



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CITATION CAUSE NO. 8 OF 2019**

**HUMPHREY MWADIME MGANGA**

**ALICE MAFUNDISHO NDAWIRO.....CITORS**

**VERSUS**

**MICHAEL MURIUKI MURAGE**

**CHRLES NDIMU MURAGE.....CITEES**

**RULING**

1. By a citation dated 26<sup>th</sup> July 2021, Humphrey Mwadime Mganga and Alice Mafundisho Ndawiro (hereinafter the citors) cited Michael Muriuki Murage and Charles Mwadime Murage (hereinafter the citees) seeking them to show cause why they should not petition for a grant of representation in respect of the estate of their late mother Esther Wanjiru Murage who died intestate on 9<sup>th</sup> June 2004 leaving behind the citees and one Silas Njeru Murage as her survivors. The citors notified the citees of their intention to petition for the same grant as creditors to the estate having purchased plot no.263 Mikanjuni together with the 11rooms houses standing on it on the 29<sup>th</sup> August 2008.
2. Having expressed difficulties in reaching the citees for service, the citors filed a notice of motion application dated 29<sup>th</sup> January 2021 seeking leave to effect service through advertisement in any daily publication with wide circulation. The application was allowed on 29<sup>th</sup> February 2021. Consequently, the citation was served as such through the daily Nation of 12<sup>th</sup> May 2021. However, there was no response hence the hearing of this citation application exparte.
3. During the hearing, Mr. Khatib for the applicant submitted that his client bought the aforesaid subject property from the deceased before she died but no transfer was effected before her demise. That the citees having failed to take out a grant of representation as persons entitled in priority, the citors as creditors are duty bound to petition for the same. As proof of their credit/ debtor relationship, the applicant attached a sale agreement between one Silas Njeru and the citors.
4. There is no dispute that the citees as persons entitled in priority to petition for a grant of representation in respect of their late mother's estate have not filed any objection to the citation. Under section 66 of the law of succession Act, as a general principle, where a person dies intestate, the court has final discretion on who to take a grant of letters of administration in the following order of preference; 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.
5. However, a perusal of the sale agreement attached reveals that the sale agreement was executed on 29<sup>th</sup> August 2008 yet the deceased herein Esther Wanjiru is alleged to have died on 9<sup>th</sup> June 2004. Under the circumstances, the deceased could not have sold the plot while in the grave. To that extent, the citors cannot claim to have entered into any contract with the deceased. If anything, any transaction regarding the sale of the land belonging to the deceased before processing a grant amounted to intermeddling with the estate. There is therefore no bonafide purchaser of any land from the deceased hence the claim of a creditor does not arise
6. Consequently, the citors have no right to claim beneficial interest from the estate of the late Esther Wanjiru. Accordingly, the citation relating to the estate of Esther Wanjiru cannot stand hence the same is dismissed.
7. Curiously, in this same file, the citors have cited the same citees in respect of the estate of Silas Njeru Murage a son to Esther Wanjiru who allegedly sold the property in question. In my view, this is not proper and it actually amounts to abuse of the court process. We cannot have two citations in respect of two estates in one file. If Silas sold what he had no authority to sell, the citors can follow the Estate of Silas for refund of their money. They should file a separate citation citing the heirs of Silas but not under this file. Accordingly, the application herein is dismissed with no order as to costs.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF DECEMBER, 2021**

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**J.N.ONYIEGO**

**JUDGE**