



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**SUCCESSION CAUSE NO. 128 OF 2015**

(IN THE MATTER OF ESTATE OF MUNKAYA TORONKEI TATEK , DECEASED)

**SAYO NGOINET MUNGAYO.....1<sup>ST</sup> APPLICANT**  
**SHIA WA ENE ORKET KOMBE.....2<sup>ND</sup> APPLICANT**  
**MANEN ENE LEKAMETI PURUKEI.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**NAIYESO MUNKAYA GURNE.....1<sup>ST</sup> RESPONDENT**  
**JOSPAT SENTEU MUNKAYA.....2<sup>ND</sup> RESPONDENT**

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**RULING**

**Introduction**

1. The deceased herein one **Munkaya Toronke Tatek** died on 3<sup>rd</sup> August 2002. Before his death the deceased was the registered owner of land Title No. L.R NO KAJIADO/KAPUTIEI-CENTRAL/441 situate in Kajiado.
2. Grant of letters of administration of the estate of the deceased was made to Nyaiyeso Munkaya Gurne (wife) and Josphat Senteu Munkaya (son) on the 12<sup>th</sup> April 2013.

**The application**

1. By Notice of Motion filed before this Court dated 9<sup>th</sup> July 2014, the Applicant herein Sayo Ngoinet Mongaya moved the court for revocation or annulment of the temporary grant issued to Nyaiyeso Munkaya Gurne and Josphat Senteu Munkaya. on the 12<sup>th</sup> April 2013 on the ground that:

1. The grant was obtained fraudulently by making false statements and concealment from the Honourable Court of material and pertinent facts relevant to this case.
2. That the applicant did not disclose to this Honourable Court the fact that the deceased was married to two wives and therefore beneficiaries from the other household stand to be disinherited out of the estate of the deceased.

2. The Applicant depones that he is a beneficiary of the estate of the deceased by virtue of being the first born grandson son to the deceased. (he is a son of Ngoinet Mongaya (also deceased), 1<sup>st</sup> born son to the deceased) ;That he came to know of the issuance of the grant of letters of administration to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent later.
3. That the deceased was married to tow wives namely Tinka Mongaya Tatek(1<sup>st</sup> wife) and Naiyeso Mungaya Gurne (2<sup>nd</sup> wife).
4. The Applicant further deponed that the deceased's 1<sup>st</sup> wife had three children namely Ngoinet Mongaya Tatek (1<sup>st</sup> Son), and two married daughters namely Shiawa Ene Orket Kombe and Manen Mongaya.
5. The deponent further avers that three children were borne in the second household namely Josphat Mongaya, Mike Toronkei Mongaya and Alex Saisa Mongaya.
6. It is the applicant's statement that the grant issued to Nyaiyeso Munkaya Gurne and Josphat Senteu Munkaya was obtained fraudulently by concealment of the fact that the deceased was married to two wives with an intention to disinherit the dependents.
7. The deponent further stated that the grant holders are in the process of transferring portions of the estate to third parties with a view of selling it. The Applicant moved this court to issue an injunction to the administrators of the estate in order to preserve the estate until the hearing and determination of this application.
8. The 2<sup>nd</sup> Applicant, Shiawa Ene Orket Kombe (first daughter of the late MunkayaToronkei Tatek) also filed a supplementary Affidavit dated 19<sup>th</sup> November 2014 and stated that paragraph 9 of the Respondents Affidavit is not true as LR.No KAJIADO/KAPUTIEI-CENTRAL/1784 has never belonged to the deceased Munkaya Toronkei Tatek and is unknown to him. He stated that his father Nkoinet Munkaya had his own parcel of land known as Kajiado/ Kaputei/Central/2641 which was part of Elmanen Group Ranch and he was allocated his portion which was registered in his late mother's name and that no member would have been allocated two parcels of land from the Elmanen Group Ranch. A list of membership of Elmanen Group Ranch Marked **SNM1** was annexed.
9. The 2<sup>nd</sup> Applicant deponed that the petitioners have deliberately without any reasonable cause omitted two acres of land at Konza Farming and ranching co-operative society which needs to be included as an asset of the estate of the deceased.

#### Response to the Application

10. The Respondents Naiyeso Munkaya Gurne and Josphat Senteu swore a replying affidavit dated 29<sup>th</sup> September 2014 in which they averred that they are administrators of the estate of Munkaya Toronke.
11. The Respondents deponed that they shall urge the court to strike out the Application and the Affidavit for the following reasons;
  - i. The Application is fatally defective having been brought by way of Notice of Motion contrary to the Probate and Administration rules of procedure.
  - ii. The Respondents hall at the hearing hereof crave leave of the court to cross-examine the deponent Sayo Ngoinet Mongaya.
  - iii. The Application and Affidavit as drawn amount to an abuse of the Court process and the law on statutory procedure.

12. The Respondents averred that the Grant of letters of Administration were issued on 12<sup>th</sup> April 2013 by this Honourable court after being satisfied that all legal and procedural requirements had been complied with and that the administrators have not yet obtained the confirmed grant and as such they have no capacity to sell any of the deceased's assets.

13. The deponents averred that despite the objector's allegations that the temporary grant was fraudulently obtained, no particulars of fraud have been advanced nor any evidence tendered to this effect. Additionally, the deponents averred that if they had any intention of disinheriting the Applicants, they would have hurriedly applied for confirmation of the temporary grant which they have not done to date.

14. The deponents do not dispute the fact that the deceased had two wives. They indeed proceed to depone that the deceased bequeathed the 1<sup>st</sup> wife, Tinka Mukaya Tatek(deceased) and her household LR.NO KAJIADO/KAPUTIEI-CENTRAL/1784 measuring 71.38 hectares and that a family decision was reached that the said land be registered in the name of Nkoiyo Ene Nkonet Munkaya who is actually the mother to the objector/Applicant herein. *Copies of mutation and ownership documents marked NMG 2 were annexed.*

15. Additionally, the Respondents state that the deceased consequently gave the 2<sup>nd</sup> wife Naiyeso Munkaya Gurne and her household LR NO KAJIADO/KAPUTIEI-CENTRAL/441 which is the subject land herein.

16. The Applicant's mother is namely NKOYIO ENE NKONET is married to the 1<sup>st</sup> wife's eldest son called NGOINET MUNKAYA TATEK and has actually already subdivided the land and gave the objector herein his share and it is therefore not convincible what the objector is complaining about.

17. The Respondents deponed that the applicant is being untrue by alleging the fact that he or his family has been disinherited and that he is fighting a lone battle as he does not even have the support of the rest of the members of the first wife's family whom he alleges were disinherited; In addition, the objector's intention is therefore to benefit twice.

18. The Respondents further aver that the objector/applicant has on several occasions caused unwarranted chaos among the deceased's family which conduct prompted the local administration to summon the family members for a meeting in the presence of village elders which meeting was held on 21<sup>st</sup> January 2013 way before the administrator lodged the petition for grant of letters of Administration. In the said meeting, the objector's claim to the deceased's land was dismissed. *A copy of the Resolution by the elders committee marked NMG-3 was attached.*

19. It is the Respondent's averment that the area chief on 22<sup>nd</sup> January 2013 wrote to this Honourable court confirming the rightful heirs to the deceased's subject land KAJIADO/KAPUTIEI-CENTRAL/441. A copy of the letter marked **NMG 4** was attached.

20. Deponent also averred that no evidence has been tendered to prove the Applicant's allegations that the Respondents are in the process of alienating LR No. KAJIADO/KAPUTIEI CENTRAL/441 and that no *Prima facie* case has been established to warrant the grant of an interlocutory injunction. And finally that no objection was raised when the Notice for Application of letters of grant was published in the Kenya Gazette. 22<sup>nd</sup> February 2013.

## **SUBMISSIONS**

### **Applicant's submission**

21. Counsel for the Applicants submitted that Ngoinet Mungayo is a grandson of the deceased and that Shiawa Ene Orket Kombe and Manen Ene Lekameti Purukei are children of the deceased yet they were intentionally excluded as beneficiaries in the estate of the deceased and that this was done by the

administrators for selfish reasons.

22. Counsel further submitted that the exclusion of the applicants in the list of surviving beneficiaries was done without any justifiable cause.

23. Counsel also submitted that in addition to concealing the facts about the actual beneficiaries of the estate the Respondents also failed to disclose the entire estate of the deceased by deliberately omitting two acres of land at Konza.

24. Counsel further submitted that if the orders are not granted the applicants shall suffer a lot of injustice and irreparable harm as there can never be equitable compensation for ones loss of inheritance.

### **The Respondent's submission**

25. Counsel for the Respondent submitted that no particulars of material non-disclosure, fraud or defectiveness in substance were enumerated or proved by the objectors as required by section 76 of the Law of Succession Act. Counsel also submitted that the administrators have been candid and truthful in their petition and that the objectors have not satisfied any of the requirements of Section 76.

26. The second issue that the learned counsel submitted is that the 2<sup>nd</sup> and 3<sup>rd</sup> objectors are barred by section 32 and 33 of the Law of the Succession Act from claiming an inheritance in the deceased's estate as the customary law applicable to Maasai community does not allow married ladies to claim from inheritance from her deceased parents. Counsel recapped Section Sec 32 of the Act which provides for the various districts(now counties) where the provisions of part V of the Act on intestacy do not apply.

27. He proceeded to recap section 33 to the effect that the applicable law to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe as the case may be. Counsel directed this court to the **Constitutional Petition No. 11 of 2012** in which Chemitei J held that *the sections of the Law of succession Act Chapter 160 laws of Kenya complained off by the petitioner are not at all in conflict with the Constitution.*

### **Determination and Analysis**

28. This court must address itself to is whether the temporary grant made on 5<sup>th</sup> April 2013 was granted as a result of unprocedural and illegal proceedings and whether it ought to be revoked.

29. I have considered the application, the witness statements, the verifying affidavit, the documents exhibited, the submissions and authorities cited in this matter.

30. It has been alleged and submitted before this court that the household from which the 1<sup>st</sup> Applicant was borne was bequeathed the plot LR No. KAJIADO/KAPUTIEI CENTRAL/1784 measuring 71.38 hectares while the household of the Respondents was bequeathed LR No. KAJIADO/KAPUTIEI/CENTRAL/441 measuring 99.5 hectares.

31. Of importance to note is that an interrogation of the mutation forms provided by the Respondents marked NMG 2 reveals that the dates marked in the mutation forms read 4<sup>th</sup> April 2010 and 27<sup>th</sup> April 2012 meaning that these transactions took place during the lifetime of the deceased as the deceased died on 5<sup>th</sup> April 2013. This fact therefore leaves a lot to be desired because for the court to make a determination as to whether the Applicants are entitled to inherit from LR No. KAJIADO/KAPUTIEI/CENTRAL/441, it would be important to make a determination as to whether LR No. KAJIADO/KAPUTIEI CENTRAL/1784 is free property that is available for distribution or whether it was a gift made in favour of the first family during the lifetime of the deceased.

32. From the forgoing, there are many blind spots with regard to the title KAJIADO/KAPUTIEI CENTRAL/1784. A search therefore ought to have been done against this title so as to establish the

position of this land. Additionally, since it is clear that this transaction took place during the lifetime of the deceased, it would have been prudent to provide the title documents as a mutation form cannot be conclusive proof of ownership. Further, the transfer forms (if any) signed by the deceased would have helped to shed light to this matter.

33. A form of evidence the Respondents also attached a copy of resolution by village elders for a meeting that was held to determine the 1<sup>st</sup> Applicant's claim against the deceased's estate. I have taken issue with this evidence for several reasons; first there are no proceedings as to how the decision was arrived at; the resolution arrived at does not address the agenda of the meeting as it speaks to identify the family of the deceased as opposed to dealing with the 1<sup>st</sup> Applicant's claim against the deceased's estate; it is also not clear what the meeting was addressing as the property being addressed is not stated and lastly there is no record of the family members from both households that were present in the meeting. In this regard I disregard this evidence in totality.

34. From the forgoing, the Applicants have demonstrated a claim as against the Respondents. But as to the entitlement of the Applicants, this court will not proceed to determine this issue before establishing the exact position of KAJIADO/KAPUTIEI CENTRAL/1784. The parties are therefore directed to produce title documents to KAJIADO/KAPUTIEI CENTRAL/1784 or its sub-divisions thereof and a search for the same.

35. As to the inheritance for the daughters we cannot be said and heard to apply repugnant laws in this dispensation of the Constitution of Kenya 2010. Daughters are entitled to property as much as the sons are.

36. **Section 29 of the Law of Succession Act Cap 160** does not discriminate beneficiaries on any grounds, be it gender or marital status. On the contrary, it defines dependents as including the children of the deceased without any adverse distinction. This position is well established in our legal system and has consistently been restated in our jurisprudence. In the case of *Eliseus Mbura M'Thara v Harriet Ciambaka and Another* [2012] eKLR, Lesiit J stated that:

*The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.*

37. Kimaru J reaffirmed the above position in *Peter Karumbi Keingati & 4 Others v Dr Ann Nyokabi Nguithi* [2014] eKLR, where he stated as follows:

*As regard to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that the court will grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others,*

***the time has now come for these discriminative cultural practices against women be buried in history.***

38. The court has not been provided with any oral or documentary evidence to the effect that the daughters of the deceased renounced their share in the estate of the deceased. The court will not assume but will proceed to order that the surviving daughters of the deceased must be part of this conversation.

39. There has also been allegations of an existing estate of the deceased in Konza. This court has not been presented with any documentary evidence to prove existence of this land and it will therefore not delve into that issue.

40. The Applicants therefore ask me to revoke the letters of Administration issued to the Respondents on 12<sup>th</sup> April 2013. I am of the view given the fact that there are many blind spots as to the status of the title KAJIADO/KAPUTIEI CENTRAL/1784 and Konza property as at the time of death of the deceased. The status of the two properties is not ascertainable from the scanty evidence and material placed before me by the parties. It is therefore advisable that the parties do produce certificate of search and proper ownership documents for that reference and the subdivision thereof as per the mutation form produced in evidence.

41. The other issue in this matter relate to the deceased children. It is not disputed that the deceased was survived by other children besides the sons who are named in the application for grant of letters of administration. The existence of the daughters of the deceased cannot just be washed away by invoking the Maasai Customary Law on the inheritance of property. There is no dispute that the daughters do qualify as the deceased dependants who are entitled to participate and be part of the distribution and benefits arising from the estate. According to the letter from the chief dated 22/1/2013 which was the basis for the court to issue grant of letters of administration, the respondents only disclosed that the deceased Munkaya Toronkei Tatek was survived by only sons namely; Josephat Senteu Munkaya, Mike Toronkei Munkaya and Alex Saisa Munkaya.

42. After having heard both counsels to this application and the evidence adduced by the objectors it emerged that the deceased was survived by married daughters Shiawa Orket Kombe and Manen Lekamet Purukei. This was evidenced and supported by the said letter dated 20/3/2015. The affidavit in support of the application form P&A 5 required under the probate and succession rules omitted the married daughters as the dependants of the deceased. This omission therefore flies on the face of section 76.

43. Section 76 of the Law of Succession sets out clear provisions upon which a grant of representation may be revoked or annulled, it is provided inter alia:

**“ (a) That the proceedings to obtain the grant were defective.**

**(b) That the grant was obtained fraudulently by making of the false statements or by the concealment from the court of something material to the case.**

**(c) That the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegations was made in ignorance or inadvertently.**

**(d) .....**

**(e) .....**”

44. The objectors in this case have brought themselves within the above three legal grounds to support the contention that the applicant concealed a material fact on the dependants of the deceased who were not included nor their consent obtained during the petition for grant of letters of administration. The grant of letters of administration was therefore based on untrue allegation and the court cannot withstand a legal instrument in the form of grant which is tainted with illegality.

45. This proposition was well stated in the persuasive case of the *Estate of Ezekiel Mulanda Masai P&A No. 4 of 1992* in this case where the petitioner filed for grant of letters of administration excluding the widow, the step mother of the deceased and a son to the deceased who were the surviving widow and son of the deceased. The court held that the confirmed grant be revoked on grounds that it was obtained fraudulently without disclosing all material facts and by excluding some of the survivors of the deceased from the list of survivors.

46. In deciding a similar application in the matter of the *Estate of Ngaii Gatumbi alias James Ngaii Gatumbi (deceased) High P&A No. 783 of 1993 at Nairobi* substantially the court followed the provisions of section 76 of the Laws of Succession by revoking the grant which was brought by persons who were omitted from the petition for grant which they were equally entitled to apply.

47. What I am trying to bring out is that courts have recognized the need to correctly affirm the provisions of section 76 to avoid the dependants from being deprived of the rights and benefit of the estate of the deceased. I am therefore satisfied that the applicants/objectors have raised a valid objection to warrant this court revoke the issuance of grant of letters of administration to the respondents.

55. This will in effect enable the court to make a determination as to the free estate of the deceased and the Applicants claim as against the estate.

56. From what I have discussed above this court makes the following orders:

**(a) That the letters of administration granted to the respondent by the High Court at Machakos on 5<sup>th</sup> April 2013 in respect of the estate of Munkaya Toronkei Tatek alias Munkaya Toronke Takek is hereby revoked.**

**(b) The parties are directed to produce to this court a certificate of search and proper title documents to KAJIADO/KAPUTIEI CENTRAL/1784 or its sub-divisions thereof as per the mutation forms and the Konza property.**

**(c) The administrators of the estate are hereby directed to file fresh grant of letters of administrating taking into account the omitted dependants of the deceased.**

**(d) In the interim an injunction do issue against any dealing with the estate of the deceased until further orders of this court.**

**(e) That the matter shall be mentioned after 90 days for compliance and further orders.**

**(f) That this being a family matter there shall be no order as to costs.**

**(g) It is so ordered.**

Dated, delivered and signed in open court at Kajiado this 13<sup>th</sup> day of March 2017.

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**R NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Wachira for the respondent – present

Mr. Kinuthia for Nzau for the applicants

Mr. Mateli Court Assistant