



**In re Estate of Joseph Mbugua Kihara (Deceased) (Succession Cause E1247 of 2022) [2023] KEHC 18355 (KLR) (Family) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18355 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE E1247 OF 2022  
PM NYAUNDI, J  
APRIL 28, 2023  
IN THE MATTER OF THE ESTATE OF JOSEPH MBUGUA KIHARA  
(DECEASED)  
CITATION TO ACCEPT OR REFUSE LETTERS OF  
ADMINISTRATION INTESTATE RULE 21 CAP 160 LAWS OF KENYA**

**RULING**

1. The Citee herein filed a notice of preliminary objection dated November 28, 2022, to the citation dated July 21, 2022 on the following grounds:
  1. That this Honorable Court has no jurisdiction to determine this matter as the deceased was last domiciled at Muranga County and neither did he have properties at Nairobi County.
  2. The Assistant Chief's letter dated December 1, 2021 is from Mau Narok Location, Gatimu Sub Location, Njoro within Nakuru County, therefore this Honorable Court has no geographical jurisdiction to determine this matter.
  3. The cite/ Objector is the only wife to the deceased and therefore the citor lacks any right to inherit or even claim anything from the estate and thus lacks the Locus Standi to petition for letters of administration intestate
  4. That the citation is incompetent and an abuse of the process of the Court.
2. The parties agreed to canvas the application by written submissions. The Citee filed submissions dated February 6, 2023. The Citor's submissions are dated February 9, 2023

**Citee's Submissions**

3. On lack of jurisdiction the Citee relies on the locus classicus decision in *Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd* 1989 and urges the Court to lay down its tools. The Citee contends that



the court lacks territorial/ geographical jurisdiction The Citee submits that the deceased hailed from Samuru Location, within Kandara Constituency within Muranga County and this is where he resided and that all his properties are within Kiambu and Muranga County. And relies on Section 49 of the [Law of Succession Act](#)

4. In addition, the Citee states that this Court lacks the pecuniary jurisdiction to hear the Citation given the value of the deceased's estate.
5. The Citee also contends that the Citor lacks the locus standi to present the citation as she is not a wife as is alleged, having presented a letter from the Chief as proof of marriage. The Citee relies on the decision in [Njoki Vs Mathara and others](#) Civil Appeal No 71 of 1989

#### **Citor's Submissions**

6. On territorial jurisdiction, it is submitted that the Court has jurisdiction as the property of the deceased is evenly distributed across different counties and that the high Court in Nairobi was seen as being centrally located.
7. On *locus standi* the citor contends that she is a wife of the deceased having solemnised the marriage under Kikuyu Customary law and relies on Section 40(1) of the [Law of Succession Act](#) and the decision in [Hortensiah Wanjiku Yawe Vs The public trustee](#) Civil Appeal No 13 of 1976 and [Anne Munini and Another V Margaret Nzambi](#) Civil Case No 751 of 1977.
8. It is further submitted that the Children of the citor are the children of the deceased and therefore entitled to inherit from the deceased.

#### **Analysis and Determintion**

9. Having considered the pleadings filed herein alongside the submissions, I discern the following as the issues for determination.
  1. Whether this Court should allow the Preliminary objection as presented by the Citee?
10. The Preliminary objection rests on 3 legs. The first and second challenge the pecuniary and territorial or geographical jurisdiction of the Court.
11. The locus classicus on jurisdiction is the celebrated case of [Owners of the Motor Vessel "Lilian S" vs Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows: -

“I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs it stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

“.....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”



12. A court's jurisdiction flows from either the *Constitution* or legislation or both. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia vs KCB & 2 Others*, Civil Application No 2 of 2011 stated thus: -

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

We agree with Counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

13. The *Law of Succession Act* in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

14. The Citor argues that the matters should have been filed in the Magistrate's Court given the location of the properties and their value. In the absence of a comprehensive list of the properties and an evaluation report it is impossible for the Court to determine the veracity of this assertion given that it is contested by the Citor.

15. That however is neither here nor there as the Court has unlimited jurisdiction as provided for under Section 47 of the *Law of Succession Act*.

16. On the remaining limb of the Preliminary objection, The Citee urges that the Citor lacks locus standi as she is not a wife of the deceased.

17. Rule 22(1) of the *Probate and Administration Rules* provides that:

“A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.”

18. Rule 22 is clear as to who is entitled to file a citation; that person must be of equal or the next in priority to the person cited. In *Josiah Muli Wambua* [2014] eKLR, Hon Musyoka, J explained that:

“In intestacy, citations issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in



moving the court in that behalf. The citor should not be a person who has himself already applied for the grant, for the citor should only apply for grant after the citee fails to so apply.”

19. As Olga Sewe J observed in *In re Estate of Kiprono Arap Misoi (Deceased)* [2021] eKLR

(11) For purposes of the citation, it is sufficient for the applicant to show that she has a bona fide interest in the estate of the deceased to prompt the respondent to action. Hence, rather than seek to challenge the alleged interest of the applicant in the Citation, the respondent ought to have filed a substantive petition for grant; for it is in such a petition that all the issues raised herein can be validly canvassed. The scope of a citation, to my mind, is limited and therefore cannot be the forum for determining the respective claims and identities of the beneficiaries. As was aptly stated by Hon Sitati, J in *John Osicho v Hana Omolo Osewe & Another* [2013] eKLR

“ A Citation is a document issued by the Probate Registry, whereby the person being the claimant (Citor) calls upon the person cited (Citee) to provide a reason why a particular step should not be taken; ... Citations occur in both contentious and non-contentious probate. In non-contentious Probate, they serve the purpose of bullying along or fast tracking the issue of a grant of letters of administration.”

20. Relying on the above authorities the preliminary objection must also fail on the 3<sup>rd</sup> limb. The question of the existence of a marriage between the citor and the deceased can only be determined in the main petition. Likewise, the question as to whether the deceased was the father of the children of the Citor and whether they are his dependants as provided for under the *Law Succession Act*

21. Finally applying the test in the celebrated decision of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F where Law JA (as he then was) had this to say:

.... A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

22. And at page 701 paragraph B-C Sir Charles Newbold, P added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....

23. I find that the Preliminary Objection as framed does not meet the threshold laid down in the *Mukisa* case, for this reason, the Preliminary objection fails and is dismissed with costs to the citor.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2023.**

**P M NYAUNDI**  
**JUDGE**



**In the presence of:**

..... Advocates for the Applicant

..... Advocates for the Respondent

Karani Court Assistant

