



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CITATION CAUSE NO.2 OF 2019

IN THE MATTER OF THE ESTATE OF NDOLE MWAKIDUDU

PHILIP MBURA TUNGU.....CITOR

=VERSUS=

- 1. SHARIFF NDOLE MWAKIDUDU**
- 2. LUWALI MWAKIDUDU**
- 3. KAZUNGU NDOLE MWAKIDUDU.....CITEES**

R U L I N G

BACKGROUND

On 19th July, 2019, **PHILIP TUNGU MBURA** filed an application for citation to accept or refuse letters of administration under rules 21 and 22 of the Probate and Administration Rules dated 19th July, 2019 against **SHARRIF NDOLE MWAKIDUDU, LUWALI NDOLE MWAKIDUDU** and **KAZUNGU NDOLE MWAKIDUDU** being beneficiaries of **NDOLE MWAKIDUDU** (deceased). The Citation was to direct the said **SHARIFF NDOLE MWAKIDUDU, LUWALI NDOLE MWAKIDUDU** and **KAZUNGU NDOLE MWAKIDUDU** to cause an appearance to be entered at the Malindi Registry for purposes of accepting or refusing Letters of administration of all the estate which by law devolves to and vests in the personal representative of the deceased or show cause why the same should not be granted to the said **PHILIP TUNGU MBURA**.

PHILIP TUNGU MBURA averred that he had entered into an agreement with the beneficiaries of **NDOLE MWAKIDUDU** for the purchase of 6 acres of **GEDE/ DABASO/ 138** on 14th May 1983 measuring approximately twelve acres at a purchase price of Kshs. 9,000/-. That he had lived on the said land for 25 years during which time he buried his wife, **Gladys Mercy Kabibi** on the property. He developed it with his sons and even constructed his retirement home thereon.

That the heirs and/or beneficiaries agreed to take all the necessary steps to subdivide and transfer the Applicant's share to his name. He also averred that the said beneficiaries failed to disclose to the court that he was the purchaser of half of the twelve acres of **GEDE/ DABASO/ 138** and as a result, the grant was ultimately revoked after which he held a meeting with the beneficiaries on the 25th March, 2018 to inform them of the inclusion of the said clause.

He further averred that a report on the land dispute dated 4th July, 2019 by the Chief of Gede Location clearly evidence that the family through a grandson to late **Ndole Mwakidudu** who is actually a son to the late **Ali Ndole Mwakidudu** are aware of his being the bona fide purchaser of six acres of the suit property.

The said **Shariff Ndole Mwakidudu, Luwali Mwakidudu** and **Kazungu Ndole Mwakidudu** filed an Affidavit in answer to the Citation on 13th August, 2019 stating that the heirs and beneficiaries of the estate of the deceased had before filing of the Citation given consent to the Public Trustee to Petition for a Grant of Letters of Administration intestate and that the said Public Trustee is in the process of petitioning for a grant of Letters of Administration intestate and in view of that, the Citor should not be allowed to petition the Court for letters of administration as the beneficiaries have already taken steps to petition the Court for the grant.

SUBMISSIONS

CITOR'S SUBMISSIONS

The Citor filed submissions in support of his citation on 19th July, 2019 stating that the citees were obligated to obtain letters of administration to the estate of the deceased as per the agreement dated 14th May, 1983. The Citor submits that the citees have refused to obtain the letters of administration to the estate of the deceased and the adduced gazette notice dated 30th August, 2019 is only a notice by the Public Trustee of his intention to apply for the letters of administration to the estate of the deceased. It is also the citor's submission that the said notice was published after filing of the citation.

The citor further submits that the citees are estopped from denying the citor's interest on the said parcel of land by virtue of the provisions of the agreement dated 14th May, 1983 and by conduct of allowing the citor to be in possession and occupation of the suit land for over 35 years and further build his matrimonial home on the subject land.

The Citor placed reliance on the Authority of *Alex Nzai Dzombo vs Kadzo Charo (2017) eKLR where Honourable J. O. Olola* held that the two widows of the late **Charo Kinda** led the Plaintiff to believe that they would pursue the issuance of letters of administration for their deceased husband's estate after which they would transfer 6 acres of land to him and having so led the Plaintiff, the 2nd Defendant was barred by the doctrine of estoppel from denying that which they represented to him that they shall do.

Finally, the citor submitted that he completed the payment of the purchase price and the onus was on the citees to obtain letters of administration to the estate of the deceased to enable the transfer to be finalized.

CITEE'S SUBMISSIONS

The Citees' submissions are dated 10th June, 2021. In their submissions, they have stated a number of reasons why the Citation lacks merit. Their submissions are to the effect that when a deceased dies intestate, the court has discretion as to the person to whom a grant of letters of administration shall in the best of all concerned be made and in exercising this discretion, the court must be guided by the Provisions of **Section 66 of the Law of Succession Act**.

They also cited Section 56 (1) of the Act which stipulate that no grant shall be made to a person who is a minor, or of unsound mind or bankrupt. Similarly, they quoted Section 22(1) of the Probate and Administration Rules that makes the provision 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.

They have also informed the court that Citations are to be issued where no petition has been filed in court and where the persons entitled to petition for grant are not willing or have neglected to petition for grant. That in the present instance it is not in dispute that the deceased died intestate therefore the Citor must show that he has an interest in the estate of the deceased and that the Citees have a superior right to administer the estate but have refused or neglected to take out letters of administration. Their contention is that the Citor has issued the citation in his capacity as a purchaser of land for value and he is therefore not a dependant for purposes of Section 29 of the Law of Succession Act. That there is no evidence that the Citees are minors or persons of unsound mind so as to disqualify them and they also contend that the Citor did not buy the 6 acres of land from the deceased as such he does not qualify to Petition for grant in the capacity of a creditor of the deceased as provided in Section 66 (d) of the Act. They relied on the Authorities of *Boniface Munyao Muinde Vs Maweu Muinde H.C Citation No.672 Of 2012* for the proposition that a purchaser of land who does not buy land from the deceased does not qualify to be a creditor within the meaning of Section 66 of the Act. The Citees finally submitted that the Citation is premature and misconceived since the Citees have not refused or neglected to take out letters of administration but rather it is the Citor who has persistently obstructed the Citees endeavors to Petition for grant.

Analysis, and Determination.

Issue for Determination

From the pleadings, the issue for determination by this court is whether the Citor is entitled to take out Letters of Administration intestate to the estate of the deceased. Should it be the citor or the citees? In the submissions filed by the respective parties, the citor says he is the right person to be granted the Letters of Administration while the citees say that it is Shariff Ndole Mwakidudu, Luwali Mwakidudu and Kazungu Ndole Mwakidudu who should be granted the Letters of Administration intestate to the estate of the deceased herein, Ndole Mwakidudu.

The Law

The law on citations is set out in **Part VI of the Probate and Administration Rules (P&A Rules)** where three types of citations are set out. The first citation is to accept or refuse a grant, while the second is to take probate on a will. The third one is intestacy and in this third category a person who is entitled to administer the estate of the deceased may be cited by the court to accept or refuse a grant of letters of administration. This is what the Citor seemed to have in mind in this case. If the person cited refuses or fails to appear upon being cited or to apply for the grant, the Citor may proceed to petition the court for grant. In the case of *Josiah Muli Wambua – deceased, Nairobi Succession Cause No. 2557 of 2012 [2014] eKLR W. Musyoka – J* stated the following at paragraph 9 of his ruling: -

“In intestacy, citation 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.”

After a careful analysis of the pleadings and the submissions, it is clear that on the 31st day of October, 2018 when the Succession Cause No. 48 of 2015 came up for a Notice to show cause why the grant should not be revoked for failure to confirm it, the same was revoked pursuant to Section 76 (e) of the Law of Succession Act for being useless and inoperative. In an attempt by the Citees to explain this delay they have stated that they have shown that they have subsequently moved the Public Trustee to Petition for grant and that the Petition is still pending

due to the objection by the Citor, the nature of objection having not been explained to this Honourable court.

The citor has approached this Court in his capacity as a purchaser for value; and therefore, a creditor to the estate of the late **Ndole Mwakidudu**. This is manifest at paragraphs 2, 3 and 5 of the Affidavit; and to buttress those assertions, the citor annexed to his Affidavit in Verification of Proposed Citation a copy of the Sale Agreement. He is therefore not a dependant for purposes of **Section 29** of the **Law of Succession Act**. Moreover, as a creditor, he is not ranked in parity with the Citees or with any of the surviving family of the deceased; for **Section 66** of the **Law of Succession Act** provides that:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) The surviving spouse or spouses, with or without association of other beneficiaries;

(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) The Public Trustee; and

(d) Creditors...”

While it is noteworthy that, the citor made it clear that he took out the citation to compel the citees to petition for grant, **Rule 22** aforementioned 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. A creditor would therefore only fall in line after all the other beneficiaries of the deceased and the Public Trustee have failed to take out a grant; and even then, would in effect be offering himself and not a third party, as the administrator. Hence, in **Josiah Muli Wambua [2014] eKLR, Hon. Musyoka, J explained this as above.**

Thus, to the extent that the citor is neither a beneficiary of the deceased nor the next in line in terms of the order of priority set out in **Section 66** of the **Law of Succession Act**, this citation is untenable.

It is also important to note that it has not been disputed that the Citees are the Children of the deceased and are therefore dependants within the meaning of the Provisions of Section 29 of the Law of Succession Act and that a Petition by the Public Trustee had been filed and a notice inviting objections to the making of the grant gazetted on 30th August, 2019. This is not to say that the Citees have done all they can in ensuring that they obtain the Letters of Administration in respect of the deceased estate, but have at least taken a desirable positive step.

The citees have responded to the citation and have also demonstrated to the court that they are ready and willing to petition for grant of letters of administration intestate as children of the deceased. In those circumstances, it cannot be said that **the persons entitled to apply are not willing or are slow in moving the court for grant to warrant a citation; and therefore, in the circumstances, a Citation simply does now lie and is ineffectual. Hence, I am in agreement with the position taken by Hon. Gikonyo, J. in Estate of Juma Yussuf (Deceased) [2019] eKLR that:**

“...a citation is issued to take up or refuse grant of probate or letters of administration of the estate. Once a cause has been filed in respect of the deceased, a citation is no longer necessary. In this case, a cause was filed at Isiolo in which the rightful heirs and estate of the deceased were identified and the estate distributed. Therefore, this citation became otiose. I so declare.”

In this matter there is already a petition filed by the Public Trustee. The citor should participate in it if he so desires. Otherwise the application lacks merit and is hereby rejected.

Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI VIRTUALLY THIS 22ND DAY OF NOVEMBER, 2021

In the presence/absence of: -

1. Mbura Edward the Objector
2. Mr Shujaa for the Respondent
3. Mr Mwandilo for the Citor

.....

S. M. GITHINJI

JUDGE