



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Suit 105 of 1999**

**AHMED ALI ISMAEL ..... PLAINTIFF**

**VERSUS**

**ALI SHURIA ..... DEFENDANT**

**RULING**

This is a ruling in respect of a notice of motion dated 14th January, 2013. the Applicant Ahmed Ali Ismael seeks leave of the Court to execute the decree in this suit against the Administrators of the Estate of the late Ali Shuria. The Applicant in this application had sued the deceased herein in 1999. The Applicant obtained judgment in his favour on 19/11/2002. Before the Applicant could execute the decree, the defendant died on 04/03/2003. Letters of Administration in respect of the deceased's Estate were granted to Fatuma Said and Said Ali on the 9th May, 2008. The Applicant has therefore brought this application seeking leave to execute against the Estate of the deceased who was the defendant in this suit.

The Administrators of the Estate of Ali Shuria opposed the application through grounds of opposition filed in Court on 21/03/2012. In the grounds of opposition, the Administrators contend that the Estate of the deceased comprise of only immovable property and that since the Letters of Administration have not been confirmed, the property has not vested on the Administrators and as such they cannot be compelled to meet the decree.

I have given due consideration to the application as well as grounds of oppositions and submissions by Counsel for the parties herein. Section 37 (1) of the Civil Procedure Act provides that where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of such deceased or against a person who has inter-meddled with the Estate of such deceased. It is not contested that there is a decree in force against the deceased. The same was not appealed against. It is also not in dispute that the Administrators of the Estate of the deceased are Fatuma Said and Said Ali. The two are mother and son respectively and the Applicant is brother to the deceased. The decree was to the effect that the Applicant and the deceased each hold half share in the suit property. The application is therefore properly brought

against the two who are the Administrators for the deceased. There was an argument by Mr. Gatune for the Administrators that this application cannot be sustained as there has been no substitution of the deceased. This argument is misplaced. Order 24 Rule 10 of the Civil Procedure Rules is very clear that rules 3, 4 and 7 shall not apply to proceedings in execution of a decree or order. Rule 4 (1) of Order 24 which is relevant in the present case provides as follows:-

***“4 (1) - where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or as a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit”.***

There is therefore no need for substitution of a deceased defendant where the only remaining issue is execution of a decree as in the present case. Mr. Gatune also argued that the Deputy Registrar had ruled in this case that no execution can proceed without substitution being done. The ruling of the Deputy Registrar was made in ignorance of the clear provisions of the Civil Procedure Rules and Mr. Gatune cannot be heard to argue that the same ruling has not been appealed against and it therefore stands. I find that the application is well founded. The same is allowed with costs to the Applicant.

It is so ordered.

**Dated, signed and delivered in Open Court on this 16th day of April, 2013.**

**E. OBAGA**

**JUDGE**

In the presence of Mr. Chebii for Mr. Kiarie for Applicant and M/S Nyakibia for Mr. Gatune for Respondent.

CC: Joan.

**E. OBAGA**

**JUDGE**

**16/04/2013**

**M/S NYAKIBIA**

I pray for stay of execution for 30 days.

**MR. CHEBII**

The stay sought has not been specified.

**M/S NYAKIBIA**

The stay is pending appeal.

**COURT**

Respondent is granted stay for 14 days pending application for formal stay.

**E. OBAGA**

**JUDGE**

**16/04/2013**