



REPUBLIC OF KENYA
HIGH COURT NAKURU
SUCCESSION CAUSE 290 OF 2007

**IN THE MATTER OF THE ESTATE OF SERPHINE ANYANGO ANDURU &
EMILY AKOTH ANDURU.....ADMINISTRATORS/RESPONDENTS**

AND

IN THE MATTER OF ANGELINE ANDURU & 2 OTHERS.....APPLICANTS

RULING

The brief background to the matter before me is that the deceased in this cause was survived by five widows, several children and five (5) grandchildren. He left several assets.

Initially the last two (2) widows had obtained letters of administration in respect of the estate. The first three (3) widows moved the court with Summons for Revocation and by consent it was agreed that four (4) of them be joint administratrix of the estate. That grant was issued on 5th May, 2008 and is long overdue for confirmation.

The widows are, however, divided. The borne of contention is the account arising from rent received by an estate agent in respect of the deceased person's houses.

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Indeed on 5th May, 2008 this court (Mugo, J.) recorded a consent in which the parties agreed, *inter alia*, that the estate agents do file a statement of account of all the rents collected by themselves on behalf of the estate since the death of the deceased to date. The estate agent through Masese & Nyamwange Advocates, filed a statement of account on 23rd June, 2008 as ordered.

It is also clear from the record that on 7th July, 2008, Mr. Orege, learned counsel for the respondents told the court that he needed time to clarify certain aspects of the statement of account. The matter was stood over, as a result, to the 21st July, 2008. But before the issue of accounts was concluded, the instant application was brought by Serphine Anyango Osumba, the 5th widow and Emily Akoth Okongo, the 4th widow. They are seeking, in that application, two substantive prayers namely:

- i) that Rosgret Management Consultants and General Commercial Agency be ordered to stop collecting rent from properties Nos. NJORO/NGATA Block 1/860 and RACETRACK Block 1/833.**
- ii) That the firm of M/s. Rodi, Orege & Company Advocates be disqualified from the conduct**

of this matter.

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The application is premised on the grounds that the agent has failed to give an accurate account of the rent received from the two properties; that the agent's rate of commission is higher than that ordinarily charged in

Nakuru; that the agent has failed to maintain the properties; that the firm of M/s. Rodi, Orege & Company Advocates having acted for the family of the deceased would not be objective in handling this matter on behalf of some members of the family.

The application is opposed. Angeline Mukhanyi Aduru, the 1st widow, has on behalf of the 2nd and 3rd widows sworn an affidavit in reply in which she avers that the application has been made in bad faith; that the agent had been engaged by the deceased before his death; that the agent has diligently collected the rent and deposited the same in the parties' joint account; that the applicants themselves have also been collecting rent from the estate and dealing with them secretly and are yet to account; that the firm of Rodi, Orege and Company Advocates has never acted for the respondents but infact was the deceased person's advocate.

I have considered these submissions.

The application raises only two broad issues to be determined. First, whether the court terminate the services of Rosegret Management Consultants & General Commercial Agency and secondly whether the firm of Rodi, Orege & Company Advocates should be disqualified from acting for the respondents.

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On the first question, the immediate answer is that the grounds upon which it is based are doubtful. For instance the applicant claim that the agent has failed to give a proper and true account; that the agent has been receiving higher rents than those declared in the statement of account; that the agent's commission is higher than the standard charged in Nakuru. None of these averments are backed with any form of evidence, for instance, to show the actual rent collected from which tenant for which period as opposed to what is declared in the statement of account. Similarly the source of information as to the standard rate of commission chargeable by agents in Nakuru has not been disclosed or even evidence of the actual existence of such standard rate.

What has cause me some concern is the fact that the agent having filed the statement of account as ordered by consent of the parties and even before they have appeared before the court for the purpose of confirming the status of the accounts, the applicants rushed to file this application. The parties having agreed that accounts be taken, that route ought to have been exhausted.

The acts complained of, constitute intermeddling with the estate as envisaged under Section 45 of the Law of Succession Act. Specifically Subsection 2(b) provides that:

“(2) Any person who contravenes the provisions of this section shall –

(a).....

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(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

For a person to be ordered to account, an allegation must be made that a specific asset or sum of money has been wasted or misapplied. The applicants ought to have sought the interrogation of the estate

agent over the statement of account instead of merely to have him discharged.

I turn to consider the second question, namely whether the firm of Rodi, Orege & Company Advocates ought to be disqualified. It is clear to me from the record that the firm of Rodi, Orege & Company Advocates has only acted for the deceased in two transactions, one involving the sale of NJORO/NGATA BLOCK 1/863 and another, in a criminal case in which the 4th widow – the 2nd applicant was charged (in C.M.CR.C.NO.1600 of 2005) with assaulting the deceased. I have not been shown which other transaction(s) the firm of Rodi, Orege & Company Advocates has represented the parties in this cause. The only thing I can think of which may have irritated the applicants is the transaction involving NJORO/NGATA BLOCK 1/863. The applicants had included the property as part of the deceased person's estate but learnt later from the buyer that it had been sold through a transaction drawn by the firm of Rodi, Orege & Company Advocates. The applicants concluded that the firm was not

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acting in good faith. But is that sufficient to deny the respondents their right to representation by counsel?

I was referred to **Delphis Bank Ltd V. Chatthe & 6 others**, (2005) 1 KLR 766 in which the law applicable in situations of possible conflict of interest was considered. The Court of Appeal in that case began by acknowledging the importance of a litigant's right to representation by counsel. It observed that in some cases, for example in civil litigation, this right may be put to serious test if there is conflict of interest which may endanger the equally important principle of confidentiality in advocate/client fiduciary relationship or where the advocate may be called upon to be a witness. The court went on to explain that there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation.

The test laid down in the above case, like in the previous and subsequent ones is whether real mischief or real prejudice will in all human probability result. Apart from judicial authorities, the Advocates Act in the proviso to Rule 9 of the Advocates (Practice) Rules, does not bar an advocate absolutely from giving evidence in a matter he may have dealt with so long as the evidence is a formal or non contentious matter of fact.

As the Court of Appeal in the **Delphis Bank Ltd** case (Supra) noted, the nature of the conflict of interest which may culminate in the

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advocate being called upon to take the witness stand must be disclosed. It has been deposed and not controverted that the firm of Rodi, Orege &

Company Advocates, apart from preparing the sale agreement, was not involved in the subsequent transaction leading to the transfer.

In a nutshell, the applicants have failed to show real mischief or real prejudice to warrant this court to deprive the respondents of their advocates of choice. For those reasons the application fails and is dismissed with costs. The only other matter I must conclude with is to urge the parties - all the widows to act maturely and in the interest of the estate. So much time and resources are being expended on side shows instead of proceeding to agree on distribution or making proposals on the same so that the grant may be confirmed.

DATED and DELIVERED at Nakuru this 25th day of September, 2009.

W. OUKO

JUDGE