



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

**SUCCESSION CAUSE NO. 517 OF 2014**

**IN THE MATTER OF THE ESTATE OF MUSYIMI MBAVU KOLA (DECEASED)**

**RULING**

1. This is a ruling on a citation filed by the registered proprietor of a parcel of land **Muputi/Kipandini/1038** against the sons of the deceased owner of an adjacent property **Muputi/Kipandini/1037** on which the Citor claims a right of way. The Citor intends to sue for the unblocking of a surveyed road which allegedly passes through the deceased's parcel of land, and prays that the Citees be appointed personal representatives of the Deceased, even if in *ad litem* status, to enable them have capacity to be sued on behalf of the Estates of the Deceased.
2. The Citees concede need to take out Letters of Administration to the Estate of the Deceased to be able to represent the deceased in a suit but, by Replying Affidavit of 7<sup>th</sup> November 2014, the 1<sup>st</sup> Citee on behalf of the others denies any knowledge of the access road on parcel of land, and avers that they will not take out Letters for purposes of creating an access road:

***“That we cannot take out letters of administration to create access road through parcel NO. Muputi/ Kipandini/1037. The Citor’s share was not in 1037 but it was in 1038. The Citor has no rights to create a road to parcel No. 1037 since it was not here in Muputi/Kipandinin/234.***

***That we will obtain letters of Administration to administer the estate of our father only and to sue my Uncle Muutu Mbau because he fraudulently obtained registration of title Muputi/Kipandini/1037 after subdivision from 234 into five plots. Parcel No. 1037 was awarded to my father while 1038 was awarded to him. How he is jointly registered with my father as proprietor of Parcel NO. 1037 remains a mystery.***

***That I do not know how he sold the land to the Citor and how was the road created. The road was not created with either the consent of my father or the Clan.” (sic)***

3. In their written submissions dated 26<sup>th</sup> January 2016, Counsel for the Citors, M/S O.N. Makau & Mulei Advocates, relied on the constitutional right of access to the courts under Article 48 of the Constitution to support his prayer for the appointment of the Citees as personal representative of the deceased to enable him sue them on behalf of the Estate and to section 24 and 28 of the Land Registration Act to support that as a registered proprietor, the Citor was entitled to all rights and privileges appurtenant thereto including the overriding interest in the form of a right of way.
4. Counsel for the Citees, M/S Paul Kisongoa & Co. Advocates, in their submissions dated 12<sup>th</sup> November 2015 reiterate the Citees' position that the creation of plots from the original parcel of land Muputi/Kipandini/ 234 making the parcels of land the subject of the citation namely plots 1038 and 1037 was fraudulently done by the deceased's brother, after the deceased's death and

that therefore:

***“All in all the Citation has no merit at all. No road of access has been created through parcel Mavuti/ Kipandini/1037 by Musyimi Mbavu or his children. The Citees have neither blocked any road of access as it doesn’t exist. The citation should be dismissed with costs.”***

5. With respect, Counsel appears to have misunderstood the nature of proceedings before the Court. It is not the substantive suit by plaintiff for the declaration and unblocking of a right of way, in which case the Citees’ defence on the merits that the creation of the parcel was fraudulent and or that there no road access created would arise. It is simply an application that named persons who are said to be sons of the deceased, the Citees, take out Letters of Administration to the Estate of the deceased to enable them to be sued (or to sue) in respect to the estate property.
6. The Court cannot in this citation proceedings determine the merits whether the Citor is the *bona fide* purchaser and registered proprietor of plot no. 1038 to which he claims a right of way over the deceased’s plot no. 1037. That can only be done in a suit filed by any of the parties herein for that purpose. In this proceeding, the Citor merely seeks that the Citees be empowered to represent the estate of the deceased person.
7. Indeed, even if the Citees refuse to take out Letters of administration to the estate of their deceased father, the Court is empowered to appoint by Limited Grant a person to represent the Estate of a deceased for purposes of a suit in various circumstances, in terms of section 54 of the Law of Succession Act and Rules 10, 14, 15 and 16 of the Fifth Schedule to the Act, which provides as follows:

***“10. Administration pendente lite***

*Pending any suit touching the validity of the will of a deceased person, or for **obtaining** or revoking any probate or **any grant of letters of administration**, the court may appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate, and the administrator shall be subject to the immediate control of the court and shall act under its direction.*

***14. Administration limited to suit***

*When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.*

***15. Administration limited to purpose of becoming party to suit to be brought against administrator***

*If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the grant has been made is absent from Kenya, it shall be lawful for any court to grant to any person whom it may think fit, letters of administration, limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.*

***16. Appointment of person not normally entitled to a grant***

*Where it appears to the court to be necessary or convenient to appoint some person to*

*administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, the court may, in its discretion and having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration, whether limited or otherwise, as it shall think fit.”*

**Orders**

8. Accordingly, for the reasons set out above, and in view of the intimation by the Citees that they intend to take out Letters of Administration for their own purposes of suing their Uncle, the Court orders that the Citees shall take out Letters of Administration ***Ad Litem*** within the next 30 days.
9. In default, the Court shall at the instance of the Citor appoint a representative(s) of the Deceased pursuant to Rule 16 of the Fifth Schedule to the Law of Succession Act to represent the Estate for purposes of their intended suit.
10. The Citees will pay the costs of this Citation to the Citors.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MARCH 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

Mr. Mumbi for Mr. Mulei for the Citor

No appearance for the Citees

Mr. Mutero - Court Assistant.