



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CITATION CAUSE NO.232 OF 2015**

**IN THE MATTER OF THE ESTATE OF MATEE OLE RISA SAMULI (DECEASED)**

**MUTUA MALELU**

**STEPHEN MUIA MBUNGO**

**MUTUKU MASAI.....CITORS/RESPONDENTS**

**STEPHEN KYENGO**

**MUOKI NZOLI**

**VERSUS**

**MESHACK KONDOY**

**WILLIAM MATEE.....CITEES/APPLICANTS**

**RULING OF THE COURT**

1. The Citees/Applicants vide a summons general dated 31/12/2015 pursuant to Rule 49 of the Probate and Administration Rules have approached this court for the following reliefs namely:-

***1. That this Honourable court be pleased to set aside its orders issued on the 21<sup>st</sup> October, 2015 appointing the Citees/Applicants herein as administrators of the deceased's estate for purposes of defending Machakos CMCC. NO.423 of 2014.***

***2. That costs of the application be in the cause.***

The application is supported by an annexed affidavit of the Citee's advocate sworn on even date and further upon the following grounds:-

***a. That the Citees herein were appointed as Administrators for the purposes of defending Machakos CMCC. No.423 of 2014 by the order of the Honourable court issued on 21/10/2015.***

***b. That a grant of letters of Administration had already been issued by Justice Lilian Mutende on 11/11/2014 in Machakos Succession Cause No.535 of 2014 and which was later confirmed.***

***c. That this citation cause is thus overtaken by events and superfluous and should not have been filed in the first place.***

**d. That the orders of 21/10/2015 were issued Exparte in absence of counsel for the Citees. The hearing date had been obtained Exparte and the Citees advocates had received the hearing notice under protest as the date was not convenient to the counsel handling this matter.**

**e. That Mr. Wachira had by phone requested a fellow advocate practicing in Machakos to hold his brief and inform the court of the succession Cause and the appointment of administrators as aforesaid unfortunately the counsel he requested to do so did not attend court for the reason that he was attending to several matters from their firm and this matter by passed his attention.**

**f. That unless the order of this court issued on 21/10/2015 is set aside, it is going to create confusion, conflict and absurdity and ultimately result to a waste of the court's time.**

**g. That this application has been brought without unreasonable delay and it is in the interest of justice that this Application be allowed as prayed.**

2. The Application is opposed by the Citors/Respondents. A replying affidavit was sworn by the 1<sup>st</sup> Citor/Respondent on his behalf and on behalf of the other Citors which raised the following grounds of objections:-

**a. The Citee/Applicants were duly served with the citation and did not bother to appear before this Honourable court to oppose the same nor indicate to the court that a grant of representation of the estate in question had been issued to other beneficiaries.**

**b. That the Honourable court issued an order appointing the Citees/Applicants herein as administrators for the purposes of defending Machakos CMCC 423 of 2014.**

**c. That it is in the interest of Justice that the application herein should not be allowed as there is an application before the High court which is pending determination seeking for orders of transfer and consolidation of CMCC No. 423 of 2014, HC ELC. NO.179 of 2014 and HC ELC.32 of 2014 as the parties are the same and suit property is the same.**

**d. That the 1<sup>st</sup> Citee/Applicant herein is the Plaintiff in HC ELC. No.179 of 2014 while 2<sup>nd</sup> Citee/Applicant is the Plaintiff in HC ELC 32 of 2014 while the deceased was Defendant in CMCC No. 423 of 2014 wherein the subject matter in all the suits is the same as it involves the estate of the deceased.**

**e. That it is in the interest of justice that this Honourable court does not set aside the orders issued on 30/10/2015 as there is an application pending hearing and determination on transfer and consolidation of the aforementioned suits in order to avoid duplicity of suits.**

**f. That the Applicant's application be dismissed with costs as it is a waste of the court's precious time.**

3. Parties filed submissions. Counsel for the Citees/Applicants submitted that the orders of 21/10/2015 be set aside since the same were issued in the absence of the Applicants or their advocates and that had they been present they would have informed court of the existence of Machakos Succession Cause No.535 of 2014. Counsel further submitted that the cases sought to be consolidated are in regard to different properties and parties. It is the contention of counsel for the Citee that the administrators of the estate duly appointed in Machakos Succession Cause No. 535 of 2014 and who are brothers of the Citees are the right persons to administer the estate and defend suit in CMCC. 423 of 2014. Counsel referred the court to several court decisions whereby review orders were granted as follows:-

i. Nuh Nassir Abdi =VS Ali Wario & 2 others [2013] eKLR where Odunga Judge held:

**“A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve**

*useful purpose”.*

ii. Pashito holding ltd & another =Vs= Paul Ndungu & 2 others [1997] Court of Appeal No.138

***“it is an indispensable requirement of Justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what urged against him”***

4. Applicants counsel urged this court to invoke its discretion and set aside the orders of 21/10/2015 to enable the administrators duly appointed in the Succession Cause to defend **Machakos CMCC No. 423 of 2014** to avert the looming absurdity.

5. Counsel for the Citors submitted that the Citees were duly served with the citation and failed to respond and also failed to disclose the existence of **Succession cause No.535 of 2014** to the court. It was submitted further for the Citors that the determination of the several cases are needed to be finalized and hence the Citees should desist from circumventing the real issues in the dispute and that their application be dismissed. The Citors counsel has further submitted that in the event that the court accedes to the Citee’s Application, the Applicants should be condemned to bear the costs for filing the citation for sole reason of not disclosing the existence of the grant of letters of administration issued prior to the citation orders.

6. The citation cause herein had been lodged by the Citors following the death of Matee Ole Risa Samuli who was the defendant in Machakos CMCC No.423 of 2014 and in which the Citors were Plaintiffs. The Citees were needed to come on board and to defend the said suit. The Citees upon being cited duly entered appearance through learned counsel. The matter was then fixed for the hearing of the citation. However, counsel failed to appear despite being aware and thus this court proceeded to appoint the Citees as administrators for the purpose only of defending the said suit Machakos CMCC. 423 of 2014. The order was made on 21/10/2015. The Citees having been served with the citation and order and having had knowledge that their other brothers had been issued with a certificate of confirmation of grant vide Machakos succession Cause 535 of 2014 withheld, this piece of information from the court. The confirmation of grant indicates that the same was done on 5/6/2015 and it must have been done in the presence of the Citees and the administrators who are their brothers. It was therefore quite odd for the Citees to have withheld such vital information from the court. They could have given the information either orally or by affidavit or even by way of a letter but they waited until 31/12/2015 to do so as herein. The Citees application is akin to one for review pursuant to Section 80 of the Civil Procedure Act and Order 45 of the civil Procedure Rules as they have relied on Rule 49 of the Probate and Administration rules as a Summons general. The Citees are now saying that this court should now find that some new matter has been discovered namely that a grant had already been issued to administrators for the estate of Matee Ole Risa Samuli who is the Defendants in Machakos CMCC. 423 of 2014. The grant was confirmed on 5/6/2015 and hence the said administrators were the right persons to defend the said suit and not the Citees herein and further that this court ought not to have appointed the Citees as Administrators. Indeed the purpose of the appointment was specifically to defend the civil case No.423 of 2014 and not to do anything else such as administering the estate. The Citors have indicated that the said suit **No.423 of 2014** is due for consolidation with two others namely **HC ELC. 179 of 2014** and **HC ELC 32/2014** wherein the Citees are Plaintiffs while the Citors are defendants and that the matter is pending for determination on the said transfer and consolidation. Hence removing the Citees now will further delay the matters. It is only fair and just to have the status quo as regards the role of the Citees as ordered on 21/10/2015 to be maintained until such time the real administrators seek to be substituted so as to take over from the Citees. This court notes that the Citees had knowledge of the issuance of grant way back in June, 2015 but withheld same from the court yet as parties they had a duty to assist the court in its overriding objective of expeditious disposal of cases. The conduct of the Citees and the administrators of the estate of Matee ole Risa Samuli appears to have been deliberate and strategic with a view to delay the finalization of Machakos CMCC. No.423 of 2014. It is even curious for the Citees and the administrators to deliberately fail to file an affidavit in support of this application so as to address the issues raised by the Citors. The Affidavit filed by the Citee’s counsel only relate to his failure to attend court for the hearing of the citation and that the Citees or the administrators were needed to present responses to the Citors application. As has been confirmed that the Citees are brothers to the Administrators, I find there will be

no prejudice if the Citees continue defending the said Machakos CMCC 423 of 2014 as ordered on the 21/10/2015 until the Administrators' are substituted in the said case. It is imperative to ensure that matters regarding the estate of the deceased herein especially in the **CMCC. 423 of 2014** are protected even as the Administrators are being awaited to take over the proceedings on behalf of the Defendant.

7. The upshot of the foregoing observations is that the Citees Application dated 31/12/2105 lacks merit. The same is ordered dismissed with costs to the Citors.

It is so ordered.

Dated, signed and delivered at Machakos this 25<sup>TH</sup> day of **APRIL** 2017.

**D.K. KEMEI**

**JUDGE**

**In the presence of:-**

Mukula for Mwangi for Citee.....

Kimeu for Makundi for Citor.....

C/A: Kituva.....