



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

SUCCESSION CAUSE NO 4 OF 2017

(FORMERLY NAKURU HIGH COURT SUCCESSION CAUSE NO 457 OF 2012)

IN THE MATTER OF ANNAH NENCHUNGEI KOIKAI (DECEASED)

FRANCO NAURORI KOIKAI

LUCIA NANTOTI KOIKAI

MICHAEL KOILEKEN KOIKAI.....ADMINISTRATORS/RESPONDENTS

VERSUS

SIRERE OLE KOIKAI.....1ST OBJECTOR/APPLICANT

NGENDA LOCATION RANCHING CO. LTD...2ND OBJECTOR/APPLICANT

RULING

INTRODUCTION

1. The objectors have opposed the application dated 15th April 2013 for confirmation of the grant. An order for the grant of letters of administration was issued in favour of the administrators by the High Court in Nakuru on 21st September 2012. The basis of the first objector is that he was not given a share in the estate of his deceased mother and that the second objector was not given a share of the parcel of land that it had bought from the deceased. The objection of the second objector is that it has not been given the parcel of land that it had bought from the deceased.

2. The administrators are of the view that the first objector has been given his rightful share of the estate.

3. As regards the claim of the second objector, the administrators contend that the claim of this objector is time barred, since the consent of the land control board was not obtained.

The case for the first objector.

4. The first objector is the last born brother of the administrators. He testified as Pw 3 and called David Turere Koikai (Pw 6) in support of his claim to the entire estate of the deceased. The basis of his claim is that under Maasai customary, being the last born he is entitled to the entire of his deceased mother. The second basis of his claim to the entire estate is that the deceased had given parcels of land to his brothers during her life time.

5. The first objector testified that their deceased mother was given land reference No Cis-Mara/Ngoben/Ololulunga/130 as a gift by her late brother namely Sarun Koikai. Due to the illiteracy of the deceased and her brother, Franco Koikai took this parcel of land. The deceased was allocated land reference No. Cis-Mara/Ololulunga/181 by her Enaikishomi group ranch, by virtue of her being a member of that ranch. She then gave this parcel of land to Franco Koikai. He continued to testify that Franco Koikai was allocated land parcel No. Cis-Mara/Ololulunga/177, by virtue of their mother being a member of that ranch.

6. The first objector further testified that land reference No. Cis-Mara/Ololulunga/178 was allocated to John Purko and William Letoya by virtue of their mother being a member of that ranch. Similarly, Michael Koikai was also allocated land reference Cis-Mara/Ololulunga/179 by virtue of their mother being a member of that ranch. Furthermore, William Kirringai and Lucia Koikai were allocated land reference No.

Cis-Mara/Ololulunga/180 by virtue of their mother being a member of that ranch. Finally, the deceased was given land reference No. Cis-Mara/Ololulunga/181. All these parcels of land were acquired by his brothers by virtue of the deceased being a member of Enaikishomi group ranch.

7. It was also the evidence of Pw 3 that his brothers acquired parcels of land in Oleporos group ranch by virtue of their mother being a member of that ranch. The brothers of the deceased were as a result given the following parcels of land. John Purko was given land reference No. Cis-Mara/Ololulunga/3491, while Michael Koikai was given land reference No. Cis-Mara/Ololulunga/3485 or 3487. The first objector was given land reference No. 3541 by Oleporos group ranch after successfully persuading them to do so.

8. He also testified that in June 1996 he began to reside on land reference No. Cis-Mara/Ololulunga/3486. He further testified that none of his brothers and sisters resisted his occupation of the said land. He further testified that in 1982 they moved from land reference Cis-Mara/Ololulunga/74 in Pangani to Oleporos group ranch. Franco Koikai and John Purko were left behind in the land at Pangani.

9. The first objector also testified as to the mode of distribution. He testified that he is entitled to the entire land reference No. Cis-Mara/Ololulunga/181, because he is the last born in accordance with Maasai customary law. He called David Turere Koikai (Pw 6) in support of his Maasai customary law claim. Pw 6 testified that Pw 3 is entitled under Maasai customary law to inherit the entire of his mother's estate for being the last born. He testified that he knows Maasai customary law having been born in 1946. It was also his evidence that the first born (Franco Koikai) is entitled to inherit the entire estate of his father under Maasai customary.

10. Pw 3 further testified that land reference No. Cis-Mara/Ololulunga/181 was sold to the second objector to enable him go for further studies in Switzerland. He testified that the second objector paid a half of the purchase price. He also testified that Franco Koikai used part of the purchase money to buy a tractor and a land cruiser. As a result, he was only able to study for a diploma in hospitality management. Because of this purchase the second objector is entitled to a half the share of land reference No. Cis-Mara/Ololulunga/181.

11. He further testified that the balance of the purchase price was not released by the second objector, as the consent of the land control board was not obtained. The failure to obtain the consent of the said board was due to the tribal clashes of 1990, 1991 and 1992. These clashes discouraged non-Maasai communities from buying land in Narok. It is for this reason the sale to the second objector was frustrated.

12. The first objector also testified that land parcel Nos. Cis-Mara/Ololulunga/74 and 3486 should be shared among the beneficiaries. The first objector also testified that he is entitled to a half of the share of land reference No. Cis-Mara/Ololulunga/181, with the other a half to be given to the second objector.

13. It was also the evidence of the first objector that Maureen Soila Paswa, who is the daughter of his late sister (Sally Seletto), is not entitled to a share in the estate of the deceased. It is only her sisters who are entitled to inherit and not their daughters.

14. While under cross examination, the first objector admitted that the High Court in Succession Cause No. 2 of 2010 ordered land parcel Nos. Cis-Mara/Ololulunga/74, 181 and 3486 to revert to the estate. This is clear from the ruling of that court in which was put in evidence as exhibit Pexh 8.

15. In addition to the foregoing witnesses the first objector, called John Purke Koikai (Pw 4). Pw 4 testified that Maureen Soila Paswa, who is the daughter of his late sister, Seletto Paswa has a right to inherit a share in land parcel No. Cis-Mara/Ololulunga/74. Pw 4 also testified that he is only claiming a share in land reference No. Cis-Mara/Ololulunga/74. He is not claiming any share in the other parcels of land.

16. The first objector also called Gilbert Yegon (Pw 4), who is the district land surveyor for Narok. Pw 4 testified that land parcel No. Cis-Mara/Ololulunga/177 does not exist, following its subdivision into two parcels Nos. Cis-Mara/Ololulunga/11916 and 11917. He produced a map as exhibit 11, which confirmed his evidence. The map also confirmed the existence of land parcel No. Cis-Mara/Ololulunga/181.

The case for the second objector

17. The second objector is a land buying company. It called three witnesses in support of their claim that they are entitled to land reference No. Narok/Cis-Mara/Ololulunga/181. The basis of its claim is that they bought the land on 19th August 1987 and they are therefore a creditor to the estate. The company called Sylvester Mwangi Muhia (Pw 1), who is an advocate of the High Court. Pw 1 drew the sale agreement (exhibit 1) between the deceased and the company, in respect of the subject land. Pw 1 further testified that the purchase price was one million five hundred and thirty five thousand (shs 1, 535, 000). It was also his evidence that the company paid a half of the purchase price. The company then called its director namely George Ngaru Gitau (Pw 2). Pw 2 testified that about the sale and confirmed that the consent of the land control board was not obtained. Pw 2 also confirmed that they had paid half of the purchase price with the balance, which was deposited with Duncan Commercial Agencies. The latter was a mutual agent both for the seller (the deceased) and the buyer (the company).

18. Furthermore, the company called Felistas Njeri Cheror (Pw 7), who was originally its secretary and rose to the rank of being a director of the company. Pw 7 also confirmed the sale of the land to the company. Pw 7 also testified that the company cautioned the subject land. Pw 7 exhibited the caution as exhibit 16. Pw 7 further testified in respect of negotiations between the company and the administrators to resolve the subject land dispute, which did not succeed.

The submissions of both objectors

19. Mr. Orege, counsel for objectors submitted that the sale agreement between the parties is valid and enforceable notwithstanding that the consent of the land control board was not obtained as required by section 6 of the Land Control Act (Cap 302) Laws of Kenya. According to counsel the agreement was frustrated by the death of both the deceased and their mutual agent namely Duncan Commercial Agencies. Counsel further submitted that since the contracting parties were desirous of completing the agreement this court has power to extend the time for an application to be made for the consent of the land control board. He also urged the court to invoke its equitable jurisdiction to

enforce the agreement. He cited the Court of Appeal decision in *Willy Kimutai Kitilit v Michael Kibet (2018) eKLR* in support of his submission. In that case the court held that the lack of consent of the land control board did not preclude the court from giving effect to equitable principles.

20. Counsel concluded his submissions by urging the court to allow the objections of both objectors. He therefore urged the court to rectify the grant of letters of administration by including the first and second objectors as the sole beneficiaries of land parcel No. Narok/Cis-Mara/Ololulunga/181, with each beneficiary taking a half the share of that parcel, amongst other prayers.

The case for the respondents

21. The respondents called three witnesses namely Franco Naurori Koikai (Rw 1), Michael Koikai (Rw2) and Lucia Nantito Koikai (Rw 3). Rw 1 testified that there are three properties for distribution namely parcel numbers Narok/Cis-Mara/Ololulunga/74, 181 and 3486. Rw 1 testified that he did not know that land parcel No. Narok/Cis-Mara/Ololulunga/181 was bought by the second objector. Rw 1 also testified that he saw the sale agreement for the first time during the hearing of this objections. It was also the testimony of Rw 1 Maureen Soila Paswa is the daughter of their late sister Sally Paswa. Rw 1 further testified that the first objector was given his rightful share of the estate. Rw 1 testified that it was not true that the first objector, who is their last born, was entitled to the entire estate of their late mother.

22. Rw 1 also testified that it was not true that the three administrators got shares of land in Oleporos group ranch by virtue of their mother being a member of that ranch. It was his evidence that he never got a share in Oleporos group ranch since he was not a member of that group ranch. Rw 1 further testified that Michael Koikai, the deceased and John Purko got shares in that ranch by virtue of being members of that ranch; but the first objector got a share in that ranch by virtue of the deceased being a member of that ranch. The share of the first objector is land reference No. Naro/Cis-Mara/Ololulunga/5341. Rw 1 produced a register as exhibit D Exh 1, which shows that they are registered as members of Oleporos group ranch, with their names appearing in serial numbers 32,34 and 75 in that register.

23. Rw 1 has applied to the court to confirm the letters of administration. Furthermore, Rw 1 has also applied to the court to order the second objector to surrender the title deed for land parcel No. Narok/Cis-Mara/Ololulunga/181 to enable them to distribute the estate. Rw 1 has also applied to the court for an order to issue directing the first objector to surrender the title deed for land reference No Narok/Cis-Mara/Ololulunga/3486 to enable them to distribute the estate. Finally, Rw 1 has applied to the court to dismiss the two objections with costs to the respondents.

24. Michael Koikai (Rw 2) was the second witness called by the respondents. Rw 2 supported the evidence of Rw 1. Rw 2 in particular testified that the deceased sold land reference No. Narok/Cis-Mara/Ololulunga/181 to the second objector. Rw 2 further testified that the consent of the land control board was not obtained in respect of this transaction. It was the evidence of Rw 2 that the first objector was included as a beneficiary of the estate. The further testimony of Rw 2 is that the first objector is not entitled to inherit the entire estate of the deceased under Maasai customary law, since their mother was an ardent catholic and treated all her children equally.

25. Furthermore, Rw 2 testified that none of the beneficiaries was allocated land at Enaikishomi group ranch by virtue of their mother being a member of that ranch. The first objector persuaded Oleporos group ranch and as a result he was allocated land reference No Narok/Cis-Mara/Ololulunga/3541. It was the evidence of RW 2 that people were registered as members of a group ranch by virtue of being members of the community (Maasai).

26. It was also the evidence of Rw 2 that during negotiations with the second objector, he told them that the agreement was not enforceable since it was entered into thirty years ago. The negotiations did not succeed. Finally, it was his testimony that he was shocked to learn that the advocate for the second objector had filed succession proceedings instead of opting for negotiations to settle the matter.

27. The respondents called Lucia Nantito Koikai (Rw 3), who supported their evidence.

The submissions of the respondents

28. Counsel for the respondents, Mr. Andama, raised a preliminary objection that this court lacks jurisdiction to entertain and determine the objection of the second objector, since the consent of the land control board had not been obtained. Counsel cited *Alexander Mbaka v Rayford Muriuki Rauni and 7 others (2016) Eklr* in which it was held that: “*it is only where one has an established claim against the estate that has already crystallized that he can litigate before a family court.*” Counsel therefore submitted that the second objector is not a creditor to the estate. And therefore the claim of the second objector should be dismissed.

29. As regards the claim of the first objector, counsel has submitted that this objector has been provided for in all the land parcel numbers that constitute the estate namely land parcel Nos Cis-Mara/Ololulunga/181, 74 and 3486. Furthermore, counsel has submitted that Maasai customary law is not applicable; since the deceased died after 1st July 1981. That is the date when the law of succession came into force. Counsel has submitted that the grant should be confirmed in terms of paragraph 8 of the supporting affidavit.

Issues for determination.

30. I have considered the evidence of both parties and the submissions of both counsel in the light of the applicable law. As a result, I find the following to be the issues for determinations.

1. Whether or not Maureen Soila Paswa is a beneficiary.
2. Whether or not the first objector is entitled to inherit the entire estate of the deceased under Maasai customary law.

3. Whether or not the second objector is a creditor to the estate

4. which properties are available for distribution?

5. Who bears the costs of this application?

31. After considering the entire evidence, I find that the respondents were credible witnesses and I believe their evidence. Furthermore, I find that the first objector was an intelligent witness but not credible on a number of issues. I further find that the second objector and his witnesses were credible witnesses. With this in mind I now turn to the issues raised in this cause.

Issue 1

32. It is common ground between the first objector and the three administrators that Maureen Soila Paswa is the daughter of their late sister, Sally Paswa. Those who qualify as beneficiaries include the following. First, the surviving spouse or spouses. Second, the children of the deceased. Third, the grand children of the deceased. Maureen Soila Paswa is the granddaughter of the deceased. She is therefore a beneficiary and is entitled to a share in the estate of the deceased. It is therefore irrelevant that she is not the daughter of the deceased.

Issue 2

33. The application of Maasai customary law like other customary laws is allowed by section 3 of the Judicature Act (Cap 8) Laws of Kenya. However, its application is made subject to other written laws including the 2010 Constitution. In the instant cause, its application would amount to overriding the clear provisions of the Law of Succession Act, which directs that all beneficiaries share equally the net assets of the estate. It is for this reason that I do not accept the evidence of the first objector (Pw 3) and his Maasai customary law expert witness (Pw 5) that Pw 3 is entitled to inherit the entire estate of his late mother.

Issue 3

34. The second objector bought land parcel No Cis-Mara/Ololulunga/181 from the deceased and the agreed purchase price was Shs 1, 535, 000, but the consent of the land control board was not obtained as required by section 6 (1) of the Land Control Act. As a result, the sale transaction by operation of the provisions of that law, became void for all purposes at the expiration of three months after the signing of the agreement; except that the buyer by operation of the same law is allowed to recover the money paid pursuant to the sale agreement as a debt in terms of section 7 of the Land Control Act. *See also Rioki Estate Co (1970) Ltd v Kinuthia Njoroge (1976-1980) 1 KLR 589.* In the circumstances I find that the second objector is not a creditor to the estate. In terms of section 7 of the Land Control Act (Cap 302) Laws of Kenya, the second objector may recover a half of that purchase price in a court exercising competent civil jurisdiction and not in the Environment and Land Court as submitted by counsel for the administrators. The Environment and Land Court does not have jurisdiction in claims of recovery of civil debts. It is equally important to point out that the second objector did not acquire any legal or equitable interest in land parcel No Narok/Cis-Mara/Ololulunga/181 by virtue of the provisions of section 6 (1) of the Land Control Act, which made void the sale agreement. The function of this court sitting as a probate and administration court (or succession court) is to ascertain the properties that are available for distribution and those that are entitled to inherit as beneficiaries or creditors. It is not the function of this court to ascertain the validity of other claims to the estate. That function is conferred upon other courts. In the instant cause, it is the function of the court exercising civil jurisdiction to ascertain whether or not the second objector is a creditor to the estate and not this court. This court is therefore devoid of any jurisdiction to do so. It therefore follows that the invitation by counsel for the administrators that the estate be ordered to pay a half of the purchase price in respect of the failed land purchase transaction plus 10 per cent for breach of the agreement is without merit for lack of jurisdiction in this court.

35. Furthermore, I find that the case of *Willy Kimutai Kitilit v Michael Kibet, supra*, is distinguishable from the instant case.

Issue 4

36. I find from the evidence tendered in court that the properties of the estate that are available for distribution are land parcel numbers Narok/Cis-Mara/Ololulunga/74, 181 and 3486. I further find that land reference No Narok/Cis-Mara/Ololulunga/177, which upon subdivision gave rise to parcel Nos 11916 and 11917 is not part of the estate of the deceased.

37. All beneficiaries are entitled to equal shares. *See Selly Chebet Molel v Philip Kipkemoi Towett*, Succession Cause No. 35 of 2012 (Narok). It therefore follows that all the eight beneficiaries are entitled to equal shares in all parcels of land; except that John Purko Koikai is only entitled to an equal share in land reference Narok/Cis-Mara/Ololulunga/74 and is not entitled to any share in the other parcels of land. The reason is that in terms of his evidence, he abandoned his claims in those other parcels of land.

Issue 5

38. I find that this a family dispute, which has been in the courts since 2010. In the circumstances, I find each party has to pay for its own costs.

Ruling dated, signed and delivered in open court at Narok this 6th day of June, 2019

in the presence of

Mr. Langat holding brief for Mr. Andama for the administrators and Ms Mungai holding brief for Mr. Orege for the objectors.

J. M. Bwonwonga

Judge

6/6/2019