



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 203 OF 2013

IN THE MATTER OF THE ESTATE OF KIDOGO LOLMETETEK OLORMOR (DECEASED)

LOLOMETETEK KARUBA SIMEON.....OBJECTOR / APPLICANT

VERSUS

MARY POTISHOI.....PETITIONER

LESHAN METETEK.....PETITIONER

RULING

1. The background of this matter is as follows; the deceased died on the 26th day of June 2009. The only asset left by the deceased was **L.R. No. Transmara/Poroko/4 ('parcel no. 4')** measuring approximately 9.8 Ha (about 24.8 acres). The respondents filed succession cause vide Kilgoris PMCC succession cause no. 2 of 2010 and obtained a grant of letters of administration in respect of the estate of the deceased person on the 25th January 2011. Upon confirmation of the said grant the 1st respondent caused the transfer of land parcel L.R. No. Transmara/ Poroko/4 in her name. On the 4th September 2013 the Ololmetetek Karuba Simeon (**'Objector/ applicant'**) filed an application to revoke the grant. The application is brought under sections 48 & 76 of the Law of Succession Act, Cap 160 (**the Act**) and Rules 44,49,59,63 & 73 of the Probate and Administration Rules. The objector seeks the following orders;

i. Spent

ii. Pending the hearing and determination of the Summons herein, the Hon. Court be pleased to issue a Prohibitory Order of injunction and/or conservatory order, restraining the respondents jointly and severally from disposing of alienating selling and or appropriating the assets of Kidogo Lolmetetek Olormor the deceased herein, more particularly, L.R. No. Trans-mara/Poroko/4 measuring 9.8Ha

iii. The grant of letters of administration granted to the petitioners/respondents on 25th January 2011 and confirmed on the 4th August 2011 vide Kilgoris PMCC Succession cause no. 2 of 2010 be revoked and/ or annulled.

iv. The Registrar in respect of L.R. Trans-mara/Poroko/4 be rectified and the name of the 1st Respondent and/or any other beneficiary therefore be rescinded and/or deleted there from and same do revert to the names of Kidogo Lolmetetek Olormor the deceased person herein.

v. The Respondent do tender accounts in respect of the state of the estate of Kidogo Lolmetetek Olormor the deceased person herein more particularly, the obtaining extent of the administration so

far taken.

vi. Costs of the application be borne by the respondent.

The application is supported by the affidavit of **Ololmetetek Karuna Simeon** dated the 4th September 2013. The respondents are **Mary Potishoi** ('1st Respondent') and **Leshan Metetek**('2nd Respondent'). The application was opposed.

2. Directions given that the matter be heard by way of viva voce evidence. Parties filed witness statement. The objector called 3 witnesses. **Ololmetetek Karuna Simeon (applicant)** (Pw1), **Samuel Munjet Sumpel** (Pw2), **Lekilabu Olotalam** (Pw3). For the respondent's case, the 1st respondent (Dw1) testified, **Samson Ntalyio** (Dw2-former chief of Poroko), **Samuel Laulo Ole Kisorio** (Dw3) and **Benjamin Lemso Ntuntai**(Dw4). Justice Okwany before her transfer from Kisii High Court heard the evidence of Pw1. I heard the evidence of the remaining witnesses.

APPLICANT'S EVIDENCE

3. The applicant testified that the deceased is his father. The deceased owned and lived in land parcel no. L.R. Transmara/Poroko/4. His mother Kipeni Olemetetek too is deceased. He has 2 siblings John Nkoyon and Joseph Nkoyon. His father was buried in parcel no. 4. His mother was buried in Shartuka. His brother Joseph Nkoyon was buried in Oloibor-Soito. His father had only one wife his mother. His father died on the 26/6/2006 after a long illness. He took care of his father with his brother John. Mary Potoshoi is the wife of his cousin Paul Nkoyon. She is not the father's wife. She did not participate in his funeral arrangements or burial. His father wrote a will before he died. He does not agree with the succession cause Mary filed in Kilgoris. Mary lied. He is not Mary's son nor are her sons his brothers. They were not consulted when the succession cause was filled. Mary has sold part of the suit land to Josephine Njoki. She did not involve them in the sale of the land. He owns land parcel Transmara/Olposoit/44. Transmara/Olposoit/41 belongs to Paul, Mary's husband. Mary has not lived in parcel no. 4 she lives in parcel no. 41. He has never seen Mary's children. The 2nd respondent is not his younger brother. He did not chase away Mary during the funeral. Mary has never lived in the suit land. His father is not Sayialel Metek. He denied being the deceased's nephew. His mother was the deceased's 2nd wife. The first wife died too but Mary is not the wife of the deceased. He has lived in the land all his life. He admitted knowing the persons listed as Mary's witnesses. He produced the deceased's death certificate (ext. 1), his will (ext.2), certificate of official search dated 16/11/2011 in the name of Mary Potoshoi (ext.3), a grant and certificate of confirmation (ext.4 &5), title deed in the name of Mary Potoshoi (ext.6), a letter from the area chief dated 12/4/2016 (ext.7), a police abstract indicating his father lost his identity card (ext.8), application for registration certificate (ext.9), receipt and the waiting card (ext.10 &11), his father's national identity card (ext.12), a copy of his father's old identity card (ext.13) a burial permit (ext.14) extract of the register index map of the suit land(ext.15) a green card showing that Josephine Njoki name was entered in the register (ext.16) a certificate of official search (ext.17) a green card and official search showing that parcel no. Transmara/ Poroko/237 remained in the name of Mary Potoshoi (ext. 18&19). During cross examination he stated that his father had subdivided his land amongst the 3 sons. Nancy the wife of his late brother got 2 acres and he got 9Ha. His father did not give them titles but he wrote a will in the presence of John Lekodi Ngoyoni. The will was drawn by the firm of Oguttu Mboya on the 10/12/2008. The lawyer and John (his elder brother) were witnesses. Paul is a distant relative and it is Paul who paid Mary's dowry.

4. **Pw2** testified that the objector is the deceased's son and Mary is the wife of Paul. Paul is not the son of the deceased. The suit parcel belonged to the deceased. The deceased is his grandfather. Mary lives in a different parcel of land. The deceased's sons are the applicant and Lekodi John Nkoyon. During cross-examination he told court that the chief lied when he wrote in his letter to court that Mary is the wife of the deceased. He denied that the applicant is the son of the eldest brother of the deceased. **Pw3** testified that the deceased was his neighbour. The applicant is the deceased's son. He has 2 brothers John and Lepita Ololotetek. The deceased's wife was Kiperu. Mary is not the wife of the deceased. He never saw her in the boma of the deceased.

RESPONDENT'S EVIDENCE

5. **Mary** adopted her statement filed in court on the 19/2/2014 and her affidavit filed in court on the 19/9/2013. Her evidence was that she married the deceased on the 14/5/1988. Her full dowry was paid by the deceased. The final ceremony as per the Masai customs to confirm her marriage to the deceased was done on the 10/12/1988. They have 4 children Leshan, Meiteikuiru, Kakenya and Kinyamal. The deceased died on the 26/6/2009. The deceased had 5 other siblings namely Sayialel, Tumpes, Naisiamon, Ngatunyand Plengilasi. She was the only wife of the deceased. The applicant is not the son of the deceased. He is the son of Sayialel Metetek. Kiperu is Sayialel's wife. The applicant lives in his own parcel of land. Nancy is from the 3rd house and she has her own parcel of land. Nancy was the wife of John Nkoyon. John is the cousin of the applicant. It is alie that Nancy and Simeon were given land. She was chased away with all her children and currently she stays at the uncle's place. John and Nancy occupy parcel no. 4. She is being oppressed by the men. She filed a succession cause in Kilgoris. The chief who wrote the letter knew her as the wife of the deceased. During cross examination she maintained that she was the wife of the deceased. She told court that she was chased from the homestead because Simeon wanted the shamba. She was chased away five years before the deceased died. The deceased used to visit her. She does not know Paul Nkoyon. Paul did not marry her. Her 4 children are not sired by Paul. She is not aware if the deceased wrote a will. She has not taken any step to challenge the will. Nancy's husband is from Nkoyon family. Nancy stays in parcel no. 4. She lived there even when the deceased was alive.

6. **Dw2** testified that he was the chief of Poroko. He retired in 2014. Mary was the wife of the deceased. He wrote the letter to enable her file the succession cause. Mary was the only wife of the deceased. The deceased had no other wife. He knows Simeon the applicant. The applicant is the son of Saiyilel and is not the son of the deceased. Mary's children are the ones listed in the letter he wrote. Kiperu was the wife of Sayilele. The applicant chased Mary when the deceased got sick. After the deceased died they sat down and the Wazees stated that the shamba is Mary's.

7. **Dw3** testified that Mary is her younger sister. The deceased was his brother in law. The deceased was married to his sister. The deceased paid the full dowry. He conducted the marriage between the deceased and Mary. The deceased had no other wife at the time he married Mary. Mary was chased from her boma. Mary stays with him. **Dw4** testified that Mary got married to Mzee Kidogo in accordance with Masai customs. He was present during the said ceremony. The deceased was old and delayed in getting marrying. Simeon chased her away.

8. Parties filed written submissions. The objector's submitted as follows; that the deceased executed a will before his death therefore the estate of the deceased was not available for succession proceedings vide grant of letters of administration intestate. The respondents are not the lawful beneficiaries of the deceased's estate. The 1st respondent did not notify the applicant when she filed the succession cause. She therefore concealed and or failed to disclose to the court the true position concerning the estate of the deceased. That the value of the suit parcel is in excess of Kshs.100, 000/- which exceeds the pecuniary and or monetary jurisdiction of the subordinate court. That the proceedings in the subordinate court were therefore defective, unlawful, illegal and void ab initio and the grant that was issued and confirmed should be revoked.

9. It was further submitted that the issues that arise are as follows; the will left by the deceased has not been challenged. (See **Succession cause no. 3221 of 2013 In the matter of the estate of Krishna Kumari Bhatti (deceased)** and **Succession cause no. 1141 of 2011 In the matter of the estate of Murimi Kennedy Njogu (deceased)**). That the respondent did not bring any family members from the family of the deceased to confirm that she was married to the deceased. That the witnesses she called were all her kinship relations. That the respondent did not adduce any evidence that she sired children with the deceased, no birth certificate was tendered in court. That the objector called witnesses who confirmed that he was the son of the deceased and that the 1st respondent was not the wife of the deceased. That the grants should be revoked for the respondents are guilty of concealment and or nondisclosure of material facts, that the procedure used to apply for the grant in the succession cause in Kilgoris court was wrought with illegality and that the grant of letters of administration is null ab initio and should be prohibited by

section 47 of the succession act and that in the interest of the beneficiaries the said grant should be revoked.

10. According to the petitioners the 3 issues for determination are;

- i. Whether or not the proceedings in Kilgoris PMCC Court in succession cause no. 2 of 2010 were null and void for want of jurisdiction
- ii. Who is entitled to succeed the estate of the deceased?
- iii. Who should bear costs

On the first issue the respondent submitted that the court in Kilgoris did not reject the petition that it did not have jurisdiction to handle the matter. That the petitioner followed the due process of filing a petition for letters of administration until the due process was completed. That the objector did not have a valuation report to show the value of the property. That the court cannot guess the value of the parcel of land. On the 2nd issue it was submitted that the respondent filed the succession cause in her capacity as the widow of the deceased. The chief's evidence confirmed she was the deceased's widow. That the chief was nonpartisan and had even handled a dispute when the applicant chased the 1st respondent away. That the evidence adduced by the 1st respondent clearly shows that she was the widow of the deceased. That the will was not sincere as it locked out Lekodi John Nkoyon as a direct beneficiary of the deceased. On costs it was submitted that the objector should bear the costs.

ANALYSIS AND DETERMINATION

11. I have considered the evidence, the submissions and the law. The issues for determination are;

- i. Whether or not the proceedings in Kilgoris PMCC Court in succession cause no. 2 of 2010 were null and void for want of jurisdiction.
- ii. Who are the beneficiaries of the deceased's estate?
- iii. Did the deceased leave a valid will?
- iv. Who should be the administrator/s of the deceased's estate?

On the first issue there is no dispute that the 1st respondent filed a succession cause in Kilgoris PMCC no. 2 of 2010. She filed it in person and declared the deceased's only assets as Land Parcel Transmara/ Poroko/4. The 1st respondent estimated the value of the land parcel as Kshs.100, 000/-. The land parcel is 9.8 Ha which is about 24.2 acres. Though it has been submitted that the applicant has not had the property valued, in my view considering the acreage of the said land, its value in 2011 could not have been Kshs. 100,000/-. If I divide 100,000/- by 24, each acre would cost about 4200/- per acre. I doubt that an acre in Kilgoris area could have been sold for 4200/- in the year 2011. In my view the value of the property was obviously beyond the monetary jurisdiction of the court where the succession cause was filed. The monetary jurisdiction of the Magistrate's court was enhanced in 2015 with the enactment of the Magistrate's court Act No. 26 of 2015. In my view Kilgoris court lacked jurisdiction to issue the grant on the 25th January 2011. The monetary jurisdiction of the magistrate's court before the amendment was Kshs. 100,000/-. I therefore revoke the grant issued on the 25/1/2011 and confirmed on the 4th August 2011.

12. The next issue is who are the beneficiaries of the deceased's estate. The applicant claims to be the son of the deceased. The 1st respondent claims to be the deceased's wife. Each party called witnesses to support their case. The applicant called the deceased's grandchild and a neighbour. The respondent called, the former area chief, her uncle, a step brother and a person known to her. In any case he who alleges a fact has the burden to prove it (see sections 107 and 109 of the Evidence Act). The applicant testified that

the deceased was his father and that his mother Kiperu and the deceased had 3 sons. One of his brother Joseph is deceased. He explained that he is not the son of Saiyilel. He produced a letter from an assistant chief called Ole Suya. In the letter dated 12.4.2016 the assistant chief states that the late Kiperu died in 1979 leaving behind 2 children the late Olotherati Metetek Oleyiame and Simeon Karuna Ole Metetek and that the 2 were brought up by the brother of Ololmonjo Metetek known as Sayialel Metetek until 1981 when Simeon was able to do work and re-joined the deceased who took him to school and the teachers training colleague and that the court should establish the truth from the neighbours. There is some variance in the applicant's evidence and the said letter, one being the year the applicant's mother died and the other the number of sons the deceased had with Kiperu. The assistant chief indicates Kiperu died in 1979 and that Kiperu had 2 sons with the deceased. The applicant during cross examination indicated that his mother died in 2000 and that the deceased had 3 sons with his mother. The applicant too did not indicate that he lived with his uncle at one time as indicated by the assistant. The assistant chief was not called to be cross-examined on the contents of his letter. I also note that the applicant's brother John did not testify. Mary claims that the applicant was a child of Sayialel, no evidence was adduced to establish this allegation. So the only evidence adduced is from the applicant and that of his witnesses. I have asked myself why I should not believe the applicant and I find nothing that persuades me otherwise. On balance of probability am persuaded that the applicant is deceased's son and therefore a beneficiary of the estate of the deceased.

13. The respondent on the other hand too claims that she is a member of the deceased's family and that she is his widow. To support her case, she called the area chief who testified that the respondent was the wife of the deceased and that the respondent was chased by the applicant and that as the area chief they had meetings with the family. There is also the evidence of the uncle and the step brother who testified that they attended the dowry ceremony when the deceased paid the 1st respondent's dowry. The evidence of these witnesses too is very persuasive I find no reason why I should doubt their evidence. It has been submitted that the respondent did not attach any birth certificate of the 4 children. The respondent's witnesses told court that the deceased and the 1st respondent had 4 children. A DNA test can be done to establish that the 4 children belong to the deceased. Having considered the evidence, I find that the applicant is the deceased's son and Mary is the deceased's widow and that her children listed in her statement are the deceased's children, unless otherwise proved by way of a medical test through DNA. The applicant, Mary and her 4 children are beneficiaries of the deceased's estate.

14. The next issue is whether the deceased left a will. Section 11 of the Act deals with written wills. The section provides as follows;

No written will shall be valid unless—

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

The applicant testified that the deceased left a will ext.2. The applicant stated he is pursuing his inheritance as per the contents of the will. In the said will the deceased appointed Olemetetek Karuna Simeon as the executor and trustee of his will. The deceased stated that he bequeaths land parcel no. Transmara/Poroko/4 to Nancy Nkoyon 2 acres of the said land and Olemetetek Karuna Simeon the remainder of the parcel of land after curving out the 2 acres in a favour of Nancy Nkoyon. The deceased/

testator placed his left thumb print in the presence of J.M Oguttu advocate and it was witnessed by Lekodi John Nkoyon who signed John. In **Succession Cause no. 3221 of 2013 In the Matter of the Estate of Krishna Kumari Bhatti (Deceased)** Justice Musyoka stated as follows;

“The deceased herein is said to have died testate. She died after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. The validity or otherwise of her will of 21st November 2013 should therefore be tested against the provisions of the said statute. Part II thereof provides for wills. The validity of wills is dependent on capacity of the maker and whether the same was made in proper form, for a will is defined as valid if made by a person with the relevant capacity in proper form.

The law on capacity is stated in section 5 of the Law of Succession Act. The maker ought to be a person of sound mind, who is not a minor. The provision goes on to state that the soundness of mind of the maker shall be presumed unless at the time of executing the will he was not in a state of mind as not to know what he was doing, on account of either mental or physical illness, or drunkenness, or any other cause. The burden of proving lack of capacity on account of lack of a sound mind is cast on the person alleging that the deceased lacked such capacity. Related to that is the provision in section 7 of the said Act, with regard to wills caused by fraud or coercion or importunity or mistake. Such wills are stated to be void.

Mary testified that she was not aware of the will. Though she did not strongly challenge the will, I note that in her submissions she queries the validity of the will. The applicant relies on the will to demonstrate that the land parcel was left to him and Nancy his sister in law. It is not in dispute that before the deceased died he was ailing. There is nothing to show that he was not capable of making a will whilst ailing. There was no evidence adduced to show that what he was suffering from affected his mind. I can therefore assume that when he made the will he was of sound mind. The contents of the will are that he bequeathed the land to Nancy and Simeon, the applicant. The will was witnessed by Lekodi John Nkoyon of ID card no. [...]. Besides the words in the presence of is the stamp of J.M. Oguttu Advocate & Commissioner for oaths P.O. Box 320 Kisii. The applicant argues that the advocate was the other witness. Section 11 (c) provides that the will has to be attested by **two or more** competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. The will is indicated as drawn by the deceased. What I need to interpret is whether the advocate witnessed the will. The part indicating witnesses is very clearly shown. Lekodi John Nkoyon signed under the word “witnesses”. The stamp of J.M Oguttu is between the words ‘in the presence of; and witnesses’. The applicant stated that the advocate was a witness. The will as drawn was only witnessed by one person Lekodi John Nkoyon. There was no 2nd witness to make it a valid will in line with the provisions of section 11 (c) of the Act.

15. The last issue is who should be the administrators of the deceased’s estate. The applicant is a son of the deceased and Mary is the deceased’s wife. Section 66 of the Law of Succession Act Cap 160 provides as follows;

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

I therefore appoint the applicant **Ololmetetek Karuna Simeon** the deceased's son and **Mary Potishoi** the deceased's wife as administrators of the deceased's estate.

1. FINAL ORDERS;

- i. The grant of letters of administration issued to the petitioner/ respondents on the 25th January 2011 and confirmed on the 4th of August 2011 vide Kilgoris PMCC Succession cause no. 2 of 2010 is hereby revoked.
- ii. **Ololmetetek Karuna Simeon** and **Mary Potishoi** are appointed administrators of the estate of Kidogo Lolmetetek Olormor, a fresh grant shall issue forthwith.
- iii. The title in respect of Land parcel no. Transmara/Poroko/4 issued to Mary Potishoi on the 11th August 2011 is hereby cancelled, the Land Registrar shall make an entry in the register that the title reverts to the names of Kidogo Lolmetetek Olormor, the deceased person.
- iv. The in charge of Civil Registry (High Court) shall open a new succession cause file in place of miscellaneous application no 203 of 2013 to enable the parties proceed with the administration of the estate of the deceased intestate. File reference Miscellaneous Application no 203 of 2013 shall form part of the said succession cause.
- v. The parties shall not dispose off or transfer the suit land. The administrators shall engage a surveyor to establish the portions that are occupied by the applicant and Nancy and the portion that was sold by the 1st respondent to one **Josephine Njoki**. The administrators to share the surveyor's fees. This order to be served on the surveyor by counsels representing the parties.
- vi. The administrators shall file an application to confirm the grant within **90 days** or earlier if the surveyors report is ready. Mention for directions after 90 days.
- vii. Since this is a family matter each party shall bear its own costs.

Dated signed and delivered via Zoom (as per practice directions dated the 17th April 2020) on the **4th day of May 2020.**

R.E.OUGO

JUDGE

In the presence of;

Mr. Adawo For the Applicant

Mr Anyona For the Respondent

Mr. Mose ICT Officer

Rael Court Assistant