



**In Re the Estate of Sheldon Oyalo Mukhaye (Deceased) (Succession Cause
81 of 2017) [2023] KEHC 20285 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 81 OF 2017**

CM KARIUKI, J

JULY 13, 2023

IN THE MATTER OF THE ESTATE OF SHELDON OYALO MUKHAYE (DECEASED)

BETWEEN

JULIUS OMBISI 1ST RESPONDENT

ANDREW OKWAKO 2ND RESPONDENT

WALTER OYALO 3RD RESPONDENT

AND

JAMES MUKHAYE OYALO APPLICANT

JUDGMENT

1. The estate herein relates to the estate of Sheldon Oyalo Mukhaye, who died on 5th March 1985. The current succession cause was instituted by the 2nd to 3rd Administrators before the Nakuru High Court. The matter was contested from its inception, and on 7th May 2010, the Court gave orders for the management and preservation of the estate. The Court appointed M/S Nyakach Commercial Insurance Agency to manage LR Nyahururu Municipality Block 6/ 428 and LR Nyahururu Municipality Block 4/35.
2. The 1st Administrator filed his summons for confirmation dated 11th July 2013 and outlined his preferred distribution mode. In contrast, the 2nd to 4th Administrators gave their preferred distribution mode in the summons for confirmation dated 22nd July 2009. The parties tendered evidence to justify their respective preferred mode of distribution.

1st Administrator's Submissions

3. The 1st Administrator stated that the evidence on record is clear that the 1st Administrator is the eldest child of the deceased. At the time of the deceased's demise, the 2nd - 4th Administrators were minors. All



- the deceased children, including the respondents herein, were raised and educated from the proceeds of the rent collected from the estate under the management of the deceased's wife, Karen Ayoma Oyalo, who is now deceased, with the help of the 1st Administrator.
4. He stated that the estate was under the management of Mamuka Agencies, who had been appointed by the deceased before his demise, and no evidence was tabled to prove that the 1st Administrator took over the management of the estate from the agent described above at any given time. Only after they finished their education and came of age did the three gang up against the 1st Administrator who had ensured that they were well taken care of, and they started demanding a share of and control of the deceased's estate. Before that, no one, including the deceased surviving wife, had raised an issue on intermeddling of the deceased estate by the 1st Administrator. The respondents further changed the agent to Nyakach Agency in the year 2009.
 5. It was argued that it could not be true that the 1st Administrator intermeddled with the estate of the deceased by collecting the entire rent from 1985 — 2010 and putting it to his use as alleged by the respondents. If indeed that was the case, then, where did the money for bringing up and educating the deceased children come from?
 6. Moreover, none of the surviving wives testified in Court to dispute the 1st Administrator's evidence that the children were raised from the income generated from rent. All the children, including the 1st Administrator, were living together as a family at the family house at Asian Estate, and this is where the 2nd -4th Administrators grew up until they finished their education under the care of Karen Ayoma and the 1st Administrator.
 7. The 1st Administrator questioned why they waited until they finished their education to ask for accounts of the rent dating from 1985 on money spent to feed, clothe and educate them, knowing very well that such an account would practically be impossible to render due to effluxion of time. Could the 1st Administrator and others who raised the children keep receipts and records of all expenditures, including food and clothing bought, bills paid to include hospital bills, etc.? He asserted that the prayer was made in bad faith to settle the family feud between the 2nd to 4th Administrators and the 1st Administrator. He noted that the other six children have not affidavits or testified in Court in support of the extraneous demands of accounts from 1985. It is worth mentioning that a similar prayer was made in an application dated 1/2/2009, and the same was not granted in the ruling delivered on 7/5/2010.
 8. The 1st Administrator noted that in the ruling by Justice W. Ouko, as he then was, delivered on 18/6/2012, the Judge held as follows on the alleged intermeddling "The misappropriation has not been proved but only suspected." Therefore, nothing has changed to date, and the allegations remain hot air.
 9. It was averred that the assets left by the deceased, including a Motor Vehicle, which is easily disposable, are intact to date, and none were sold by the 1st Administrators when the 2nd — 4th Administrators were minors. The allegations that the 1st Administrator borrowed a loan using the deceased title deed are false and malicious, and no evidence to that effect was availed in Court even after summoning the manager of Barclays Bank Ltd, where the loan is alleged to have been borrowed.
 10. The 2nd - 4th Administrators admitted having harvested mature cypress trees in August 2009 from the deceased plot at Asian Estate Plot No. 428 after they became of age and did not account for the proceeds from the sale of the mature trees. The 1st Administrator would have comfortably harvested these trees if he had all intentions of intermeddling with the estate. That the respondents forcefully took over the management of the rental plot at Asian Estate in collusion with their appointed agent M/S Nyakach Agency who admitted that he stopped collecting rent from the plot in the year 2013.



- The 1st Administrator confirmed that the plot has tenants, and the 2nd — 4th Administrators have been collecting rent.
11. The 1st Administrator contended that the agent has been sharing out rent collected from the estate with the 2nd — 4th Administrators and that we were lucky to get evidence through a document filed by error by the agent in Court confirming payment of Kshs 10,000/- to one Walter Oyalo and Julius Ombisi on 20/12/2013. On being cross-examined on this expense, the agent termed it as a loan and that the records filed by the agent do not show that the said amount was ever refunded to the estate by the two.
 12. The 1st Administrator also complained of misappropriation of the monies collected by the agent and false entries in the name of John Rotich, who was said to be a watchman collecting Kshs 7,800/- per month. The agent did not produce an employment contract for this particular employee, and the 1st Administrator maintained that the tenants occupying the rental premises in town lot 35 are responsible for their security and no watchman was ever employed to guard the property. It was asserted that efforts to have the person summoned in Court to testify were futile after the agent declined to receive his summons because he was unknown to him.
 13. He submitted that the above confirms that the agent has been making payments since 2010 to the respondents from the rent collected from the estate and falsifying his records to conceal the payments.
 14. The 1st Administrator averred that the agent filed a document dated 26/7/2022 after the 1st Administrator insisted on a comprehensive statement on the total amount collected and banked from May 2010, and the following anomalies were noted from the said document: -
 15. The only amount banked in the account opened in the names of the advocates for the rent collected from June 2010 - May 2022 is Kshs 1,919,700 only. (12 years)
 16. The total amount alleged to have been collected from the two plots between -June 2010 — May 2022, a period of 12 years, is Kshs6594,940/= only.
 17. The same agent claims that the Administrator owes Kshs 3,205,000/- for the same period being room rent No, 10. This debt is half what he claims to have collected from the two plots with over 15 tenants for the same period. This is not practical.
 18. He argued that if at all the 2nd — 4th Administrators in their capacity as Administrators of the estate, feel that the 1st Administrator owes the estate rent, the most appropriate thing would have been to file a suit for eviction or recovery of rent before the Business Premises Rent Tribunal which has exclusive jurisdiction to deal with such disputes and that the claim cannot be adjudicated upon before this Honourable Court.
 19. He submitted that this honourable Court lacks jurisdiction to make a determination for recovery of the alleged outstanding rent or on issues of a tenancy touching on the 1st Administrator or any other beneficiary as such a dispute should be adjudicated before the Business Premises Rent Tribunal. There is no written tenancy agreement between the 1st Administrator and the respondents as he was never a tenant in the very 1st instance. If a tenancy was created through the Court order of 13/7/2016, the same is a controlled tenancy under Section 2 of CAP 301. Reliance was placed on the case of Beatrice Nduta Kiarie v John Mwangi Thuo, where the Court held as follows: -

“From the provisions mentioned above of the law, it is clear that it is the Tribunal established under Section 11 of the Act which has original jurisdiction to determine whether or not a given tenancy is controlled and to make orders for recovery of possession and payment of arrears of rent and mesne profits.”



Further, *Section 12*, as read with *Section 15*, shows that the tribunal is the one clothed with original jurisdiction to hear and determine this dispute regarding a controlled tenancy. "

20. The 1st Administrator contended that the rent charged at Kshs 22,500/- per month is disputed, and from the statements supplied by the agent, it is the highest rent chargeable on all the tenants occupying the premises. The rent is backdated to the year 2010 though it is said to be charged based on the ruling of 13/7/2016 by Justice Ndungu. The law does not apply retrospectively. That the explanation given that the 1st Administrator occupies four rooms is false as the statements by the agent clearly show that his name is listed against room No: 10 only and not four rooms as alleged.
21. It was asserted that the proposal by the respondents is actuated by greed and malice and is aimed at disinheriting three beneficiaries, James Mukhaye, Joel Mukhaye, and Harron Oyalo, who are not on good terms with the respondents, and he prayed for the same to be rejected as it goes against the spirit of the law and the Succession Act and urged the Court to distribute the estate as proposed by the 1st Administrator. Reliance was placed on *Grace Muthoni Ndilinyei v Charles Gitonga Muriuki* [2009] eKLR
22. Regarding costs, the 1st Administrator averred that they are agreeable to the proposal by counsel for the respondents that the same be paid from the amounts held at KCB Bank upon taxation by the Deputy Registrar, as both parties have incurred litigation costs.

2nd - 4th Administrators' Submissions

23. The 2nd – 4th Administrators urged the Court to be guided by the list of beneficiaries as stated by the 2nd 3rd Administrators as per Section 29 of the *Law of Succession Act*. They stated that in his list of beneficiaries, the 1st Administrator omitted the names of the widows and concentrated on the children of the deceased.
24. It was stated that it is evident from the parties' evidence that the deceased was operating a workshop business at the time of his death. In addition, he was collecting rental income from LR Nyahururu Municipality Block 6/ 428 and LR Nyahururu Municipality Block 4/35. Upon his demise, the 1st Administrator took over the workshop business and the collection of the rental income, and according to the 1st Administrator, he used to apportion the rental income collected to the four houses of the deceased.
25. They contended that the 1st Administrator did not tender any evidence to prove the said apportionment of the rental income. It was the 4th Administrator's evidence that he was unaware of such apportionment of the rental income and did not benefit from it. The 1st Administrator collected the said rent up to the time when the Court appointed M/S Nyakach Commercial and Insurance Agency.
26. They stated that the 1st Administrator contended that he was using the rental income to maintain the deceased's children and wives. However, he did not tender any evidence to prove such expenditure. In any case, as rightly held by Justice Ouko, the 1st Administrator did not have the authority to distribute and apply the deceased's income.
27. They asserted that the 1st Administrator should be held to account for the rental income collected from March 1985 to May 2010. That from the statement of account for July 2010 (found in the bound booklet filed by Nyakach Commercial & Insurance Agency) indicates that the town plot had a rental income of Kshs 38,810/-. That this was the rental income that the 1st Administrator was collecting before Nyakach Commercial & Insurance Agency took over the management of the town plot.



28. That the statement of account for July 2010 indicates that the residential plot had a rental income of Kshs 7,650/-. This is the rental income that the 1st Administrator was collecting before Nyakach Commercial & Insurance Agency took over the management of the town plot.
29. The 4th Administrator produced County Council of Laikipia demand notes for land rates, which indicated a huge outstanding bill for land rates that were long overdue. Despite collecting the rental income, the 1st Administrator did not deem it fit to pay the said land rates, proving that he was after personal gain from the estate. It is thus submitted that the 1st Administrator intermeddled with the estate by misappropriating the rental income. In the circumstances, his share in the estate should be considerably reduced.
30. They contended that the 1st Administrator admitted that he took over the deceased's workshop business, which he is operating up-to-date. The 1st Administrator did not tender an account of the income realized from the said business. It would thus imply that he was operating the said business for his gain, which amounted to intermeddling with the estate. This state of affairs should be considered in reducing the 1st Administrator's share in the estate.
31. It was the evidence of Christopher Kageri (for Nyakach Commercial & Insurance Agency) that when he took over the management of the town plot, he found the 1st Administrator operating the front shop and four other shops on the back side. The agent was categorical that only the 1st Administrator had been occupying and using the commercial rooms in the town plot. The 4th Administrator corroborated this fact.
32. It was argued that the court order of 13th July 2016 mandated the 1st Administrator to pay rent for the commercial premises he has been occupying. The 4th Administrator stated that in compliance with the 29th September 2016 orders and consultation with Nyakach Commercial & Insurance Agency and the 2nd and 3rd Administrators, the rent was set at Kshs 22,500/- per month for the commercial premises that the 1st Administrator was occupying. The 1st Administrator admitted that he did not contest the said rent, despite being given demand letters by Nyakach Commercial Insurance Agency and Ndegwa Wahome & Co. Advocates demanding payment of rent arrears.
33. The 1st Administrator was further served with a proclamation notice by Classic Auctioneers, and he did not challenge the rate applied for his monthly rent. The 1st Administrator rushed to Court and sought an injunction to stop the distress for rent arrears. However, he did not institute any proceedings before the Business Premises Tribunal to challenge the monthly rent of Kshs 22,500/-.
34. The 1st Administrator admitted that he has never paid any rent for the commercial premises that he has been occupying in the town plot. The 1st Administrator admitted that at one time, his Advocate (through a letter dated 30th August 2016) had proposed paying rent at the rate of Kshs 4,000/- per month. However, he did not even attempt to make good the offer. In his statement dated 26th July 2022, Christopher Kageri (for Nyakach Commercial & Insurance Agency) indicated that the rent arrears from the 1st Administrator stood at Kshs 3,232,500/-. Therefore, the 2nd- 4th Administrator urged the Court to consider this figure and note that the said arrears of rent have continued to accumulate since August 2022. The total arrears of rent due from the 1st Administrator should be set off against his share in the estate.
35. Reliance was placed on *In the Matter of the Estate of Alloyce M. Obiero (Deceased)* [2011] eKLR
36. The 4th Administrator produced green cards for LR Nyahururu Municipality Block 6/ 428 and LR Nyahururu Municipality Block 4/35. The encumbrances sections of the green cards indicate that they were charged on 12th May 1992 and 8th September 1992, seven years after the deceased's death. The 1st



- Administrator was at a loss to explain how he charged the said properties seven years after the deceased's death and without lawful authority. This is another instance of the intermeddling of the estate that the 1st Administrator was committing.
37. The Administrators submitted that the deceased's assets are listed in the 2nd to 4th Administrator's summons for confirmation dated 22nd July 2009. That the 2nd to 4th Administrators have given their preferred mode of distribution, which the 4th Administrator justified. We urge the Court to find that the said distribution mode is fair under the circumstances.
 38. The values of the land parcels that comprise the estate were ascertained by filing valuation reports. Regarding the parcels of land in Bunyore are concerned, the parties agreed to set their values at 2,800,000/- and Kshs 700,000/- respectively. The cash at the bank is as per the statement produced by Nyakach Commercial & Insurance Agency.
 39. They submitted that the 1st Administrator's mode of distribution is not tenable more so taking into account that he has for some years grossly misappropriated the income of the estate. In addition, the proposed mode of distribution is discriminatory. In all fairness, the mode of distribution proposed by the 2nd to 4th Administrator is reasonable and equitable under the circumstances. Thus, they urged the Court to confirm the grant regarding the said distribution mode.
 40. In conclusion, the 2nd to 4th Administrators stated that it is in the interest of justice for the estate to pay the legal fees before the beneficiaries get their respective shares. The appropriate order would be for the legal fees for the two law firms to be taxed by the Deputy Registrar and deducted from the amount held in the bank account opened in the joint law firms' names of the parties' Advocates that the balance of the amount should then be distributed to the beneficiaries.

Analysis And Determination

41. The issue for determination by this Court is on the proposed mode distribution of the estate, which ought to be adopted for the distribution of the deceased's estate.
42. It is not disputed that the deceased herein died intestate on 5th March 1985.
43. During his lifetime, the deceased had been married to 4 wives, 3 of whom he had separated from, and they remarried while one passed away on 2nd August 2005. He also left behind ten children as follows:-1st House James Mukhaye 2nd House Joel Mukhaye Julius Ombisi 3rd House Leah Nanga Naomi Oyaloe Andrew Okwalo 4th House Edinah Oyalo Harun Oyalo Walter Oyalo Sheldon Mukhaye
44. I, therefore, find that the ten children mentioned above are the legal beneficiaries to the estate of the deceased and thus entitled to his estate as per Section 40 as read with Section 38 of the [Law of Succession Act](#).
45. The deceased left behind the following assets:-LR Bunyore/Emakunda/117 – 1.9 acres LR Bunyore/Emakunda/617 – 0.3 acres LR No Nyahururu Municipality Block 4/35 LR No Nyahururu Municipality Block 6/428 One vehicle- a Pick-Up Plate No. KSQ 258 Monies at the Bank account in KCB Bank
46. The 2nd to 4th Administrator also includes plain machine sup tool, lantin machine batch no. LX 36, saw machine SC 300, 2 singer machines, furniture filing machine 2800, 3 pieces clab, fridge 6 x 3 (3ft), and office cabinet, tables, and chairs as part of the deceased estate, but I will decline to include these items as part of the deceased's estate. I agree with the 1st Administrator that the deceased, having died in 1985, the existence of these items may have been overtaken by events, and in any case, the 1st Administrator denies their existence. Indeed, no proof has been submitted to prove their existence.



47. I did not find evidence of any available monies belonging to the deceased from Barclays Bank – Nyahururu Branch, Standard Chartered Bank – Nakuru Branch, or Post Bank – Nyahururu Branch.
48. In the premises, I find that the deceased's assets that are available for distribution include:-LR Bunyore/Emakunda/117 – 1.9 acresLR Bunyore/Emakunda/617 – 0.3 acresLR No Nyahururu Municipality Block 4/35LR No Nyahururu Municipality Block 6/428One vehicle- a Pick-Up Plate No. KSQ 258Monies at the Bank account in KCB Bank
49. The 2nd to 4th Administrators insisted that the 1st Administrator account for intermeddling with the estate from 1985 when the deceased died to 2010. They asserted that he had misappropriated the estate's funds, particularly regarding the two rental properties in Nyahururu. On the other hand, the 1st Administrator argued that it could not be true that he intermeddled with the estate of the }deceased by collecting the entire rent from 1985 to 2010 and putting it to his use as alleged by the respondents. He stated that he utilized the money with Karren Ayoma (now deceased) to bring up and educate his siblings and pay off the loans the deceased had left. I will give the 1st Administrator the benefit of the doubt in that I find evidence that he used the monies from 1985 to 2010 to care for the family. Therefore, it is unreasonable to ask him to account for such expenses.
50. Being a very old matter that has unfortunately gone several decades without proper administration of the estate, I find myself in a difficult situation. It is my finding that the 1st applicant certainly had no authority to distribute or apply any income of the deceased's personal estate until there was a grant of representation. This issue must now come to rest in view of finding a lasting solution to the distribution of the deceased's estate. Moreover, it appears that even after the Court had made orders as to the temporary administration of the estate, such administration has still been marred with suspected misappropriation and wastage of the estate from both parties as per their allegations.
51. It is evident that the Administrators of this estate have grossly engaged in incessant fights and ego trips at the expense of administrating the estate. The Court addressed the issue in its ruling dated 13th July 2016, wherein it stated that the Administrators had forgotten that they had a duty to act collectively in the estate's interest and that there had never been a sense of urgency to administer the estate herein.
52. It is my considered view that the protracted dispute between the beneficiaries of the estate must now come to an end. It has been 38 years since the deceased died. The Administrators, having been unable to come to a mutually agreeable and acceptable mode of distribution, it is left to the Court to ensure the equitable and fair administration of the estate. The Court in *Re Estate of John Musambayi Katumanga – Deceased* [2014] eKLR held as follows: -
- “The spirit of Part V, especially Sections 35, 38, and 40, is on equal distribution of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is 'equally' as opposed to 'equitably.' This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall ... be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender, and financial status of the children.”
53. Moreover, it has previously been held that:-
- The Court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate. the



relationship between the deceased and his beneficiaries and the age of the beneficiaries may well determine the mode of distribution to attain fairness.

54. It is thus my holding that since the income from the rental properties in LR No Nyahururu Municipality Block 4/35 and LR No Nyahururu Municipality Block 6/428 has been the source of the incessant dispute among the brothers, it is unreasonable to think that the wrangles will end even if the Court makes an order appointing different agents to represent each of the families upon distribution. To end the disputes and to curtail any future disputes and in light of the need for the due and proper administration of the estate, it is only reasonable that these properties should be sold, and all the proceeds acquired from the sales should be shared equally among the ten children.
55. Thus, court orders;
- a. The rental properties in LR No Nyahururu Municipality Block 4/35 and LR No Nyahururu Municipality Block 6/428 shall be sold, and all the proceeds acquired from the sales shall be shared equally among the ten children.
 - b. Any rent arrears claimed from any of the beneficiaries should be pursued in the proper avenue.
 - c. The monies available regarding the rental properties from Nyakach Agencies and any monies held at KCB Bank shall be used to settle the advocates' bills after taxation by the Deputy Registrar and any expenses the estate may incur while conducting the aforementioned sales. Any balance remaining shall then be divided equally amongst the ten beneficiaries.
 - d. Further, I order the vehicle- a Pick-Up Plate No. KSQ 258 shall be sold, and the proceeds be shared equally among the ten beneficiaries.
 - e. As for LR Bunyore/Emakunda/117-1.9 acres and LR Bunyore/Emakunda/617 - 0.3 acres. It is hereby ordered that the same shall be distributed equally among the ten beneficiaries.
 - f. Parties to bear their own costs.
 - g. There be liberty to apply.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 13TH DAY OF JULY 2023.

CHARLES KARIUKI

JUDGE

