



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CITATION NO. E003 OF 2021

IN THE MATTER OF THE ESTATE OF KIPRONO ARAP MISOI (DECEASED)

IN THE MATTER OF AN APPLICATION FOR PRESERVATION OF THE ESTATE OF THE DECEASED

BETWEEN

TECLA CHEPCHUMBA.....CITOR/APPLICANT

AND

JEPKINYOR MISOI.....CITEE/RESPONDENT

RULING

[1] This ruling is in respect of the application dated **26 May 2021**. The said application was filed by the applicant pursuant to the provisions of **Rules 49, 63 and 73** of the **Probate and Administration Rules**, as well as **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; and **Order 40 Rules 1 and 4** of the **Civil Procedure Rules, 2010**. The applicant seeks orders that the Officer Commanding Station at Chepterwai Police Station do provide security and ensure observance of the orders issued herein on **22 March 2021** pursuant to the ruling delivered on **15 March 2021**. She also prayed that the costs of the application be provided for.

[2] The application was premised on the grounds that, pursuant to the ruling delivered on **15 March 2021**, the applicant was granted orders restraining the respondent, her agents and/or servants from interfering with her use of land **Parcel No. Nandi/Surungai/1**; and that, although a formal order was extracted and served upon the respondent and her advocates on **20 April 2021**, the respondent, through her sons and other relatives, has continued to deny her the right to use the said parcel of land; and has on several occasions sent away a tractor and farm hands hired by the applicant to plough the land. It is on that basis that she now seeks an order directing the OCS, Chepterwai Police Station, to provide her with security to enable her plough the land.

[3] The applicant annexed a copy of the Court's Ruling dated **15 March 2021** along with a copy of the Order issued on **22 March 2021**. She also exhibited a copy of the email communication between her counsel and counsel for the respondent as proof that the order was duly served.

[4] The respondent opposed the application. To that end a Notice of Preliminary Objection was filed herein on **5 July 2021** by which the Court was urged to strike out the entire Citation for having been filed in abuse of the process of the Court. The respondent took the posturing that the applicant lacks the requisite *locus standi* to bring the Citation and by extension the instant application.

[5] The application was canvassed by way of written submissions, in line with the directions given herein on **15 June 2021**. Thus, in his written submissions filed herein on **28 June 2021**, **Mr. Sambu** for the applicant relied on **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors** [1969] EA as to what ought to form the subject matter of a preliminary objection. He submitted that the respondent's preliminary objection does not seem to take into account the ruling delivered on **15 March 2021**. Counsel further submitted that the issue of *locus standi* in the circumstances of this case is a question of fact, and would require the examination of evidence for the Court to determine whether or not the applicant was married under Nandi customary law.

[6] It was further the submission of **Mr. Sambu** that, under **Section 22(1)** of the **Probate and Administration Rules**, 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. It was therefore his contention that the applicant is perfectly entitled to move the Court as she had done. He also mentioned that the applicant has already been granted injunctive orders which she is interested in executing; and added that under **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**, the Court has jurisdiction to make such orders as may be expedient and necessary for the ends of justice or to prevent abuse of the process of the court. Thus, **Mr. Sambu** urged the Court to dismiss the respondent's preliminary objection and to grant the orders sought by the applicant.

[7] On behalf of the respondent, **Mr. Sagasi** submitted that although the applicant introduced herself as the widow of the late **Tecla Jemeli David** (Deceased), who was the 1st wife of the deceased person, she is claiming the estate of **Kiprono Arap Misoi** (the deceased herein) through the estate of **Tecla Jemeli David**; and therefore, so long as she has not taken out limited or full grant of letters of administration, her citation and the subsequent proceedings are null and void. **Mr. Sagasi** relied on **Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga vs. Eliud Timothy Mwamunga & Sagalla Ranchers Limited** [2017] eKLR and **Patrick Kiseki Mutisya (suing as the personal representative of the Estate of Nzomo Mutisya (Deceased) vs. K.B. Shangani & Sons Limited & Others** [2012] eKLR for the proposition that the issue of *locus standi* is so cardinal that without it, the proceedings of the court would be null and void.

[8] It was further the submission of **Mr. Sagasi** that what the applicant seeks is tantamount to protection by the Court and encouragement for her to commit an offence under **Section 45(1)** of the **Law of Succession Act**. He relied on **Re Estate of David Julius Nturibi M'Ithinji (Deceased)** [2012] eKLR for a definition of intermeddling; and urged the Court to find that it includes making it impossible for an administrator to administer the estate of a deceased person. Counsel therefore posited that it is an act of impunity for the applicant to seek the Court's protection as well as the protection of the OCS to commit an offence of intermeddling with the property of the deceased. It was therefore the prayer of **Mr. Sagasi** that the Court finds merit in the preliminary objection and dismiss the Citation in its entirety.

[9] The preliminary objection basically questions the applicant's *locus standi* to bring not only the instant application but also the Citation itself. For purposes of citations, **Rule 22(1)** of the **Probate and Administration Rules** is explicit 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.”

[10] The applicant herein concedes that the respondent, **Jepkinyor Misoi**, is the one entitled to petition for grant in respect of the estate of **Kiprono Arap Misoi**; but that she has failed or neglected to so apply. The applicant further contends that she also has a right to the deceased's estate under Nandi customary laws; particularly the laws that recognize woman-to-woman marriages. There appears to be no dispute that the deceased had a first wife known as **Tecla Jemeli David** who is now deceased. That is the person the applicant contends she was married to under the arrangement of woman-to-woman marriage; granted that **Tecla Jemeli David** was childless.

[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] And, 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.”

[13] I therefore entertain no doubt that this Citation is competent; and that the applicant qualifies as an aggrieved person for purposes of **Rule 22(1)** aforementioned.

[14] As to whether the Court has the jurisdiction to grant the orders sought, **Section 47** of the **Law of Succession Act** provides that:

“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...”

[15] Similarly, **Rule 73** of the **Probate and Administration Rules**, provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

[16] Pursuant to the ruling delivered herein on **15 March 2021**, the Court was satisfied that the applicant had a *prima facie* case. The Court particularly noted that:

“...in support of the application, the applicant annexed documents from the Office of the Chief, Kimngoror Location as well as Minutes of a Meeting held by a panel of elders on 14 July 2020 under the chairmanship of the Assistant County Commissioner, Chepterwai Division. Those Minutes show that the elders were convinced that there was justifiable cause for the applicant to reside on the subject property. Moreover, the applicant annexed a copy of a letter dated 26 November 2020 written by the Assistant County Commissioner, Kipkaren Division reiterating that the applicant rightfully inherited 7 acres of land from the late Mrs. Boit Chelule in accordance with Nandi Cultural laws. The respondent was accordingly warned thus:

“It has however, come to the attention of this office that you have continued to trespass and cause disturbance on the said piece of land which is contrary to the resolutions of the meeting. This is therefore to warn you to desist from this illegal act otherwise the law will take its course...”

[17] The Court further found that:

“...the respondent acknowledged that the applicant is indeed occupying the suit property; and that there was a meeting held by their larger family over the applicant’s allegations. There is therefore an acknowledged dispute in respect of a piece of property that forms part of the estate of the deceased that involves the applicant. There appears to be no dispute that the respondent is the widow of the deceased. The applicant has filed a citation that is yet to be disposed of, contending that the respondent has failed and/or neglected to apply for Grant of Letters of Administration Intestate in respect of the deceased’s estate.”

[18] It was on that account that the Court issued a temporary injunction to restrain the Citee/Respondent, either by herself, her agents and/or servants, from encroaching, evicting and/or interfering with the Citor/Applicant’s occupation and quiet possession of the portion of land measuring 7 acres, of that property known as **Nandi/Surungai/1**, pending the hearing and determination of the Citation. The instant application merely seeks to augment the implementation of that order. I therefore find the objection thereto by the respondent entirely misplaced. Rather than protect wrongdoing, the order seeks to ensure the orders of the Court are implemented. If any of the parties has acted with impunity, that party is, not the applicant, but the respondent; granted her deliberate failure to petition for grant of letters of administration and failure to adhere to the advice given by the local administration officials.

[19] In the premises, I am satisfied that the application dated **26 May 2021** is meritorious. The same is hereby allowed and orders granted as hereunder:

[a] That the OCS Chepterwai Police Station do provide security and ensure observance of the orders issued on **22 March 2021** pursuant to the ruling delivered on **15 March 2021**.

[b] Costs of the application to be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 9TH DAY OF AUGUST 2021

OLGA SEWE

JUDGE