



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO 94 OF 2015

IN THE MATTER OF THE ESTATE OF LEMAYIAN NALIKI MAIGUSIE (DECEASED)

SAPEI NAREYIO LEMAYIAN.....1ST PETITIONER

NENGOE ENE MAIGUSIE.....2ND PETITIONER

VERSUS

EUNICE JEMTAI CHEBET.....OBJECTOR

RULING

1. This matter relates to the estate of **Lemayian Naliki Maigusie** (the deceased) who died on 14th June 2014. According to the letter from the Chief of Oloirien Location dated 7th July 2014, the deceased was survived by two widows, **Sapei Nareyio Lemayian** ('*Sapei*') and **Nengoe Ene Maigusie** ('*Nengoe*') and five sons – **Marampei Joseph Naliki**, **John Naliki**, **Moses Semeyioi Naliki**, **Sakana Daniel Naliki** and **William Olais Lemayian**.

2. Sapei and Nengoe petitioned for grant of letters of administration and according to their affidavit in support of the petition the deceased's only asset was **Transmara/Olorien/24** ('*parcel 24*'). The petitioners were issued with grant of letters of administration on 12th October 2015. On 4th November 2015 Sapei and Nengoe filed summons for confirmation of grant together with an affidavit in support of the application and an affidavit on the proposed mode of distribution. The grant was confirmed on 27th November 2015. By an application dated 15th January 2016 the petitioners sought to have the grant rectified. The court allowed their application and rectified the grant to include funds held in Equity Bank Account number 1230xxxxxx518.

3. In due course summons for revocation of grant was lodged at the registry, dated 24th May 2017, by **Eunice Jemtai Chebet** ('*Eunice*'), claiming also to be a widow of the deceased and that she and the deceased had three daughters together. Eunice seeks the following orders; to have the grant issued to Sapei and Nengoe issued on the 12th October 2015 revoked, that Sapei and Nengoe be ordered to account for the income received by the estate of the deceased, an order of provision for maintenance for the objector and her children out of the income received by the deceased's estate pending the hearing and determination of the application, an order prohibiting any sale, transfer, leasing, charging, subdividing, wasting or in any other manner affecting the register of parcel number **L.R.No. TransMara/Oloirien/24** until the application is heard and determined. The grounds upon which the application was premised are set out on the face of the application, while the factual background is given in the affidavit in support of the application, sworn by the applicant on 24th May 2017. She averred that she got married to the deceased in 2003 and out of the marriage were blessed with three children. She contends that the deceased had built her a house on parcel 24 but upon his death, she was chased away. She therefore moved to her parents' home. She also claimed that the petition did not include income from orange booster installed on the deceased land, compensation from fatal injuries claim, income from a road usage, rental income from Mara West Lodge, Money in equity bank Account number 1230xxxxxx518 and domestic animals.

4. **Eunice Jemutai Chebet** (Pw1) testified that the deceased was her late husband. They got married in 2003 and lived in Kawai sub-location. They had three children, Abigael Naseran, Sarah Makisho and Ruth Mashipi. That before meeting the deceased she had 2 children. Sapei and Nengoe were 1st and 2nd wives respectively while she was the 3rd wife. That they lived together in one *boma*. The deceased had a Mara West Lodge within parcel 24. They earned money from a celtel booster installed on parcel 24. From the payment made by celtel they bought cows, sheep and goats. She attended the deceased's burial. She recalled that in August she found her home destroyed and had nowhere to stay. Joseph Marampei Naliki chased them away as she had only given birth to girls. She reported the matter to the District Officer and it was agreed that the matter be discussed at home. The deceased had 6 children with the 1st wife, 2 girls and 4 boys. The 2nd wife has 5 girls and a son called Daniel Naliki. She testified that the petition did not include the land where the deceased was born or the land with the celtel booster. On cross examination she admitted that her dowry was never paid.

5. **Kemunto Ene Oloibarkune** (Pw2) testified in court that she works with Trusted Society of Human Rights Alliance. She adopted her

statement dated 19th December 2018 as her evidence in chief. She testified that she knows Pw1 as the 3rd wife of the deceased. John Ledama Kariko (Pw3) testified that he knew the deceased and that the deceased and Eunice had a home at Kawai and Kilgoris. He knew that the two had children but did not know the number of children they had together.

6. **Peter Ramet** (Dw1) testified that he knows the family of the deceased; the 1st wife is Sapei and the 2nd Nengoe. That Eunice was not the deceased's wife. He explained that the deceased was his immediate neighbour. He was born in 1986 and well versed with cultural practices. That when getting married under Maasai customary law, dowry must be paid before you are given the girl. That one must attend the dowry negotiations with *mama*, *mzee* and other persons. That he neither heard that the deceased had a 3rd wife nor of demolition of her house.

7. Nengoe testified as Dw2 that she is the deceased's 1st wife. She testified that the deceased built a *boma* for his 2 wives and also had a camp in the property. That no other wife came to the deceased's burial. She denied attending the meeting of 13th October 2016 and refuted the claims that Eunice was chased away from the *boma* for reasons that Eunice did not have a home with the deceased. On cross examination she testified that the deceased had 2 Zain boosters and received money from the camp. She testified that the children get the money for the booster and she gets money from the camp. She further testified that there is a road which generates income.

8. **Lekisha Ole Maasae** (Dw3) testified that he is a resident of Kawai and that Nengoe is a neighbor. He testified that the deceased had 2 wives, the 1st wife is Nengoe and the 2nd one is called Sapei both of whom live in his *boma*. He was not aware that the deceased, who was his friend and neighbor, had another wife called Eunice. He testified that the deceased's property was divided by the *wazee*'s and no beneficiaries were left out. That during the deceased's burial all the wives and children came and sat together. On cross examination he testified that the deceased's *boma* had 2 houses. He recalled that there was a 3rd house which the deceased used as a small office. The small house was destroyed after the deceased died.

9. The parties filed written submissions. Eunice in her submissions contends that her application is guided by the provisions of **section 76** of the **Law of Succession Act Cap 160**. She contends that she lived with the deceased in Kilgoris. She submitted that the birth certificates produced in court clearly indicate that the deceased is the father to her children. She and her children are dependants of the deceased within the meaning of **section 29 (a) of the Law of Succession Act**.

10. The Petitioners filed their written submissions dated 13th September 2019 raising two issues, the first being whether the objector demonstrated that the grant should be revoked and second, whether the objector is entitled to the estate. They argued that the estate of persons dying before the commencement of the Law of succession Act are subject to the written laws and customs applying at the date of death. They urged that **section 66 of the Law of Succession Act** provides that the preference should be given to certain persons to administer the deceased's estate. They also submitted that the objector had failed to establish a case for revocation of grant.

DETERMINATION

11. I have considered the evidence tendered by the parties, their submissions and the law. The deceased in this cause died on 17th June 2014 after the commencement of the Succession Act and thus the applicable law shall be the Law of Succession Act Cap 160. The first issue for determination is whether or not Eunice is a wife. It is her case that she was married to the deceased in 2003 and they cohabited until 2014. It was not in dispute that Eunice was not married under the customary law as she testified on cross examination that her dowry was never paid by the deceased. Eugene Cotran in his book "**Restatement of African Customary Law, The Law of marriage and Divorce Vol.1**" at page 159 discussed that under the Maasai culture, '*isayieta*' (marriage consideration), is necessary for validity of a marriage. In the absence of the deceased paying the marriage consideration, then no valid customary law marriage can be deemed to have been created between the deceased and Eunice. Eunice merely claims that she was married to the deceased but does not specifically mention under which law their marriage was recognized. She however alluded to long cohabitation between herself and the deceased. Could the long cohabitation between Eunice and the deceased lead to presumption of marriage? The Court of Appeal in its decision in the case of ***Beth Nyandwa Kimani vrs Joyce Nyakinywa Kimani & others (2006) eKLR*** held as follows: -

"For it matters not whether statutory or customary marriage requirements are strictly proved in marriage. The Court must go further and consider whether, on the facts and circumstances available on record, the principles of presumption of marriage was applicable in the appellant's favour. Such was the situation following the predecessor of this Court in Hortenesiah Wanjiku Yaweh vrs Public Trustee, Civil Appeal No. 13 of 1976 where Mustafa J.A in his leading judgment stated:

"I agree with the trial Judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on the issue, the trial Judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption."

12. In this case Eunice testified that the deceased would often refer to her as Baringo after her home district. Pw3 also referred to her as Baringo. Nengoe told court that she did not attend the meeting of 13th October 2016 however when pressed on cross examination she testified that she is also called Nengoe. As per the minutes of the meeting held on 13th October 2016 Nengoe was in attendance and the meeting resolved that part of the money collected from the road revenue be given to Baringo. Even though Eunice a.k.a Baringo did not attend the meeting, she was recognized as a beneficiary of the deceased and it can only be presumed that it was in her capacity as a wife. Eunice also produced the birth certificates to her children Abigael Naserian, Sarah Nakisho and Ruth Nashipai and the name of their father is indicated as that of the deceased. Eunice testified that the deceased *boma* had three houses but her house was demolished after the deceased's death. The petitioners insisted that the *boma* only had 2 houses belonging to the 1st and 2nd wife. However Dw3 on cross examination testified that the *boma* had three houses. It is the third house that Eunice claims was the house she lived in. I found that Eunice was honest and sincere in her testimony and it appeared that a dispute ensued between herself and the two houses after the demise of the deceased. From my analysis I find that Eunice was the wife of the deceased under the common law doctrine of presumption of marriage.

13. The law on revocation of grants as per **section 76 of the Law of Succession Act**, is as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

14. The petitioners concealed the fact that the deceased generated income from a celtel booster, income from West Mara Lodge and the road running through parcel 24 all of which must be taken into consideration during distribution of the deceased's estate. Having found that the petitioners also failed to disclose to the court that the deceased had a third wife with whom she had 3 children, the application to have the grant revoked is thus merited.

15. In view of what I have stated above, I shall dispose of the application dated 15th March 2010 in the following terms:

a. The grant of letters of administration intestate issued to **Sapei Nareyio Lemayian** and **Nengoe Ene Maigusie** on 12th October 2015 and confirmed by an amended certificate of grant dated the 3rd March 2016 is hereby revoked;

b. A fresh grant shall now issue to **Sapei Nareyio Lemayian**, **Nengoe Ene Maigusie** and **Eunice Jemtai Chebet** as the administrators of the estate of the deceased forthwith.

c. Prayer 2 to have Sapei and Nengoe to account for the income received by the estate is declined as the objector did not specify the period in issue.

d. Prayer 3 for maintenance for objector and the children of the deceased is also declined as the objector failed to adduce sufficient evidence on the same.

e. The administrators shall not dispose off any portion of **L.R TransMara/ Oloririen/24** until such time that the grant is confirmed.

f. Any of the administrators shall file an application for confirmation of the grant within 60 days from the date hereof.

Dated, signed and delivered at Kisii this 3rd day of December 2019.

R. E. OUGO

JUDGE

In the presence of;

Miss Oeri h/b Mr. Ombachi For the Objector

Petitioner/ Respondents Absent

Ms. Rael Court Clerk