



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ndegu v Oluoch & another (Civil Appeal E037 of 2022)  
[2023] KEHC 25745 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25745 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E037 OF 2022  
DO OGEMBO, J  
NOVEMBER 23, 2023**

**BETWEEN**

**FRANCIS AYORO NDEGU ..... APPELLANT**

**AND**

**NASHON OLWANDE OLUOCH ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MACKKEY OUKO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. S.W. Mathenge, delivered on 24th August 2022, in Bondo Succession Cause No. 92 of 2019 dated 24/8/2022)*

**JUDGMENT**

1. This cause started off as a citation filed by Nashon Olwande Oluoch, (Citor) seeking that Francis Ayoro Ndege and James Mackey Ouko (Citees) be directed to enter an appearance to accept or refuse letters of administration of all the estate of the deceased Jared Mbori Adero, or show cause why the same should not be granted to Nashon Olwande Oluoch, the Citor. The trial magistrate having heard the parties, made the following finding: -

“Having stated the purpose of a citation is to kick start the administration process, I find that there is need to do the same to avoid wasting of the state of the deceased. The issue of how many parcels of land left behind by the deceased or if the said Erasto Odongo was the son to the deceased or not are best to be canvassed in the petition and not in the citation cause. Accordingly, I allow the citation application and grant leave to the citor Nashon Olwande Oluoch to forthwith petition the court for grant of letters of administration intestate in respect of the estate of Jared Mbori Adero (deceased) in full compliance with Section 51 of the *Law of Succession Act* and the same be filed within 14 days from the date hereof.”



2. This is the ruling that the Appellant Francis Ayoro Ndegũ, one of the named citees has appealed against. In the Memorandum of appeal filed on 30/8/2022, the appellant has listed the following grounds of appeal: -
  1. That the Honourable magistrate erred in law and fact by incorrectly applying the law relating to *Succession Act*, and legal test on the case and issues before her and thereby arriving at an erroneous finding.
  2. That the Honourable magistrate erred in law and fact by making a substantive decision on the citor's case on a mention date contrary to the law.
  3. That the Honourable magistrate was biased in her decision making.
  4. That the learned trial magistrate erred in law and fact refused to allow the wife and son of the deceased to take letters of grant and instead gave the order to a stranger contrary to Section 29 of the *Succession Act*.
  5. That the learned trial magistrate erred in law by failing to observe Article 47 and 50 of the *Constitution* thus denying the wife and son of the deceased who were present in court, a chance to be heard even after written protest from the citor Advocate.
  6. That the Honourable magistrate ignored the solid documents /Affidavits filed by the Citors and their witnesses.
  7. That the decision was against the weight of evidence.
  8. That the learned magistrate did not consider the contradictions in the citors case and thus arrived at an unjust decision.
3. The appellant prays that this appeal be allowed and the appellant and the family of the deceased be allowed to take out letters of administration and that the citees case be dismissed with costs.
4. The parties canvassed this appeal by way of written submissions. The appellant submitted that the property in question is Siaya/Omiya/Mwalo/412, and that the property should be administered by one Erasto Odongo who to now has the capacity to administer the estate unlike the previous instance when his father appointed the appellant who was a minor. That Section 66 of *Cap 160* ranks the surviving spouse in priority of administration of the estate of her deceased husband and children second and equally.
5. That the deceased died intestate but left beneficiaries and that Section 39 of the *Act* only comes to force when the spouse and children of the deceased are not available. That in this case, the person with superior rights ought to take out a grant (*Maamun bin Rashid bin Salim El-Rubmy v Haider Mohammed bin Rashid El-Basmay*(1963) EA 438).
6. It was lastly submitted that the wife of the deceased was never allowed to give her testimony in court.
7. The Respondents on the other hand, have submitted that the Respondents are nephews of the deceased, Jared Mbori Adero. That deceased had no wife or child that survived him and so the Respondents are the only beneficiaries. That though the appellant, and James Mackay Ouko had the certificate of death of the deceased, they refused to take out grant of letters of administration over the estate of the deceased, leading to the filing of the citation by the Respondent.
8. The 1<sup>st</sup> Respondent filed the citation and served the appellant and James Mackay Ouko, but instead of accepting or refusing to take out the grant, the appellant resorted to giving explanations indicating that



- he is not the right person to do so. That the named Erasto Odongo Odino is a son to one John Odino Oluoch, a total stranger to the estate of the deceased (Kisumu Succession Cause No. 776/2008).
9. That this appeal is incompetent since the said order or decree of aggrieved was never extracted (*Ndegu Kamau T/A Sideview Garage v Fredrick Isika Kalumbo* [2016]eKLR).
  10. I have considered the submissions of both sides. I have also considered the ruling of the trial court which the appellants are aggrieved of. As rightly found by the trial court, a citation is to kick start the process of administration of the estate of the deceased so that that wastage of the same is avoided. And it becomes necessary where the party in priority to petition for grant of letters of administration of the deceased's estate fails to petition for such grant.
  11. Section 66 of the *Law of Succession Act*, Cap 160 declares those who may be in priority in taking out a grant of letters of administration of deceased's estate. It states that preference shall be given to the surviving spouse, other beneficiaries, public trustee and creditors.
  12. And Section 39 of the *Act*, dealing with a scenario where the deceased dies intestate with no surviving spouse or children, the order of priority is listed as: -
    - a. father, or if dead
    - b. mother, or if dead
    - c. brothers and sisters, and any children or children of deceased brother and sisters in equal shares, or if none
    - d. half brothers, half sisters and any child or children of deceased half brothers and half sisters, in equal shares, or if none,
    - e. the relatives who are in the nearest degree of consanguinity upto and including the 6<sup>th</sup> degree in equal measure.
  13. And that failure of all the above, the estate shall devolve upon the state and be paid to the consolidated fund.
  14. Opinions are divided on this matter, it is the case of the Respondents that they are nephews of the deceased. And that the deceased is neither survived by any spouse nor child. The appellant, however maintains that deceased is survived by a spouse and a child (minor). This is a fact that can only be proved when parties give evidence and are subjected to cross examination.
  15. It has however, not been denied by the appellant and James Mackey Ouko, that they are the ones who are holding and are in possession of the Certificate of death of the deceased. They were cited and dully served to either accept or refuse to take out the grant. They have chosen to do neither.
  16. The deceased herein died in 1987. His estate has remained with no administrator all this time. The Citer gave priority to the citees (appellants) to petition for grant. They have failed to take up that offer. In the circumstances, there is clear justification in the citor's Plea to be allowed to petition since the citees cannot be forced to petition for grant in a case they have maintained they are not the right parties to apply for the grant.
  17. I also see no prejudice that the appellant will suffer should the Respondents be appointed the administrators of the deceased's estate since their duties as administrators would be in accordance with the law and in the best interest of the beneficiaries of the estate.



18. The appeal of the appellants which seeks to overturn the orders of the trial court granting the Respondents the right to petition for grant herein, therefore does not have any merits whatsoever. This appeal is dismissed with costs to the Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**D.O. OGEMBO**

**JUDGE**

**23.11.2023**

**Court:**

Judgment read out in court in the presence of Mr. Mwamu and Mr. Omollo for the parties.

**D.O. OGEMBO**

**JUDGE**

**23.11.2023**

**Mr. Mwamu:**

Just in case, my client is dissatisfied, we ask for leave to appeal.

**Court:**

Leave to appeal is granted as prayed.

**D.O. OGEMBO**

**JUDGE**

**23.11.2023**

