



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SUCCESSION CAUSE NO.148 OF 2016

IN THE MATTER OF THE ESTATE OF: MISHAEL OYAA DIANG'A.....DECEASED

AND

MARTIN ODIPO OYAA.....PETITIONER/RESPONDENT

VERSUS

SIPRINA OSORE OYAA.....OBJECTOR/APPLICANT

RULING

[1] The original file at the lower court being SRMCC No.172 of 2003 was not available at any one time from the inception of this matter on the 15th May 2016. So, the entire proceedings herein were conducted without the benefit of the original file in which the impugned grant was issued. In the circumstances, reliance was placed more on the documents produced in copy by the parties in the present application dated 11th April 2016, by **Siprina Osore Oyaa** (applicant/objector), seeking revocation of the grant of letters of administration intestate issued by the magistrate's court to the petitioner/respondent, **Martin Odipo Oyaa**, on the 30th March 2004.

[2] The annexed copy of the grant identifies the estate of the late Mishael Oyaa Diang'a (**deceased**) as comprising of two parcels of land described as Kanyada/Kanyabala/781 (**plot No.781**) and Kanyada/ Kanyabala/1242 (**plot 1242**).

The availed document do not include a certificate of confirmation of grant thereby implying that the grant was never confirmed within the time stipulated by **Section 71 (1) of the Law of Succession Act**, which provides that:-

“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”.

[3] This means that distribution of any assets belonging to the deceased can only occur after the grant is confirmed and a certificate of confirmation of grant is issued specifying the shares of the beneficiaries in any particular asset/property.

Therefore, inasmuch as the impugned grant remained unconfirmed within the prescribed period or any such other period as ordered by the court; any purported distribution of the estate was unlawful, null and void “ab-in-tio”.

Indeed, **Section 55 (1)** of the **Act** provides that:-

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in Section 71”.

[4] Be that as it may, the present application was made long after the period provided for notice under **Section 73** of the **Act**. In fact, the application was filed more than ten (10) years after the impugned grant was issued to the petitioner. At this point, it is only prayer (4) of the summons for revocation of grant which is relevant. **Section 76** of the

Act is invoked in that regard.

The grounds in support of the application clearly indicate that in the application for the grant of representation, the petitioner/respondent

failed to disclose the identity of all the beneficiaries thereby excluding the applicant/objector from the process and from the benefit of the grant and that the petitioner sub-divided or distributed the estate before confirmation of the grant. These grounds imply that the petitioner's alleged acts brings into fore the provisions of **section 76 (b)** and **(d) (i)** of the **Act** and justifies the revocation and/or annulment of the impugned grant. The grounds are fortified by the applicant's averments in her supporting affidavit dated 11th April 2016.

[5] Generally, **Section 76** of the **Act** provides for revocation or annulment of grant whether or not confirmed at any time on application by any interested party or of the court's own motion.

If the grant was obtained as contemplated in **Section 76 (b)** i.e by the making of a false statement or by the concealment from the court of something material to the case, or **Section 76 (d) (i)** i.e. that the person to whom the grant was made has failed, after due notice and without reasonable cause, to apply for confirmation of the grant with one year from the date thereof or such lower period as the court order or allow, then the grant would be amenable to revocation.

This was an intestate succession, meaning that the deceased died intestate in respect of all his free property of which he made no will capable of taking effect (See **section 34** of the **Act**).

Under **Section 35 (1)** of the **Act**, a surviving spouse is entitled to a life interest in the whole residue of the intestate estate, but that interest is extinguished upon remarriage of the spouse to any person.

[6] In an intestate succession, grant of letters of administration is normally issued to preferred persons but the court retains a final discretion as to the person or persons to whom a grant shall in the best interests of all concerned be made. This is provided for under **Section 66** of the **Act** which sets out the order of preference as follows:-

- (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.

[7] It would follow that, as between the applicant, who was the surviving wife of the deceased, and the petitioner, who is the eldest son of the deceased with his first wife, Teodera Ayoo Oyaa (deceased), the applicant was the first in priority to have the grant issued to her with or without the association of other beneficiaries, and given that the deceased was a polygamist, the distribution of his estate was to accord with **Section 40 (1)** of the **Law of Succession Act**, which provides that:-

“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”.

[8] In her evidence, the applicant (**PW1**) contended that she was excluded from the entire succession process when and after the petitioner obtained the grant respecting her late husband. That, it was only later that she learnt of the grant and sought a remedy by filing the instant application. She further contended that her children with the deceased were minors when the petitioner filed the petition for grant of letters of administration respecting the estate of her late husband in the year 2003. This was confirmed by her son, **Fredrick Odhiambo Oyaa (PW2)** and a nephew of her late husband, **Jared Otieno Okendo (PW3)**.

[9] The respondent (**DW1**) raised no substantial dispute with regard to the exclusion of the applicant from the succession process. He indicated that the reason for that omission was that he was waiting for one of the children of the deceased with the respondent (second wife) to attain adulthood. He said that it was in the year 2003, that a son of the deceased called **Chrispin Okoth**, became an adult. It was during that year that he then applied for the impugned grant.

Edward Ouma Oyoo (DW2), a brother to the respondent, confirmed that **Chrispin Okoth** was an adult in the year 2003, and that he was one of those who gave his consent for the respondent to apply for the grant.

[10] **Rosalina Wayua Muluku (DW3)**, a sister in-law of the respondent, however, indicated that in the year 2003, some of the applicant's children were minors i.e. the last two. She did not name them, thereby failing to mention **Chrispin Okoth** as one of the said last two children. Nonetheless, although the respondent placed more emphases on the adulthood of **Chrispin Okoth** in the year 2003, he did not give any or satisfactory reason why he decided to apply for the grant when the applicant who ranked above him in priority as the second wife of the deceased was alive. He also failed to give satisfactory reason why he **excluded** her from the entire succession process apart from stating without proof that she was re-married to a person called **Lango Opiyo**.

[11] It is clear from the foregoing that the respondent obtained the grant without involving the surviving second widow of the deceased by seeking her consent and hence, the consent of the deceased's second house. He then proceeded to distribute the entire estate of the deceased without obtaining the consent of the court to do so by way of a certificate of confirmation of grant. He never even made an attempt to have the grant confirmed within the prescribed period.

It would therefore be safe for this court to find and hold that the grant was obtained contrary to the requirements of the Law of Succession Act. It was thus obtained by concealment of material facts and was never confirmed within one year from the date of its issue. It is for these reasons that this application by the second widow of the deceased is merited and is hereby sustained and allowed to the effect that the grant dated 30th March 2004 issued by the magistrate's court at Homa Bay to the respondent; be and is hereby revoked forthwith with orders that a fresh grant do issue forthwith in the names of the respondent and the eldest daughter of the deceased with his first wife, both representing the first house and the names of the eldest son and daughter of the deceased **with his second wife, both of whom will represent the second house.**

[12] Parties shall thereafter agree on proper distribution of the estate of the deceased and accordingly take out necessary summons for confirmation of grant within the next six (6) months from this date hereof, failure to which the matter shall be forwarded to the Public Trustee for necessary distribution in accordance with the law.

For the avoidance of doubt, the estate property comprises of the aforementioned parcels of land described as Kanyada/Kanyabala/781 and Kanyada/Kanyabala/1242.

Ordered accordingly.

J.R. KARANJAH

JUDGE

21.11.2019

[Delivered and dated this 21st day of November, 2019]