



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

SUCCESSION CAUSE NO. 28 OF 2017

BENSON KESIER.....1ST OBJECTOR/APPLICANT

SITONIK SUIYANKA.....2ND OBJECTOR/APPLICANT

PARSIMEI OLE SUIYANKA.....3RD OBJECTOR/APPLICANT

VERSUS

ALEX S. KARANGAE.....1ST PETITIONER/RESPONDENT

DAVID KARANGAE.....2ND PETITIONER/RESPONDENT

RULING

1. The three objectors have applied to this court seeking an order to revoke the confirmed grant issued on 29th June, 2010 in favour of the 1st respondent. The basis of the revocation is that the 1st respondent did not disclose the existence of the Narok Magisterial Court Succession Cause No.34 of 2003, in which they had lodged objections.
2. The 1st respondent opposed the revocation on the basis that the three objectors are not beneficiaries of the estate of his father, namely Karangae Kesier.
3. The 1st and 3rd objectors gave oral evidence before Hon. Mr. Justice Musyoka. The 1st respondent did the same, with the result that I am only required to prepare and deliver a ruling.
4. Benson Kesier Shau (PW1) testified that the three fathers of the three objectors, who were all brothers, were allocated 30 acres of land by the elders to be shared equally among themselves. As a result, the 1st respondent's father took 20 acres and his uncle, Seno Kesier took 10 acres. PW1's father did not get a share of that land reference No. Narok/CIS-Mara/Nairagie-Enkare/77. The father of PW1 ended up in not getting his share of the land.
5. Consequently, PW1 filed a case in the office of the District Officer (DO) before the elders, which awarded them one acre. He then filed a case before the tribunal in Nakuru, which awarded him three acres, that were to be hived off from land reference No. Narok/CIS-Mara/Nairegie-Enkare/77.
6. As a result PW1 filed a further appeal to the Provincial Land Disputes Tribunal Appeals Committee at Nakuru, which dismissed their appeal, the ruling thereof was produced as Pex.1.
7. PW1 did not proceed to the national tribunal by way of a further appeal. When the respondent filed Succession Cause No.34 of 2003 at Narok magisterial court, they lodged an objection claiming a share of their ten (10) acres in that estate.
8. During the pendency of the Succession Cause No.34 of 2003 at Narok, there was a failed attempt to have the matter settled out of court with the 1st objector being given 4 acres that were to be hived off of the suit land. PW1 objected to this proposed settlement. Finally, it was the evidence of PW1 that they were born and raised in the suit land and that his father died in 1999.
9. Furthermore, Parsimei Ole Suiyanka (PW2) testified in support of the objection. He testified that the father of the two respondents hived off a portion of land reference No. Narok/CIS-Mara/Nairagie-Enkare 415 from land reference No. Narok/CIS-Mara/Nairagie Enkare 338, claiming that he bought it from the father of PW2.

10. The father of PW2 filed a case against the father of the two respondents in the tribunal which in 2000 confirmed the position that the father of PW2 had actually sold the suit land. As a result he filed an appeal in the Provincial Land Disputes Tribunal Appeals Committee in Nakuru, being appeal No.24 of 2000. The father of PW2 died before the appeal could be heard and determined. The respondent's father also died.

11. However, PW2 confirmed that the suit land is registered in the name of the father of the two respondents.

12. The 1st respondent (DW1) testified that he is the son of the late Karangae Kesier. He further testified that during demarcation his late father was allocated land reference No. Narok/CIS-Mara/Nairagie-Enkare/77. The father of PW1 moved out of this suit land and went to Kojonga, leaving PW1 and his mother on this suit land.

13. It was his evidence that his father died in 1993. During his life time, no one filed a case against his father, the deceased herein. In 2000 a case was filed against the father of DW1 at Narok District Tribunal Court. This tribunal awarded the father of DW1 land reference No.Narok/CIS-Mara/Nairagie-Enkare/77 and awarded land reference No. Narok/CIS-Mara/Nairagie-Enkare/338 to PW2.

DW1 further testified that the father of PW1 should have claimed the land before his father died. It was also his evidence that they thus carried out farming on this suit from 1984 to 2002 and had homes thereon.

14. In respect the crucial issue as to why the 1st respondent filed Succession Cause No.3061 of 2007 in the High Court, in Nairobi, DW1 testified that he did so because, the magisterial court in Narok did not the pecuniary jurisdiction to hear and determine the succession cause. DW1 also testified that he told both PW1 and PW2, that he was going to file succession cause in Nairobi because of the issue of jurisdiction.

15. Counsel for the objectors filed written submissions in support of the revocation of the confirmed grant. It was counsel's submission that the respondents obtained a confirmed grant by failing to disclose the existence of the succession cause at the magisterial court at Narok involving the same estate.

16. Furthermore, counsel submitted that some of the properties of the estate of the deceased namely land reference Nos. Narok/CIS-Mara/Nairagie-Enkare/415 and 77 were not available for distribution. In support thereof, counsel cited three authorities.

17. First, counsel cited *Jamleck Maina Njoroge v. Mary Wanjiru Mwangi [2015] eKLR*, in which the court held that the respondent therein concealed the proceedings of the Resident Magistrate's Court in Thika and that two properties belonged to another estate and were therefore not available for distribution. The grant was revoked for those two reasons.

18. Furthermore, counsel also cited *Ndamba v. M'Murungi & another [2004] eKLR (Meru)*, in which the court revoked a grant because the petitioner had failed to disclose that he had earlier on filed a similar cause in respect of the same subject matter. The failure to disclose the earlier cause was held to be a fatal error.

19. As a result the court therein revoked the grant under section 76 of the Law of Succession Act (cap 160) Laws of Kenya.

20. Additionally, counsel cited *Naomi Okul v. Mark Okul [2014] eKLR*, in which the court ruled that a person who makes false statements and/or conceals material facts at the time of applying for a grant of letters of administration would be treated as having acted fraudulently and the subsequent obtainment of the grant would be revoked under section 70 of the Law of Succession Act.

21. Finally, counsel cited *John Kibunja Njoka & another v. Joseph Njuguna & 3 others [2014] eKLR*, in which the court stated that any party interested in the estate of the a deceased person may object to the making of a grant which has already been applied for by another person.

22. Counsel for the respondents filed written submissions in opposition to the revocation of the grant. Counsel submitted that the 1st objector is the son of Shau Kesier, the latter was the brother of the deceased herein. The 2nd and 3rd objectors are the sons of the late Suiyanka Naenkop, the latter was a neighbour to the late father of the two respondents.

23. It was therefore counsel's submissions that the three objectors are not beneficiaries of the estate of Karangae Kesier. In view of this, counsel submitted that the three objectors have no *locus standi* in these proceedings.

24. Counsel further submitted that the 1st respondent's father is the registered owner of both the suit properties namely Narok/CIs-Mara/Nairagie-Enkare 77 and 415. Counsel produced two green cards that clearly show that his father is the registered owner of the two parcels of land.

25. Furthermore, counsel submitted that the objectors knew that the Narok magisterial court lacked jurisdiction since the estate of the deceased was valued over ten million Kenya shillings (Kshs.10,000,000).

26. Finally, counsel submitted in respect of concealing material facts that the 1st respondent had gazetted the petition in the Kenya Gazette, to which the public have access. On that basis, counsel submitted that there was no concealment of material facts and therefore the grant was issued properly.

27. Counsel cited two authorities namely *Zachariah Moseri Otweri v. Flex Pac International Ltd [2013] eKLR*, in which the court held that it is trite law that he who alleges must prove and that the standard of proof is on a balance of probabilities or preponderance of evidence. In this regard, counsel submitted that the objectors failed to prove that they are the owners of the two suit properties.

28. As regards revocation of the grant, counsel has cited *In the Estate of Johnson Theuri Gitahi [20150 eKLR*, in which the court held that the purpose of filing succession causes is to determine the appointment of the legal representative of the estate of deceased persons. That court further held that the other purpose is to ascertain the heirs to the estate and their respective shares.

29. In the light of the foregoing evidence for both parties, the rival submissions of both counsel and the applicable law, I find the following to be the issues for determination.

1. Whether or not the 1st respondent concealed the existence of Succession Cause No. 34 of 2003 in Narok magisterial court.
2. Whether or not the Narok magisterial court had jurisdiction to hear and determine that succession cause.
3. Whether or not this court can determine the succession cause finally or remit it to the Narok magisterial court.

Issue 1

30. On the totality of the evidence of PW1, PW2 and DW1, I find that the 1st respondent failed to disclose the existence of the Narok Succession Cause No.34 of 2003, when he applied for and obtained a grant in Succession Cause No.3061 of 2007 in the High Court. The submission of his counsel that the 1st respondent gazetted the petition for the grant in the Kenya Gazette constitutes disclosure, was not enough. They should have gone further and served notice of the petition upon the three objectors in the Narok magisterial Succession Cause No. 30 of 2003. However, I find that the concealment was not prejudicially fatal to the grant, since it is common ground that the Narok magisterial court lacked jurisdiction. Furthermore, all the parties have led evidence that will enable the court to finally determine the matter expeditiously. The authorities cited are distinguishable.

31. Service upon them was essential due to the high level of illiteracy in this country, of which I hereby take judicial notice.

Issue 2

32. The evidence of Benson Kesier Shau (PW1) is that: “.....in my objection I said the Narok Court lacked jurisdiction.” The evidence of the 1st respondent is that the Narok magisterial court lacked jurisdiction. It is therefore common ground that the magisterial court lacked jurisdiction to determine Succession Cause No.30 of 2003. I further find that Pw1 was not a truthful witness.

33. It therefore follows that the filing of the Succession Cause No. 3061 of 2007 in Nairobi by the 1st respondent was proper.

Issue 3

34. The High Court indisputably has jurisdiction to hear and determine this cause. The contention by the three objectors that the cause be sent back to magisterial court for hearing and determination is without basis and is hereby rejected.

35. Furthermore, the parties have adduced evidence in this court in respect of both the objection and the basis of their entitlement to the shares in the subject properties of the estate of Karangae Kesier.

36. As regards the claim of Benson Kesier Shau (PW1), the Provincial Land Disputes Appeal Committee awarded the father of PW1 three acres. This was in respect of land reference No. Narok/CIS-Mara/Nairegie-Enkare/77. That committee in making the award ruled that: “... *The elders rule that the appellant be satisfied with the three acres given to him by the respondent’s family. They therefore upheld the ruling of the Narok District Land Dispute Tribunal*”.

37. Additionally counsel for the respondents has submitted that Benson Kesier Shau, the first objector is only entitled to 4 acres in terms of the failed consent dated 9/5/2012. I hereby adopt the award of 3 acres made by the Provincial Land Disputes Appeals Committee plus the additional one acre, totalling 4 acres, as the judgement of this court.

38. Furthermore, as regards the claim of 2nd and 3rd objectors, I find that it was filed 8 years later after the death of Karangae Kesier. I therefore find that the claim by 2nd and 3rd objectors is not genuine. If it was genuine their father would have filed it in court during the lifetime of Karangae Kesier. PW2 failed to prove his claim against the respondents, as held in *Zachariah Moseri Otweri v. Flex Pac International Ltd, supra*.

39. In view of the foregoing, I hereby confirm the decision of the Narok Land Disputes Tribunal in case No. 12 of 2000, which dismissed the claim of the 2nd and 3rd objectors.

40. The upshot of the foregoing is that the confirmed granted dated 29th June, 2010 is hereby amended in respect of land parcel No. Narok/CIS-Mara/Nairagie-Enkare/77 by subtracting 4 acres therefrom, which 4 acres are hereby awarded to Benson Shau Kesier.

41. Additionally, the three objectors’ claims are hereby dismissed in their entirety.

42. There will be no order as to costs.

Ruling Dated, Signed and Delivered in open court at **Narok** this **4th** day of **July, 2018** in the presence of Mr. Macharia for the objectors

and Mr. Langat holding brief for Ms. Morara for the respondents.

J. M. BWONWONGA

JUDGE

4/7/2018