REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

IN THE MATTER OF THE ESTATE OF KABUE OLE LEPATE

SUCCESSION CAUSE NO. 17 OF 2016

WANJIKU KEPUE.....1ST ADMINISTRATOR

SIMON MAINA KEPUE.....2ND ADMINISTRATOR

VERSUS

PAUL NTISHO OLE KEPUE.....1ST OBJECTOR

LEKURIA OLE KEPUE LAPATE.....2nd OBJECTOR

ELIJAH KEPUE.....3RD OBJECTOR

KISULU OLE KEPUE.....4TH OBJECTOR

JUDGEMENT

The objectors namely, Paul Ntisho ole Kepue, Lekuria ole Kepue, Elijah Kepue and Kisulu Ole Kepue by way of summons dated 19th May, 2014 supported by an affidavit sought the following orders:

That the letters of grant issued in the matter of the Estate of Kepue ole Lepatei Karongoro to Ann Wanjiku Kepue and Simon Kepue be revoked and/ annulled forthwith.

The grounds on which the orders are sought are that:

(1) The proceedings therein for obtaining the grant were defective and tainted with misrepresentation of facts.

(2) The objectors herein being sons of the deceased were precluded and left out of the proceedings herein and have not even been provided for in the Estate of the deceased.

The application/objection is made pursuance to Section 76 of the law of Succession Act which permits an aggrieved party who is entitled to the Estate to apply to the court for revocation of letters of grant on any of the specified grounds in this section. The petitioners/administrators to the Estate of the deceased are opposed to the summons for revocation as filed by the objectors.

Historical Background

The deceased Kapue ole Lepatei Karongoro as per the death certificate died on 13th June, 2012 at Arroi Sub-Location Kajiado County. In a petition for letters of grant of administration dated 1st April, 2013 Ann Wanjiku Kepue and Simon Maina Kepue were issued with the said grant by the chief magistrate court at Kajiado on 4th July, 2013 to be administrators of the Estate of the deceased Kepue ole Lepatei Karongoro.

In support of the petition to obtain grant of letter of administration was a letter by the location chief dated and stamped 17th December, 2012. The chief stated in the letter that the deceased Kepue ole Lepatei was survived by the following dependents, Ann Wanjiku Kepue (Widow), Memusi Kepie (Son -36 years old), Alex Mungai Kepue (Son – 26 years old), Misira Kepie (Daughter – 26 years old), C I K (Minor).

According to the affidavit in support of the petition the petitioners had identified parcel number KJD/Kaputiei Central/ 2319 registered in the name of the deceased as a subject matter for the proposed administration under the law of succession. As a result the petitioners obtained the letters of grant of administration. The objectors commenced objection proceedings alleging that they did not participate nor were they made aware that the petitioners had applied for the letter of grant to administer the estate of the deceased.

The objectors Case

The 1st witness for the objectors was one Paul Ntisho Ole Kepue. In his testimony pw1 claimed that their later father Kapue ole Lepatei was survived by three widows namely, Milka Kepue blessed with two sons Kimisoi Kepue, Elijah Kepue and daughters Nyakuo Kepue, Njeri Kepue, Nguni Kepue and Maternuily Kepue. Pw1 further stated in court under Oath that the second house comprised of widow Wangui Kepue with two daughters, namely, Mokone Kepue and Nyokabi Kepue. The sons in the second family being Simon Maina Kepue, Paul Ntisho Kipue and Silas Kepue. Finally, pw1 testified that the third house consisted of Ann Wanjiku Kepue the widow with the following children; Memusi Kepue, Alex Mungai, Misira Kepue and Christine Kepue. The witness further stated that despite the deceased being survived with all these dependants none of them except those of the petitioner – Ann Wanjiku was recognized and or informed of the petition for letters of grant of administration. He further deposed that there was no provision made for either of them in the schedule of distribution in the proceedings before the senior resident magistrate. According to pw1 testimony there was no evidence before the trial court that a notice of the petitioner's petition had been served upon them to participate in the proceedings to consider the petition of grant in favour of the petitioners. Therefore pw1 stated that though the petitioners had Locus Standi to apply for letters of grant in the matter they did not comply with the law. In his evidence pw1 stated that the petitioners ignored the will left behind by the deceased which outlined the mode of distribution of the Estate to the dependants. Yet in his testimony the petitioners proceeded as if the deceased had died intestate.

Pw2- Kisulu ole Kepue testified and corroborated pw1 story in regard to the estate of the deceased and survivorship. According to pw2 the procedure in the magistrate court was irregular since the will by the deceased was not brought to its action nor were they notified of the pending proceedings to obtain letters of grant to administer the Estate of the deceased.

PW3 Jackson Kikoy testified as the area chief who authored the second letter dated 19th December, 2012 identifying the dependants of the deceased Kibue Ole Lepatei. According to pw3 the earlier letter from the same office had omitted to include the name of one sibling Wilson Kariuki Kepue as one of the beneficiaries to the Estate. The two letters were admitted in evidence as exhibit 3 and 4 respectively.

The respondents Case:

In the evidence of Dw1 Simon Maina stated that contrary to the assertion by the objectors the deceased left a will which clearly stipulated the mode of distribution of the Estate. Dw1 in his testimony referred to a family meeting where it was resolved that he becomes a co-administrator with one Wanjiku to the Estate of the deceased in the same session Dw1 went further to denounce the existence of a will being referred to by pw1. According to DW1, the will of his late father was to have the portion of land referred as KJD/Kaputiei Central/2319 be wholly be granted to Ann Wanjiku and her children exclusively.

In cross-examination DW1 admits that the objectors are sons to the deceased but the letters from the locational Chiefs did not recognize them as dependants. He however alluded to the fact that their exclusion from inheritance of the remaining asset was as a result of having already individual possession of respective titles to land unlike the children of the third house. Dw2- Ann Wanjiku who testified as the younger wife to the deceased vehemently opposed the objection proceedings on grounds that she will be disinherited. She further made reference to the family meeting held on 13th February, 2013 which resolved that her family members have exclusive property rights under the remaining land identified as KJD/Kaputiei Central 2319. She therefore prayed for the dismissal of the objection proceedings.

Submissions by Counsel for the objectors

Mr. Mackay counsel for the objectors submitted that the letters of grant of administration was obtained essential on materials tainted with fraud and concealment as to the real dependants of the deceased. Learned counsel further contended that the objectors being children of the deceased were never involved nor notified of the petition to obtain letters of grant by the respondents. Whereas the petitioners were entitled to apply for letters of grant of administration, argued counsel it was incumbent upon them to include the consents by the objectors. According to learned counsel the declaration of letters of grant in favour of the petitioners deprived the objectors an opportunity to be heard in breach of the rules of natural justice. Learned counsel contended that the letters of grant obtained contrary to the provisions of Section 76 of Cap. 16 of the Law of Kenya should not be allowed to stand as it can result in substantial injustice to the objectors. He places reliance on the following cited authorities. In the Estate of ***Wahome Mwenje Ngonoro Deceased 2016 eKLR*** and the provisions of the law of succession Act.

The petitioner's submissions

In contest to the objections Mr. Sankale learned counsel for the petitioners submitted that the parcel in question was given as a gift to Ann Wanjiku Kepue and her children by the deceased. Mr. Sankale contended that the objectors are already endowed with adequate proportion to land unlike the petitioner and her children. With that Mr. Sankale submitted that if this court agrees to revoke the grant it will render them destitute and deprived of the only asset left for their benefit.

In reference to the various issues which emerged under Section 76 of the law of Succession. Mr. Sankale submitted and placed reliance on the following cases: ***Albert Imbuga Kashiwa v Recho Kavai Kisigwa succession cause no. 158 of 2000*** and Section 31,11 and 66 of Cap. 160 of the laws of Kenya. Mr. Sankale invited this court to approach this application on basis that the objector's version of the matter is not true.

Analysis and determination

It is within this background that I will proceed to address the issues in this matter. In my view there are two primary issues to settle this dispute. First is whether the deceased Kepue ole Lepatei left a valid will in respect to his Estate. Secondly, the alternate issue is whether the proceedings in the magistrate court to obtain letters of grant of administration in the Estate of the deceased were in breach of Section 76 of the laws of succession Act.

Issue No. 1

The statutory requirements of a valid written will commences with the provisions under Section 5 of the law of succession which states as follows:

5(1) subject to the provisions of this part and part III, any person who is not of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any similar or religious law that he chooses.

Section II if the same Act states as follows on execution and attestation. ***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 pleased that it shall appear that it was intended thereby to give office 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.

In the case of ***Fulter v Strum 2002 1 KLR, "It is not, and cannot be in dispute that before admitting the document to probate, the judge needed to be satisfied that it did truly represent the testators testamentary intentions, or to use the traditional phrase, that the a testator, knew and approved its contents nor is it in dispute that, if satisfied that the testator knew and approved of part of the contents of the document, the judge was bound before admitting the doctrine to probate to require that those parts with respect to which he was not so satisfied be struck out".***

The question of all questions regarding the scope of Section 5(1) and 11 of the Act has got always to do when the genuineness and authenticity of the will. The rationale is that the will is meant to the thine last will of the deceased. It ought therefore to proof prima facie that the testator understood out of his free will the nature of the Act and its effects on the beneficiaries and extent of the property to be disposed off. Alternatively the will must reflect accurately the instructions of the testator because once he or she dies the court cannot rewrite the will.

At the trial reference was made to a purported will dated 21st, March, 2009 attributed to the deceased testamentary on how his property should be distributed upon death. From the perusal of the contents of the will there is no mention any specific property in reference to the deceased. The will presumably makes general descriptions to some land with no particulars to be gifted to Ann and her children. The second paragraph of the said will makes reference to livestock and household goods. It was stated that all household and livestock to retain in the hands of Ann the younger wife, together with her children with only one being given to Elijah Kepue.

At reading of the will shows that there were no witnesses who attested or agreed to the contents of the will by the deceased. The committee members mentioned in paragraph 5 of the purported will comprising of Samuel Kepue, Paul Kepue, Silas Kepue though said to be resent never seemed or executed the will.

It is now settled law as it was found in the matter of the Estate of ***Humphrey Edmond Gituru Karunyu Nairobi Succession Cause No. 2322 of 1995*** where the court held that "a ***will is valid if it fully complies with Section 11 of the law of Succession with respect to execution and attestation"***

In short I have found on the evidence that the said will is indicated to be in English Language. The party who adduced evidence moving this court to rely of it faulted to show that the testator was literate in English language. Further if the will was made in the primary language of the testator, no evidence has been placed before this court as to the original language of the testator. I have also further established that the purported will was not witnessed by any other person save for the thumb print stated to be that of the testator. Looking at this thump print, no one can positively identify it as a sign, mark and thumb print to be that of the testator now herein deceased. Even if this court was to assume that the will is about authority the testator's property to his young wife and children, no such land, livestock or household goods has been particularized in the will.

In so far as the purported will is concerned the language on the face of it is ambiguous and does not reflect the testator's intention.

On this evidence any reference by witnesses to an existence of a will made by the testator on 21st March 2009 failed the authority and credibility test of a valid binding will to be upheld by this court I find that the respondents have not discharged the onus placed upon them by the law to prove that a will made by the testator existed which satisfied the legal requirement of the Act.

Issue No. 2

Principally the objector's claim turn in whether or not the trial court issued letters of grant of administration which are in contravention of Section 76 of the law of Succession Act. In the length affidavits by the objectors who also testified on Oath as pw1 and pw2 their major complaints was that o being executed from the distribution of the Estate.

This in the circumstances of Section 76 of the Act letters of grant of administration can be revoked if an aggrieved party proves any of the following grounds exist: 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 allegations of a fact essential in point of law to justify the grant notwithstanding that the allegations 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 has ordered or allowed; or

(ii) To proceed diligently with the administration of the estate; of

(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.

The gravamen of the objector's argument before this court was that they were not notified of the proceedings to obtain grant nor were they included in the distribution of the Estate. Further it was contended that from the onset the letter of the Chief dated 19th December, 2012 in support of the administrators to petition failed to acknowledge that they were dependents of the deceased Kepue Ole Lepatei.

The respondents admits that they made an application to obtain letters of grant without involving the objectors because of the family arbitration restriction meeting held on 13th February, 2013. That virtue of the outcome of the family members and the elders it was resolved that Ann Wanjiku and her children remain the sole beneficiaries to the only asset left behind by the decease. Under Section 76 subjections to the provisions of Section 71 on the making of a grant. The right to consider for the beneficiaries to the Estate is provided for in favour of the administrators/executors of the estate.

A helpful authority on this question is the case of ***Simiyu Wafula Samwel Wafula Waseke v Hudson 1993 KLR CA***. where the court held as follows: "***A grant obtained on the strength of false claims without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court is liable to revocation"***

In persuasive authority on the same subject matter Koome, J. as she then was pronounced herself in the case of the Estate of ***Ngaii Gathumbi alias James Ngaii Gatumbi*** (Deceased) held in succession cause No. 783 of 1993 at Nairobi held inter alias as follows: "***That the application to obtain letters of grant is considered defective and irregular if a person who is entitled to apply is not notified by the petitioner of that intention to apply and that persons consent to the petitioner's application is not sought. It was held that on such grant is in breach of Section 76 of the two of succession and may be revoked. It is also emphasized by the express provisions of Rule 26 and 40(8) of the probate and administration Rules that letters of administration shall not be granted to any applicant without notice to ever person entitled to the same degree as or in priority to the applicant"***

As was stated earlier the objector's case as placed was that the deceased died as a polygamous man originally married to three wives. Evidence was further adduced to the effect that the deceased owned Kajiado/Kaputiei Central 2317. The ownership was supported with certificate of title to land annexed to the petition for letters of grant of administration. So as at the date the succession case before the lower court the petitioner did not consider the objectors entitled to the land or any part thereof as dependents of the deceased. The petitioners claimed that the objectors had their respective shares implying they had no claim over this land.

As Judge Waki of the court of Appeal said in the matter of the Estate of ***Yusuf Mohamed in P & A No. 434 of 1995*** at Mombasa***. "The application for revocation of grant made by an alleged first-born son of the deceased stating that the petitioners were survived by three children only and that he did not consent to the issue of the grant to the petitioners was defective and fraudulently obtained from the court. The court further held that the petitioners faulted to disclose that there were other survivors of the deceased who were not notified of the proceedings".***

In the instant application it's necessary to make some observations from the proceedings before the probate court. It is not in dispute that the petitioners obtained two letters from the chief of Arroi Location dated 17th February, 2013 and 19th February, 2012 both of which only recognized survivorship of the youngest wife and her children as beneficiaries to the Estate of the deceased. The serious observation is that neither the Chief pw3 nor the petitioner's challenges evidence of survivorship of the objectors in this proceedings. In the affidavit sworn by the petitioners as administrators they swore that they are the only beneficiaries of the deceased.

What is important was for the petitioner to acknowledge that the family of the deceased was not limited only to the youngest wife and her children. There is no doubt that the letter from the Chief dated 19th February, 2012 in support of the petition for letters of grant was false document. And it is also clear that the objectors consent was not sought either at the commencement or during the grant of letters issued by the court on 4th July, 2013.

The question we have to deal with is whether the deceased was survived with Ann Wanjiku and her four children on a whole range of the other two houses as stated on oath by pw1 – Paul Kepue. In my opinion it is beyond question that in addition to Ann Wanjiku family the deceased was married to two wives who also had children in equal measure. The idea that the family inheritance be exclusively be for the younger spouse and children is a matter for the entire family to determine accordance with the applicable legal principles. To say that the children have acquired other parcels of land of a kind does not out rightly disinherit them of their share of the estate of the deceased.

It is my view that in making of the grant the probate court had in its possession a letter from the chief with fundamental omission of the key survivors of the deceased. Secondly, the petitioner concealed a material matter by obtaining skewed consent from only her children leaving out dependents from the other two houses. Thirdly, the mediation meeting of 13th February, 2013 purporting to distribute the estate of the deceased outside the framework of letters of grant of administration is null and void. Fourth, for purposes of the notification in the Kenya Gazzette, the probate proceedings and its objection trial will begin to run only when the objector learns of the existence of such letters of grant.

I note with concern that the design of publication of matters of probate and administration continue to remain exclusively the domain of the Kenya Gazette. It can be stated categorically that not every citizen can access a copy of the Gazette to appraise himself or herself on the weekly notices to do with petition for letters of grant of administration.

At the hearing of this objection proceedings, Mr. Sankale for respondent submitted that besides the explanation set out in the replying affidavit to the application the respondent relies on the doctrine of donations Mortis Causa or Gifts.

In contemplation of death regarding this doctrine section 31 of the Laws of Succession Act provides as follows:

"***A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if:***

> ***(a) The person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present or imminent danger, and***
>
> ***(b) A person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will, and***
>
> ***(c) There is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto: and***
>
> ***(d) A person makes a gift in such circumstances as to show that he intended it to revert to him should he survive the illness or danger; and***
>
> ***(e) The person making the gift dies from any cause without having survived that same illness or danger; and***
>
> ***(f) The intended beneficiary survives the person who mad the gift to him: provides that:***
>
> > ***(i) No gift made in contemplation of death shall be valid if the death is caused by suicide;***
> >
> > ***(ii) The person making the gift may, at any time before his death, lawfully request its return."***

As the name suggests it is transfer of property in contemplation or anticipation of the death of the maker. The effect of the transfer involves a conditional precedent that if is a transfer which vests in the beneficiary but subject to the condition that the testators death should occur shortly.

So far as the condition precedent attached to the doctrine the court in craven's Estate 1937 Chancery 423 – 426 where the court emphasized the conditions which are essential to a Donation Mortis Causa to be: ***"Firstly, a clear intention to give, but to give only if the donor dies, whereas if the donor dies not die, then the gift is not to take effect and the donor is to have the subject matter of the gift. Secondly, the gift must be made in contemplation of death, by which is meant not the possibility of death at some time or other, but death within the near future, what may be caused death for some reason believed to be impending. Thirdly, the donor must part with donation over the subject matter of the donatio"***

The other test is as clearly illustrated in the case of ***Nourse LJ in Sen V Headbery 1991 ch. 425*** held that the right on gifts in contemplation of death to also apply to land interest. The learned Judge restated the law on the requirements of a valid gift in contemplation of death in the following language,

"***First, the gift must be made in contemplation, although not necessarily in expectation of impending death. Secondly, the gift must be made upon the condition that it is to be absolute and perfected only on the donors death, being revocable until that event occurs and ineffective if it does not. Thirdly, there must be a delivery of the subject matter of the gift, or the essential indicia of title thereto, which amount to a parting with dominion and not mere physical possession over the subject matter of the gift:"***

According to the most recent case of ***King v Chiltern Dog Rescue 2015 EWCA Civil 581*** the court of Appeal held as follows:

"***First in contemplating his impending death, it was clear from the authorities that the donor must have 'good reason to anticipate death in the near future from an identified cause'. In neither Vallee nor King had that requirement been met. In Vallee Mr. Bogusz was approaching the end of his natural lifespan, but he did not have reason to anticipate his death in the near future from a known cause. Similarly, while most of Mrs Fairbrother's life was behind her, she was not anticipating her impending death in the sense used in the authorities. She was not suffering from a fatal illness or shortly to undergo an operation or to undertake a dangerous journey.***

Secondly, it was essential that the gift was conditional on the contemplated death and in any event the gift would lapse if that death did not occur soon enough. In cases where early death is inevitable the court relaxes the requirement that the donor should specifically require the return of the property if he should recover. In the instant case Mrs. Fairbrother's words were no more than a statement of testamentary intent and both Mr. King and Mrs Fairbrother had proceeded on that basis, rather on the basis that a gift had been made.

Thirdly, 'dominion' meant physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter.

It should be remembered that our courts in the cases of the ***Estate of Ngetich (2003) eKLR and Registered Trustee Anglican Church of Kenya Mbeere Diocese vs David Waweru Njoroge (2007) eKLR*** have followed what was illustrated by ***LJ Jackson in King v Chiltern Dog Rescue case***.

In the present case both the applicants and objectors adduced evidence stating that respective positions on the matter the objectors disputed the purported will including any suggestion that a gift in contemplation of death was mad to Anna Kepue and her children.

Mr. Sankale who appeared for Anna Kepue submitted inter-alia, that the deceased during his life time had allocated or distributed his properties to his dependants. Counsel, specifically contended that on the matter of Kajiado/Kaputiei Central2319 Title was vested in the third wife Anna Kepue. Going by the requirements of the doctrine donation Mortis Causa I do not accept the submissions by Mr. Sankale that in the event the respondent does not bring herself with the scope of the will, this principle be considered applicable to this case. That may be the position from the perspective of the respondent but certainly not the law. It should be noted that on the facts the deceased in a purported will stated to be made on 21st March 2009 bequeath some unspecified parcel of land to Anne Kepue and her children. We are not told the conditions prevailing at the time as to the deceased death or sickness to contemplate death from which he was to Will his property in anticipation of death.

Secondly, and perhaps, more important question is lapse of time between 21st March, 2009 when the donation Mortis Causa was allegedly made and the date of the deceased death is indicated in the death certificate to be due to old age.

As it states Gifts in contemplation of death are only valid where a person making it contemplates death from a cause that is proximate, either at existing or immediately impeding peril placing the donor in extremis. A mere ailing state is insufficient ***(See the principle in Wood Bridge Spooner 1819 3 B and Aldo 233 106 ER 647)***

The categorical conclusion is that it is impossible without evidence to contend that the deceased had an ailment which subsisted from the year 2009 until his demise on 13th June, 2012. If there was none of the respondents proved by way of medical evidence. It is elementary principle as defined in **Blacks Law Dictionary 4th Edition 701 and Cyclopaedic Law Dictionary 3rd Edition** that "***when a person is sick beyond the hope of recovery and near death, he is said to be in extremis".***

Accordingly in this case there was no real evidence before me that the deceased as at 21st March 2009 was near death and said to be extremis to donate his property as gifts in contemplation of death.

It is not shown by evidence adduced by the respondents that as at the time the deceased made the alleged gift his death was inevitable within the immediate future. Secondly, this matter in my judgement must satisfy in strict sense the legal requirements as was stated by Jackson L.J. in the persuasive decision in the case of **King v Chiltern Dog rescue case (supra**). With respect to the respondents case I have considered the rival contentions on this aspect and do agree with the *ratio decidendi* of the cases as follows:

That in contemplation of death the version of the respondent failed to demonstrate good reason for the deceased to anticipate death in the near future from the date in 21st March 2009 when he made the donation over his property until his demise on 13th June, 2012. In fact the deceased died of old age and not from any serious sickness. Secondly, the respondent has failed to account with cogent material and evidence the gift was conditional on the contemplated death and in any event the gift would lapse if that death did not occur soon enough. The object of this second element would be defeated by the delay and long lapse of time it took the deceased death to occur. This ground alone invalidates the gift in contemplation of death as urged by the respondent.

Apart from the foregoing I draw the respondent's attention to the requirement of dominion to be identified in fulfilment of a valid gift in contemplation of death. The proof of occupation by the respondent on the suit land where also the deceased lived with his family until the eve of his death does not constitute physical possession of the subject suit land donated as a gift to the respondent in contemplation of death.

The certificate of title in respect of the land whereof was held and registered in the name of the deceased Kepue ole Lepatei – Karongoro was issued on 6th January, 2012. If indeed the deceased willed that the property dominion be conveyed to the 3rd respondent he had sufficient time and opportunity to do in exclusion of all other beneficiaries. The guiding principle for purposes of making gifts in contemplation of death in immovable property is to effect the transfer by registering the gift or in any way delivery of dominion as held by Lord Jackson in Kings Case.

Keeping in mind these principles I am satisfied that the respondent arguments have failed the threshold test to successfully retain the use and ownership of the suit land as a gift in contemplation of death from the deceased. This ground also as a defence to the objection proceedings will not see the light of the day.

The other ancillary issue though not raised before me which does impact on the principle of natural justice touches on the publication of the petition in the Kenya Gazette. I recognize this key publication has a limited circulation. It will appear to me that with the promulgation of the new constitution and right to access of information under Article 47 there is need to expand the center point of legal notice. In my opinion all publications affecting title to the estate of the deceased should be published in some daily or weekly newspapers of general circulation in both national and county units where the immovable property/land is situated. In doing so it would ensure notices as to the petition of grant of letters of administration reach the interested parties rapidly and efficiently. As things stand now some unscrupulous members of the deceased family can petition, publish and obtain grant of letters of administration without the knowledge of other beneficiaries. The reason being non-accessibility of the Kenya Gazette which is a weekly government printed publication.

To simplify this process of administration of the estate a review to the law relating to recognition of other daily or weekly newspaper to support the already existing framework on publication of the petition will go a long way in enhancing transparence and accountability in the same context.

Having carefully considered the objection proceedings, the evidence and submissions by both counsels I have reached a conclusion that summon for revocation of grant is well founded. The applicants have brought themselves within the provisions of section76 of the law of Succession Act.

In the result the following orders do issue:

That the grant of letters of administration for the above named estate issued to Ann Wanjiku Kepue and Simon Maina Kepue on 4th July, 2013 is hereby revoked for being defective and tainted with fraud. Secondly, for reason that the deceased other beneficiaries were excluded from participating in the proceedings leading to the grant of letters of administration.

That the petition in the matter of the estate of Kepue ole Lepatei Karongoro do commence *denovo*.

That fresh consultation between the family members be started for nominees as per the provisions of the law of succession to be appointed as administrators of the estate of the decease.

That Land parcel LR/Kaputiei Central/2319 and all other subsequent subdivisions are hereby revoked forthwith. By this order the Land Registrar Kajiado is ordered to place a restriction on this title pending further directions from this succession court.

That the costs of this application be in the cause.

It is so ordered.

Dated and delivered in open court at Kajiado this 11th day of July, 2018.

……

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Sankale for the respondent

Mr. Maina for Wanjiku for the respondent