



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, ASIKE-MAKHANDIA & MUSINGA, J.J.A.)**

**CIVIL APPEAL NO. 32 OF 2018**

**BETWEEN**

**MOSES MOOKE LOONTASATI.....APPELLANT**

**AND**

**TWAARARI OLE LOONTASATI OLOLOWUAYA.....RESPONDENT**

*(Being an appeal against the Judgment and Certificate of Confirmation of Grant of the High Court of Kenya at Nairobi (Machelule, J.) delivered on 6th April 2016*

*in*

*Succession Cause No. 1060 of 1987.)*

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**JUDGMENT OF THE COURT**

1. This is a succession matter in respect of the Estate of **Loontasati Ole Lolowuaya (Deceased)**, who died on 20th February 1980 leaving behind five widows namely **Ntatae Loontasati (deceased)**, **Ntimbili Loontasati (deceased)**, **Sankai Loontasati**, **Kuya Loontasati** and **Ntiyo Loontasati**. The deceased's known assets included Land Parcel **Kajiado/Elangata/Wuasi/4** measuring 1204.5 Hectares, **Kajiado/Elangata/Wuasi/26** measuring 10 acres, 5000 shares in KMQ Limited and 1 Bedford Lorry JG.
2. On 5th January 1988, the appellant, **Moses Loontasati**, a son of the deceased, petitioned the High Court for grant of letters of administration intestate of the estate of the deceased. He stated that the deceased was survived by three wives and eight children. The grant was issued and subsequently confirmed on 19th April 1991.
3. On 28th June 2010, one **Twaarari Ole Loontasati Olowuaya**, also a son to the deceased together with the respondent herein, applied for summons for revocation or annulment of the grant on the basis that it was fraudulently obtained by concealment of material facts from the court; and that the grant was obtained by means of untrue allegation of facts essential in point of law to justify the grant.
4. According to the respondent, he was not aware that any of the family members had moved to acquire letters of administration until an elders meeting was held to discuss the distribution of the deceased estate convened by his brother, the appellant. He also stated that the appellant had failed to disclose to the court that their father was a traditionalist who followed Maasai customary practices which demand that a deceased person's property be shared on the basis of households headed by each of his wives.
5. In his replying affidavit dated 11th April 2013, the appellant refuted the claims and maintained that upon the death of his father the entire family including the respondent met under the chairmanship of their uncle, **David Letela Olowuaya**, where it was unanimously agreed that they should subdivide **LR Kajiado/Elangata/Wuasi/4** into 12 parcels, and that they also agreed that he would be the administrator of the estate of their late father with their uncle and one **Rianto Ole Sitelo** as sureties.
6. On 13th July 2015, the parties consented to the revocation of the grant. It was also agreed that a fresh grant be issued in the joint names of the **respondent, the appellant, Martha Nashipae Loontasati** and **Sakai Ene Loontasati Olowuaya**. Further, it was agreed that the appellant files an application for confirmation of the grant within 30 days, proposing the mode of distribution of the estate; and the respondent was also tasked to file a replying affidavit proposing his mode of distribution.
7. The appellant failed and/or refused to apply for the confirmation of the grant. The respondent felt that the estate was going to waste and

decided to file an application to have the grant confirmed on 2nd November 2015.

8. On 22nd February 2016 the appellant filed an affidavit in support of the respondent's summons for confirmation of the grant. He stated the estate owed him Kshs 6,990,005 which he had spent on its account. He asserted that he deserved a bigger share of the estate owing to the said debt.

9. The learned judge allowed the application for confirmation of grant and ordered that 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 KMQ Limited. The learned judge also held that the children from the 3rd, 4th and 5th widows of the deceased born after the deceased's death were beneficiaries of the deceased's estate.

The learned judge further directed that the share of each house be held in trust for the benefit of their respective members.

10. The appellant was aggrieved by those orders and is now before this Court on a first appeal, which requires us to consider and analyse the evidence afresh and come up with our own conclusions.

11. The principles upon which we should consider the matter are *Sir Clement De Lestang, V. Pin Mbogoh & Anor v Shah [1968] EA 93*:

***“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

12. Ten grounds were put forward in the memorandum of appeal. However, in his submissions, the appellant's counsel condensed his arguments into three broad grounds. The first one regards to the mode of distribution of the estate. The appellant urged the court to consider the variances and diversities in the properties themselves, to wit topography, terrain, location, value, and proximity to infrastructure.

13. According to him, such considerations were completely ignored and/or overlooked by the High Court. He urged that there was no fairness, equity and/or equality in the distribution of the deceased's estate. The appellant submitted that it was unjust for one family to be granted 240.9 Ha of rocky, bumpy and rough land, while the others with equal inheritance status were accorded fertile and lucrative portions of the same land.

14. It was also contended that due to lack of a clear and/or proper subdivision scheme, the learned judge failed to consider and/or provide for the sporadic settlements and developments by the beneficiaries of the estate in the properties and therefore the execution of the impugned judgment will result to eviction of some of the beneficiaries.

15. The appellant also submitted that the parcel of land Kajiado/Elangata/Wuasi/26 has a borehole that is used by the entire family and therefore the execution of the impugned judgment and the certificate of confirmation of grant, which does not provide for the said borehole to be held in trust for all the beneficiaries will mean deprivation of a considerable number of the deceased's family members from the use and benefit of the borehole.

16. It was further submitted that the beneficiaries of the estate are all adults who have the capacity to own and dispose of property and therefore the order to have the share of each house held in trust for the beneficiaries was not warranted.

17. The appellant also faulted the judge for considering the children of the 3rd, 4th and 5th wives born after the death of the deceased as beneficiaries of the deceased.

18. The second ground of appeal was in regard to the evidence adduced in support of Maasai customary law. The appellant stated that no specific evidence was tendered and/or tested in cross examination on the substance and application of the Maasai customary law on inheritance and distribution of the estate of the deceased. He faulted the learned judge for finding that under the Maasai customary law children born to the widows of the deceased after his demise and who admittedly are not biological children of the deceased are also beneficiaries of the estate; and that under the Maasai customary law, land is divided among the houses equally irrespective of the number of units.

19. He argued that the learned judge placed reliance on extraneous material and evidence in determining the summons for confirmation of grant without according the appellant an opportunity to submit on the veracity of such material and evidence.

20. The third issue was on the expenses that the appellant had incurred on behalf of the deceased's estate. According to the appellant, he incurred a total of Kshs 6,990,005/= plus interest in protecting the estate, a debt which he says is still owed to him by the estate to date; that even after producing all the documents in proof thereof the trial judge did not make any favourable order to that effect.

21. In conclusion, the appellant urged that the appeal be allowed and the application for confirmation of grant be remitted for hearing *de novo* in accordance with **section 2(2) of the Law of Succession Act** before another judge.

22. In his written response through counsel, the respondent raised three issues for determination. The first one was whether the learned judge erred in applying the Maasai customary law in administering of the estate. According to him, evidence was led by both parties that the deceased subscribed to the Maasai cultural practices, and the judge, having been fully satisfied by the uncontroverted evidence relied on the same to arrive at the impugned conclusion.

23. Counsel added that both parties were afforded chance and opportunity to call expert witnesses on Maasai customary law, but the

appellant failed, refused and/or ignored to do so. On the other hand, the respondent called **David Letela Olowuaya**, a step-brother to the deceased, who testified that under the Maasai customary law properties of a deceased person are shared equally amongst the deceased's widows.

24. The respondent also submitted that the entire land of the estate is agricultural, falling within a district listed in the schedule under **section 32 of the Law of Succession Act**, hence the Act does not apply to the administration of the estate.

25. The second issue was whether the learned judge erred by failing to distribute the shares of the respective houses amongst each individual beneficiary. He submitted that it was proven that under the Maasai customary law the individual households are headed by the widows and it is up to each one of them to divide the land amongst her children.

26. Thirdly is the issue of whether the learned judge erred by failing to apportion the access roads and/or surrenders as alleged by the appellant. The respondent submitted that the learned judge was guided by the consent dated 23rd October 2015 as to the mode of subdivision, which consent was executed by all beneficiaries, save for the appellant and two of his brothers, and which document was not challenged or controverted; further, that the learned judge considered the evidence on record on the size and nature of the estate as well as the geographical location of each beneficiary. He also noted that there were no permanent structures in the form of houses on the entire land.

27. The respondent urged the court to balance the rights of 3 widows and 31 children of the deceased as engendered in the aforesaid Maasai customary law practices against those of the appellant and his two brothers. He prayed that the appeal be dismissed.

28. We have considered the entire record of appeal and submissions by counsel. It is not in dispute that the deceased died on 20th February 1980 before the commencement of the Law of Succession Act on 1st July 1981. **Section 2(2)** of the said Act states as follows:

***“The estate 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.”***

29. The first issue for determination is whether the learned judge erred in applying the Maasai customary law in administering the estate of the deceased. The appellant contends that the learned judge applied the Maasai customary law, yet no compelling evidence of the Maasai customs on inheritance and distribution of the estate was tendered.

30. As regards the evidence on applicability of Maasai customary law, it was submitted that this instant case is hinged on the notion that land is divided among the houses equally, irrespective of the number of units. From the evidence of **Martha Nashipae Loontasati**, who was an Assistant Chief of the Esampukike Sub-location at the time, one of her duties as an Assistant Chief was to preside over disputes in the area and as such, she affirmed that it is a well known and accepted practice that the property of a deceased person is divided equally among the wives of a deceased.

31. In the cases of **Ernest Kinyanjui Kimani v Muiru Gikanga and Another [1965] EA 735** and **Nyariba Nyankomba v Mary Bonareri Munge [2010] eKLR**, it was held that:

***“Time and again it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claims remain unproved.”***

32. It is trite law that any party seeking to rely on customary law is mandated to aid the Court in ascertaining its existence, as the trial court is presumed not to be well versed in customary laws of various communities; and in so doing the party asserting its existence is required to establish its veracity by adducing evidence and or calling upon expert witnesses to offer guidance. Did the respondent discharge that burden?

33. In our view, we find that the evidence of the deceased's step-brother and the afore-mentioned Assistant Chief was sufficient to prove that custom. The evidence of **Amboko Ole Laimerrri Mulei**, the vice chairman of the Mailwa group, also corroborated the respondent's evidence of equal distribution of land amongst a deceased's wives according to the Maasai customary practices.

34. In **Sheldon Shadora v Stanley S. Shadora, Civil Appeal No. 210 of 1995**, this Court held that:

***“Although in a first appeal the Court is entitled to rehear the dispute, it must be remembered that the trial court had the advantage of hearing and seeing the witnesses testify before him... A Court of Appeal will not normally interfere with the finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did... An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him.”***

35. In our view, therefore, based on the evidence that was adduced before the trial court, the learned judge was entitled to arrive at the findings of fact in the manner he did. Although the appellant submitted that there was no proof of the Maasai customary law, in **Sakina Sote Kaitany & Ano. v Mary Wamaita [1995] eKLR**, this Court held that: -

***“The Parties in this case are Africans and therefore the court will take judicial notice of such African Customary Law as may be applicable but subject to the provisions of reg. 4 as set out above. The difficulty remains how are these customary laws to be***

*established as facts before the courts? In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of previous judicial decision or where the Customary Law is set out in a book or document of reference as provided in sub-s. 2 (2) above, but usually in the High Court or in a Magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on the particular customary law in support of his case."*

36. Similarly, in Morris Odawa v Samuel Ochieng Auma [2019] eKLR, the Court cited this Court's decision in Edwin Otieno Obanjo v Martin Ondera Okumu, [1996] eKLR where it was held:

*"...if African customary law is not caught up by the qualifications under section 3(2) of the Judicature Act then it must be given effect by the courts and must be applied in deciding cases before it but according to 'Substantial justice.'"*

37. We therefore agree with the learned judge's application of the Maasai customary law in distributing the deceased's estate equally amongst the five houses. We also agree with the contention of the respondent that distributing the estate amongst all the beneficiaries would have been tantamount to usurping the responsibilities of the surviving widows.

Regarding children who were born by the deceased's widows after his demise, evidence was tendered that under the Maasai customary laws such children are considered as beneficiaries of the deceased's estate, and it is up to the members of each household as guided by their matriarch to determine the share they ought to get.

38. The second issue for determination is whether the learned judge erred in failing to apportion the access roads and/or surrenders as alleged by the appellant. The appellant raised the concern that distribution of the property did not consider the sporadic settlements, and that it would be unjust to apportion one family 240.9 Ha of rocky or rough terrain while others inherit fertile portions of the land. He further faulted the trial court for failing to consider that the borehole serves the entire family of the deceased and could not therefore be given to one house.

39. The respondent refuted those claims. He stated that no actual subdivision of the land had been undertaken, the learned judge had simply ordered that the land be subdivided as per the Maasai customary laws; and the beneficiaries will be at liberty to employ any mode of subdivision as will be agreed upon. He further deponed that there are no permanent structures in the entire land and hence the issue of the applicant and other beneficiaries being displaced would not arise. It was his further testimony that there exists a public road that leads to the borehole and thus the intended sub-division shall not deprive anyone the right to access the said borehole.

40. From the evidence on record, we are inclined to believe the respondent on a balance of probabilities. It seems to us that amongst the family members of the deceased there was no intention to disadvantage any of the houses in the distribution of the deceased's estate or deny any of them access to the borehole, which serves all of them. We affirm that.

41. The trial court directed that the parties come up with a proposal on the mode of distribution of the properties. The appellant proposed that each of the beneficiaries be awarded 64 Ha except for him, proposing that he should be awarded 10 Ha more, making it 74 Ha, on the basis that he had incurred substantial expenses in maintaining the estate. On the other hand, the respondent and the other beneficiaries proposed equal share of 240.09 Ha per house. The latter is what the trial court adopted as it was in accordance with the Maasai customary practices.

42. It is our considered view that it would be unreasonable to expect the court to know the topographical features of the said parcel of land when the same was not brought to the attention of the trial court at the time of the proposed consent. The trial court did not conduct a site visit to ascertain the topography of the land. It is only the appellant and his two brothers who disagreed with the mode of distribution of the estate, all the other beneficiaries were in agreement. We have no reason to vary the orders made by the trial court regarding distribution of the land. This ground must also fail.

43. As regards the appellant's claim that the estate owed him Kshs.6,990,005, this claim was not proved. Besides, the other beneficiaries contended that the appellant did not account for the income generated from the estate for the period between 19th April 1991 and 13th July 2015. In the circumstances, we do not agree that the appellant is entitled to a bigger share of the deceased's estate than the other beneficiaries for the reason he advanced

44. All in all, we find this appeal lacking in merit and dismiss it in its entirety. This being a family dispute, each party shall bear its own costs of the appeal.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

*I certify that this is a true  
copy of the original.*

*Signed*

**DEPUTY REGISTRAR**