her husband Simon had been chased away from his land and had gone to stay with her at her father's home.

But later she said she had gone to work at various places including Kiwinda Langata, Ngando Lenana 1971, Gateiguru, 1974 and Wathieki. She revealed that at each of those places, she gave birth to children with different men.

According to the evidence of Samuel Kipaito, brother of Simon, the first objector left Simon in 1963 and Simon himself died in 1964.

From that time the first objector features nowhere until allegedly 1981 when she came back to the land NGONG/NGONG/4100. What for? She had left Simon home 16 years ago and had not even checked on him or attended his funeral when he died in 1964. And between 1963 to 1981 she had moved in many places bearing children with different men.

On what basis would she come back to the late Simon's land NGONG/NGONG/4100 to claim a share there of? Surely I see none.

Anne Kineiya is not a proper objector in this matter and I see no basis for her lodging this objection save to cause confusion just because the deceased has died leaving some property she can get a share in the name of Simon. No. Not through this court. If her children sympathise with her and want to give her a place to live on that land, let that be their decision but not that of this court. She had deserted Simon at the hour of need and was no longer his wife when he died in 1964. Her objection is dismissed.

On the other hand, though the deceased lived with the 3rd objector on plot number NGONG/NGONG 10247, and that he was buried in NGONG/NGONG/10248 – registered in the third objector's name he did not include the latter in his will. Maybe the presumed this was obviously the first bequest he would make to his surviving wife. This is why it was registered in the 3rd objector's name.

This plot No.10248, the petitioner purported to allot to herself when the letters of administration were confirmed in her names allegedly to look after the grave.

Surely who, of the surviving spouse and a grand daughter of the deceased would be best suited to look after such grave?

When the deceased ailed the petitioner was nowhere. It was the 3rd objector tending to him. When he is dead, the petitioner round to allocate herself the land on which he was buried yet she is only a grand daughter! No way. Common sense would dictate that the spouse who was living with the deceased at the time he died do take over such land and look after the grave; unless she was a mere mistress.

The third objector was not a mere mistress but a lawfully wedded wife of the deceased – hence the proper person to be given the parcel of land where the remains of the deceased were laid to rest in addition to NGONG/NGONG/10247 where the 3rd objector lived with the deceased.

Other objections to the will of the deceased to the 3rd objector. John Mutungei, Grace Tete and Cecilia Mirisn did not testify hence their objections not worth any consideration, hence one dismissed for non appearance.

As regards plot Number NGONG/NGONG/10249, it was agreed by both parties, 3rd objector included that it had been given to Ziporah Naidu (PW2), but that the petitioner had sold it and given Naidu only

Kshs. 100,000/=.

The petitioner herself agreed to have sold this plot at Kshs.350,000/= and that when she gets the balance she would pass it over to the said beneficiary.

Another point needing highlight is the evidence of Sawel Kapaito that he has no interest in the deceased property. He did not elaborate but could it not be that it was because the deceased had given some of his children their shares? This likelihood is not remote and this is why the same deceased only remembered Paul Repro Parimbhai in his will and gave him L.R NGONG/NGONG/10258.

The third objector talked of NGONG/NGONG/10260 which the deceased had sold to the third party but that such sale was revoked. She said nobody lives on this land. However, according to the petitioner, this parcel of land is registered in the third objector's name.

That after the petitioner obtained letters of administration, she had shared out this portion to one Peter Kapaito who, unfortunately died leaving no wife or children.

However, since this plot was registered in the third objector's name, purporting to allocate it to Peter Kapaito by the petition was invalid.

Plot number NGONG/NGONG/10249 is in the list of property given to the 3rd objector by the deceased and I did not understand the evidence of Ziporah Naigu and the petitioner that in fact this plot had been given to the former. The will was drawn by an advocate in 1989 whose evidence was not challenged and in my view Ziporah and the petitioner have concocted this story to defeat the wishes of the deceased in his will, which I am satisfied has not been adequately challenged as regards this plot.

The petitioner admitted selling this plot to a third party for Kshs.350,000/= and giving Ziporah Kshs.100,000/=. This was not proper and these two must account for that money to the 3rd objector. The evidence of Paul Lepro attempting to support the action of the petitioner in this matter had no merit. The deceased, his father provided for him in his will in 1989 and if he wished to do what this witness attempted to show in his evidence he would have done it – otherwise, I am of the view that except for L.R NO. NGONG/NGONG/4100 the deceased wishes in the will should be respected.

If Samuel has no claim in the deceased estate, strongly implying that he had already been provided for, then I do not understand the complaint of Peter when he has been provided for in the will.

I do not think there is any evidence of fraud implicating the 3rd objector in the drawing of the will by the deceased. I am satisfied since the date of marriage, the 3rd objector had remained loyal to the deceased and it was only fair she be given such recognition in the will.

The other objectors and petitioner do not want her to get this property just because she was the third wife. This is jealousy and not a good ground to nullify the, otherwise properly drawn will by the deceased.

Save for what I have said about plot number NGONG/NGONG/4100, I dismiss the objection to the deceased will but order that each party/parties bear his/her/their own costs of these proceedings.

Delivered this 10th day of May, 2001.

D.K.S AGANYANYA

JUDGE