



IN THE MATTER OF THE ESTATE OF THE PETER ODUSI ALIAS PETER ODUSI TABU (DECEASED)

**CHRISTINE ACHIENG OGESA.....1ST
APPLICANT**

SERAH OGESA.....2ND APPLICANT

VERSUS

**BRITISH AMERICAN ASSET MANAGERS
LIMITED.....RESPONDENT**

RULING

PETER ODUSI ALIAS PETER ODUSI TABU (the deceased) died on 27th July 2011 at Aga Khan Hospital. He hailed from Nanguba location, Funyula Division Samia District. At the time of his death, he was not married and had no child. His closest next of kin were his mother, Agnes Namulundu Ogesa, and his brother and sister, **John Bwire Jonathan**, and **Christine Achieng Ogesa** respectively (who are hereinafter referred to as “**the applicants**”).

On 15.11.2011, the deceased’s said siblings, John Bwire Jonathan and Christine Achieng Ogesa (the Applicants) petitioned in this cause for a Grant of Letters of Administration in the deceased’s estate. The petition has not been gazetted and no Grant of Letters of Administration has been made to the Applicants or to anyone else as yet.

On 19.1.2012, the Applicants instituted in the cause a Notice of Motion dated 19.1.2012 under a Certificate of Urgency signed by R. W. Chege & Associates in which they sought orders that **British American Asset Managers Limited** be joined in the proceedings as a **Respondent** and further

2. *THAT the interested party do surrender to the applicants’ lawyers the sum of Ksh.6,526,061.44 being the amount held by the Respondent as at 7.9.2011 on account of the deceased for the Applicant’s lawyers to invest the funds in an income generating account with CFC Stanbic Bank and or such other finance institution with a competitive interest earning account to preserve the fund and prevent it from wasting pending determination of the succession cause over the Estate of the Deceased.*

3. *THAT costs of the application be provided for.*

The said Notice of Motion was based on the grounds:-

1. *THAT the succession cause of the Estate of PETER ODUSI the deceased herein is pending before court and is bound to take time to be completed.*

2. *THAT the asset hereof of sum of Ksh.6,526,061.44 in the custody of the Asset Manager is at the risk of wastage and the Asset Manager is not co-operative in conserving and investing the fund pending completion of the succession cause.*

3. *THAT the Applicant's are in a position to invest the funds in an income generating account with CFC Stanbic Bank with an interest rate of 11% per annum and or any other licensed finance institution with a competitive interest rate account pending completion of the succession cause which action shall be in the best interest of the estate of the deceased.*

The Applicants averred in paragraphs 2, 3, 4, 5, 6 and of their Affidavit sworn on 19.1.2012 in support of the Notice of Motion as follows:

2. *THAT our brother had an investment account with British American Asset Managers Ltd (herein referred to as the Asset Manager) Balanced fund Account BA025574.*

3. *THAT being the persons stated to be the contact persons in absence of the deceased for purposes of the funds held by the Respondent the said Asset Managers issued to us a statement of account of the funds in the deceased said account reflecting that the Respondent held the sum of Ksh.6,526,061.44 to the deceased's credit as at 7/9/2011 a copy of which statement is annexed hereto and marked "CS1".*

4. *THAT upon our instructions amongst the petitioners of the letters of administration of the deceased herein our lawyers wrote to the said Asset Managers a letter dated 8.9.2011 requesting them to invest the funds in the deceased's account in an interest bearing account pending administration of the Estate of the deceased which letter was followed by a further letter dated 6.1.2012 copies of which letters are annexed hereto and marked "CS2" & "CS2(A)".*

5. *THAT the Asset Managers by their letters dated 12.9.2011 & 10/1/2012 copies of which letters are annexed hereto and marked "CS 3" and "CS3a" have declined to invest the funds and we are apprehensive that the same shall waste and it is therefore in the interest of justice that the court does intervene to conserve the estate of the deceased and prevent the same from wastage pending determination of the succession cause.*

6. *THAT we have enquired and established that we are in apposition to invest the funds held by the Respondent at the CFC Stanbic Bank in an interest earning account at the rate of interest of 11% per annum as evidenced by an abstract of the advertisement in the Daily Nation of 15th December 2011 a copy of which is annexed hereto and marked "CS4"*

On 20.1.2012, British American Asset Managers Ltd was joined as a Respondent and an order was made directing it to show cause on 27.2.2012 why it should not surrender to the Applicants' advocates the sum of Shs.6,526,061.44. This order was served on the Respondent on 31.1.2012 along with the Notice of Motion dated 19.1.2012.

The Applicants are represented by the firm of R. W. Chege & Associates, Advocates while the Respondent is represented by Messrs Daly & Figgis, advocates. The latter filed in response to the Notice of Motion on 22.2.2012 a replying affidavit sworn by Patricia Njeri Wanjama, a Manager in the Respondent (company).

Both the Applicant's advocates and the Respondent's advocates filed written submissions. They recorded a consent requiring the court to render a decision on the Notice of Motion on the basis of their clients' affidavits and the submissions filed.

I have perused the application and the Affidavits and submissions. The Applicants admit that they have petitioned for a Grant of Letters of Administration in the Estate of the deceased. They contend that they are dependants of the deceased. They aver that the Respondent is holding Shs.6,526,061.44 belonging to the deceased which the Respondent has refused, even after request, to place "in an interest earning account pending determination of the succession proceedings." The Petition has not been gazetted and consequently the Grant of Letters of Administration has not been made.

On the 8th September 2011, the Applicants' advocates wrote to the Respondent requiring the Respondent to invest the said money. After a reminder, the Respondent responded on 12th September

2011 stating that the deceased had indicated in his documentation to the Respondent that the Applicants were the deceased's **contact persons** and that the deceased held "*within the British American Balanced Fund as unit trust investments which are moveable assets which are subject to administration under the Laws of Succession in the same way shares of listed companies are subject to the aforementioned laws.*" The respondent stated in part in its letter dated 12.9.2011 annexed to the affidavit of the Applicants; "*we concur that all efforts should be made by the Estate to preserve the assets due to the estate and as we would wish to assist the estate in those efforts, we advice that you explore the process of applying for limited Grant of Letters of Administration for that purpose and as more specifically outlined under Section 54, the Fifth Schedule and the Probate and Administration Rules of Succession Act Chapter 160 of the Laws of Kenya. Once obtained, the proposed Administrators can then provide us with instructions on how to preserve the estate before the Confirmation of Grant.*"

On 10th January 2012, the Respondent further wrote as follows to the advocates of the Applicants:

The above account, account-holder (now deceased) and your letter (received via email) dated January 6, 2011 refers.

In clarification to your query, please note that Ms. Serah Ogesa and Ms. Christine Achieng' were not named as beneficiaries to this account and instead, were named as contact persons-the people who the Fund Manager would contact in the absence of reaching our client. Attached for reference is page 2 of the application form where your clients' names have been recorded as contact persons.

We further wish to clarify that we are not arbitrarily withholding the funds in our late Client's account and confirm that as communicated in our last letter dated September 12 2011, that we shall be able to receive instructions regarding this account once we receive the Certificate of Confirmation of Grant giving us details of the named beneficiary.

We look forward to hearing from you on the progress on obtaining the relevant administration letters.

As rightly pointed out in the submissions of the Applicants' advocates, there is no dispute that the Respondent is holding funds belonging to the Estate of the deceased. There is no dispute either that the Applicants have not obtained a Grant of Letters of Administration in the Estate of the deceased. It is on record that an order of the court was made after the filing of the Applicant's Notice of Motion dated 19.1.2012 requiring the Respondent to show cause why the Respondent should not surrender to the Applicants' lawyers the amount of Shs.6,526,061.44 reflected in the statement of account issued by the Respondent to the Applicants as shown in annexure CSV attached to the affidavit filed in support of the Application. The Applicants contend that the process of obtaining a Grant of Letters of Administration is underway and that there is no need for Letters of Administration ad colligenda bona as *this would only serve to add costs. At any rate, they submitted, the court has a wide discretion and can order the Respondent to remit the money in question as the Respondent has admitted that it is holding it on behalf of the Estate of the deceased.* It is the contention of the Applicants that under Order 40 Rule 11 of the Civil Procedure Rules 2010, the court is empowered to order the Respondent to remit the money to the Applicants. The Applicants also invoked Chapter Four of the Constitution containing the Bill of Rights to buttress the argument that they have a Constitutional right to claim the money. It was also contended by the Applicants that they did not need to have a Grant of Letters of Administration and that the case of **Trouistic Union International & Another** CA Civil Appeal No.145 of 1990 lends support to this view. But does it?

In their submissions, the Respondent's advocates, Messrs Daly and Figgis relying on Section 79 of the Law of Succession Act, Cap 160 contended that the Applicants have no *locus standi* in absence of a Grant of Letters of Administration. They contended that their submission was buttressed by the decision in **Virginia Edith Wambui Otieno versus Joash Ochieng Ougo & Omolo [1982 – 88] 1 KAR 1049** in which the court held that *an action started by an intestate's intended administrator, before the granting of Letters of Administration, is incompetent at the date of its inception.* It was the Respondent's further submission that, if, as the Applicants contended, the Applicants intended to collect and preserve the estate, they needed a special limited grant of Letters ad colligenda bona as provided by Section 67(1) of

the Law of Succession Act, and Rule 36 of the Probate and Administration Rules. They opined that such limited grant can be applied for any time before the grant of letters of administration if the parties feel that the circumstances warrant urgent intervention. The Applicants' invocation of fundamental rights in the Constitution was misplaced, submitted the Respondent's advocates, not least because there was no court determination that the Applicants are beneficiaries. The Respondents' advocates referred to the following authorities which I have perused.

1. *Elizabeth Ndulu Muthava & 2 others v Joseph Mbiu Muthiani & Another [2008] e KLR*
2. *Re Succession – Limited Grant (2000) 2 EA 495*
3. *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo and Omolo Siranga (1988) 1 KAR 1049*
4. *Re Succession – Limited Grant (2000) 2 EA 93*

I have duly perused the Notice of Motion dated 19.1.2012 and the affidavit in support thereof as well as the Respondents' Replying Affidavit and the submissions by both counsel. The Applicants aver that they are the nearest next of kin to the deceased. They admit that they have neither a limited grant (*ad colligenda bona*) nor a full grant although they have petitioned for the latter grant. Their position is that they do not need either so as to be entitled to demand and receive the money held by the Respondent.

Have the Applicants made out a case to justify the grant of an order compelling the Respondent to release the money to them for their intended investment in an interest bearing account? The Respondent does not deny that it is holding the money demanded. However, it contends that the Applicants are not entitled to it as they have no *locus standi* in absence of Letters of Administration. The Respondent also contends that it would expose itself to liability if it liquidated the deceased's unit trusts to the Applicants before the Applicants have obtained Letters of Administration. However, the Respondent is willing to comply with any orders this court may give regarding the deceased's assets.

Clearly, the Applicants are not “**administrators**” of the estate of the deceased within the meaning of Section 2 of the Law of Succession Act Cap 160 which also defines a “**personal representative**” of an estate to mean the executor or administrator of a deceased person. The powers of an administrator or personal representative as set out in Section 82 of the Law of Succession Act include the enforcement by suit or otherwise of causes of action arising out of the deceased's death or which survive the deceased's death. Nowhere in the Law of Succession Act is a person who does not have a full or limited grant legally empowered to sue on behalf of the estate of a deceased person even if such person might turn out to be a beneficiary or an heir of the estate. The intendment of the law is to protect the rights of persons who are entitled to estates of such deceased persons by ensuring that estates of deceased persons are administered properly by those who will safeguard the estates and that properties in such estates devolve to those who are legally entitled. The decision of the Court of Appeal in the **Trouistic case** reflects the current law in Kenya but contrary to the Applicants' contention, it does not support the Applicants' case. In his judgement, in the case, Chief Justice Apaloo stated:

“Section 2 of the Law of Succession Act (Cap.160 provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the Act “shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act”.

“The Act came into force on the 1st July, 1981..... To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to Section 82 (a) of the Law of Succession Act. That Section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, Section 3, the interpretative Section, provides an all inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an

administrator within the true meaning and intendment of the Act? Section 3 says “administrator means a person to whom a grant of letters of administration has been made under this Act”.

“It is not in dispute that the two respondents who invoked the aid of the Court to agitate the cause of action which letters of administration have been made under the Act” i.e. the Law of Succession Act. They did not even pretend to be such. The only capacity in which they sought to enforce the deceased’s chose in action, was as dependants....”

“The Appellants, by Counsel, contended that as the Respondents sought damages under the Law Reform Act without first obtaining letters of administration, they lacked standing and their suit was incompetent therefore. This was disputed by the Respondents who, for their part, relied on the Hintz case to which we referred. The Appellants replied that that holding was overruled in the subsequent holding of the Court of Appeal in Virginia Otieno v Joash Ougo and another (1988) 1 KAR 1048 decided in 1987.”

The learned trial Judge gave consideration to these conflicting submissions and in the end, resolved it in the respondents’ favour.....

“The learned Judge did not advert his mind to the Law of Succession Act from which he could have derived a great deal of assistance and by which he was bound. Such help as he thought he could get was from the majority judgment in the Hintz case....”

With great respect, we have not found it easy to comprehend what seems to be an authoritative statement of the succession law in Kenya. No customary notions were involved in this case. At common law, death by itself automatically divests the deceased of his chose in action. The reason for this is because in law, the dead have no rights. But no legal right is without an owner so it must be vested in a person or entity.....”

I”n some Commonwealth jurisdictions, such right is vested in the Chief Justice or some other statutorily designated body or entity. Our law of Succession Act (Cap 160) did not provide for the vesting of an intestate’s property between the date of death and the grant of letters in any entity. So Kneller, J. A. suggested in the Hintz case, that it will be vested in the Courts. Such a suggestion conforms with common law notions of the transmission of an intestate’s right or estate. It ought to be remembered that all these temporary custodians of an intestate’s rights are bare trustees only. But as soon as a grant is obtained, the right or estate vests automatically and by the force of the grant in the Administrator.....”

“Perhaps, it is not uncharitable to conclude that its nine-year life was undeserved and we should now give this decision, whose life is in the balance, its “coup de grace” and lay it safely to rest.....”

“Mr. Khana invited us to say that the Hintz appeal was wrongly decided by the majority and that we should overrule it. In view of what we said in the foregoing paragraphs, we respond positively to that invitation and hold that the Hintz case is no longer good law, if it ever was. We think it must go, and the decision of Bosire, J. which was founded on it, must go with it.....”

“The damages awarded in favour of the Respondents in the sum of Ksh.50,000/= under the Law Reform Act was wrong and ought to be set aside with costs. We do so order.”

Under the Constitution, public officers who include judicial officers, are bound by the national values and principles of governance in Article 10 whenever applying or interpreting the Constitution or applying or interpreting any law. These national values and principles of governance include the rule of law, equity, social justice and human rights. Under Article 27(1), the Constitution, every person is equal before the law and has the right to equal protection of the law and equal benefit of the law. It recognizes that as long as statute law is consistent with it, it must be obeyed. There is nothing in the Law of Succession Act Cap 160 in relation to the requirement to have a grant, full or limited, before a party can acquire capacity to act on behalf of a deceased person that can be said to be inconsistent with the Constitution. On the contrary, the provisions of the law of succession Act are in harmony with the Constitution not least because they are designed to protect estates of deceased persons and property rights

by ensuring that estates of deceased persons devolve to those who are legally entitled. This promotes and helps to achieve social order and equity in society.

Without a grant of representation or a special limited grant ad colligenda bona, the Applicants have no legal capacity to sue the Respondent as yet for payment to them of the money the deceased's estate is entitled to. Indeed, S.45(1) of the Law of Succession Act prohibits intermeddling with the property of a deceased person and S.45(2) creates penal sanctions for intermeddling.

The Section 45(1) states:

S.45(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.

In these succession proceedings, the Respondent has conceded that it is holding money to which the Estate of the Deceased is entitled. That money has not been invested and it is probably losing value. The court has a duty to protect the Estate of any deceased person by issuing appropriate orders for that purpose. I have given due consideration to the order sought by the Applicants and the objection taken by the Respondent. I have also considered the need to protect and forestall diminution of value of the money being held by the Respondent on behalf of the Estate of the deceased.

Accordingly I make the following orders:

1. The Notice of Motion dated 19.1.2012 is dismissed with costs to the Respondent to be agreed on within 21 days and in absence of agreement to be taxed.
2. The Petition herein shall be gazetted immediately to pave way for issuance of a Grant.
3. On the basis of the inherent powers of the court, the Respondent is directed to immediately invest the sum of Shs. 6,526,061.44 belonging to the Estate of the late Peter Odusi alias Peter Odusi Tabu deceased in the highest possible interest bearing account for the benefit of the Estate and hence the beneficiaries who will ultimately be entitled. A report in this regard shall be filed within 30 days with the Deputy Registrar of this Court.
4. This cause shall be mentioned on 25th July 2012.

Dated at Milimani Law Courts, Nairobi, this 14th day of June 2012.

G.B.M. KARIUKI, SC

JUDGE

COUNSEL APPEARING

Mr. Ngoge Advocate of R. W. Chege & Associates, Advocates for the Applicants

Mr. Odhiambo Advocate of Daly & Figgis & Co., Advocates for the Respondent

Mr. Kugwa – Court Clerk