REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT KAJIADO

SUCCESSION CAUSE NO.107 OF 2015

IN THE MATTER OF THE ESTATE OF OLOIKAMPAI SARAPAE SANGUTI (DECEASED)

BETWEEN

JOSEPHINE SASINET OLOIKAMPAI.....1st PETITIONER

JEREMIAH LEPAPA OLOIKAMPAI.....PETITIONER

AND

PHILIP KOIPATON OLOIKAMPAI.....OBJECTOR

JUDGEMENT

This is a succession matter in respect of the estate of OLOIKAMBAI SARAPAE SANGUTI who died on the 31st October 2010. The Objector herein seek to revoke the grant of letter of administration pursuant to section 76 of The Law of Succession Act, Cap 160, Laws of Kenya. The said grant was issued to the Petitioners on 12th March 2014 and it was confirmed on the 2nd July 2014.

The Objector herein is seeking revocation of letter of administration on grounds that:

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

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

d) the person to whom the grant was made has failed, after due notice and without reasonable cause:- to apply for a confirmation of a grant within one year from the date thereof, or such longer period as the court ordered or allowed; or to proceed diligently with the administration of the estate; or to produce to the court within the time prescribed, any such inventory or account of administration as is required by the provision 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) the grant has become useless and in operative though subsequent circumstances.

According to the evidence on record, before Oloikampai Sarape Sanguti (deceased) the first petitioner, he was married to Soyiantet Kiyiyo Meeli (deceased), the objector's mother whom he divorced and she got married to another man. Further, Oloikampai Sarape Sanguti (deceased) left behind several dependents namely:

a) Soyiantet Kiyiyo Meeli – 1st Wife (deceased).

b) Josephine Sasinet Oloikampai – 2nd wife and the only surviving widow of the deceased.

c) Philip Koipaton Oloukamopai – son.

d) Jeremiah Lepapa- son.

e) George Sumore- son.

f) Timothy Sinket – son.

g) Alice Soilan – daughter.

At the time of his death he left a sizeable number of properties both moveable and immovable including Kajiado/Kitengela/13471 and Kajiado 13469. There is also evidence that the Objector was given 20 acres of land by the deceased, 10 acres of which he is said to have sold.

The 1st Petitioner's Statement.

She stated that she got married by her late husband in 1998 through Maasai Customary Law and in the year 2002 and their marriage was exchanged under African Christian Marriage and Divorce Act (cap. 151) where the said marriage was blessed with four issues; Jeremiah Lepapa; Stanley Sumare; Timothy Sinket and Alice Soilan. She acknowledged the fact her late husband was had earlier married the Objector's mother and later divorced with her under the Maasai Customary Law.

She alluded to the fact that during the subsistence of her marriage with her deceased husband, the deceased and the objector had differences as the objector was demanding for land and asking him why he married her. It was her testimony that at some point the objector chased her away. She averred that in 2006 her deceased husband held a meeting with clan elders and the area assistant Chief to inform them that he had given his son, the objector 10 acres of land which the objector had already sold and that he should not demand for any of his father's properties. According to the 1st Petitioner, her deceased husband did so to ensure that he would not leave problems in his family since he knew the Objector's behavior upon her and her children.

The 1st Petitioner further averred that the Chief and the elders that were present at the meeting pleaded with the deceased to add him another 10 acres since he had already sold and also considering that he had other children. The deceased eventually agreed to the said request to add him 10 more acres but unfortunately the deceased passed on before subdividing the 10 acres to the Objector. It was also her testimony that since her deceased husband died before subdividing the said 10 acres for purposes of giving it to the objector, she took the responsibility to subdivide the land and handover 10 acres to the objector which the Objector refused to take. As a result, she was then advised by the area Chief to take letters of administration since the Objector had kept on disturbing her demanding for the deceased's death certificate and title deeds.

She also stated that since the death of her husband, she has been living with her children in the home that her late husband built for them on Plot Kajiado/Kitengela/13471 and Kajiado 13469 and that she has been running all the affairs of the family since the death of her late husband. She therefore prayed that the land aforementioned be allocated to her and her children since they have no other land and since the objector has his own land plus the 20 acres allocated to him by his late father. She produced a document outlining was transpired at the said meeting.

The 1st Petitioners Witness Jackson Supeyo Munyaka the assistant Chief of the area; gave a witness statement narrating his knowledge as far as the deceased family affairs are concerned. He stated that the objector had been given 10 acres of land by his late father which he sold. He also alluded to the fact that the deceased called for a meeting to the family, the Chief and the village elders. Further that during the said meeting they pleaded with the deceased to add the objector 10 more acres of land which he later agreed but he died before handing over the same to Objector. It was also his testimony that the 1st Petitioner was ready to give him the said 10 acres but the objector was not willing and he wanted more than that.

The 2nd Petitioner's statement was almost identical to that of the 1st Petitioner. He corroborated all the facts concerning the alleged meeting and the issue of the land that was to be handed over to the Objector.

Mukaampa Ole Leleta Kisoso (village elder) and Stanley Moyo Sompiroi (the area chief) also corroborated the evidence given by the abovementioned witnesses

Submissions by Counsel for The Petitioner

Ms. Nzau counsel for the petitioner submitted that the deceased was only married to one wife contrary to the assertion by the objector Learned counsel further submitted and challenged the objector to disclose any evidence of existence of a marriage which would entitle him a share of the estate of the deceased. According to learned counsel its undisputed that the objector wants to get a half share of the whole estate of the deceased which is likely to occasion an injustice to the petitioner and her children.

Submissions by Counsel for The Objector

Ms. Macheru learned counsel for the objector submitted that contrary to the assertion by the petitioner the deceased died intestate and there was no valid Will as to the administration of the estate. On the subject of the letter from the location Chief Ms. Macheru argued and submitted that the beneficiaries with interest in the estate were omitted thus the validity of the confirmed grant is in dispute. Ms. Macheru further contended that the deceased in transmitting the property being held as the time of his death does not seem to have signed any document being touted as Will by the petitioners. Further Ms. Macheru argued and submitted that the objector was surviving son of the deceased but the petitioner in lodging the petition failed to notify him nor obtained his consent to administer the estate. It was her contention that the objector was required and entitled to benefit in every way from the estate of his late Father in every way he could have done during his lifetime. To that end Ms. Macheru submitted in this area was to demonstrate that the objector under section 29 of the Act was entitled to a

share equally in the residue of the estate. Concerning the legal rule on the distribution of the estate of polygamous family, Ms. Macheru opined that section 40 of the law of succession Act does apply. According to Ms. Macheru the first principle in construing distribution is to divide the estate equally among the household expressed in the grant or Will as whole. In the second limb according to the number of children in each house as expressly stated in section 35 and 38 of the Act. In search of who is the intended beneficiary to inherit the estate of the deceased Ms. Macheru submitted and urged this court to be guided by the principles elucidated under Maasai customary law. Taking that as the position Ms. Macheru placed reliance in the case of the estate of Kamonjo Njiinu Alias Kamonjo 2011 eKLR. On whether the confirmed grant should be revoked Ms. Macheru submitted that the petitioner in taking up duties of an administrator omitted other siblings of the deceased. That alone argued counsel is sufficient cause to revoke the grant made to her. Further Ms. Macheru contended that there was evidence at the time that the deceased was married to another wife being the mother of the objector besides the petitioner. It was learned counsel contention that the petitioner having benefitted from the estate without making full disclosure rendered the confirmed grant of letters defective. On the basis of section 76 of the Act and want of proper trust and honest to execute her duties and lack of consent from other beneficiaries impairs the fidelity of the confirmed grant in her possession. As a result, Ms. Macheru argued and submitted that this court should not permit her to continue to be executor of the estate.

ISSUES FOR DETERMINATION

The Objector challenged the outcome of the meeting that the Petitioners and the witnesses in support of their claim alluded to. The said meeting which was attended by elders and the area chief is the one that the deceased is said to have distributed his wishes and the same was documented. According to the objector the 1st Petitioner insinuated a will was left behind by the deceased. The objector challenged the document that the petitioner made reference to (annexed in her further affidavit sworn on 2nd October 2015) marked as "JSO-1". He questioned why the deceased only mentioned the Objector in the distribution of his estate and not the 1st Petitioner and her children during the alleged meeting and in the will. As regards the evidence of the two witnesses called by the 1st Petitioner who made reference of the same document, in the objector's view the said witnesses gave contradicting evidence in as far as the said document is concerned. The Objector questioned the presence of Gideon Mardadi (late) and Ole Manwa (late) who were included on the list of names of individuals alleged to have been present at the meeting and asserted that the 1st Petitioner failed to give an explanation as to how deceased persons were able to attend the alleged meeting.

The Objector in response to the 1st Petitioner's evidence that he was given land measuring 10 acres and that he had sold it, he said that the same was not proved since no documentary evidence was produced before the court. Further that the evidence of the area chief contradicted that of the 1st Petitioner when the said witness stated that the document was written after the present case was filed in court hence the deceased was not there to confirm that the contents of the said document were true and / or that they were his wishes. The Objector further asserted that the 1st Petitioner's witness failed to explain why the names of family members and that of the deceased were missing from the list of those who were alleged to have been present in the alleged meeting. He further challenged the evidence of yet another Petitioner's witness; Mukapa Ole Kisoso saying that the said witness contradicted the evidence of other witnesses when he testified that he could not remember the persons that were present at the meeting and that deceased bequeathed land measuring twenty (20) acres to the Objector. He therefore submitted that none of the Petitioner's witnesses is credible including that of the Petitioners themselves and their evidence can only mislead the court.

As regards the document that the Petitioners and their witnesses brought before the court, the Objector submitted that the same does not meet the requirements of section 11 of The Law of Succession Act which provides for the formal requirements of a valid will. He brought to the attention of the court the fact that the document in question is not dated and signed by the deceased and/or witnesses. He further argued that other than the Chief's stamp and a signature signifying that the document had originated from the Chief's office, none of the other witnesses listed in the document signed and/or affixed any mark on the document. He therefore reiterated that the said document cannot be said to be a will and it was humbly submitted that the deceased died intestate.

I note that from the objector's evidence above, he has taken an issue in the validity of the will or the document produced before court which purports to provide for the wishes of the deceased as far as distribution of his property is concerned. The deceased's requisite capacity to make a will is not in question herein. It is important to note that there is a rebuttable presumption under Section **5 (3)** of the Law of Succession Act**. The said section** encompasses the principle of testamentary freedom by providing that any person is capable of disposing of his property by Will so long as he is of sound mind. Testamentary capacity has been described as the testator's ability to understand the nature of Will making. The essentials of testamentary capacity were laid out in the case of *Banks vs. Goodfellow* [1870] LR 5 QB 549 as cited with approval in the case of **Vaghella Vs. Vaghella-**

> *"a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."*

The burden of proving lack of capacity in cases like the instant case resides with the person who alleges the lack of it. As I have alluded to above, the objector did not raise the issue of lack of capacity. What the Objector has taken issue in is whether the said document meets the formal requirements of a valid will. The same is envisaged under Section **11** of the Law of Succession Act which states as follows: -

> *11. 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.

In the foregoing and in view of the evidence on record, it is clear that the testator never signed or affixed a mark or signature on the will as mentioned in the evidence of the area Chief who testified that the document was reduced into writing after the death of the testator, and that the same document was written after this court had already been filed in court. As regards attestation and execution of a will pursuant to section **11(c)** of the **Law of Succession Act**, any person can witness the execution of a Will so long as they are capable of seeing the signature and understand what they are doing. A witness competent to attest a Will is defined by **Section 3(1)** of the **Act** as ***"a person of sound mind and full age"*** **Further it's a legal declaration by a person of his wishes or intentions regarding the dispositions of his property after his death duly made and executed accordingly. .** In the instant case, no such witnesses attested the signing of the said document by the testator as required by the law.

At the hearing of this objection the petitioner and her witnesses strongly agitated for recognition of an existence of an oral Will by the deceased. What Cotran recorded in the RESTATEMENT OF AFRICAN LAW AT PAGE 15 IS THAT. *A person may make his will in his old age or on his deathbed. He calls a meeting of all his close relatives from his mbari, other muhiriga relatives and declares orally how his property is to be distributed item by item, and also declares who shall be his muramati.'*

In section 9 of the Act it provides as follows No oral will shall be valid unless (a) unless it's made before two or more persons' competent witnesses and (b) The testator dies within a period of three months from the date of making the Will

As regards validity of Wills mental or testamentary capacity is of essence .I reiterate the provisions of section 5(1) and (3) of the law of succession .I refer to the case of Charles v baker 1840 ALL ER 117 where the court held *To constitute a sound disposing mind the testator must have a sound mind enabling him to understand the nature of will making, a sound memory to enable him recollect the property he is disposing of and a sound understanding to enable him remember the persons he is morally bound to provide for having regard to the persons relationship with him.*

Upon carefully perusing the evidence more specifically the cause of death as indicated in the death certificate the deceased died at an old age of 88 years due to cardio pulmonary arrest due to sepsis cancer of colon senile dementia and arthritis. If one were to believe the evidence of the petitioner, then the purported Will cannot pass the test of mental or testamentary capacity. Its indeed a matter of concern that a person suffering from cancer, dementia, arthritis and old age would have the capacity to make declarations of valid oral Will. By its nature if it existed I can only classify it as a Will made in suspicious circumstances. See the legal proposition in the cases of Vijay Chand Rakant shah the Public Trustee Civil Appeal No. 63 of 1994, TYRELL V PAINTON 1894 ALL ER131.

In the premises, I find no difficulty in concluding that, the said property in question cannot be said to have passed to the 1st Petitioner and her children by way of a written or an Oral will or by way of gift in contemplation of death.

The central issue in this case is the revocation of the confirmed grant. The succession Act itself under section 76 sets out clearly the grounds upon which a grant whether or not confirmed can be revoked. Some of the salient provisions include the following. *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 concealment from the court of something material to the case, (c) that the grant was obtained by means of an untrue allegation of fact to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*

The question I ask is whether the petitioner obtained letters of grant intestate tainted with illegality or fraud.

We have two versions of the history of this matter, In the first instance is the evidence by the objector that on application to obtain grant of letters the petitioner concealed a material fact that he was a beneficiary to the Estate. According to his supporting affidavit Philip Oloikompai identified defects in the process of petitioning for letters to include lack of consent on his part, the discreet manner the petitioner went about obtaining the limited and confirmed grant, non-disclosure that the deceased was married to two wives and the requisition of the letter from the chief which only recognized the family of the petitioner. The petitioner on the other hand in her testimony maintained that the objector though a son to the deceased is not entitled to any share of the estate. It was her disposition that during the lifetime of the deceased the objector was given a portion of KJD/ KITENGELA 13470 hence precluding him from any share in the present suit property. considering that the objector has already 400 acres of land to his own benefit the petitioner stated that it would be unjust to share part of the land again with him

In assessing the evidence, the letter from the chief dated 23.12,13 makes no mention of the objector's name as the son of the deceased. From the sum total of the evidence by both the objector and petitioner the whole of the proceedings at Machakos high court were commenced and finalized without the necessary consent duly signed by the objector. The evidence is further corroborated by the petitioners own admission that by virtue of the objector already in possession of 400 acres of land she didn't see the need of him being included in the succession cause.

Having heard the evidence and submissions from both counsels it's not in dispute that the petitioner concealed a material factor that the objector was not a beneficiary to the deceased estate. The issues that emerged as per the evidence on record is that as far back as at 20th May 2011 the petitioner entered into a sale agreement to dispose off two acres of land even before confirmation of grant. In the first instance she had no authority to transact on behalf of the estate without confirmed letters of grant of administration'.

In light of the above finding it is clear that during the obtaining of the letters of administration, there was non-inclusivity, non-disclosure, misrepresentation and intermeddling of the estate of the deceased rendering the letters of grant defective and inoperative. On consent the fact is that the objector was not involved in the process of obtaining the grant, neither was his name included on the list of dependants of the

deceased. The exclusion of the Objector in the petitioning of the grant only goes to show that there was misrepresentation and or concealment of material facts during the process of applying for the grant of letters of administration. In the result, I hold that the confirmed letters of grant of administration ought to be revoked for failing the legal test expressly recognized in section 76 of the of succession Act. Further am satisfied that the grant in question was issued in total breach of section 37 of cap 160 of the laws of Kenya and rule 40(8) of the probate and administration Rules.

As regards to how the estate should be distributed, the Objector referred the court to the provisions relating to intestacy as contained in Part V, that is section 32 and 42 of the Law of Succession Act. In his view the intestacy rules only benefit people who have a blood link with the intestate that is apart from the spouse. He further asserted that the Law of Succession Act provides for both monogamous and polygamous situations and the nature of distribution of property upon intestacy depends on whether the deceased was polygamous or monogamous.

In this case, the deceased Oloikampai Sarapae Sanguti had separated with his first wife (deceased) way before he died. In the Objector's view, that does not stop her from being considered as a wife of the deceased husband. The Objector referred the court to section of the Law of Succession Act which interprets the term wife to include a separated wife for purposes of succession matters.

The petitioner has referred to the fundamental question in this case whether there is sufficient evidence of existence of valid marriage between the deceased and the mother to the objector. In Kenya recognition of customary marriage is not a matter of conjecture but one which fulfills the requirements under the marriage Act 2014. I desire to add that even before the Act came into being the requirements and validity of customary marriages was well settled in accordance to the terms and conditions of each community or tribe.

One of the crucial elements of customary marriage may it be that of Maasai, Kamba, Kikuyu etc. is the negotiations entered into between the bride and bridegroom family followed by the payment of the bride price or commonly known as dowry to her family. There must be according to the customs of various communities the handing over of the bride to the groom to solemnize the union. It must however be observed that until one has fulfilled the requirements of customary marriage to distinguish it from mere cohabitation there can be no valid marriage.

It is uncontroverted that the Objector was born during the subsistence of some kind of woman to man relationship between his late parents. I have alluded to the legal position in Kenya that a customary marriage is understood as one which has met the requirements that must be complied with to conclude a valid customary marriage. It happens however a man and wife cohabit together with intentions to fulfill the customary rites and rituals to have their marriage validated but until that is done what is to be done it remains mere come we stay relationship.

The position of this case is ambiguous as much as the objector advanced the argument of existence of a valid customary marriage between his late parents no cogent evidence to that effect was adduced before this court. By general presumption what is not disputed is the fact that the objector was born out of a union of both parents without necessarily raising their cohabitation to validly recognized customary marriage.

Following PHIPSON ON EVIDENCE 5TH EDITION AT PAGE 44 the learned scholar had this to say on matters of this nature. *Presumption are either of law or fact. Presumption of law arbitrary consequences expressly annexed by law to particular facts and may either be conclusive or rebuttable. Presumption of fact are inferences which the mind naturally draws from given facts irrespective of their cause. They are always reputable.*

I am of the opinion that for the court to give effect to marriage by presumption it must be clearly and unequivocally deduced in evidence to distinguish it from temporary cohabitation for purposes of sustaining sexual relationship in a union. The essence of the matter am in doubt as to whether the deceased marriage with the mother of the objector can be brought within the ambit of Maasai customary law. In the event am found to have erred on the above synopsis, the question to be answered is whether the objector has any claim against the estate of the deceased.

Taking into consideration the meaning of a dependent in respect of section 29 of the Act, there is no doubt that the Objector is a dependent of the deceased. In terms of section 40 of the Law of Section Act which addresses the case of an estate of a polygamous intestate, the objector asserted that the personal and household effects and the residue of the net estate should first be subdivided among the houses according to the number of children in each house. Section 40 provides as follows:

> 40. ***Where intestate was polygamous (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.***
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> ***According to the law of succession at section 38 where an intestate has left a surviving child or children but no spouse the net intestate estate shall subject to the provisions of section41 and 42dealing with a polygamous house divide upon the surviving child. If there is only one, or be equally divided among the surviving children.***

It is not in doubt that the Objectors deceased parents cohabited what one may presume to be a marriage under the Maasai Customary Law. when they passed on, the law makes it very clear that the distribution can no longer be pegged on house but rather on the surviving child. Thus the principle of house hold is not applicable in this scenario. What needs to be ascertained herein is the question as to what is what kind of share is the Objector entitled and applicable to the objector upon identifying and ascertaining the available asserts of the deceased. What is liable to distribution herein is land measuring 94 acres including the 10 acres that the deceased had agreed to subdivide and hand it over to the objector herein. There are pertinent factors to distribution of the deceased's estate. This court shall take the position that the distribution should not equal but equitable distribution. To avoid injustice from being occasioned to the younger children of the deceased the Objector cannot be allocated equal portion as that of the younger children who is still to be maintained, educated and generally seen through life. If

such children were to get an equal inheritance with another who is working or who already owns he own property and for whom no school fees and anything of that sort is still to be provided, then such would manifestly be an injustice to the children and no law provides for such kind of equality. Furthermore, this court shall also take into consideration the fact that the Objector was once given land measuring 10 acres which he sold and yet another 10acres were allocated to him before the death of his father.

I have put into consideration the depositions and submissions in support of and in opposition to the Summons for Revocation. In view of the evidence on record, it's quite clear that the Petitioner during the time of application for Grant of Letters of Administration and the Summons for Confirmation of the Grant herein made a false representation or concealed some material facts. She failed to disclose that her deceased husband had another beneficiary, that is, the Objector and without notifying the Objector of the same. There is no doubt that the processes leading the issuance of the Grant in question lacks transparency, accountability and inclusivity hence to my mind, it's fatally defective.

In the circumstances, I make the following orders:

a) The Grant of Letters of Administration for the estate of Oloikampai Sarapae Sanguti issued to the Petitioners herein and confirmed by the court be and is hereby revoked.

b) A Grant of the Administration for the estate of Oloikampai Sarapae Sanguti (deceased) is hereby issued to Josephine Sasinet Oloikampai and Philip Koipaton Oloukamopai.

c) The Administrators shall apply for confirmation of the Grant within thirty (30) days from the date hereof.

d) The Objector shall still be entitled to the 10 acres of Land as far as Land Title Numbers Kajiado/Kitengela/13471 and Kajiado 13469 are concerned.

e) The other considerations to be dealt with during the confirmation hearings.

f) The Land Registrar is hereby directed to enter a restriction on the suit property pending the determination of this succession cause.

g) The Petitioner/Respondent shall bear the cost of this petition.

Read, Dated, Signed and Delivered in open court in Kajiado on this 15th October, 2018.

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R. NYAKUNDI

JUDGE

Representation

Ms. Macheru for the Objector – Present

Ms. Nzau for the Respondent – Absent

Petitioner/Objector - Present