



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SUCCESSION CAUSE NO.767 OF 2015

IN THE MATTER OF THE ESTATE OF:

ALEMA OKOTH.....DECEASED

AND

BERNARD OTIENO ELISHA.....1ST APPLICANT/OBJECTOR

GEORGE OMONDI MBURA.....2ND APPLICANT/OBJECTOR

VERSUS

JOHN DIANGA AGAWO.....1ST PETITIONER/RESPONDENT

CHARLES OJWOK ONDORO.....2ND PETITIONER/RESPONDENT

RULING

[1] After the demise of **Alema Okoth** (deceased) on the 3rd July 1996, a grant of Letters of Administration Intestate respecting his estate was issued to **Charles Ojwok Ondoro** and **John Dianga Agawo** (herein, the first and second petitioners) in their capacity as sons-in-law of the deceased on the 26th January 2016.

The only asset availed for distribution among the beneficiaries of the estate was a parcel of land described as **No.S/Karachuonyo/Kamenya/1479 (Plot No.1479)** whose estimated value was given as Kshs.300,000/=.

The grant was confirmed and the necessary certificate of confirmation of grant was issued on the 20th September 2016, showing that the estate was to be shared equally among the listed beneficiaries who apparently were the sons and daughters-in-law of the deceased namely:-

- (1) John Dianga Agawo (second petitioner)
- (2) William Agawo Dianga
- (3) Morris Odhiambo Dianga
- (4) Charles Ojwok Ondoro (first petitioner)
- (5) Mary Atieno Ogori
- (6) Maurice Ogutu Ondoro
- (7) Elisha Mbura Ondoro
- (8) Caleb Mbago
- (9) Jane Juma

(10) Jackton Onditi Ondoro

[2] However, on the 10th July 2017, **Bernard Otieno Elisha** and **George Omondi Mbura** (the first and second applicants/objectors respectively) filed the present application for revocation nor annulment of the grant and the certificate of confirmation of the grant on grounds that the petitioners are strangers as they do not have relations with the deceased. That, the objectors are grandchildren to the brothers of the deceased. That, the petitioners concealed material facts with regard to the real beneficiaries of the estate of the deceased. That, the petitioners failed to disclose to the objectors that they intended to petition for the grant. That, the objectors live on the suit estate property and that this application is brought in good faith without prejudice to any of the parties.

[3] These grounds are fortified by the averments contained in a supporting affidavit deponed by the first objector dated 10th July 2017 and are opposed on the basis of the averments contained in a replying affidavit dated 28th July 2017, deponed by the second respondent, John Dianga Agawo (first respondent in summons for revocation of grant) and a second replying affidavit dated 5th April 2018, deponed by both respondents/petitioners.

Directions were given by this court on the 24th October 2018, to the effect that the application be heard by oral or “**viva-voce**” evidence.

In that regard witness statements were filed and oral evidence was led by both applicants/objectors (i.e. **PW1** and **PW2**) and their witnesses, **Samwel Yogo Onyoo (PW3)**, **Esther Omollo Omulo (PW4)** and **Tobias Aulo (PW5)**.

The petitioners/respondents also led oral evidence as **DW1** and **DW2** and called three witnesses, **Daniel Nyawara Obungu (DW3)**, **Hezron Odundo Obongo (DW4)** and **John Ounda Aol (DW5)**.

Thereafter, both parties filed their respective written submissions.

None of them made oral highlights in respect thereof.

[4] From the evidence, both affidavit and oral, as well as the rival submission it was apparent that the basic issue for determination was whether the impugned grant was obtained by false representations and/or concealment of material facts with regard to the actual beneficiaries of the estate.

Undoubtedly, this was an intestate succession. Therefore, the question as to whether the deceased left a will whether oral or written did not and does not herein arise.

The relevant law regarding revocation and/or annulment of grants is contained in **Section 76 of the Law of Succession Act (Cap 160 Laws of Kenya)** and for the purposes of this case, the most relevant provision is **Section 76 (b)** which provides that a grant may at any time be revoked or annulled if it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

[5] The burden to establish on a balance of probabilities that the petitioners/respondents obtained the disputed grant by making false statements and concealing material information or facts in relation to the actual beneficiaries of the estate of the deceased lay with the applicants/objectors. By the same token, the objectors had the obligation to establish that the petitioners are strangers to the estate without any capacity to petition for the grant and be included as beneficiaries.

The word “**beneficiary**” is not defined in the Law of Succession Act but ordinarily the word actually means a person who benefits from the estate of a deceased person by virtue of kinship or family relationship with the deceased. However, in some instances, non-family members may claim a beneficial interest in the estate property if they were dependents of the deceased or if they were purchasers of part of the property or the entire property from the deceased during his lifetime.

[6] The allegation by the objectors that the petitioners and in particular, the first petitioner/respondent in this application (i.e. John Dianga Agawo) are strangers to the estate of the deceased was not proved. Although the first objector Bernard (PW1) insisted that John Dianga Agawo is a stranger to the estate and therefore not a beneficiary thereof, the evidence by his witnesses Samwel (PW3), Esther (PW4) and Tobias (PW5) as well as that by both respondents and their witnesses Hezron (DW4) and John Ounda (DW5) indicated otherwise and showed that both respondents referred to the deceased as their father or step father or uncle as he was a brother to their fathers.

It was also indicated and confirmed in evidence that the father of the two objectors is a son to a brother of the deceased and that they (objectors) are referred to as grandsons of the deceased.

[7] It would thus follow that, no matter the capacity, both the objectors and the respondents were related to the deceased and were potential beneficiaries of his estate depending on the degree of consanguinity given that the deceased was survived by a widow called Aska but the two were not blessed with any child. Aska passed away some years after the deceased. Her life interest in the estate as provided in **Section 36 (c)** of the **Law of Succession Act** was thus extinguished thereby paving way for the estate property to devolve in accordance with the order of priority set out in **Section 39 (1)** of the **Act** which provides that:-

“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, 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 upto and including the sixth degree, in equal shares.”

[8] Where an applicant seeks a grant of representation to the estate of a deceased person, he is required to provide specified particulars which under **Rule 7 (1) (e) (ii)** of the **Probate and Administration Rules 1980**, would include the names, addresses, marital status and description of all surviving spouses or children of the deceased or where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with **Section 39 (1)** of the **Law of Succession Act**.

Herein, it has been shown that both the applicants/objectors and the petitioners/respondents trace their roots to a common ancestor and indeed the deceased through their fathers.

Whereas, the petitioners/respondents are sons of the deceased person's brothers, the objectors/applicants are grandchildren of the deceased. In the circumstances, the distribution of the estate of the deceased would be in accordance with **Section 39 (1)** of the **Act** with regard to the order of priority and in particular **Section 39 (1) (e)** of the **Act**.

[9] The fact of being descended from the same ancestor or being from the same kinship as another person is what is described as “**consanguinity**”. This is based on common ancestry as opposed to affinity which means a close relation based more on marriage and is the basis of laws that govern distribution of property. It connotes direct blood relation such as between parent, child or grandparent or son, father, grandfather or son, grandson and great grandson. It also connotes remote relationship who are related by a common ancestor but do not necessarily descend from each other such as cousins with the same grandparents.

The second schedule of the Law of Succession Rules contains a consanguinity chart which classifies the different degrees of consanguinity. Such charts more or less follow a similar pattern as they classify parents and children of the deceased to fall within the first degree of consanguinity and the siblings of the deceased to fall within the second degree. Uncles, aunts, nieces and nephew would fall under the third degree while first cousins would fall under the fourth degree.

[10] The second schedule of the Rules in relation to **Rule 7 (1) (e) (iii)** of the **Probate Rules** extends upto the sixth degree of consanguinity.

Herein, the respondents being the sons of the brothers of the deceased who are also deceased, would be regarded as nephews of the deceased while the objectors would be regarded as grandnephews of the deceased. Therefore, the chart aforementioned would place the respondents/petitioners in the third degree and the applicants/objectors in the fourth degree of consanguinity. It would therefore follow that the respondents ranked higher in priority than the objectors in applying for the disputed grant and being listed as beneficiaries together with other beneficiaries who fell within the category of nephews and/or nieces of the deceased, among them, the father of the objectors, **Elisha Mbura Ondoro**, whose share in the estate of the deceased would ordinarily be inherited by them (objectors) and their other siblings.

[11] However, in their evidence both the objectors indicated that they lived with the deceased from 1987 on his request and after their father had given his consent so that they could assist the deceased with domestic chores. They went on to imply that they depended on the deceased and in showing his appreciation he expressed an intention to have them inherit his property then known as parcel No.492 – Kamenya, so that they could protect it.

Bernard, the first objector, indicated that he was only aged thirteen (13) years when the deceased died.

Samwel (PW3), Esther (PW4) and Tobias (PW5) supported the objectors' evidence with regard to dependency and to the alleged intention of the deceased to bequeath his property then, known as parcel No.492 –Kamenya, to the objectors so that they could protect it.

[12] In effect, what was actually established by the objectors in evidence was that they were minors when they started living with the deceased for purposes of assisting him with his domestic chores or works and that in the process he treated them as his dependants and did so until his last day on earth despite having their own father who was alive and was son to one of the brothers of the deceased.

The objectors did not however, establish that they were taken in by the deceased and treated as the children he never had with his wife Aska. Neither, did they establish that they alleged intention or action of the deceased to bequeath his parcel of land or part thereof to them was reduced to a valid and lawful Will for purposes of inheritance. In any event, as noted hereinabove, this is an intestate succession and as such, the issue pertaining to validity or otherwise of a will does not arise and is irrelevant.

[13] The fact that the objectors were dependants of the deceased was known or ought to have been known by the respondents/petitioners as they did not raise any or substantial dispute in respect thereof. Much as they ranked above the objectors in applying for the grant and being listed as beneficiaries they failed to inform the objectors of their intention to apply for grant and seek their consent. They therefore failed to provide an opportunity for the objectors to seek reasonable provision from the estate of the deceased as dependants. They even went further to omit the names of the objectors as beneficiaries or additional beneficiaries on the basis of **Section 26** of the **Law of Succession Act** which provides that:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the

disposition of the deceased's estate effected by his Will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provisions as the court thinks fit shall be made for that dependant out of the deceased's net estate".

[14] This court holds that the failure by the respondents/petitioners to inform the objectors of their intention to apply for the grant and their failure to include the objectors as additional beneficiaries of the estate of the deceased in their capacity as dependants of the deceased amounted to fraudulent concealment of material facts particularly at the time the grant was confirmed.

Therefore, justice demands that the certificate of confirmation of grant issued to the respondents and dated the **20th September 2016** be revoked forthwith rather than the grants of letters of administration intestate issued and dated 26th January 2016.

The grant remains intact, but the parties must go back to the drawing board and agree on distribution of the estate among all beneficiaries inclusive of the objectors/applicants after which the respondents may take out fresh summons for confirmation of grant within the next six (6) months from this date hereof.

In default, the grant of letters of administration issued to the respondents on 26th January 2016, shall stand revoked and the matter be referred to the office of the Public Trustee for proper administration of the estate of the deceased.

Ordered accordingly.

J.R. KARANJAH

JUDGE

25.07.2019

[Read and signed this 25th day of **July, 2019**]