



REPUBLIC OF KENYA



**In re Estate of John Oroo Oyioka (Deceased) (Succession Cause
1 of 2022) [2022] KEHC 14838 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 1 OF 2022
REA OUGO, J
OCTOBER 31, 2022**

BETWEEN

PAMELA OTIENO OKODE CITOR

AND

TERESA BITUTU OROO CITEE

RULING

1. This is Citation lodged by the Citor, Pamela Otieno Okode ('Pamela') in respect of Estate of John Oroo Oyioka (deceased). She cites Teresa Bitutu Oroo ('Teresa') requiring her to apply for and accept Letters of Administration Intestate in respect of the estate of the deceased in her capacity as the wife. Pamela in her affidavit sworn on August 27, 2021 listed the following as the beneficiaries of the deceased:
 - a. Teresa Bitutu Oroo – Widow
 - b. Pamela Atieno Okode – Widow
 - c. Catherine Moraa Oroo – Daughter
 - d. Julius Omambia Oroo – Son
 - e. Caroline Kwamboka Oroo – Daughter
 - f. Lillian Kerubo Oroo – Daughter
 - g. Solomon Nyakina Oroo – Son
 - h. BOO - Son
2. According to Pamela, Teresa failed to take out grant of letters of administration and therefore Pamela being the other wife of the deceased is desirous to take out grant of letters of administration. She advanced that she is unable to access money to pay for her son's school fees.



3. The application was opposed by Teresa who deposed that Pamela was not legally married to the deceased, as the deceased did not have the legal capacity to enter into another marriage as his marriage with Teresa was under the African Christian Marriage and Divorce Act. She also denied that the deceased did not have a son, BOO, with the Citor. Although the Citor filed a replying affidavit and further replying affidavit on November 17, 2021, both documents were neither dated nor signed.
4. The parties filed their respective submissions in respect to the application as directed by the court. The Citor submitted that she has an interest in the estate of the deceased by the verge that she is a dependent and a widow to the deceased. She has a child with the deceased who is of school going age and requires funds for his upkeep. She was listed as the 2nd wife in the obituary, and was considered a wife by the deceased' employer. *In the case of Josiah Muli Wambua – deceased*, Nairobi Succession Cause No 2557 of 2012 [2014] eKLR the courts stated:

“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.”

5. It was submitted that the Citor will distribute the estate equally among all the beneficiaries. She argued that the scope of a citation is limited and is not the forum to determine claims and identities of the beneficiaries. (See *John Osicho v Hana Omolo Osewe & Another* [2013] eKLR).
6. The Citee in her submissions identified the following issues for determination by the court: whether the citor was a spouse/beneficiary to the deceased and therefore entitled to act as an administrator.
7. It was submitted that the deceased did not have the legal capacity to marry because he had solemnized his marriage to Teresa on August 30, 1997 under the *African Christian Marriage and Divorce Act*, and the marriage was never dissolved. Reliance was placed on the case of *NLS v BRP* (2016) eKLR; *In Re Estate of BMR* [1997] eKLR and *M v RM* [1985] Eklr. In *Margaret Wanjira Mutbike v Janifer Wanjiru Njoka & 3 others* (2019) eKLR the Court of Appeal stated that the existence of a customary marriage must be established by the party who intends to rely on it. Had Pamela contracted a legal customary marriage with the deceased, they would have been issued with a certificate in accordance with section 55 (1) of the *Marriage Act* 2014. There was no evidence to corroborate the assertions by the Citor that the marriage took place in accordance to the customs of either the Citor or deceased. It was argued that the Citor is not a widow to the deceased and cannot act as the administrator of the estate save for purposes of safeguarding the interest of her child, BOO if he is found to be an eligible beneficiary following a DNA test. It was submitted that the Citor is not a wife, or former wife to the deceased and as such not a beneficiary of his estate.

Analysis and Determination

8. The only issue before the court is whether the Citor has established her case that is, whether she has an interest in the deceased's estate. 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.”
9. Under section 66 of the *Law of Succession Act*, in the event a person dies intestate, the court has final discretion on who shall take out a grant of letters of administration in the following order of priority; surviving spouse or spouses with or without association to other beneficiaries; other beneficiaries



entitled on intestacy with priority according to their beneficial interests as provided under part v; the public Trustee and lastly the creditor.

10. In this case, although the Citor has given sworn testimony that she was married to the deceased, the Citee objected to her assertion on grounds that the deceased did not have capacity enter into a marriage with Pamela as the deceased and Teresa were married under the *African Christian Marriage and Divorce Act* and had been issued with a certificate. However, I find that the question of whether or not Pamela was a wife or not is a matter that should be better resolved before the probate and administration court once a petition for grant of letters of administration has been filed.
11. The reason for filing of the citation according to Pamela was that BOO (the deceased's son who is a minor) is in need of school fees and it necessary therefore that a petition be filed and grant issued. *In re Estate of Kiprono Arap Misoi (Deceased)* [2021] eKLR the court was clear on the parameters of an application for citation.

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“(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.”

12. I am therefore satisfied that the Citor has made a good case for her quest to proceed and seek for letters of grant of the estate of the deceased. However, I note that the Citee responded to the citation and there is no dispute that Teresa ranks highest in regard to preference given in regards to taking out grant of letters of administration. There is no dispute that she was the deceased's wife. I therefore find that the Citee Teresa Bitutu do petition the court for the grant of letters of administration intestate to the estate of John Oroo Oyieko within 60 days from the date of this ruling. In the event that the Citee fails to comply with these directions, then the Citor shall upon expiry of 60 days, be at liberty to petition for the grant in accordance with the law and the relevant rules.
13. This being a family matter there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS IN BUNGOMA THIS 31ST DAY OF OCTOBER, 2022

R.E. OUGO

JUDGE

In the presence of:

Miss Mumbi for the Citee holding brief Mr. Morara



Citor – Absent

Ms Wilkister– Court Assistant.

