

UGANDA / JUDGMENT

**In Re: Estate of Sheikh Mohamed Bin Ali
Bin Saad El Mandiry (Deceased) (Cause No.
10 of 1933) [1938] EACA 172 (1 January 1938)**
[1938] EACA 172

COURT

East African Court of Appeal

BEFORE

Lucie-Smith, J. (Kenya)

CASE / FILE NUMBER

Cause No. 10 of 1933

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PROBATE AND ADMINISTRATION

Before LUCIE-SMITH, J.

**IN THE ESTATE OF SHEIKH MOHAMED BIN ALI BIN SAAD. EL-MANDIRY
(Deceased)**

Cause No. 10 of 1933

Practice—Application by an Administrator for release—Originating Summons—Order XXXIV, Rules 1 and 2.

Held (25-11-39).—That the proper procedure is by way of Originating Summons and not by way of Petition or Notice of Motion.

Bryson for Applicant.

Inamdar, Budhdeo and A. B. Patel for Respondents.

RULING.—This is an application by the Administrator of the estate of Sheikh Mahomed bin Ali bin Saad deceased that he be released from his appointment as Administrator de bonis non of the said estate.

There is also a petition on the file by the Public Trustee asking that he the Public Trustee be granted Letters of Administration to the said estate—but with that petition we are not at present concerned.

Mr. Inamdar for one of the respondents to the application has in limine objected to the procedure adopted. Mr. Inamdar argues that the application should be by way of petition by a third party in this case the Public Trustee—such petition being duly verified and not by way of notice of motion. Mr. Patel for another respondent associated himself with Mr. Inamdar's contention.

Mr. Budhdeo at first found himself unable to associate himself with Messrs. Inamdar and Patel but subsequently saw the light and fell into line.

Mr. Bryson for the applicant argued that the proper procedure following the English practice is by way of Originating Summons A. P. (1939) 2601. In view of our Order XXXIV, Rule 1 (g) and Rule 2, I am of opinion that Mr. Bryson's contention is the correct one more especially in view of the fact that our Order is taken from the English Rules. I think that Mr. Budhdeo put his finger on the spot when he pointed out that this application is not for revocation but release. $\mathcal{M} \rightarrow \mathcal{M} \mathcal{A}^{\pm}$

Having come to the above decision I find myself in a difficult position as the procedure successfully contended for by Mr. Bryson has not been followed by him, he having come by way of notice of motion and not by way of originating summons.

The respondents having failed in their preliminary contention as to procedure and the applicant though successful in his argument having failed to adopt the procedure for which he argued I think that there should be no order as to costs.

The notice of motion will be struck out, the applicant to be at liberty to take such further proceedings as he may be advised.

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