



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1060 OF 1987

IN THE MATTER OF THE ESTATE OF LOONTASATI OLE LOLOWUAYA (DECEASED)

TWAARARI OLE LOONTASATI OLOWUAYA.....APPLICANT

VERSUS

MOSES MOOKE LOONTASATI.....RESPONDENT

JUDGMENT

1. The deceased Loontasati Ole Lolowuaya, a Maasai, died intestate on 20th February 1980 in Kajiado. During his lifetime he had five wives. The wives were Ntatae Loontasati (deceased), Ntimbili Loontasati (deceased), Sankai Loontasati, Kuya Loontasati and Ntiyo Loontasati, in that order. On 5th January 1988 the respondent (who was from the 2nd house) was allowed to petition for the grant of letters of administration intestate. A grant was issued on 28th September 1990 and confirmed on 19th April 1991.
2. On 28th June 2010 Richard Loontasati (a son from the 1st house) filed summons for the revocation and/or annulment of the grant on the basis that there had been no family agreement on who should be issued with the grant and on how the estate should be distributed. The respondent filed a replying affidavit to defend the summons. Justice Kimaru begun hearing the summons and adjourned it. Subsequently, this Court took over the conduct of the Cause. On 13th July 2015 the parties consented to the revocation of the grant. It was agreed that a fresh grant be issued in the joint names of the respondent, the applicant, Martha Nashipae Loontasati and Sakai Ene Loontasati Lolowuaya. It was further agreed that the respondent files an application for confirmation within 30 days proposing the mode of distribution of the estate. On service, the objector was to file a replying affidavit proposing the mode of distribution. The parties were asked to meet to agree on the mode of distribution.
3. On 2nd November 2015 the applicant filed the present application to have the grant confirmed. In the affidavit in support of the summons he named the beneficiaries of the deceased to be 33 children and 3 wives. The children were Melkan D. Loontasati, Richard T. Loontasati, Latino Kereya (deceased), Pilale Olokula (deceased), Karatoi Salash (deceased), Soinkei Oseur, Joseph O. Loontasati, Moses M. Loontasati, Jonathan Loontasati, Peter P. Loontasati, Eliud S. Loontasati, Jimmy S. Loontasati, Kamuaka Loontasati, Kitetoi Letema, Ratia Kutao, Sempela Munye, Judah O. Loontasati, Sapati J. Loontasati, Felix P. Loontasati, Stanley M. Loontasati, Lita Sankili,

Jackson M. Loontasati, Bernard M. Loontasati, Ezekiel K. Loontasati, Martha N. Loontasati, Janet Sinante, Mcdonald M. Loontasati, Fredrick K. Loontasati, Alamazon L. Loontasati, Teyasi Mburu and Kipeno Musengi. The wives were Sakai Loontasati Ololowuaya, Kuya Loontasati Ololuwuaya and Ntiyio Loontasati Ololowuaya. He indicated that the deceased's estate comprised land parcel Kajiado/Elangata/Wuasi/4 measuring 1204.5 Ha; Kajiado/Elangata/Wuasi/26 measuring 10 acres; 5000 shares in K.M.Q. Limited; and 1 Bedford lorry JG. He asked that the estate be distributed equally among the five houses. That form of distribution, according to him, was in accordance with Maasai customary law. If that was done, he swore, he asked that each house gets 240.9 Ha from parcel Kajiado/Elangata/Wausi/4, 2 acres from Kajiado/Elangata/Wausi/26 and 100 shares from K.M.Q Limited.

4. The respondent filed an affidavit in support of the summons for confirmation in which he disagreed with the applicant on the number of children that the deceased left and also disagreed with him on the mode of distribution. According to him, the deceased's 1st wife Ntatae Loongasati (deceased) had 2 children (two sons Daniel Meikan Loontasati and Richard Twaarari Loontasati and five married daughters the late Sinet Loontasati, the late Latino Loontasati, the late Karotich Loontasati, Soinkei Loontasati and the late Pilale Loontasati); 2nd wife Ntimbili Loontasati had 11 children (three married daughters Ketitoi Loontasati, the late Ratia Loontasati and Sempela Loontasati and eight sons Joseph Oseur Loontasati, Moses Mooke Loontasati, Jonathan Nkaldes Loontasati, Peter Parmeres Loontasati, Kamaunka Loontasati, Eliud Simel Loontasati and Jimmy Sais Loontasati); 3rd wife is still alive and has three children (two sons Judah Olubu Loontasati and Sapati Loontasati and one married daughter Lita Loontasati); 4th wife Kuya Loontasati who is alive and who has four children (one married daughter Sinante Peroni Loontasati, one single daughter Martha Nasipai Loontasati and two sons Bernard Memeru Loontasati and Jackson Matopei Loontasati); and the 5th wife Ntiyio Loontasati who is still alive and has no child. It is apparent that after the death of the deceased the 4th wife got three children Kirka Loontasati (son), Tonkei Loontasati (son) and Sabone Loontasati, and the 5th wife got seven children Kipeno Loontasati (married daughter), Florence Teyiasi (married daughter), Mepukoni Loontasati (son), Poesi Loontasati (married daughter), Kiruti Loontasati (son), Kirarapon Loontasati (daughter) and Lemek Loontasati (son) . According to the respondent these children were not fathered by the deceased and were therefore not his beneficiaries. Further, he stated that, in accordance with Maasai customary law, all the married daughters, whether dead or alive, cannot inherit the deceased and should be excluded from the distribution. Following that, he stated, the two sons from the 1st wife should get 64.94 Ha each; the eight sons from the 2nd wife should get 64.94 Ha each; the two sons in 3rd wife's house should get 64.94 Ha each and the wife (Sakai Loontasati) gets 64.94 Ha; the 4th wife Kuya Loontasati, her two sons and single daughter each gets 64.94 Ha; and the 5th wife Ntiyio Loontasati gets 64.94. The respondent stated that he had spent Kshs.6,990,005/= to protect and improve the estate and asked for 10 Ha to compensate him. That would give him in total 74.94 Ha. He then proposed that 25.58 Ha should be set aside for road access within the property. He asked that the 10 acres in Kajiado/Elangata/Wausi/26 be held by the administrators in trust. As for the lorry, he stated that it has completely broken down and faded and that the 5000 shares had not been paid for and their status was not known.
5. The deceased died on 20th February 1980. That was before the commencement of the **Law of Succession Act (Cap 160)** on 1st July 1981. **Section 2(2)** of the **Act** is clear on the law applicable to the estate of a deceased person dying before the commencement of the Act. It states that:

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence and proceed so far as possible in accordance with this Act.”

In the matter of the Estate of Mwaura Mutungi alias Mwaura Gichingo Mbura alias Mwaura Mbura (deceased) (NBR HC Succession Cause No. 935 of 2003), the court held that since the deceased

died before the **Act** came into force, the applicable law on the distribution of the estate was customary law, but the law applicable to the administration and procedural aspects of the estate was the **Law of Succession Act**. I find that, and both sides agreed with this, the law application on the distribution of the estate of the deceased herein is Maasai customary law.

6. The property of the estate is not in dispute. The deceased left parcels Kajiado/Elangata/Wuasi/4 measuring 1204.5 Ha, Kajiado/ Elangata/Wuasi/26 measuring 10 acres, a Bedford lorry 5.6 and 5000 shares in K.M.G Limited. The respondent stated that the lorry had wasted away. In the distribution schedule in paragraph 5 of the applicant's supporting affidavit the lorry was not distributed. I accept that the lorry is of no value.
7. The deceased left five houses. Of the five widows, three are still alive. They are Sakai Loontasati, Kuya Loontasati and Ntiyio Loontasati. According to the respondent, widow Ntatae Loontasati had seven children four of whom have died. Two sons and one married daughter are alive. Widow Ntimbili Loontasati left eleven children one whom died, leaving two married daughters and eight sons. Widow Sakai has two sons and one married daughter. Widow Kuya Loontasati has two sons and two daughters. One of the daughters is married. Ntiyio Loontasati has no child. However, Kuya got three children after the deceased died and Ntiyio got 10 children, three of whom are married daughters. The applicant considers all these children to be the children of the deceased, and therefore beneficiaries. The respondent considers that children not fathered by the deceased are not to be beneficiaries of his estate. On 22nd July 2014 David Letila Ololowuaya (PW 2) testified for the applicant in the application for revocation of the grant. The deceased was his step-brother. He stated that the children born to the deceased's widows after his death were considered the deceased's children. They belong to the family. I consider that the present application for confirmation and the proposed distribution were supported by 23 children of the deceased. They, I find, supported the fact that these children born after the deceased's death belong to the family and are beneficiaries. I accept these children to be part of the beneficiaries of the deceased.
8. The applicant and these 23 beneficiaries supported the view that under Maasai customary law the estate should be shared equally among the houses. The respondent proposed that the estate should essentially be shared equally among the sons, unmarried daughters and the living widows. He was alone in that contention. He stated that the estate owed him Kshs.6,990,000/= and sought to be compensated by being given 10 Ha. He said that he saved the estate from auction by AFC, etc. However, when the applicant and PW 2 testified in the application for revocation they stated that the AFC loan was paid by contributions from each of the five houses. Did the respondent benefit from the estate during the many years he was the single administrator? I have considered the evidence on record. I accept that the Maasai customary law is to the effect that the estate be shared equally among the houses.
9. Consequently, I allow the application for confirmation dated 23rd October 2015 and filed on 2nd November 2015 by the applicant. Each of the five houses shall get 240.9Ha from land parcel Kajiado/Elangata/Wuasi/4, 2 acres from Kajiado/Elangata/ Wuasi/26 and 1000 shares of K.M.G Limited. The shares of the house of Ntatae Loontasati shall be held in trust by Richard Twaarari Loontasati to be shared equally to the members of the family; Joseph Oseur Loontasati and Moses Mooke Loontasati shall be registered on behalf of the house of Ntimbili Loontasati to be shared equally to the members of the household; Sanakai Loontasati and Judah Olubu Loontasati shall be registered to hold the share of their house to eventually share equally to the members of the house; Kuya Loontasati and Bernard Mereru Loontasati shall hold the share of their house for equal distribution to its members; and Ntiyio Loontasati and Mepukoni Loontasati shall be registered on behalf of their house to share equally to its members.
10. The costs of the application, petition, and the charges for the survey, subdivision and registration shall be equally borne by the five houses.

DATED AND DELIVERED at NAIROBI this 4TH APRIL, 2016.

A.O. MUCHELULE

JUDGE