



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

PROBATE AND ADMINISTRATION CAUSE NO 28 OF 2017

IN THE ESTATE OF KARANGAE KESIER- DECEASED

ELIZABETH NASHIPAE KARANGAE.....1ST OBJECTOR/APPLICANT

CHARITY NAISENYA KARANGAE.....2ND OBJECTOR/APPLICANT

VERSUS

ALEX KARANGAE.....PETITIONER/RESPONDENT

RULING

Introduction

1. The objectors filed a summons for revocation of a grant issued to the petitioner pursuant to the provisions of section 76 (a) (b) (c) of the Law of Succession Act (Cap 160) Laws of Kenya. The objectors sought the following orders.

1. That the letters of administration issued to Alex S. Karangae be revoked on the ground that the petitioner obtained the grant through proceedings that were defective in substance, fraudulently making false statements and concealment from the court something material to the cause by giving untrue allegation of a fact essential in point of law.

2. That the 1st objector be included as an administrator of the estate.

3. That upon revocation the title deeds in the name of Alex S. Karangae in respect of Longonot/Kijabe block 4/10 and Gilgil/Karunga block 6/10 and make further directions to be taken.

2. The objectors have called one witness in support of the revocation namely Elizabeth Nashipae Karangae (Pw 1).

3. The petitioner has opposed the revocation and has called three witnesses in support of the opposition namely Kamau Karanja (Dw 1), Josephine Njeri Theuri (Dw 2), George Kesier Karangae (Dw 3) and Alex Sankale Karangae (Dw 4).

The case for the objectors.

4. Only the first objector testified in support of the objection as Pw 1. Pw 1 testified that she herself belongs to the second house of the deceased. The respondent belongs to the first house. Pw 1 further testified that both her mother and step mother are dead. It was her evidence that the deceased died leaving behind tractors and agricultural shambas in his name. Pw 1 continued to testify that by the time the deceased died, he had not shared out the following properties.

1. Three rental plots at Nairegia- Enkare

2. Agricultural land at Nairegia- Enkare, being land reference No 77, where the whole family resides.

3. Another shamba at Nairegia-Enkare being No 415

4. Another shamba at Nairegia-Enkare being No 151

5. Another agricultural land at Longonot/Kijabe/ 410

6. Gilgil/Karunga/610

7. Nairegia/Enkare plot No. 4

8. Nairegia/Enkare plot Nos. 35 and 36

5. PW 1 further testified that the deceased while ill called for a family meeting including all his sons and daughters. The purpose of the meeting was for him to tell his children on how he was going to share out his properties. PW 1 then was ten years and was schooling, but her late mother attended. PW 1 accompanied the deceased to Nairegia-Enkare centre, where the deceased showed each of her twelve brothers the rental premises from where each was to collect rent. They then left the centre and went home. At home, the deceased told them that he was suffering from cancer from which he could not recover. The deceased urged all his children, both married and unmarried to live in harmony. As at that time the entire family was living on land No. 77. He did not tell the family members about the other properties, since he was very ill. The minutes of that meeting were recorded by the petitioner, David Karangae and George Karangae, although she does not know the whereabouts of those minutes.

6. There was a small portion of land which her blood mother was using in land No. 77, which she was told to be using; since her blood sisters had been married. She used to lease that portion of land until 2017, when the petitioner told her not to lease it. When she asked the petitioner as to why he stopped her from leasing that portion; the petitioner told her that he wanted to fix the boundaries properly. Later she learned that the same portion has been leased by George Karangae to Mama Gaisha. She then rang George Karangae and asked him about it. George Karangae told her he was going to refund her the leasehold money. He never refunded.

7. Furthermore, PW 1 continued to testify that she rang her brother Kofo Karangae concerning the leasehold money. Kofo told her to talk to George Karangae. George Karangae told her that the deceased had decided all his daughters were not going to get a share of his estate. Since George Karangae was her blood elder brother, she decided not to argue with him. Kofo Karangae then told her to go and use the land reference No. Kijabe/Longonot/410. She then took her workers to clear that shamba. In the course of clearing that shamba, the petitioner, George Karangae and Kamau Karangae arrived at the scene and told her that she was not entitled to use that land. They told her that daughters were not entitled to inherit from their father's estate.

8. As a result of the refusal by her brothers not to use that parcel of land, she carried out a search in the land registry at Naivasha. The outcome of that search was that land reference Nos. Longonot/Kijabe/410 and land reference No. Gilgil/Karunga/block 610 were registered in the name of the deceased.

9. Furthermore, PW 1 managed to get a copy of the confirmed grant in respect of the estate of the deceased being succession cause No. 3061 Of 2007, which was filed in the Nairobi High Court registry. Upon examination of the grant PW 1 discovered that the following were not listed as beneficiaries.

1. Nairesiai

2. Mama Eli

3. Mary Wangai

4. Deceased Mary Njeri

5. Naisenya Karangae

6. Deceased Julius Karangae

7. Deceased Joseph Kariuki

8. Caroline Lanet

9. Elizabeth Karangae

10. Furthermore, she testified that her co-objector and other sisters were not listed as beneficiaries. The only sister who was listed as a beneficiary was Josephine Njeri Theuri, who inherited part of land reference No. N/Nkare 151. PW 1 then went and asked Alex Karangae about the grant. The petitioner told her that even if she went to any court she was not going to be assisted; since the court had issued the grant. She then went to see the chief who referred her to the advocate. PW 1 prays that each beneficiary to get an equal share in the estate. Additionally, PW 1 also wants land reference Nos Longonot/Kijabe/410 and Gilgil/Karunga/block 610 to be included as part of the estate and be distributed equally.

11. While under cross examination, she testified as follows. The deceased died in 1993. The second objector is her blood sister from the second house. She also testified that in 1993, she was 10 or 11 years old. She was born in 1982. She also testified that she was not aware of the succession cause, although it started in 2003. Shau Kesier was the brother of the deceased. She came to learn of the case of Shau Kesier against the estate of their father in 2010. She also used to do farming in land reference No. 77, on a piece of land that was one and a quarter of an acre. None of her sisters got a share in land reference No.77. The deceased allocated to each of his twelve sons a shop at Nairege Enkare.

12. Furthermore, it is the evidence of Pw 1 that the land at Gilgil is not fertile. It is rocky and hilly. In size it is 5.3 hectares. She testified that the confirmed grant does not reflect the wishes of the deceased. The land at Longonot is 28 acres, while that in Gilgil is about 13 acres. All her brothers and sisters in the second house are in agreement except one brother, who is in disagreement. She also testified that they did not agree with their brothers in the first house. Furthermore, she testified that they did not agree that all female beneficiaries share the land at Gilgil. It is her evidence that the deceased had not shared his land before he died.

13. While under re-examination, Pw 1 testified that land reference No. Gilgil/Karunga/6/10 is in the name of Alex Karangae, while land reference No. Longonot/Kijabe is in the name of Karangae Ole Kesier (her deceased father).

14. It was also her evidence that land reference No. Nairege Enkare/ 77 was shared out to the nine brothers of Pw 1 by the petitioner/administrator. Pw 1 further testified that they were not involved in the succession cause that led to the confirmed grant. The two objectors were not given a share in the said land. Pw 1 also testified that the deceased never said that his daughters should not inherit from his estate. It was also her evidence that land reference No. Cis-Mara/Nairegie/Enkare/ 151 is shared equally among Josephine Njeri, John Njoroge Karangae, Benson Kamau and Alex Karangae.

The submissions of the objectors

15. Ms. Rebecca Nchoe, counsel for the objectors submitted that the deceased had not shared out his properties. She also submitted that the distribution of the properties did reflect the wishes of the deceased. She further submitted that the deceased died intestate in terms of section 34 of the Law of Succession Act (Cap 160) Laws of Kenya, since he did not make a will. And for that reason section 38 of the Law of Succession Act applies; which directs the court to have the properties to be shared equally.

16. Furthermore, counsel cited *Purity Kaari Gilbert and Another v David Njeru Mugwika [2017] ECLR*, in which the court revoked the confirmed grant because the applicant had not disclosed all the names of the beneficiaries as required by section 51 (1) (g) of the Law of Succession Act. The provisions of that section impose upon the applicant an obligation to reveal all the names of the surviving children of the deceased. The evidence of the objector was that the administrator did not consult them in respect of the instant cause.

17. Furthermore, counsel submitted based on section 51 (1) (h) of the Law of Succession Act, that the administrator did not give a full inventory of all the assets and liabilities of the estate. In this regard, counsel submitted that the administrator failed to include in his petition for letters of administration two properties namely the parcels of land at Longonot and Gilgil. Counsel therefore urged the court to revoke the grant.

The case of the petitioner/administrator.

18. The petitioner called George Kesier Karangae (Dw 3), whose evidence is as follows. He is the elder brother of the two objectors from the same mother. They all belong to the second house. Elizabeth Nshipae Karangae was born in 1982, while Charity Naisinya Karangae was born in 1979.

19. The deceased started to share his properties in 1975 and he finished doing so in 1989; except for the two parcels of land at Longonot and Gilgil. The deceased died in 1992. The estate had two tractors. One tractor was given to the first house and the other tractor was given to the second house. The tractor that was given to the second house was sold by Hezron Kofo (or Kovo), the younger brother of Dw 3 from the same mother. The second tractor was sold to prosecute this succession cause, which took 18 years to finalize.

20. Furthermore, the deceased gave the following properties to Hezron Kofo (**Kovo**).

1. The parcel of land at Lelengo.
2. One acre of land at home, which was part of parcel No. Nairegie/Enkare/ 77.
3. The deceased gave the following properties to **Alex Karangae** in **1989**.
4. The whole of parcel No Narok/ Cis-Mara/ Nairegie/ Enkare/415, the whole of which is now covered with water.

Share of the eleven sons of deceased

21. The eleven sons were given land reference No. Narok/Cis-Mara/Nairregie/Enkare/77 out of which 4 acres were given to the family of Shau Kesier, through a court ruling, leaving a balance of 16 acres for the beneficiaries. The deceased gave his sons this parcel of land in **1983**. The late Ngigi was also given one acre in this parcel of land. The whole boma occupies 6 acres and each son got one acre.

DW 3 continued to testify as follows.

Share of the beneficiaries in respect of parcel No. Narok/Cis-Mara/Nairegie-Enkare/151

22. In **1978** the deceased gave his daughter and sons the following shares in respect of the above land.

- | | |
|--------------------|---------|
| 1. Josephine Njeri | 4 acres |
| 2. Kamau Karangae | 2 acres |

3. Alex Karangae 2 acres

4. Njoroge Karangae 2 acres

Share of the beneficiaries in respect of plot No. Narok/Cis-Mara/Nairregie-Enkare/35

23. In 1989 the deceased gave his sons the following shares in respect of the immediate above plot.

1. Muhia Karangae - back side of the plot

2. Peter Karangae - front side of the plot

Share of the beneficiaries in respect of plot No. Narok/Cis-Mara/Nairegia-Enkare/4

24. In 1989 the deceased gave his sons the following shares in respect of the immediate above plot.

1. Alex Karangae - got one piece in the front part of the plot

2. Simon Karangae - got one piece

3. Njoroge Karangae - got one piece

4. Peter Karangae - got one piece

25. The deceased gave each son a shop in this plot. The objectors were not there when the deceased gave each son a share in this plot. Dw 3 also testified the two objectors are married and live in Maa Mahiu town in the house of the first objector. Dw 3 denied chasing the first objector from their home.

Share of the beneficiaries in respect of plot at Ngong

26. In 1975 the deceased gave the immediate above plot to Kariuki Karangae at Ngong

Share of the beneficiaries in respect of parcel of land at Lelengo.

27. The deceased gave this 8-acre parcel of land to Hezron Kofo (Kovo), Simon Karangae, Muhia Karangae and Wangari Karangae, with each brother being registered as the owner.

Parcel of land at St Antonys

28. Deceased gave this one-acre parcel of land to the blood mother of Dw 3. In 2012 Hezron Kofo sold this land without the knowledge of the family, when their mother was alive. Hezron Kofo sold all his parcels of land except the one he owns at Longonot.

29. Furthermore, Dw 3 testified that the deceased did not consult any one in respect of sharing his parcels of land to his sons. It was also the evidence of Dw 3 that the deceased was mentally fit when he was distributing his properties to his sons. In doing so the deceased transferred his properties to his sons whatever he gave them. Dw 3 also testified that they have lived in harmony despite the fact that some of his brothers have bigger shares than others.

30. Dw 3 further testified that they called a family meeting which the objectors did not attend. In that meeting all his sisters except the objectors agreed that they inherit the 18-acre land at Gilgil, while his brothers were to inherit the 12 or 13-acre land at Longonot. This mode of distribution was intended to avoid another litigation in court following the 18 years' litigation with the Kesier Shau family. It was also intended to enable them to live in harmony. The objectors did not agree with this mode of distribution. While under cross examination, Dw 3 testified the deceased did not state that his daughters should inherit his estate.

31. Finally, it was the evidence of Dw 3 that the deceased wanted his properties to be distributed as per the confirmed grant.

32. In addition to Dw 3 the respondent called Alex Karangae (Dw 4). Dw 4 is a step brother to Dw 3 and he belongs to the first house. Dw 4 adopted the evidence of Dw 3, except for the following evidence. Dw 4 produced the family meeting minutes of 13/10/2018 as exhibit Pexh 1.

33. Dw 4 also testified that he had no intention of taking the parcels of land at Gilgil and Longonot as he was only registered as a trustee. They were not included in the grant since he was not aware of them.

34. The further evidence of Dw 4 was that Dupleix Karangae was not given land by the deceased because he was a minor and was left in the custody of Hezron Kofo. Joseph Kariuki was given land by the deceased, but he sold it. Dw 4 also testified that those whose names do not appear in the confirmed grant sold their parcels of land. He further testified that Hezron Kofo sold his parcel of land to him and he sold another parcel to the son of the sister of Dw 4, after the grant was confirmed. Hezron Kofo sold his third parcel to a person who was not a family member. Dw 4 also testified that those whose names appear in the grant are those whom the deceased had given land. The names of

those who sold land given to them by the deceased do not appear in the grant. Dw 4 urged the court to re-confirm the grant.

35. The respondent also called Kamau Karanja alias Kamau Mubee (Dw 1). Dw 1 is a brother in law to the deceased. He gave *de benesse* evidence. He testified as follows. He testified that the deceased did not consult anyone in the course of sharing his property. He also testified that the objectors were given land at Gilgil and they refused. They also did not attend a meeting called by Alex Karangae (Dw 4). He also testified that the deceased was of good health when he shared out his properties. And that he followed Kikuyu custom.

36. Finally, the respondent called Josephine Njeri Theuri (Dw 2). She also testified along similar lines like Dw 3.

The submissions of the respondent.

37. Mr. Ndungu, counsel for the respondents submitted that it was the tradition not to give girls property. It is only Josephine Njeri Theuri who was given land by the deceased. Furthermore, based on the evidence of Alex Karangae (Dw 4) and George Karangae (Dw 3), counsel submitted that the deceased shared out his properties between 1975 and 1989, except the properties at Longonot being land reference No. Longonot/Kijabe block 4 and Gilgil being land reference No Gilgil/Karunga block 6/10. The evidence of George Karangae was adopted by Alex Karangae (Dw 4). Dw 4 testified that the certificate of confirmed of grant and the mode of distribution was a reflection of his father's wishes. The petitioner according to counsel only fulfilled his father's wishes. There was therefore no discrimination. In short the deceased had gifted and distributed his properties to his children during his life time.

38. In support of his submission, Mr. Ndungu cited W. M. Musyoka in his book titled A case book on the Law of Succession in which he in turn cited the judgement of *Kneller, JA in In re Estate of Ngamini Kirira (Deceased) [2016] ECLR*, in which the said Judge stated that: "Now, by custom, Kikuyu father has to distribute his land during his life time if possible, and usually does so. This often happens where a son marries and counts as that son's share if his father has not revoked the gift before he dies."

39. Counsel also cited *In re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] ECLR* in which the court recognized two types of gifts. In doing so that court pronounced itself as follows: "**In law, gifts are of two types. There are the gifts made between two living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa).....**" The court therein stated that gifts made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer if the conditions set out in section 31 (a) to (f) of the Law of Succession Act are present.

40. Counsel for the respondent has also opposed the appointment of the first objector on the basis that the objector has not established any ground to be granted such an order. He has also submitted that he administrator has not mismanaged the estate and has not concealed any matters.

41. Counsel for the respondent has therefore submitted that the only properties available for distribution are the parcels of land at Longonot and Gilgil. It is his submission that the daughters of the deceased should inherit the land at Gilgil and their brothers to inherit the land at Longonot.

Issues for determination

42. I have considered the totality of the evidence of both parties. As a result, I find the following to be the issues for determination.

1. Whether or not the objectors have made out a case for the revocation of the grant.
2. What properties are available for distribution?
3. What is the mode of distribution?

Issue 1: Whether or not the objectors have made out a case for the revocation of the grant.

43. It is common ground that the administrator did not disclose in his petition to the court that the two objectors were beneficiaries. It is also common ground that the parcels of land at Longonot and Gilgil were not included among the assets of the estate. It is therefore clear that the administrator concealed these two material matters from the court. The administrator had not disclosed all the names of the beneficiaries as required by section 51 (1) (g) of the Law of Succession Act, before obtaining the confirmed grant. This case is on all fours with *Purity Kaari Gilbert and Another v David Njeru Mugwika, supra*.

44. Furthermore, the administrator did not in terms of **section** 51 (1) (h) of the Law of Succession Act, give a full inventory of all the assets of the estate.

45. In the premises, I find that the objectors have made out a case for the revocation of the confirmed grant.

46. I also find that objectors have made out a case for the first objector to be appointed as a co-administrator of the estate.

Issue 2: What properties are available for distribution?

47. I find as credible and cogent the evidence of George Karangae (Dw 3) that the deceased had gifted all his properties during his life time, between 1975 and 1989; with the exception of the two properties at Longonot and Gilgil. The evidence of DW 3 is supported by that of Alex Karangae and Josephine Njeri Theuri (Dw 2). I do not believe the evidence of the objectors since they had not been born when their father

was sharing out his properties. The first objector (Elizabeth Nashipae Karangae) was born in 1982 while the second objector (Charity Naisinya Karangae) was born in 1979. They were born after the deceased had share out most of his properties. According to Kamau Karanja alias Kamau Mubee (Dw 1), whose evidence was taken de benesse the deceased distributed his properties according to Kikuyu customary law. That law was recognized and applied in *Ngamini Kirira (Deceased), supra*. The instant cause is in all fours with that cause. Rule 64 of the Probate and Administration Rules makes provision for the application of African Customary Law in the following terms:

48. *“Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross examination.”*

49. In the instant cause Kamau Karanja alias Kamau Mubee (Dw 1), testified that the deceased distributed his properties in accordance with Kikuyu customary law. I find that the said customary law is applicable in the instant cause by virtue of section 3 (2) of the Judicature Act (Cap 8) Laws of Kenya. I further find that the application of the said law is not repugnant to justice and morality. It is also not inconsistent with any written law. The evidence produced here is that as each son married, the deceased gave to him a parcel of land, apparently for his support and upkeep. I find that this to be a good practice and did not amount to discrimination a between his sons and daughters of the deceased. I therefore find that properties were validly shared out by the deceased as gifts. And for that reason all those parcels of land are not available for distribution. That leaves only the parcels of land at Longonot and Gilgil as the only parcels available for distribution.

Issue 3: What is the mode of distribution?

50. The deceased died intestate. It therefore follows that according to section 38 of the Law of Succession Act, all the beneficiaries are to share equally the said two parcels of land at Longonot and Gilgil. All the beneficiaries will retain their shares as given to them by the deceased except the two objectors who were not given any shares by their late father.

Final orders

51. In the premises, a grant is hereby issued as directed in the immediate foregoing paragraph. Additionally, the grant will have to reflect the shares of Kamau Karangae and Muhia Karangae in respect of land parcel No. Narok/Cis-Mara/Nairegie-Enkare/35, whose names were omitted by error.

52. Elizabeth Nashipae Karangae is hereby appointed as a co-administrator along with Alex Sankale Karangae.

53. By consent of the parties, there will be no order as to costs.

Ruling signed, dated and delivered in open court at Narok this 6th day of February, 2020 in the presence of Ms Irene Nchoe holding brief for Ms Rebecca Kudate for the objectors and in the presence of the Petitioner in person.

J. M. Bwonwong’a

Judge

6/2/2020