REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 859 OF 2015

IN THE MATTER OF THE ESTATE OF AGWANG WASIRO alias ACHWANG WASINO (DECEASED)

JUDGMENT

1. This matter relates to the estate of Ajwang Wasiro, who died on 5th February 1983. According to the letter from the Chief of Marama South Location, dated 7th December 2015, the deceased had been survived by four children, being Philister Wasiro, Pauline Shiundu, McDonald Oroka and Anthony Okello.

2. Representation to his estate was sought vide a petition lodged herein on 7th December 2015, by Anthony Okello, in his capacity as son of the deceased. He expressed the deceased to have had died possessed of North Marama/Shibembe/900, and to have been survived by the individuals mentioned in the Chief's letter that I have mentioned in paragraph 1 hereabove. Letters of administration intestate were made to him on 16th June 2016, a grant was duly issued, dated 30th July 2016. I shall consequently refer to him as the administrator.

3. On 21st November 2017, a summons for revocation of the grant was filed herein, to be referred to as the first aplication. The application is dated 21st November 2017 and was lodged herein by Joshua Oluoch Mahero, to be hereinafter referred to as the first applicant. The grounds upon which the application was premised are set out on the face of the application, while the factual background is given in the affidavit in support of the application, sworn by applicant on 21st November 2017. He avers that he had purchased a portion of the estate land, and it was for that reason that he had been listed in the petition as a liability. He avers to be in occupation of the subject portion, which he has been utilizing. He accuses the administrator of failing to take action to finalize the matter, saying that administrator appears to be disinterested in the matter. He has attached a copy of a sale agreement showing that he had a bought a portion of the estate property from administrator on 25th November 2015.

4. The response to the application is by Donald Oroka Oneya and John Wasiro Sijenga. They swore a joint affidavit on 4th October 2018. They acknowledge that the applicant had a purchaser's interest in the property. They accuse the administrator of failing to administer the estate and of disposing the estate to strangers. They pray that the grant be revoked and a fresh one issued to Donald Oroka Oneya.

5. There is a second revocation application that was filed herein on 9th August 2019, dated 8th August 2019 which I shall hereinafter refer to as the second appliction. It is at the instance of Donald Oroka Oneya, a son of the deceased. I shall refer to him as the second applicant. He complains that the administrator has failed to complete administration of the estate by failing to apply for confirmation. He also states that the administrator has not proceeded diligently with administration. To support that point he has attached a letter from the Assistant Chief of Masaba Sub-Location, dated 8th August 2019, which indicates that the administrator had sold ¾ acre of the estate land to a Mr. Mahero, and that he was in the process of seeking to have it transferred to the buyer, but the same had been objected to. He also complains that the grant was obtained fraudulently by making of false statements and by concealment from court of certain facts.

6. Directions were given on 4th October 2018, that the applications be served on the administrator. There is an affidavit of service filed herein on 13th November 2019, sworn on even date, which indicates that the application dated 8th August 2019 was served on the wife of the administrator on 19th August 2019. There is nothing to indicate that the first application, dated 21st November 2017, was ever served on the administrator. The administrator has not filed any response or responses to the two applications.

7. The matter of the service of the two applications is not satisfactory. But under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, upon which the second application is premised, the court can, on its own motion, revoke a grant where it is satisfied that the grant on record was liable to revocation on any of the grounds set out in the section 76. That would mean that I can exercise discretion under section 76 even without hearing any of the parties. I did, though hear the parties orally on 18th November 2019. Both applicants were in court, but the administrator was not. They gave sworn evidence and called one witness, John Wasiro Sijenga.

8. The second applicant was the first on the witness stand. His main point was that he was unaware when the cause was initiated, and he did not know when his brother was appointed administrator. He complained that since his appointment the administrator had not moved for distribution of the property. He urged that the property be shared equally. He stated that he was a squatter in his father's land as the administrator had sold the property to the strangers, such as Mahero. John Wasiro Sijenga was the next on the witness stand. He was a nephew of the deceased. He claimed that the land was ancestral, and that his father was entitled to a share of it, since he had no land of his

own. He proposed that the same be shared out equally between him, the administrator and the two applicants. The first applicant testified last. He stated that he did not know the deceased, saying that the persons he knew were the administrator, the second applicant and John Wasiro Sijenga. He said that he bought land from the administrator in 2015, confirming that there was no leave of court obtained to facilitate the said sale. He accused the administrator of running underground after selling the land.

9. The applications for determination seek revocation of a grant representation. The deceased died in 1983, which was after the Law of Succession Act, had come into operation in 1981. His estate, therefore, falls for administration and distribution in accordance with the provisions of the said Act.

10. The Law of Succession Act provides for revocation of grants under section 76, which 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."*

11. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining it was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.

12. In the instant case, the applicants appear to anchor their cases on the first two general grounds, that there were issues with the manner the grant was obtained and that the administrator, upon being appointed, has failed to apply for confirmation of his grant within the time prescribed, and has failed to diligently administer the estate. They have not complained about anything that would bring their cases within the third ground. The issue of fraud in obtaining representation was raised by the second applicant, but he has not articulated in what respect there was fraud. The only thing he mentioned at the oral hearing was that he did not know how the administrator got appointed to that office. The first applicant has not raised any issue with regard to that.

13. The framework for applications for grants of representation is section 51 of the Law of Succession Act. The most relevant provisions, 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)...”

14. Section 51(2) (g) requires the petitioner to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administrator herein disclosed himself and the other three children of the deceased. He did not leave out any of them. In view of that I hold that there was compliance with section 51(2) (g).

15. The second applicant also complains that he was unaware of the proceedings, as he did not know how the administrator got appointed as such. That would mean that he was not consulted before administration was sought, or his consent was not obtained before representation was sought by the administrator.

16. Section 66 of the Law of Succession Act 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 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.

17. 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. “

18. Rule 26 of the Probate and Administration Rules is also relevant. it 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.”*

19. Rule 26(1) (2) would apply where representation is sought by a person with equal right to others who have not petitioned like him or with a lesser right. In such case, the petitioner is expected to notify such persons with equal entitlement with notice. The individuals with 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 dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

20. The record herein indicates that the deceased was not survived by a spouse, but by two sons and two daughters. All four children had equal right or entitlement to apply for administration, 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 together, would mean if any one of the four children of the deceased sought representation to the estate, to the exclusion of the other three, there would, then, be need to comply with the requirements of Rules 7(7) and 26 Probate and Administration Rules, since those provisions apply to persons who seek representation while they had an equal or lesser right to administration. The administrator herein had equal right to administration with the second applicant and the two daughters, he, therefore, needed to obtain their consents or their renunciation of right to administer or obtained citations to be issued and served on them, before he applied for representation to the estate of their late father.

21. I have perused the record before me relating to the process of application for grant herein. I have noted that there is a consent form to the making of grant that was lodged herein on 7th December 2015. It is in the prescribed Form 38, and it bears signatures purported to be of the second applicant and the two daughters of the deceased, Felister Wasiro and Pauline Shiundu. The second applicant did not address me on this form. He did not renounce it, and in particular the signature on it that is purported to be his. It cannot, therefore, in my view, be argued that Rules 7(7) and 26 Probate and Administration Rules were not complied with and that the grant was not obtained procedurally. There was no defect nor fraud in the process proved.

22. Both applicants raised issue with failure by the administrator to apply for confirmation of grant within the period allowed in law. Confirmation of grants is provided for in section 71 of the Law of Succession Act, the relevant portion says as follows:

> "*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."*

23. Under section 71, an administrator is enjoined to apply for confirmation of his grant after expiration of six months from the date the grant was made to him. The provision is in mandatory terms. The grant herein was made on 16th June 2016 and issued on 30th July 2016. The effective date of making is 16th June 2016, 30th July 2016 was when the document that evidences that appointment was issued. The six months began to run from 16th June 2016. Six months expired on 16th December 2016. The administrator should have filed a summons for confirmation of his grant after that date. That had not been done as at the date the first application was being filed on 21st November 2017 and has not been done to date.

24. So what is the consequence of failing to apply for confirmation of grant with the period prescribed by section 71(1) of the Act? The applicants have asked me to revoke the grant as a consequence. One of them appears to premise his case on section 76, while the other has brought his application under Rule 73 of the Probate and Administration Rules. It would appear, under section 76(d), that a revocation founded on the third ground would only apply where the administrator has been given due notice but fails without reasonable cause to apply for confirmation of grant or to proceed with diligence or to render accounts, as the case may be. It would appear that failure to apply for confirmation of grant generally, without a notice having been issued to the administrator, would not suffice as a ground to revoke a grant. I believe section 76(d) should be read together with section 73 of the Law of Succession Act, which provides:

> "*73. Duty of court to give notice to holder of grant to apply for confirmation*
>
> *The court shall within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof."*

25. Read together, these provisions would mean that a grant is not liable for revocation only because the administrator has not applied for its confirmation within the period prescribed under section 71(1), it must be demonstrated that in addition, the court had discharged its duty under section 73, whether *suo moto* or on application by the parties, of giving notice to the administrator who has failed to apply for confirmation of their grant, and the administrator had failed to harken to that notice. It would appear that it is only then that the provisions of section 76(d) would kick in. it has not been demonstrated that any notice was ever issued on the administrator under section 73, and, therefore, section 76(d) cannot be invoked at this stage.

26. The second applicant has made reference to lack of diligence in administration. He has not pointed at any particular instance, save for the question of failure to apply for confirmation of grant in compliance with section 71(1). Lack of diligence in administration is unconnected with failure to apply for confirmation of grant, for if they were connected, they would not have been covered in two separate paragraphs in section 76(d)(i)(ii) of the Law of Succession Act. The two refer to different things or situations. I am not persuaded that the second applicant has made a case that the administrator has lacked diligence in administration to warrant his grant being revoked.

27. The final thing that I should address is with respect to the first applicant. It is common ground that he entered into a sale agreement with the administrator to dispose of a portion of Marama/Shibembe/900, the estate property. The exact date of the sale is not very clear, but the acknowledgement placed on record by the first applicant, dated 18th June 2017, appears to suggest that the agreement was dated 25th November 2018. The deceased person herein died in 1983. The petition for representation to his estate was lodged herein on 7th December

2015. That would mean that this cause was initiated after the sale transaction was entered into, ostensibly to facilitate the same. The grant was eventually made to the administrator on 16th June 2016.

28. The deceased person died intestate, as no will has been proved in this cause. Indeed, the petition lodged herein was for a grant of letters of administration intestate, and the grant made was in intestacy. The effect of a grant being made is to vest the property of the estate or dead person, by virtue of section 79 of the Law of Succession Act, in the person to whom the grant is made. That means that the grant-holder steps onto the shoes of the dead owner of the property. He succeeds into his rights and powers, and he can do anything that the deceased himself would have done with respect to the property. In other words, the grant-holder is legally the owner of the property. The powers that he can exercise as a grant-holder, which are akin to those of an owner, are set out in section 82 of the Law of Succession Act, and include the power to dispose of such property by way of sale.

29. Sections 79 and 82 of the Law of Succession Act say as follows:

> "*79. Property of deceased to vest in personal representative*
>
> *The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.*
>
> *80. …*
>
> *81. …*
>
> *82. Powers of personal representatives*
>
> *Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*
>
>> *(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*
>>
>> *(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best …"*

30. However, there are limitations. In the first place, the grant-holder is not an absolute owner of the property in question. The property does not belong to him, but to the estate, and he holds it as a personal representative of the deceased. He holds the property for the purpose of administration and management only, with the ultimate objective of the same being distributed to the persons beneficially entitled to it under the law of inheritance, depending on whether the deceased person died testate or intestate. His powers over the property are, therefore, limited. There are certain things that an owner of such property can do that a grant-holder cannot. He cannot sell it at will, for example. Section 82(b) (ii) of the Law of Succession Act, is specific that, whereas the grant-holder does have a power to sell estate property, immovable property can only be sold after confirmation of grant. The said provision says:

> "*82. Powers of personal representatives*
>
> *Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*
>
> *(a) …*
>
> *(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*
>
> *Provided that—*
>
>> *(i) …*
>>
>> *(ii) no immovable property shall be sold before confirmation of the grant;"*

31. I indicated above that the deceased died intestate in 1983 and the representation to his intestate estate was obtained on 16th June 2016. The question then is, when did the powers of an owner under section 82 begin to accrue to the administrator herein? When could he begin to exercise them? The answer to those questions lies in section 80, of the law of succession Act which deals with when a grant becomes effective. For a person dying testate, having made a valid will, section 80(1) applies, the grant of probate is effective from the date of the death, in the sense that it relates back, and validates any acts of the executor that date back to the death of the testator. The office of a testator is established upon the death of the testator, and the executor named in the will begins to validly discharge his duties as such from the date of death. He is appointed by the will and not the grant. His acts after the death of the testator are valid, and he only needs the grant to authenticate or validate those acts or as evidence of his appointment. Under section 80(2), a grant of letters of administration is effective from the date of its making. Unlike a grant of probate, it does not relate back to the date of the death of the deceased. It does not validate or authenticate any acts of the administrator carried out before the grant was made. The administrator is appointed by the grant and he can only exercise the powers of his office from the date of his appointment, that is from the date of the making of the grant.

32. Section 80 reads as follows:

> *"80. When grant takes effect*
>
> *(1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.*
>
> *(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant."*

33. Since a grant vests the property of the dead person in the grant-holder, what would be the effect of dealing with the property of a dead person before a grant is made? For grants of probate, it would appear, because of the principle of relation back, that any acts carried by the personal representative would be valid and binding, and in accord with the law. However, for a grant of letters of administration intestate, such acts would be unlawful. They would amount to what is defined as intermeddling, which is outlawed by section 45 of the Law of Succession Act, for the authority to handle the property of a dead person emanates only from a grant of representation, and any person who handled such property without a grant acts without authority and outside of the law, which amounts to intermeddling, which is an offence under section 45 of the Law of Succession Acts. section 45 says:

> *"45. No intermeddling with property of deceased person*
>
> *(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose,*
>
> *take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*
>
> *(2) Any person who contravenes the provisions of this section shall—*
>
> > *(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*
> >
> > *(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."*

34. The deceased herein died intestate, and, therefore, the principle of relation back did not apply to authenticate any acts carried out by the administrator before he was appointed as such. The first applicant did not buy the estate asset from the deceased before he died. He bought it from the administrator after the deceased died and before the administrator had been appointed administrator in June 2016. That would mean that the property had not vested in the administrator as at the date that he purported to sell it to the first applicant. He had no power to sell. He had nothing to sell it. He could not pass any good title to the first applicant. What he did fell afoul of section 45 of the Law of Succession Act. Both the first applicant and the administrator contravened section 45 and should have been prosecuted. The alleged sale was invalid in view of sections 45, 79, 80(2) and 82(b) (ii) of the Law of Succession Act. The first applicant is, therefore, not a creditor of the estate, he did not deal with the estate and the estate is not indebted to him. The administrator had no authority to bind the estate before his appointment as such in June 2016. The first applicant has no claim against the estate and has no *locus standi* to bring any application in this cause as a person beneficially entitled to a share in the estate for he is not such a person. He should look up to the administrator, as an individual, rather than the personal representative of the deceased, for recompense.

35. In view of what I have stated so far, it should be clear that no case has been made out, technically, for revocation of the grant herein. I note, though, that it is more than one year since the grant herein was made, yet the administrator has not acted by way of moving the court for confirmation of his grant. I have noted too that the administrator has purported to sell estate property before he had been appointed administrator. Indeed, it would appear that his petition for representation soon thereafter was designed to sanitize his unlawful acts. The office of administrator is one of trust. A person who unlawfully deals with estate property prior to his appointment cannot possibly be trusted to faithfully administer such property in accordance with the law. His conduct does not inspire faith, trust and confidence. I do not think he is the proper person to be placed in charge of the estate, and I shall exercise the powers conferred upon me by section 76 of the Law of Succession Act, and the inherent powers saved in Rule 73 of the Probate and Administration Rules , to remove him from office.

36. The parties addressed me on distribution of the estate, in terms of who is entitled to a share in the estate and how the same should be distributed. I do not have a confirmation application before me, and, therefore, there cannot be any basis for me to address the matter of distribution. A proper application for distribution should be brought under section 71 of the Law of Succession Act and Rule 40, to be dealt with as spelt out in section 71 and Rules 40 and 41 of the Probate and Administration Rules.

37. In the end, the final orders that I shall make in this matter are as follows:

> **(a) That I hereby dismiss the summonses for revocation of grant dated 21st November 2017 and 8th August 2019;**
>
> **(b) That I hereby, in exercise of the powers in section 76 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, suo moto, revoke the grant made on 16th June 2016 to Anthony Okello;**
>
> **(c) That I hereby appoint Donald Oroka Oneka the administrator of the estate of the deceased herein and a grant of letters of administration intestate shall issue to him accordingly;**

(d) That the administrator appointed in (c), above, shall with due dispatch, and in any event within the next forty-five (45) days, apply for confirmation of the grant that I have hereby made to him;

(e) That the said administrator shall, in that application, comply with all the requirements of section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules;

(f) That the administrator shall cause the application to be filed to be served on all the children of the deceased, including the daughters;

(g) That any individuals, beneficially interested in the assets of the estate, and who shall be dissatisfied with the proposals made in the application to be filed under (c), above, shall be at liberty to file affidavits of protest making their own proposals on distribution;

(h) That such individuals shall thereafter attend court on the date to be appointed for the hearing of the confirmation application to state their position;

(i) That the matter shall be mentioned thereafter for compliance and for further directions;

(j) That each party shall bear their own costs; and

(k) That any party aggrieved by the orders made herein shall be at liberty to appeal against the same at the Court of Appeal within the next twenty-eight days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF February,. 2020

W. MUSYOKA

JUDGE