



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Succession Cause 461 of 2009**  
**(IN THE MATTERS OF THE ESTATE OF THE LATE SHELDON OYARO MUKHAYE (DECEASED))**

**JULIUS OMBISI**  
**ANDREW OKWARO**  
**WALTER OYALO.....PETITIONERS/RESPONDENTS**  
**VERSUS**  
**JAMES MUKHAYE OYALO**  
**JOEL MUKHAYE**  
**H. OYALO.....INTENDED OBJECTORS/APPLICANT**  
**RULING**

The undisputed facts in this matter are:

- i) that the deceased, Sheldon Oyalo Mukhaye died on 5<sup>th</sup> March, 1985
- ii) that he was survived by several children from four (4) wives
- iii) that three (3) of the four (4) wives separated from him and were re-married, while one passed away.
- iv) that since his demise some twenty-five (25) years ago no succession cause for the administration of his estate has been filed until August, 2009 when this cause was filed
- v) that the deceased left behind assets which included commercial and residential properties, a motor vehicle and bank accounts.
  
- vi) that he also had two properties in Nyahururu – namely, NYAHURURU/MUNICIPALITY BLOCK 6/428 and NYAHURURU/MUNICIPALITY BLOCK 4/35 for rental purposes which properties are at the centre of the present controversy.

It follows that since the death of the deceased, someone without letters of administration has been collecting rent from the two properties. The respondents who are some of the sons of the deceased person, have filed the cause for the grant of representation. The applicants who are also some of the sons of the deceased person have filed an objection to the making of the grant. The cause has not been gazetted.

In their objection, the applicants have alleged that the respondents in filling the cause did not notify them (the applicants); that their (applicants) signatures purporting to signify their consents to the filing of the cause were forged; that the respondents are wasting the estate. Subsequent to the filing of the objection, the applicants have also brought the instant application to which this ruling relates.

In it they are seeking orders to restrain the respondents from demanding or collecting rents from the two properties in Nyahururu; from evicting tenants or from wasting the properties.

The applicants have averred that all through MAMUKA PROPERTIES LTD has been collecting rent which would be shared between the deceased person's children. That the respondents have appointed M/s. NYAKACH COMMERCIAL AGENCY to collect the rent for the two properties without consulting the rest of the family members; that the respondents have cut down trees on property No.6/428.

In reply, the respondents have denied engaging M/S. NYAKACH COMMERCIAL AGENCY and cutting down trees. They have deposed that the applicants' intention is to perpetuate the 1<sup>st</sup> applicant's enrichment from the rent collection since they have deliberately failed to take out letters of administration for nearly twenty four (24) years; that the 1<sup>st</sup> applicant has been using MAMUKA PROPERTIES

LIMITED to collect the rent for him yet the former has not rendered account of the income received and how it has been applied.

I have considered these averments, both counsel's very able written submissions and useful authorities cited. I wish only to reiterate that no form of grant has been issued in respect of this estate, even though the deceased died some 25 years ago.

The **Law of Succession Act** was promulgated mainly to regulate the administration of the estate of an intestate or testate deceased persons. The administration of a deceased person's estate is vested in a personal representative whose powers and duties, according to **sections 82 and 83** of the **Law of Succession Act**, include, the enforcement, by suit or otherwise all causes of action, which survive the deceased or arise out of his death for his estate and to deal generally with the estate.

It is now settled on the authority of **Otieno Vs. Ougo & Another** (1987) KLR 407 and the subsequent decision in **Tvonstic Union International & Another Vs. Mrs. Jane Mbiyu & Another**, Civil Appeal No.145 of 1990 that the only person who can agitate by a suit any cause of action to protect or preserve the estate of a deceased person, is the personal representative. A personal representative is defined in **section 3** of the **Law of Succession Act** as the executor or administrator of a deceased person. An executor is defined as a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. An administrator is a person to whom a grant of letters of administration has been made. Since the deceased in this cause died intestate, do the applicants answer to the description of administrators?

They do not and to that extend, they lack *locus standi* to bring an application to preserve the estate of the deceased. Not even the respondents can bring such application until they are issued with a grant of representation. I may only add, as a warning to the 1st applicant, that there is no authority to distribute or apply any income from the deceased person's estate until there is a grant of representation, whether confirmed or not.

If the applicants are of the view that there is intermeddling by the respondents with the estate before the issuance of the grant, their recourse is **section 45** of the **Act**, namely make a report of the matter to the police under **sub-section 2(a)** or wait until the grant is issued to seek accounts. Of course **Rule 60** of the **P & A Rules** to which counsel for the respondents referred is not applicable as it deals with situation where there is an application other than a petition. The procedure of challenging a petition for grant can either be by the entry of a caveat or filing of an objection, answer to the petition and cross-application. An objection however, can only be lodged after the cause has been gazetted.

The present objection has been brought prematurely as there has been no notice of it by way of gazettelement or otherwise. The cause must immediately proceed to gazettelement. See **Rule 7(4), 15 and 17** of the Probate and Administration Rules.

I come to the conclusion that there is no merit in this application and dismiss it. However, in the exercise of the discretion donated by **section 47** of the **Law of Succession Act**, it is ordered that pending the finalization of this cause, M/S NYAKACH COMMERCIAL INSURANCE AGENCY shall continue to collect rent from the two properties in question and bank the same in an interest earning joint account to be opened in the names of the applicants and the respondents to be facilitated by counsel for both sides.

I make no orders as to costs.

**Dated, Signed and Delivered at Nakuru this 7<sup>th</sup> day of May, 2010.**

**W. OUKO**  
**JUDGE**