



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MIGORI**  
**SUCCESSION CAUSE NO. 469 OF 2014**  
**IN THE MATTER OF THE ESTATE OF OLARE TANA.....DECEASED**  
**AND**  
**IN THE MATTER OF REVOCATION / NULIFICATION OF**  
**GRANT OF LETTERS ADMINISTRATION**  
**AND**  
**IN THE MATTER OF LR NO. KANYAMKAGO / KAWERE 1/90**  
**BETWEEN**  
**JOHN OYO OLARE.....APPLICANT**  
**AND**  
**JOSEPH OREYO TANA**  
**GABRIEL ALUGA TANA.....RESPONDENTS**

**JUDGMENT**

1. Grant of Letters of Administration Intestate in respect to the **Estate of Olare Tana** (the deceased herein) were made to **Joseph Oreyo Tana** and **Gabriel Aluga Tana** in **Migori Senior Principal Magistrate's Court Succession Cause No. 15 of 1995** on 08/05/1996. The Grant was confirmed on 23/10/1998 and a Certificate of Confirmation of Grant duly issued.

2. On 08/11/2014 **John Oyoo Olare** (the Applicant herein) filed a Summons for Revocation of the Grant. The Summons were heard and a ruling rendered on 05/03/2015. The Court made the following orders: -

*(a) The issue of LAND PARCEL NO. KANYAMKAGO / KAWERE 1/90 and who are the heirs / descendants of the deceased and occupants thereof shall be arbitrated by the District Officer Oyani Division assisted by Local Elders.*

*(b) The District Officer together with the Clan Elders shall come up with a map showing the parts occupied by each person and a mutation sketch map prepared with assistance of the District Land Registrar, Migori County*

*(c) All the parties herein shall give the District Officer and the Elders all necessary assistance to resolve the matter.*

*(d) The matter shall be mentioned on 17<sup>th</sup> April 2015 to confirm progress on the same and for any further orders.*

3. On 01/07/2015 the Deputy County Commissioner for Uiri Sub-County (hereinafter referred to as '**the Commissioner**') filed a Report in this Court. The Report was very detailed on all meetings and other steps taken in implementing the Court Order. The beneficiaries of the Estate of the deceased managed to come up with agreed names of the Elders who were to arbitrate over the matter. After deliberations between the Commissioner, the Elders and the beneficiaries the number of beneficiaries to the Estate of the deceased was unanimously agreed at five. They were **Olare Tana, Aluga Tana, Adudas Tana, Nyakado Tana** and **Joseph Oreyo**. The first limb of the Court Order

was hence implemented without any hitch. That identification of the beneficiaries has not been challenged to date.

4. It was the implementation of the second limb of the Court Order on the identification of the shares on the Estate Land known as **Kanyamkago/Kawere 1/90** which the team could not reach a consensus on and the matter was referred back to this Court for further directions.

5. The matter came up before me severally and I took a deliberate course to urge the parties to discuss the issue of identification of the shares. Although the parties at first were sharply divided and could not agree on anything I nevertheless continued urging them to consider discussing the matter for ease of living in peace since after all they remained as one family. The efforts bore fruits on 28/11/2016 when the parties eventually recorded a consent on the way forward. The consent was as follows: -

*(a) The County Surveyor, Migori County who is present in Court Mr. peter Wanjala, be and is hereby ordered to carry out the survey works over and in respect of LR NO. KANYAMKAGO / KAWERE 1/90 and to prepare the requisite Mutation in line with the arbitral award by the Assistant County Commissioner Uririr/Oyani Divisions filed in Court on the 1<sup>st</sup> day of July 2015.*

*(b) The Sub-division and the attendant Mutation shall be such that the Distribution shall be in favour of the 5 identified heirs / beneficiaries of the Estate only.*

*(c) The survey charges to be communicated by the Surveyor towards and in respect of the exercise shall be shared equally by the 5 Beneficiaries and in Default by any of the Beneficiaries either of the Beneficiaries shall foot the same, but shall recover from the Defaulting Party.*

*(d) The County Surveyor to be provided with Security by the Administration Police Commandant of Uriki Sub-County during the exercise.*

*(e) The payments in line with limb (c) above in respect to the Survey costs to be paid within 30 days of today.*

*(f) Upon receipt of the relevant Survey charges, the County Surveyor to notify all the Parties concerned of the due date of the Survey works and the Surveyor to carry out and conclude the exercise within 30 days of such Notice.*

*(g) The County Surveyor to file his Report, if any, together with the duly completed Mutation Form with the Court within a further 30 days of completing the exercise.*

*(h) Mention on the 27<sup>th</sup> day of February, 2017 for further Directions and Orders.*

6. The exercise on identification of the shares was duly undertaken by the Commissioner, the Elders, the Beneficiaries and the County Surveyor and Report filed in Court on 09/05/2017 together with a Mutation Form. The Report had four beneficiaries instead of five, but it was satisfactorily explained that one of the beneficiaries Nyakado Tana had passed on and was not survived by any widow or children.

7. The County Surveyor, by an Order of this Court, appeared and formally produced the Report. All parties examined him accordingly. Thereafter, parties were directed to file their respective submissions and they all complied. The Applicant fully supported the Report by the Surveyor and relied on several decisions in urging this Court to adopt the Report whereas the Interested Party one **Fredrick Ogal Aluga** opposed it on two grounds. That, the negotiations between the beneficiaries never crystallized for implementation and that the Elders were not properly appointed since some were under age whereas others hailed from another clan.

8. I will start with the objection on the Elders. According to the Report by the Commissioner, the Elders were unanimously agreed and appointed by the beneficiaries on 18/03/2015. Those are the Elders who took part in the meeting convened on 25/03/2015 by the Commissioner which took place at the Estate land and the beneficiaries identified. The Interested Party took part in the process of appointing the Elders and identifying the beneficiaries. Until the filing of his submissions which challenged the distribution of the estate land on 09/07/2018 (which was over 3 years from the appointment), the Interested Party had no problem with the earlier processes and findings. I therefore find the objection on the Elders as an afterthought and an attempt at scuttling the distribution process. On whether the negotiations crystallized leading to the distribution, the Report by the County Surveyor was very clear. The boundaries of the respective portions were identified by the Elders and the Surveyor only picked them and came up with a Mutation. None of the parties raised any objections on the boundaries. Had that happened the Elders would have definitely and satisfactorily dealt with the issue(s) and if they encountered any hardships they would have referred the matter back to Court just like how they handled the matter initially. I again do not find any merit on the objection. The Interested Party has also not challenged the customary law considerations by the Elders to be unconstitutional in any way. The upshot is that the objections by the Interested Party are hereby overruled.

9. I have as well carefully addressed my mind to this matter. From the history of the matter, it appears that the land was registered in the name of the deceased in trust of his brothers who are the now beneficiaries. One of the beneficiaries was **Gabriel Aluga** who was the father to the Interested Party herein. Since the beneficiaries were brothers had the matter fallen within the confines of **Law of Succession Act, Cap. 160** of the Laws of Kenya, the position would have been equal shares on all of them. However, that is not the case since the **Law of Succession Act** did not apply in this matter. The current proposed distribution is that Gabriel Aluga (the father to the Interested Party) has the biggest share of 13.79Ha followed by Aduda Tana with 11.99Ha, Joseph Oreyo with 5.99Ha and Olare Tana with 4.49Ha. Whereas the other beneficiaries seem to concede to such a proposal the Interested Party still wants more of the land.

10. Be that as it may, **Article 10(b)** of the **Constitution** provides for social justice, equity and human dignity as some of the national values. Considering the matter in light of these values and the proposed distribution and in the interests of **Article 45(1)** of the **Constitution** which holds the family as the natural and fundamental unit of society and the necessary basis of social order and the need for the family members to

peacefully co-exist, I find no basis to interfere with proposed distribution by the Elders.

11. This Court is also alive to the approach taken by the Court (**Majanja, J.**) on the Summons for Revocation of the Grant filed on 08/11/2014 and the fact that one of the Administrators is now deceased and I shall make appropriate orders towards implementation of this judgment.

12. As I come to the end of this judgment I must apologize to the parties for the late delivery of this judgment which was caused by several challenges beyond my control and my involvement in a Multi-Judge Bench matter at the High Court in Mombasa.

13. Consequently, the Report by the Migori County Surveyor Report dated 26/04/2017 and filed in Court on 09/05/2017 is hereby adopted by this Court and judgment is hereby entered as follows: -

**a) The Grant of Letters of Administration Intestate in respect to the Estate of Olare Tana (the deceased herein) made to Joseph Oreyo Tana and Gabriel Aluga Tana in Migori Senior Principal Magistrate's Court Succession Cause No. 15 of 1995 on 08/05/1996 and the resultant Certificate of Confirmation of the Grant be and are hereby revoked.**

**b) A Fresh Grant shall issue in the joint names of Joseph Oreyo Tana, John Oyoo Olare and Fredrick Ogal Aluga which Grant shall stand confirmed at issuance.**

**c) The estate property known as Kanyamkago/Kawere I/90 shall devolve as follows: -**

**(i) Gabriel Aluga - 13.79Ha.**

**(ii) Aduda Tana - 11.99Ha.**

**(iii) Joseph Oreyo - 5.99Ha.**

**(iv) Olare Tana - 4.49Ha.**

**d) A Certificate of Confirmation of the Grant shall forthwith issue.**

**e) The Migori County Land Registrar with the assistance of the Migori County Surveyor shall issue separate title deeds to each of the beneficiaries herein.**

**f) The Administrators and/or any of them shall, without any delay, execute any documents towards the implementation of this judgment and in default the Deputy Registrar of this Court shall so execute the documents.**

**g) Each party shall bear its own costs of these proceedings as well as the costs of the sub-divisions and up to the issuance of the respective title deeds.**

14. Those are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 14<sup>th</sup> day of February 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Oguttu** Counsel instructed by the firm of Messrs. Oguttu Mboya & Company Advocates for the Applicant.

**Fredrick Ogal Aluga** - Interested Party in person.

**Joseph Oreyo Tana** - First Respondent in person.

**Evelyn Nyauke** – Court Assistant