



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**SUCCESSION CAUSE NO.518 OF 2015**

**IN THE MATTER OF THE ESTATE OF:**

**MIAWA DIANG'A.....DECEASED**

**AND**

**PETER DIANG'A**

**DICKENS AMADI DIANG'A.....OBJECTORS/APPLICANTS**

**VERSUS**

**BENJAMIN OBUYA DIANG'A.....PETITIONER/RESPONDENT**

**RULING**

[1] The summons for revocation of grant dated 23<sup>rd</sup> February 2018 were taken out by the applicants/objectors **PETER DIANG'A** and **DICKENS AMADI DIANG'A** against the respondent/petitioner, **BENJAMIN OMBUYA DIANG'A**, who petitioned and was granted letters of administration intestate respecting the estate of the late **MIAWA DIANG'A** (deceased) also known as **GEDION MIYAWA DIANG'A**, who passed away on the 28<sup>th</sup> June, 2010,

without being married and without children.

[2] Both petitioner and objectors are brothers of the deceased. However, in the petition for grant of letters of administration dated 20<sup>th</sup> August 2015, those listed as having survived the deceased were two brothers namely **BENJAMIN OMBUYA DIANG'A** (petitioner) and **DANIEL ONGUKA DIANG'A** and the sisters namely, **MAURINE AUMA** and **DEBORAH ADHIAMBO**. The deceased it would appear was also survived by his parents **HEZEKIAH DIANG'A** and **RUTH OLOO**, who are deceased.

[3] The necessary Grant of Letters of Administration intestate was issued on the 27<sup>th</sup> January 2016 and was confirmed on 4<sup>th</sup> April 2016, with the sole asset being land parcel No. **CENTRAL KARACHUONYO/KAMSER NYAKONGO/633**, being transferred to the petitioner after his brother **Daniel** and sisters, **Maurine** and **Deborah**, renounced their rights and shares thereof.

After about a year, following the confirmation of the grant, the two objectors, Peter and Dickens filed the present application on 1<sup>st</sup> March 2018, seeking orders for revocation of the grant and the rectification of the land register respecting the estate property.

[4] The ground sin support of the application are mainly that the grant was obtained by fraud, concealment of material facts and/or deliberate misrepresentation and by making a false statement, non-disclosure and concealment of material facts and/or important information.

These grounds are fortified by the averments contained in the objectors' supporting affidavit dated 23<sup>rd</sup> February 2018 and by their oral evidence at the hearing of the application.

The petitioner opposed the application on the basis of the averments contained in his replying affidavit dated 16<sup>th</sup> April 2018, and his oral evidence at the hearing of the application.

[5] Both parties filed their respective written submissions at the end of the hearing. These have been given due consideration by this court in the light of the evidence adduced herein by way of averments in the affidavits for and against the application as buttressed by the parties' oral

evidence.

It is without doubt that the deceased was a brother to both the petitioner and the objectors among others. He passed away without a wife or children but was survived by his siblings and one of the parents i.e. the father, the late Hezekiah Diang'a or both parents i.e. the father and the mother, the late Ruth Oloo Diang'a.

[6] It is also without doubt that the deceased died without making a will. This was a clear intestate succession/petition to which the **Law of Succession Act (Cap. 160 Laws of Kenya)** applied.

The rules of intestacy determine which relatives inherit the property of the person who dies intestate such as the deceased herein.

Normally, immediate family members i.e. spouse and children inherit first followed by other relatives such as parents, cousins, nephews, nieces etc.

[7] In the instant case, it has been shown without dispute that the deceased was a single man. He died without being married and with no children. In the circumstances, the persons entitled to apply and be granted letters of administration were his surviving parents and/or his siblings (brothers and sisters) depending on the nearest degree of consanguinity (see **Section 66** of the **Law of Succession Act**). A person applying for the grant should have a beneficial interest in the estate.

[8] Both the objectors and the petitioner are claiming a beneficial interest in the estate i.e. land parcel **NO. CENTRAL KARACHUONYO/KAMSER NYAKONGO/633**, which by dint of the certificate of confirmation of grant dated 4<sup>th</sup> April 2016, was distributed to the petitioner and this is the main reason why the objectors are now calling for the revocation of the grant issued to the petitioner and the subsequent certification of confirmation.

They (objectors) allege that the grant was issued fraudulent and by concealment of material facts. They say that their father died before the deceased and could not therefore have inherited the property of the deceased for his own benefit or for distribution among the deceased's surviving siblings.

[9] The objectors instead contend that the property was inherited by their late mother, who died in the year 2011, prompting the petitioner to petition for and be granted the grant of letters of administration including the estate herein. They are therefore objecting to the grant of letters of administration respecting the estate of their late mother to the petitioner. They want that grant revoked.

The petitioner contended that the estate of the deceased was inherited by their father who died in 1997 and it was him he distributed the estate to (the petitioner).

It was implied by the petitioner that the deceased had died earlier than their father.

[10] The petition filed herein on 21<sup>st</sup> September 2015, by the petitioner was in respect of the estate of his late brother **Miawa Diang'a** or **Gedion Miyawa Diang'a** and not in respect of his late mother, **Ruth Oloo Diang'a**, as alleged by the objectors in their evidence which contradicts their affidavit evidence in that respect. In that regard, the present application would be a misconception and fatally defective. However, it is evident from the pleadings that the application is intended to have the grant issued to the petitioner respecting the estate of his late brother revoked.

[11] The death certificate's annexed to the application for the material grant show that the deceased died on the 28<sup>th</sup> June 2010, while his father died on 2<sup>nd</sup> December 1977 and his mother, Ruth Oloo died in December 2014. This meant that the deceased was survived by his mother and siblings but not his father – who could not therefore have inherited his property but his mother in priority to the surviving siblings.

It was the mother who was the first in priority to apply for grant of letters of administration respecting the deceased and since the father passed away long before the deceased without making a will it cannot be said that he distributed his estate among his sons before his death. Alternatively, there was no evidence to show that he gifted his sons his parcels of land or portions thereof before he died.

[12] Since the application for grant of letters of administration was made by the petitioner after the death of their mother i.e. in the month of September 2015, it would mean that the estate of the deceased was intact as it was never distributed by his mother for her own benefit and distribution to his siblings and/or any other relatives. There was nothing to show that the estate was transmitted to the mother to become her sole property.

The death of the mother made it wide open for any of the deceased's siblings to apply for grant of letters of administration respecting the estate of the deceased with the knowledge that the other siblings had a beneficial interest in the estate and had to be included as beneficiaries plus any other surviving parents if the deceased had step mothers.

[13] Under **Section 39 (1)** of the **Law of Succession Act**, where the deceased has left no surviving spouse or children, the net intestate estate shall devolve upon his relatives 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.

**[14]** In the absence of the deceased's parents, the petitioner was entitled to apply for grant. However, he was required to include all other siblings of the deceased as beneficiaries and receive their consent in having the estate distributed to him alone or among the beneficiaries.

It is clear from the contents of the petition and the summons for confirmation of grant that not all the beneficiaries of the estate were listed as such and neither was the consent of all beneficiaries sought prior to distribution of the estate.

These facts have been established by the evidence led herein without any or substantial dispute.

It would therefore follow that the petitioner misrepresented the facts and/or concealed material facts in applying for and obtaining the impugned grant of letters of administration intestate.

**[15]** Consequently, the present application is allowed to the extent that the grant issued to the petitioner on 27<sup>th</sup> January 2016, be and is hereby revoked such that any action undertaken on its strength becomes null and void "**ab-initio.**"

A fresh grant be and is hereby issued to the petitioner, the first objector and any two of their eldest brothers from the other houses of their late father i.e. a total of four (4) administrator.

Each party shall be at liberty to apply for the confirmation of grant within six (6) months from this date hereof or three (3) months prior to the expiry of the six months.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**[Read and signed this 27<sup>th</sup> day of September, 2018].**