



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 835 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE NDALI MWOLE (DECEASED)**

**CITATION TO ACCEPT OR REFUSE LETTERS OF ADMINISTRATION INTESTATE.**

**RULING**

1. The applicant SON of the deceased has cited his brothers for purposes of taking out of letters of administration intestate to the estate of his late father and averred in his affidavit in support of the citation sworn on 5<sup>th</sup> September 2011 that –

***‘3. That I am a beneficiary together with the other children of Deceased estate in LR No. Matungulu/Kambusu/131 having been a portion of the same land and having approached Benson Nzioka Ndali to obtain grant of letters to subdivide the portions amongst all the children of the deceased but he has refused and has been using the whole portion for himself.***

***4. That I approached Benson Nzioka Ndali to release the death certificate via the Assistant Chief for purposes of instituting a succession cause to enable the family divide the portion equally amongst the children of the deceased but the said Benson Nzioka Ndali has failed and insists on using the whole portion for himself depriving the other children of the deceased their share and without Court’s Order in my favour I cannot apply for grant of letters of Administration hence the application.’*** (sic)

2. In a replying affidavit by Benson Nzioka Ndali of 9<sup>th</sup> July 2014, the citee denies that the deceased had any free property capable of inheritance through succession proceedings because “before our father’s death all his estate had been distributed to his sons with instigation of the citor herein by the Auwani Clan and therefore there is no estate left to be distributed after his death” and that he ‘was allocated parcels Matungulu/Kambusu/131, 2750 and 2827 and title deeds issued in my names. (annexed and marked BNN-II are copies of title allocated to me).’

3. I have perused the title documents on the suit property Matungulu/Kambusu/131 and considered the submissions filed by the parties on the matter. The same is shown in Titled Deed dated 3<sup>rd</sup> November 2011 as registered in the name of the citee Benson Nzioka Ndali by an entry made on 30/1/2003. The deceased is shown to have died on 20<sup>th</sup> March 1982 by a letter from the Chief Matungulu Location dated 29<sup>th</sup> June 2012.

4. Generally, a child cannot force a parent to gift his property in a certain way during his life. The child may however, apply for adequate provision under the law of succession if the inheritance by virtue of testate or intestate succession is such as not to make adequate provision for the child or other dependant.

5. However, in this case it is not clear how the parcel of land subject of the proceedings which was registered on **30/1/2003** long after the death of the deceased in **1982** could have been considered gift *inter vivos* so that it ceased to become part of the estate of the deceased. Moreover, the registration of the citee on 30/1/2003 is shown as a first registration, which in accordance with section 143 of the Registered Land Act, which applies to the parcel of land could be challenged on the grounds of fraud or misrepresentation.

6. The Citor cannot be barred from approaching the court and seeking to demonstrate that the parcel of land the subject of the dispute, although registered in the name of the citee, is truly part of the estate of the deceased. To refuse the citor his constitutional right under Article 50 of the Constitution opportunity is to bar the citor's right to have a dispute which can be resolved by application of the law, determined by a competent court or tribunal.

7. However, it would appear that in view of the registration of the suit property in the name of the citee, the appropriate tribunal is an Environment and Land Court. The citor may, if so advised, file appropriate proceedings in that court for the determination of the ownership dispute relating to the suit property, for which purpose he only need obtain limited letters of Administration *ad litem*. For the same reason, I do not think that the citation would serve any purpose in the circumstances of the case, where the claimed assets are not shown to be registered in the name of the deceased.

8. Accordingly, the citation is declined with no order as to costs.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF APRIL 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of:** -

Citor in person

Mr. Kyalo for Mr. P.M. Muinde for 1<sup>st</sup> Citee

2<sup>nd</sup> Citee in person

Doreen - Court Assistant.