REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 839 OF 2006

IN THE MATTER OF THE ESTATE OF EDWARD OMUSINDE OTONG'O (DECEASED)

RULING

1. The application that I am tasked with determining is a summons for revocation of grant dated 11th July 2019. It seeks that the grant of letters of administration and certificate of confirmation of grant issued to the administrator be revoked. The applicant is Caleb Angachi Omusinde, while the administrators are Yonam Wakhu Omusinde and Livingstone Namayi Omusinde, who I shall respectively as the first and second administrators. He also seeks other orders relating to Marama/Inaya/760 and John Olive Chibayi.

2. The principal grounds upon which the application is founded are that the grant of letters of administration intestate was obtained by the giving of false information or concealment of material from the court. It is also averred that several beneficiaries were left out of the process, including the applicant. There is also the argument that the administrator had distributed the estate to strangers, and that he had failed to administer the estate for the benefit of the rightful beneficiaries.

3. In the affidavit that the applicant swore in support, on 11th July 2019, he gives details of the members of the family of the deceased, and complains that during the process only two family members, that is the administrator and Livingstone Namayi Omusinde, were involved. He states that all the other children of the deceased were not invited to participate. He complains further that the estate of the deceased was distributed in a manner which left out some of them from benefit. He states that the property was given to strangers, some of whom have begun to harass family members. In the circumstances, he would like the grant revoked and distribution done afresh.

4. There is a reply to the application, by the administrator, through an affidavit, he swore on 26th July 2019. He avers that the applicant was not a beneficiary of the estate, and was only colluding with the second administrator. He states that when he sought confirmation of his grant, the applicant herein filed a protest to the confirmation, which was dismissed. He states that John Olive Chibayi ought not to be restrained from utilizing a portion of the land since he had bought the same from beneficiaries of the estate, namely Sophia Okutoi Indeche and Beatrice Maloba. He states that the applicant was not satisfied with the outcome of the confirmation application, and he had moved the Court of Appeal on appeal, but his appeal was dismissed.

5. The administrator has attached several documents to his affidavit to support his case. There is a copy of the judgment Sitati J delivered on 7th September 2016, on the confirmation application dated 29th November 2010. The second document is the ruling in Court of Appeal Civil Application No. 41 of 2017, delivered on 25th February 2019, which declined an application by the protestor to the confirmation application to file appeal out of time to challenge the judgment of Sitati J of 7th September 2016.

6. Directions were taken on 23rd July 2019, to the effect that the application, dated 11th July 2019, would be disposed of orally.

7. The oral arguments were taken on 27th November 2019. Mr. Manyoni for the applicant argued that the deceased had three wives, yet the succession proceedings only involved one house. He argued that the third house, from which the applicant came, was not involved at all. He submitted that the matter ought to be heard afresh.

8. The administrator submitted that his father had three wives, but it was first wife who had been given the subject property, Marama/Inaya/760. He stated that the other two wives were given land elsewhere. He said that it was the three sons in the first house who were entitled to Marama/Inaya/760. He asserted that the applicant was not entitled to Marama/Inaya/760, as the deceased had given the land to the first house and not the third house. He stated that he had approached the third house for the purpose of the succession cause, but they refused to get involved. He stated that he could not involve everybody by force. He stated that the deceased had distributed his property before he died. He stated that the applicant refused to produce the number of his land, and so he excluded him from the process. He said each of the children had their numbers.

9. The application for determination, although professionally drawn, is not purported to be premised on any provisions of the law. It is, however, an application for revocation of grant. Revocation of grants of representation is provided for by section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The sad provision states as follows:

“76. Revocation or annulment of grant

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 allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation 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 order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(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.”

10. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of representation may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. In the first place it would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation were not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made intead of a grant of probate, or *vice versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind, for whatever reason, or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, thereby, becomes unqualified to hold any office of trust.

11.The applicant in the instant case argues that the process of administration in this case did not involve the third house of the deceased. That claim is conceded by the administrator who advances several arguments. First, he says as that he only sought representation to the property that the deceased had given to his mother’s house, and left out the assets that were allocated to the other houses. That suggests that the other houses ought to have initiated their own separate causes with respect to the property that was allegedly allocated to them by the deceased during his lifetime. His second argument is that he had approached the applicant’s house, but they refused to cooperate, they even refused to disclose the reference number of their land. He submits that he could not force everyone into the process against their will. That would suggest that the process of obtaining the grant was flawed, and there was also misrepresentation as survivors of the deceased were not disclosed to the court or were concealed from the court, which then created the distorted picture that the deceased had been survived only by the individuals listed in the petition.

12. It would appear then, from the above, that the applicant has founded his case on section 76 (a) (b)(c) of the Law of Succession Act.

13. Just to satisfy myself that the administrator had or had not complied with the law in the manner that he sought administration I shall consider the relevant law relating to the whole process of application for representation.

14. Before I get to that, however, let me first address my mind to an issue that the administrator has raised. He claims that the cause was limited only to the property that the deceased gave his mother’s house, suggesting that the other houses ought to have initiated their own causes. He also appeared to conduct the proceedings as if they were a land dispute between him and the applicant. It should be clear to the parties, that this cause relates to the estate of the deceased herein. It is not a land matter, nor a civil suit as between the parties. It is initiated for the sole purpose of transmission of the property of the deceased from his name to the names of the persons who survived him or were entitled to it under succession law. The sole purpose of a succession cause is distribution of the property of the dead persons. To facilitate that it would be necessary that the survivors or persons beneficially entitled to the property are identified, and so should be the assets that the deceased left behind. It should also be clear to parties that succession is a scheme through which the wealth of dead parents is devolved to their children, hence the description of the process as an intergenerational transfer of property. So, the process must involve all the children of the dead parent, and all the assets that the parent died possessed of. It would also mean that there should be only one succession cause in relation to the estate of each individual dead person, unless he died partially testate and partiality intestate.

15. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2) (g), which state as follows:

“Application for Grant

51. (1) …

(2) Every application shall include information as to—

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h)...”

16. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administrator herein only disclosed members of the family from his mother’s house and left out the other two houses. That created an impression to the court that these individuals were the sole survivors of the deceased. The deceased had other children with his other two wives. This information came from the affidavit of the applicant, and was conceded by the administrator at the oral argument of the application. The children from the other houses were not disclosed to the court. Therefore, there was no compliance with section 51(2) (g).

17. That points to procedural defects in the manner the grant was obtained to the extent that the administrator did not comply fully with the requirements of section 51(2) (g). There was misrepresentation to the extent that he did not disclose all the persons who survived the deceased. He misled the court into believing that the deceased did not have a second and third family. There was concealment of important matter from the court as a result. That meant that a fairly good number of survivors was locked out of the succession process.

18. The administrator sought to explain why he did not disclose them. He said that cause was only meant for his mother’s house. I have already stated that he had initiated a cause in the estate of his late father. He should have listed all the survivors of the deceased, from all his three marriages. The excuse that they refused to cooperate cannot be a good reason. He knew that they were children of the deceased, and I presume that he knew their names. He had no reason at all to exclude them. He should have listed them, whether they were cooperating or not. He was obliged to. He could not carry out a valid succession process without them, and if he did, he would then encounter the obstacles that he is now facing, that the process would be challenged, and the court would eventually order that the process starts afresh, carrying with it all the survivors of the deceased.

19. From what I have stated so far I can safely conclude that the process of obtaining the grant herein was defective, and was attended by misrepresentation and concealment of matter from the court, to the extent that the administrators did not disclose to the court the existence of all the persons who had survived the deceased. The applicant has, therefore, made a case for revocation of the grant herein.

20. We are not done with the process of obtaining grant. The administrator and the applicant are sons of the same father. They are, therefore, equally entitled to administration of the estate of the deceased. The law on that is section 66 of the Law of Succession Act, which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules operationalizes section 66, and requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

21. For avoidance of doubt, these provisions state as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors …"

and

"*7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –*

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "

22. Then there is Rule 26 of the Probate and Administration Rules, which states as follows:

"*26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.*

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or *priority, be supported by an affidavit of the applicant and such other evidence as the court may require."*

23. Rule 26(1) (2) applies where representation is sought by a person with equal or lesser right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with superior or equal entitlement with notice. The individuals with superior or equal entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly addressing these issues, that is by indicating that notice was given to all the other persons equally entitled and with prior right, and perhaps demonstrating that such persons had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

24. The administrator in the instant cause, being a surviving son, had a right or entitlement to administration, which was equal to that of the other surviving children of the deceased, going by section 66 of the Law of Succession Act. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean the said surviving son needed to comply with the requirements of Rules 7(7) and 26, since those provisions apply to persons who seek representation while they had an equal or lesser right to administration. He, therefore, should have obtained the consents of the other surviving children of the deceased before he applied for representation to the estate of the deceased herein.

25. It is not lost to me that the revocation application that I am dealing with is not the first one. There was a first one, dated 12th June 2007, filed by Livingstone Namayi Omusinde, on grounds that the administrator had left out some beneficiaries, specifically the family of their late brother, Hassan Omusinde. That application was resolved by consent on 12th October 2010, when the letters of administration intestate made to Yonam Wakhu Omusinde on 26th February 2007, and a grant issued, dated 14th March 2007, were revoked, and it was ordered that afresh grant be made to Yonam Wakhu Omusinde and Livingstone Namayi Omusinde. The issue of the third house did not arise at those proceedings, and, therefore, the two administrators were still not properly appointed so long as there was still concealment of the third house.

26. The consent orders of 12th October 2010 required that the administrators appointed on that day move to apply for confirmation of their grant. The first administrator filed his summons for confirmation of grant dated 29th November 2010, to which the second administrator filed a protest affidavit dated 28th February 2011. In those filings none of the combatants mentioned the third house. The court heard the application *viva voce*, and delivered the judgement of 7th September 2016, in which there was no mention of nor provision for the house of the applicants.

27. The process of confirmation of grants is provided for in section 71 of the Law of Succession Act, which says:

"*Confirmation of Grants*

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."

28. The principal purpose of confirming the grant is to pave the way for distribution of the assets. The proviso to subsection (2) of section 71 states that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the share due to them. The proviso is emphatic that the grant shall not be confirmed before the court is so satisfied. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

"Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined."

29. Was the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? There was not compliance at the confirmation process with the said provisions to the extent that the administrators had not disclosed members of the third house. I meant that the administrators had not fully ascertained all the persons who were beneficially entitled to the estate of the deceased, for all the children of a dead person are his survivors, who are beneficially entitled to shares in his estate. For the purpose of ascertaining their respective shares, it was also necessary that the administrators properly ascertain all the assets that the deceased died possessed of, which were to be shared between the survivors.

30. The first administrator argued at the oral hearing that each of the houses had been given their land by the deceased during lifetime, and should have initiated their separate causes. I have already addressed that by stating that the law does not allow the filing of separate causes in respect of the same estate. If those assets were not transferred to the names of the members of the houses given to them, they remained assets in the estate of the deceased and should have been placed before the court at confirmation for distribution. It was the duty of the administrator to even have citations issued to require members of those houses to come to court and disclose the land reference details of the said lands, if they existed.

31. What comes out very clearly to me, from the material before me, is that the deceased was survived by other households apart from that from that of the first administrator. The individuals in the other two houses are entitled to a share in the estate of the deceased. Going by the proviso in 71(2) and Rule 40(4) the administrator had not ascertained those individuals, and, therefore, the matter was not ripe for confirmation. He misled the court into believing that he had ascertained all the persons who were beneficially entitled to the estate, and it was on the basis of his false information that the court proceeded to confirm the grant. A confirmation process under such circumstances cannot possibly stand, for it disinherits a whole constituency of beneficiaries.

32. It may be well for administrators to note that at confirmation of grant the court can still revoke a grant where it is established that the same was not obtained properly, because of defects or concealment of matter. One of the primary considerations in an application for confirmation of grant is stated in section 71(2)(a) of the Law of Succession Act, that the court be satisfied that the grant was rightly made to the administrators and the administrators were administering and would continue to administer the estate in accordance with the law. Under section 71(2)(b), where the court is not satisfied that the grant was obtained properly or that the administrators had not administered the estate in accordance with the law or were unlikely, after confirmation, to administer the estate in accordance with the law, it should not confirm them, instead it should revoke their grant and appoint fresh administrators. That is the effect of section 71(2) (b) and(c) of the Law of Succession Act.

33. In considering section 71(2) of the Law of Succession Act, one has to bear in mind section 76 of the Law of Succession Act, which provides for revocation of grants. Other than the court acting on the prompting of parties, to revoke a grant, it may also act on its own motion or *suo moto*, in those cases where it stumbles on evidence that suggests that the circumstances warranted revocation of a grant, where the evidence brought the matter within the grounds for revocation set out in section 76. One of the processes through which a court may stumble on such evidence, and may act *suo moto* to revoke a grant is where it is faced with an application for confirmation of grant under section 71, and the case before it merits consideration under section 71(2)(a)(b) and (c). The grounds upon which a grant may be revoked are set out in section 76. For the purposes of this judgment, the relevant provisions are section 76(a) (b) and (c), where the proceedings to revoke a grant were defective in substance, the grant was obtained on the basis of fraud or misrepresentation, or was obtained on the basis of an untrue allegation whether innocently or not. I have dealt with that elsewhere, but it was necessary to mention that section 71(2) and 76 dovetail at the confirmation stage.

34. From the picture that emerges above, I would find, going by section 71(2) (a) (b), it would appear that even as the administrators were seeking confirmation of their grant, their grant had not been obtained properly, for the reasons that should come out very clearly from the foregoing paragraphs. Secondly, the administrators had not, since their appointment, not administered the estate in accordance with the law. The proviso to section 71(2) of the Law of Succession Act, requires administrators to satisfy the court as to the identities of and shares of all the persons beneficially entitled to the estate of the deceased. The effect of this provision is that the administrators have a duty, before they seek distribution of the estate, and indeed, solely for that purpose, to ascertain the assets of the estate and the persons who are beneficially

entitled to a share in the estate. It is the persons who are beneficially entitled to a share in the estate, who ultimately get to be allocated shares in the estate.

35. The proviso, by way of repetition, for emphasis sake, says:

> "*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."*

The said provision is reinforced by Rule 40(4), which, again I shall hereby repeat for emphasis, which says, by way of imposing a duty on the administrator, that:

> " "*Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined."*

36. By ascertaining persons who are beneficially entitled means identifying the persons who are entitled to a share in the estate of the intestate. Under Part V, the persons who are entitled to the estate of an intestate are the survivors, that is to say the persons mentioned in sections 35, 36, 38 and 39 of the Law of Succession Act, meaning surviving spouses, children, parents and siblings of the deceased, and other relatives of the deceased up to the sixth degree. The persons that the administrators herein omitted from the petition and the application for confirmation of grant were sons and daughters of the deceased from his third house, who were, for purposes of Part V o f the Law of Succession Act, survivors of the deceased, and, therefore, persons who were beneficially entitled to a share of the estate of the deceased.

37. The provisions that I have referred to above, say as follows:

> "*35. Where intestate has left one surviving spouse and child or children*
>
> *(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—*
>
> *(a) the personal and household effects of the deceased absolutely; and*
>
> *(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) …*
>
> *(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*
>
> *36. Where intestate has left one surviving spouse but no child or children*
>
> *(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—*
>
> *(a) the personal and household effects of the deceased absolutely; and*
>
> *(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and*
>
> *(c) a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to*
>
> *(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).*
>
> *(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.*
>
> *37. Powers of spouse during life interest*
>
> *A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property*

subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.

38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares."

38. The deceased died a polygamist, and therefore section 40 is even more critical in terms of guiding administrators on what is expected of them in cases where the matter of polygamy arises. Section 40 of the Law of Succession Act 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."

39. The effect of section 40 is that the assets would be divided as between various houses of the deceased, taking into account the number of children in each house, and adding any surviving widow as an additional unit to the children. From the material before me, the deceased had married three wives, and, therefore, he had three houses. The estate of the deceased herein should, therefore, have been dealt with in accordance with section 40, but the court did not deal with the matter in accordance with those provisions because the impression that the administrators created was that there was only one household.

40. The administrators knew about the third house of the deceased. They knew that for a fact, and there was nothing for them to ascertain so far as the third house was concerned. They knew the members of that house, since they were born among them and raised together with them. It could be that the deceased had distributed his property on the ground, without effecting any transfers, that meant that such property had to go through the succession process, not in any separate proceedings but in this cause. The fact of their non-disclosure can only be described as fraudulent and designed to mislead the court as to the true status of the estate and the family of the deceased. The court was misled, lied to and hoodwinked. There was mischief. I reiterate that the proviso to section 71(2) and the provision in Rule 40(4) of the Probate and Administration Rules were not complied with, and, therefore, the confirmation was fundamentally and fatally flawed.

41. Rule 40(8) of the Probate and Administration Rules, is also relevant. It requires administrators, when applying for confirmation of their grants, to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. It says as follows:

"Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 17 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions un chambers on notice if Form 74 to the applicant, the protestor and such other person as the court thinks fit."

42. Rule 40(8) envisages that a consent, in Form 17, be signed by all the persons beneficially entitled to the estate of the deceased. All such persons include the survivors of the deceased as identified in sections 35, 36, 38, 39 and 40 of the Law of Succession Act, being surviving spouses and children of the deceased from all his houses, if he was a polygamist. Rule 40(8) is in mandatory terms. Form 17 must be signed by all the survivors of the deceased. In this case there was, curiously, no application for confirmation of grant, since the parties had been directed to file affidavits of their proposed distribution, the proposals placed on record by the administrators were not supported by the consents in Form 17.

43. Rule 40(8) of the Probate and Administration Rules, does not declare so in loud language, but it quietly requires administrators, when applying for confirmation of their grants to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Under that provision, a confirmation application may be disposed of by the court without hearing any party so long as no affidavit of protest has been filed and all the persons beneficially entitled have executed consents in Form 17. However, where there is an affidavit of protest on record or where any person who is beneficially interested in the estate has not signed the consent in Form 17, then the court should not proceed to give orders on distribution before it has heard such persons. That is the purport of Rule 40(8).

44. From the language of Rule 40(8), the court handling the matter, should address the question to whether the other persons beneficially interested in the estate have had a say to the distribution proposed. That is the utility of Form 17. All the other persons, having a beneficial interest in the estate must also be heard. Their input to the proposed distribution is through Form 17. If it is found that they have not executed any consents in Form 17, then the court ought to arrange to hear them. Rule 40(8) is in mandatory terms, and should be read together with Rule 41(1), with respect to such persons being heard, which says as follows:

> "*At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall hear the applicant and each protestor and any other person interested, whether such person appear personally or by advocate or by a representative."*

45. It is my finding that the other persons beneficially interested in the estate were not heard, such as the members of the third house. They did not execute the consent form envisaged in Rule 40(8), in the nature of Form 17. Both Rules 40(8) and 41(1) of the Probate and Administration Rules are in mandatory language. Both provisions were not observed in these proceedings. It was only democratic, just and fair that all the persons beneficially entitled to a share in the estate of the deceased got to be heard on the distribution of the assets of their late father. That is what the law expects, and the process would be fundamentally undermined where opportunity to be heard was not afforded to all the persons beneficially entitled.

46. I believe that I have said enough, to demonstrate that there is merit in the summons dated 11th July 2019 I shall accordingly make the following final orders:

> **(a) That the grant that was made to Yonam Wakhu Omusinde and Livingstone Namayi Omusinde on 12th October 2010 is hereby revoked;**
>
> **(b) That as a consequence of the above, the orders that were made on 7th September 2016 confirming that grant are hereby vacated and the certificate of confirmation of grant issued on the basis of the said orders, of even date, is hereby nullified;**
>
> **(c) That all transactions carried out on the basis of the said grant and confirmation orders are hereby vacated;**
>
> **(d) That I hereby appoint Yonam Wakhu Omusinde, Livingstone Namayi Omusinde and Caleb Angachi Omusinde administrators of the intestate estate of the deceased, and a grant of letters of administration intestate shall issue to them;**
>
> **(e) That the administrators appointed in (d) above are hereby directed to apply, jointly or severally, for confirmation of their grant, within thirty (30) days, observing all the laws and rules that I have discussed in this ruling;**
>
> **(f) That should any of the administrators not be in agreement with the proposals to be made in the application filed under (e), above, there is liberty for them to file affidavits of protest making their own proposals;**
>
> **(g) That the liberty referred to in (f) above is also available to any other family member, to file affidavits of protest, if they will not agree with the proposals to be made in the application referred to in (e) above, and make their own proposals on distribution;**
>
> **(h) That the matter shall be mentioned after thirty days for compliance and further directions;**
>
> **(i) That each party shall bear their own costs; and**
>
> **(j) That any party aggrieved by these orders shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE