



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**SUCCESSION CAUSE NO.73 OF 2017**

**IN THE MATTER OF THE ESTATE OF NOAH MALITA NKAI (DECEASED)**

HELLEN NAISERIAN NKAI.....1<sup>ST</sup> OBJECTOR

JOYCE LASOI NKAI.....2<sup>ND</sup> OBJECTOR

DEBRA SIMALOI SHININI.....3<sup>RD</sup> OBJECTOR

EMILY KAMWANKA KOIKAI.....4<sup>TH</sup> OBJECTOR

**-VERSUS-**

GEDION OLE NKAI NOAH.....RESPONDENT

**JUDGEMENT**

By a Summons for Confirmation of Grant of Letters of Administration Intestate filed in court on 24<sup>th</sup> March, 2004, the Petitioner sought to distribute the sub-divided portions of KAJIADO/DALALEKUTUK/1319 as follows:

- a. Gideon Ole Nkai Noah.....Parcel No.1982 (61.60Ha)
- b. Jane Njeri Nkai.....Parcel No.1983 (61.60Ha)
- c. Daniel Supeyo Nkai.....Parcel No.1984 (62.91Ha) and Car No. KZV 186.
- d. Kelvin Lemeiyan Nkai.....Parcel No.1987 (12.14Ha)
- e. Margaret Namunyak and Jane Njeri Nkai.....Parcel No. 1988 (12.14Ha)
- f. Richard Losile Ole Nkai.....Parcel No.1985 (41.36Ha) and Parcel No. 106 Majengo “C”
- g. Rev. Gyun Kim.....Parcel No. 1989 (2.04Ha)
- h. Timothy Tobiko Nkai.....Parcel No. 1986 (20.24Ha)
- i. Sultan Hamud Trading Centre Daniel Supeyo Nkai...Parcel No. 419.
- j. Parcel No. 1990 to be sold to Michael Muturi Karanja to cater for the cost of Administration of the Estate.

The foregoing proposed mode of distribution was vehemently opposed by the Objectors herein Helen Naiserian Nkai, Joyce Lasoi Nkai, Debra Simaloi Shinini and Emily Kamwaninka Koikai through an affidavit in support of summons for the revocation or annulment of grant filed on 9<sup>th</sup> December, 2015. In the summons for revocation of grant, the objectors seek the following orders:

1. That the Grant of Letters of Administration issued to GIDEON OLE NKAI NOAH on 2<sup>nd</sup> May, 2003 and the Certificate of Confirmation of Grant issued to GIDEON OLE NKAI NOAH on the 2 June. 200-H be revoked.

2. That there be a declaration that the aforementioned objectors are beneficiaries of the Estate of the deceased NOAH MELITA OLE NKAI (deceased) hence entitled to a share and be appointed the Administrators of the suit property and fresh grant be issued to them accordingly.

3. That Title Parcel Number KAJIADO DALALEKUTUK/1983 be revoked and cancelled and a new title be issued in the name of NOAH MELITA OLE NKAI.

4. That the Grant to be issued be confirmed in respect of Land title number Kajiado Dalalekutuk/1983 in favour of Helen Naiserian Nkai. Joyce Lasoi Nkai. Debra Simio Shinini and Emily Kamwanka Koikai and/or their nominee in equal shares.

5. That Gideon Ole Nsdl Noah be ordered to furnish the court with true account of the proceeds of the sale of Kajiado/Dalalekutuk 1990 and be ordered to pay into the Estate any amounts he may have misappropriated.

6. That in the alternative and without prejudice to prayers 5 and 6 above the title Number Kalso Dalalekutuk 1983 issued to Gideon Ole Nkai Noah be cancelled and or revoked and or a new title issued in favour of Helen Naiserian Nkai. Joyce Lasoi Nkai, Debra Simaloi Shinini and Emily Kamwanka Koikai and or their nominee.

7. That in regard to prayers 5. 6 and 8 above leave be and given to the Land Registrar Lands Registry Kajiado, to dispense with the need of the original title.

8. That Gideon Ole Nkai Noah be personally condemned to meet the costs of this application/proceedings.

The summons for revocation of grant of administration herein is premised upon several grounds. The Objectors are adamant that the Grant in question was obtained fraudulently by the Administrator, who happen to conceal from the court that the aforementioned objectors are his sisters and daughters of deceased and therefore, they are also entitled to a share of the suit property.

It is contended that a false statement in his affidavit in support of the Petition for Letters of Administration intestate that the deceased was only survived by a widow and 8 children while in fact he was survived by a widow and 9 children. The deponent alleges that the Administrator herein forged or caused to be forged the signature of one of the beneficiaries of the Estate, namely, Joyce Lasoi Nkai in the consent to the making of Grant of Administration and also to the Consent to Confirmation of Grant.

It is further alleged that the Grant was confirmed upon a false allegation in court that parties had agreed on the mode of distribution. The objectors asserted that they are lawful beneficiaries to the Estate of the deceased, but however were left out at the time of distribution of the Estate thereby being disinherited and some persons not beneficially entitled to the said Estate being factored in.

It has been brought to the attention of the court that the Administrator, Gideon Ole Nkai Noah sold a very big parcel of land measuring approximately 79.90 hectares after falsely alleging that the parties had agreed on the sale and without disclosing to the court the exact size thereof and has to date never rendered an account of the said sale. It is the objectors' position that the estate was not fairly and equitably distributed with the Administrator favoring himself and a few others while out rightly disinheriting others. The Objectors firmly hold the view that the Petitioner clearly and contrary to the law discriminated against them in light of the manner in which he distributed the suit properties.

## EVIDENCE

**PW1: No. 9691850 Stephen Muterea Taporu**, (the chief for the location for 22 years), he stated that he is well versed with the Estate of the Estate of the deceased as it falls within his jurisdiction. He stated that he knew all the children that belonged to the deceased. He mentioned that one of the children i.e. the last born, Helen Naserian Nkai was not named as a daughter on the deceased in the affidavit.

Reference was made to the certificate of grant after which he stated that the names of Emily, Deborah, Helen and Joyce were missing. He stated that the heirs of the deceased are Emily Nkai, Richard Nkai, Joyce Lasoi Nkai, Deborah Nkai, Alex Nkai, Namuya Margaret, Supeyo, Sayele and Naserian.

**PW2: Hellen Naiserean Nkai** she stated that she is the last born child of the deceased. She further told the court that she was seeking revocation of the grant of letters of administration on the basis that her name was omitted from the list of beneficiaries. Neither was she informed of the succession proceedings nor was she given any portion of the Estate. She also asserted that she was once married and got divorced in 2008. She also stated that no family meeting was conducted in pursuit of the distribution of the Estate.

She also stated that she summoned the elders to settle matter and when meetings were planned they were caution not to follow up. When they went to the land the elders chased them. It was averred that all her sisters did not benefit from their father's Estate and that Joyce's signature was forged by the administrators to purport as if she consented to the distribution of the suit properties.

**PW3, Jeremia Pesa** who was invited to give an opinion on Maasai Customary Law, presupposed that inheritance of the Maasai Community changed from the Maasai Community to where we are by the 2010 Constitution. According to him, initially before colonization, the Maasai girls had no right to land, property or inheritance. In fact they were considered properties of the home and were to be married.

In the 1990's a new perspective came in of single ladies, they went back agitating for inheritance rights and the family considered in giving in to such inheritance leaving before any woman not married had no rights of owning properties. The Constitution of 2010 solidified the educated women in Maasai-land started considering that all the sons and daughters have equal rights. The married women have earned access to the property of their family.

Upon cross-examination by the Learned Counsel for the Respondent, he stated that the Maasai community live in a communal set up which means they share resources. They depend on livestock, water, salt is key to their lifestyle. He stated there are married, unmarried and divorced women. Further that the unmarried woman is an asset of the father. According to him, children are equal and must be treated as such in all walks of life.

**DW1: Paul Ole Thlengasi**, stated that he has expertise in Maasai Customary Law. He does not agree with PW3 as regards the Maasai Customary Law. His perspective is that customary rights are pegged around livestock, social life and inheritance rights. That the Maasai culture has a system of inheritance passed on from generation to generation.

He asserted that inheritance depends of the property. The spouse and sons has a right to inherit the properties of the husband and father respectively and a girl that is not married can be given some properties in form of livestock but land was not the first priority. If the girl divorced and comes back, she is not entitled to any inheritance and the dowry can never be reversed. Marriage is based on dowry. He also stated that if married woman come back to claim a share of the fathers' property, would being conflicts like cases of double allocation.

**DW1** believes that even though the land has been subdivided, registered and individual custodial titles issued, its distribution is still governed by Maasai Customary. He stated that the meaning of equal to him is equal in shares size, and equitable is in the context of what he is given. In case of divorce, he stated that the divorced woman must prove return of dowry, the husband must prove divorce and the children must agree to the divorce. Further that the divorced woman under Maasai customary law, would be given cows to milk and a grave to be buried.

He also stated that a girl who is not married is called Indijunkan and she is entitled to a portion that is not equal with that of the sons. The married woman has no equitable rights since she enjoys the same at her matrimonial home. DW1 is of the view that some of the provisions of the constitution are in contravention of the Maa Customs.

If the family had no sons but daughters, the brother to the deceased would inherit the estate. If the deceased had no brother, the clan ruled over to the estate.

**DW3: Gideon Ole Nkai**, testified that he indeed took the grant in 2003 and during that process, they included all other siblings except Hellen because they could not trace her to sign the petition. He explained that he included two grandsons of the deceased, Kelvin and Tobiko as well as Rev Kim who was a pastor to the deceased. He averred that his father had told him to convey a portion of land to Rev Kim which was to be used to build a church.

He insisted that all his sibling took part in the succession proceedings except Hellen whose whereabouts were not known according to him. He also claim that all some beneficiaries attended the confirmation of the grant and some did not. Further that the signatures were not fabricated. He claims that Emily and Deborah were very much aware of the proceedings and their spouses guaranteed the distribution.

It is his testimony that the decision to obtain the grant was made by the family together with the elders. He believes that the distribution was fair and Hellen was left out because she was married in Loitokitok. He also told the court that the court is unavailable as it has been conveyed to third parties. He also stated that he disposed off several acres of land and the sale was endorsed by four members of the family whom he included as vendors.

He also averred that the distribution was done in accordance with Maasai customary law and it was a family decision. He also rejected the fact that Hellen was divorced. That land title Number L.R 1998 was cautioned.

In addition to the above oral testimonies, expert opinions and affidavit evidence, the parties further supported their respective positions with written submissions. I shall consider the same in my analysis below.

## **DETERMINATION**

The basic structure of this summons for revocation of grant of letters of administration would unmistakably mirror the following passage:

**“Customary Law has a great impact on the lives of the majority of African women in the area of personal law more specifically inheritance rights. A number of decisions from comparative jurisdictions have in a general legal policy framework adopted the approach that discriminatory practices in so far as it restricts the female children from inheriting the property of their parents to be repugnant to justice and morality. In the Nigeria case of *Mojekwu v Mojekwe* {1997} 7 N WLR, in this case under Nnewi custom if a man dies leaving a male issue, the male child inherits the deceased's property. However if the man leaves no male issue, the man's brother will inherit the property. The Court of Appeal held inter alia that the Nigerian custom that effectively prevented female family members from inheriting property repugnant to the principles of natural justice, equity and good conscience. Further, the court stated that all human beings are born into a free world, and are expected to participate freely, without any discrimination on grounds of sex.”**

In the Kenyan case:

**“the constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in Chapter 4 of the Bills of rights.”**

The pertinent right to these summons is provided for under Article 27 of the Constitution which is states:

**“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”**

Regarding the question of discrimination any customary law, rites and culture that completely disregards the right of equality and equal protection of the law under Article 27 runs foul of this protection and the constitution frowns at its violation.

I have carefully considered the application, rival submissions by parties and the law. What is of great significance are the arguments on the right to inherit. The Objectors believe that they were excluded from the succession process by the Respondent simply because they are women and some of them married and divorced. Their view is that they are entitled to inherit their father's estate regardless of they are married or not. In other words the Objectors' argument is that they were discriminated on the basis of gender.

On the other hand, the Petitioners argue that the Estate ought to be governed by Maasai Customary Law as well as the former constitution of Kenya which allowed the application of different personal laws regardless of whether such laws were discriminatory or not. The Counsel for the Respondents therefore reiterated that the provisions of the current Constitution of Kenya are not applicable in this case since the law at the time of the deceased's death recognised the primacy of customary law in inheritance.

Form the evidence of the Respondents, it apparent that they are suggesting that the Objectors are not entitled to a share of their father's estate because they are daughters (women) and in the case of Hellen Naserean, a divorced woman. In my view, there are arguments which do not hold much water and have little or no place in the modern-day Kenya. The Constitution of Kenya 2010, and the Law of Succession Act, Cap 60 robustly frowns upon such notions.

I'm inclined to cite **Article 27(3)** of the Constitution which specifically provides that:

**“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”**

I also seek useful guidance to the literary work by W.M. Musyoka, Law of Succession at page 118 which expounds on children under the Law of Succession Act. It is said thus:

**“Non-discrimination of daughters**

**Reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters”**

I also note that Section 29 (a) of the Law of Succession CAP 160 of the Laws of Kenya in recognizing children does not classify them on the basis of gender or marital status. Makhandia, J. (as he then was) in *In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR* rendered himself inter alia thus:

**“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”**

In *Peter Karumbi Keingati & 4 others vs. Dr. Ann Nyokabi Nguthi & 3 others (2014) eKLR Kimaru J stated thus:*

**“as regards to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that courts would grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.’**

A more recent perspective on discrimination of daughters or woman in matters inheritance was propounded **in the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased) [2017] KLR** as follows:-

### **Discrimination of daughters in inheritance**

From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when **RONO vs. RONO [2008] 1 KLR 803** delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically I am content to cite the proclamation by the Court of Appeal in the case of **STEPHEN GITONGA M'MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR** that:-

**“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”**

**Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of the Constitution. Accordingly, the 3<sup>rd</sup> Administrator and her children who are claiming the inheritance of late Festus K. M'Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M'Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.”**

The coming of the 2010 Constitution has gone a long way in improving and guaranteeing women's right in access to and control over land. Prior to its promulgation, a range of cultural, social, political and legal factors contributed to women's lack of property and inheritance rights. Due to these factors, the pursuit of gender equality in inheritance rights has been one of the most difficult challenges in rights based approaches owing to complexity as well as entrenched patriarchal characteristics of socio-economic, cultural and religious practices.

I take notice that the Maasai Customary Law specifically on inheritance, prima facie, and according to Respondents does not accord daughters direct property rights and they are only able to gain access to resources through their partners. If indeed the Maasai people recognise their daughters as subservient to their sons, then that is undisputedly repugnant and inconsistent to the Constitution of Kenya. Such a persistent cultural and customary attitude works against implementation of women's rights.

It must be remembered that prior to the advent and promulgation of the Constitution of Kenya 2010, customary laws and practices took precedence over the repealed constitutional and legal provisions for equality and this was so in areas of family, property rights and inheritance. These practices were blatantly biased and discriminatory against women. The impugned perspective at that was that property ownership was an exclusively male domain.

In any event, when a man dies without a will, his estate devolves to his heirs. The Estate to which these proceedings relate is of **NOAH MELITA NKAI** (deceased) and the rightful heirs would be his spouse together with his own children and or such persons who are able to establish that they were dependents in view of Section 29 of the Law of Succession Act. Those who are proved to be dependents of the deceased within the meaning of section 29 aforementioned, inherit the Estate in their own right.

The foregoing means that a daughter has an equal right to ancestral property as a son and her share in it accrues by dint of birth itself. The position has shifted from the pre-2010 era where only sons had a share in such property.

In view of the above, I'm in agreement with the Learned Counsel for Objectors that the actions of Gideon Ole Nkai to exclude some of the beneficiaries on the account of their gender is discriminatory and repugnant to the law. The four daughters of the deceased have all expressed their desire to inherit their father's estate just like all other beneficiaries and I found no reasonable explanation as to why they were disinherited. The Estate of the deceased cannot be seen as fairly and equitably distributed considering the matter in which the Administrator conducted the succession process.

An examination of the pleadings and submissions reveals that the Objectors borne bone of contention is that the grant obtained by the Respondent was obtained fraudulently by concealing from the court of something material that is the names of some of the objectors like Hellen Naserian Nkai. In fact none of the daughters of the deceased benefited from the distribution of the Estate. The Objectors further allege that the Respondent failed to obtain the relevant consents from the dependents of the objectors which draws the inference that the proceedings to obtain the grant were defective in substance.

Section 51 of the Law of Succession Act deals with the information that should go into an application for grant of representation. Under section 51(2)(g) it is stated:

**“51(2) An application shall include information as to-**

**(g) in cases of total and 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....”**

For the purposes of the instant case, it was incumbent upon the Respondent to disclose the names of the children of the deceased including those of the Objectors. Instead, in the affidavit in support of the Petition for grant of letters of administration intestate filed by the Respondent, the respondent listed several beneficiaries to the estate of the deceased but to the exclusion of Hellen. In my view, the Respondent deliberately omitted her name for the reasons that she was married and subsequently divorced hence she was not entitled to any portion of the deceased’s estate. The explanation by the Respondent that her whereabouts were unknown at the time as she was married was nothing but an afterthought. I therefore reject the Respondent’s explanation. During the trial, it was crystal clear that the Respondent was not prepared to distribute any part of the deceased property to that particular objector. As such, this court finds that Section 51(2)(g) aforementioned was not complied with.

Further, this court is of the view that when the high court granted the grant in question, it was not aware of the existence of the Objector (Hellen) and that she had not been listed on the list of beneficiaries. Neither did the Respondent give her notice before filing her petition nor did he make an effort to obtain her consent.

In the **Matter of the Estate of Wilson Wamagata (deceased) Nairobi High Court Succession Cause Number 261 of 1998 (Githinji J):**

**“(Where there are defects in the process of confirming the grant, the court need not revoke the grant, instead it should cancel the confirmation to pave way for a fresh confirmation application). The complaint was that the grant was confirmed fraudulently as the purported consent of two of the beneficiaries was forged, the application for confirmation was filed two days after the confirmation and the person seeking revocation of grant was not informed of the date for the hearing of the confirmation and did not attend court for the hearing of the confirmation. Evidently, one of the administrators was acting without the knowledge of the other three and had distributed the estate unilaterally allocating himself the prime properties. Some of the children of the deceased had also been disinherited. The court declined to revoke the grant; instead it set aside the confirmation, revoked the certificate of confirmation and directed that the process of confirmation be started afresh.”**

Further the court emphasized in the matter of the Estate of Thareki Wangunyu also known as Thareka Wangunyo Nairobi High Court Succession Cause Number 1996 of 1999 (Khamoni J):

**“(Section 76 of the Law of Succession Act is discretionary, and although a party may establish a case for revocation the court rather than revoke the grant may make other orders which fit the circumstances of the case) A widow obtained a grant of representation without disclosing one of her stepchildren and some of her own children as beneficiaries. The court held that the matter merited the revocation of the grant, but ordered that instead it would order that the stepchild left out be included in the list of beneficiaries without interfering with the grant.”**

It follows that therefore the Respondent is guilty of non-disclosure of material facts, misrepresentation and failure to obtain consent from the eligible beneficiaries to the estate. To that end, I find that and hold the view that the requirements set out in terms of section 76(a), (b) and (c) of the Law of Succession Act has have been satisfied.

The upshot of this matters is as follows:

- (i). That the grant of letters of administration confirmed on the 2<sup>nd</sup> day of June 2004 be and is hereby revoked.**
- (ii). As the petitioners have successfully petitioned this court under Section 83 (g) of the Law of Succession Act the administrator Noah Melita Ole Nkai do submit an authentic and detailed probate account of all the beneficiaries and liabilities so incurred by the Estate since confirmation to the grant of letters of administration.**
- (iii). As a corollary to the above subject to the provisions of Section 93 (1) of the Act a fresh distribution of the Estate be undertaken in compliance with Section 38 of the Act. The principle of equity and equality shall not be derogated from at a time of distribution of the Estate to the beneficiaries.**
- (iv). The costs of this litigation be in the cause.**

Judgment, written, signed by me on this 4<sup>th</sup> day of February 2020

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**R. NYAKUNDI**

**JUDGE**

**DELIVERED IN OPEN COURT AT KAJIADO THIS 10<sup>TH</sup> DAY OF FEBRUARY 2020**

.....

**CHACHA MWITA**

**JUDGE**