



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 569 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE MBALANYA OMWAKWE....DECEASED**

**AND**

**DR ALICE OWANO MULUSA.....APPLICANT**

**VERSUS**

**MUSA MBALANYA.....1<sup>ST</sup> RESPONDENT**

**TOM MBALANYA.....2<sup>ND</sup> RESPONDENT**

**BENSON MBALANYA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. Mbalanya Omwakwe the deceased herein died on 30<sup>th</sup> June, 1984 and a grant of Letters of Administration Intestate issued to Rebecca Alushula Litunya, Alice Owano Mulusa, Francis A. Mbalanya and Musa Mbalanya the petitioners herein on the 7.11.2014

**Applications**

2. There are two applications for determination. The first application by Musa Mbalanya dated 22.01.2016 brought pursuant to Section 45(1) and 47 of the Law of Succession Act Cap 160 Laws of Kenya seeks restraining orders against the respondent Alice Owano Mulusa and all other beneficiaries of the deceased estate herein from intermeddling with the deceased parcel of land known as West Bunyore/Ebusikhale/242 pending finalization of the succession cause herein and that status quo be maintained as at the time of the deceased death.

3. The second application is the one dated 03.02.2016 filed by Dr. Alice Owano Mulusa also brought pursuant to Sections 45 and 47 of the Law of Succession Act, and Rule 73 of the Probate and Administration Rules. The applicant seeks for orders to prohibit Musa Mbalanya, Tom Mbalanya and Benson Mbalanya from intermeddling with the deceased's parcel of land being West Bunyore/Ebusikhale/242. She further seeks orders to compel the beneficiaries to open a joint account in the names of four beneficiaries representing the 4 houses where rent collections from commercial plots and a commercial borehole belonging to the deceased estate will be deposited before the determination of the suit herein.

4. She also seeks for orders that the tenants of the commercial property namely Equity Bank Luanda Branch, and Jaffer Dawood Ahmed do deposit their monthly rent in the proposed joint account and Benson Mbalanya to also deposit proceeds from the borehole in the said account and lastly she seeks an order to compel Japheth Mbalanya a beneficiary to the estate herein to unlock the two houses that have been locked by himself

5. Both applications are brought on the grounds set out on the face thereof and supported by affidavits of the respective applicants

6. What comes out from the supporting affidavits is that Alice Owano Mulusa and Dorcas Nanjero caused and supervised the building of a wall on the deceased parcel of land whereas Musa Mbalanya, Tom Mbalanya and Benson Mbalanya together with other people who are not beneficiaries of the estate herein caused destruction and/or demolition of property belonging to the deceased's estate. They also locked up the house of the deceased's second wife Addah Mbalanya and failed to account for the rent proceeds and collections from other commercial ventures that come into their hands. The need to open a joint account is a concern which some beneficiaries want this court to address. All the activities complained of have been happening despite the pendency of the succession cause herein.

### **Responses**

7. Both the applications are opposed Alice Owano Mulusa in her replying affidavit dated 09.03.2016 claims that the application dated 22.01. 2016 is an abuse of the court process and is meant to delay the succession proceedings herein. She claims that Musa Mbalanya does not deserve the orders sought because he has intermeddled with the deceased's estate by locking up houses thereon. Benson Amukoa Mbalanya on the other hand has replied to the application dated 02.02.2016 vide his replying affidavit which is undated but filed on 16.03.2016.

8. He has explained at length what development he is undertaking and has undertaken on the deceased's estate and the costs incurred. He has also deponed to the fact that he has used proceeds from the borehole and proceeds from Equity Bank as collateral for other development loans.

9. Tom Mbalanya Omwakwe filed a replying affidavit which is also undated but filed in court on 16.03.2016. He depones therein that he supported Benson Mbalanya in his development projects on the deceased's estate. He denies being one of the people who demolished a wall that Alice and others put up on the deceased's estate.

10. He further claims that Alice has given false information regarding the properties of the deceased herein and has made mention of other properties not owned by the deceased herein. He is against the suggestion that proceeds from rent and the borehole be deposited into a joint account because he alleges that he and Benson Mbalanya are the ones who constructed the building hosting Equity Bank.

11. Musa Mbalanya filed two replying affidavits both dated 01.04.2016 wherein he depones that the application dated 03.02.2016 is full of falsehoods and total misrepresentation of facts and material non-disclosure thus devoid of merits. He points a finger at Alice for perpetually causing chaos and strife whereas he has strived to maintain peace. He denies the allegation of demolition of the deceased's estate and still points a finger at Alice who he says supervised the erection of a perimeter wall within the deceased estate which they demolished after resolving at a family meeting that the wall should be demolished.

12. Musa adds that no house was demolished. He further claims that he has been a bridge in quelling disputes in the family by embracing dialogue to resolve issues arising within the family. He has also denied the issue raised by Alice concerning the accounts of the deceased's estate and explains at length what is happening to the proceeds received and to whom they belong. He also does not support the idea of opening of a joint account

### **Submissions.**

13. The two applications were disposed of by way of written submissions. There was also a site visit by this court and there is on record a report on that visit. This court has keenly read through the applications and the supporting affidavits as well as the replying affidavits. The court has also carefully read the submissions.

14. It is evident from the affidavits that both the applicants and respondents have dealt with the deceased property in one way or the other either developing the same or demolishing it. It is also clear that everyone is trying to flex his/her muscle yet they are all using the deceased estate. All parties know that this succession cause is pending determination and that the deceased herein died testate having written a will. Executors have not yet been appointed as there is still some objection by some of the beneficiaries regarding nomination of persons to be appointed as executors. In this regard, it is clear to me that the applicants as well as the respondents have intermeddled with the deceased's estate.

15. Intermeddling with a deceased's estate is criminalized by the Law of Succession Act Cap 160 of the Laws of Kenya under Section 45. By dint of the provisions of that Section, anyone who is found and who is proved to have interfered and/intermeddled with a deceased's estate is guilty of an offence and liable to a fine not exceeding ten thousand shillings.

16. As already stated herein above all the applicants and respondents have in one way or another intermeddled with the estate of the deceased. They have ignored the fact that this case is yet to be determined and have also ignored the consent order requesting them to maintain status quo. It is confirmed by the report of the site visit that there were demolitions of the houses on the deceased estate more specifically Mama Addas house is damaged. Truphena's house is also damaged and destroyed. No matter the developments done by Tom and his brothers Musa and Benson, they undertook the same on the deceased parcel of land without authority of this court. The borehole was also constructed without authority of this court. All these acts amounted to intermeddling with the deceased estate. All the parties in this matter appear well learned and ought to be able to sit together, reasons together and resolve issues in an amicable manner.

17. It was important for the beneficiaries to follow the right procedure before undertaking any developments on the deceased's property. In as much as the developments are good, they interfered with the estate of the deceased.

18. Therefore for the purpose of preserving the estate of the deceased herein this court allows prayers (2) and (3) of the application dated 22.01. 2016. As regards prayer (3) above, the status quo to be maintained is what obtains at the date of his ruling. Prayers 2(a) (b) (c) (d) and (e ) of the application dated 03.02.2016 are also granted

19. Having found that the applicants and respondent have all intermeddled with the deceased's estate the following persons;- Alice Owano Mulusa, Dorcas Nanjero, Musa Mbalanya, Tom Mbalanya and Benson Mbalanya are all fined Kshs.5,000/- each or three(3) months imprisonment. The fine shall be paid in the close of business on Wednesday, 27.10.2016.

Ruling delivered, dated and signed at Kakamega this 25<sup>th</sup> day of October, 2016

RUTH N. SITATI

JUDGE

In the presence;-

.....Mr. Minishi for Mis Wambani (App. Dated 21/01/2016)..for Applicant

.....Mr. Minishi for same application.....1st Respondent

.....Miss Khateshi for Wilunda for Alice Owano.....2nd Respondent

.....N/A.....3rd Respondent

.....N/A.....Court Assistant