



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
SUCCESSION CAUSE NO. 35 OF 2015

IN THE MATTER OF THE ESTATE OF JAMES OKACH OTIENO – DECEASED
CITATION TO ACCEPT OR REFUSE LETTERS OF ADMINISTRATION INTESTATE

**IN THE MATTER OF CITED: PAUL ODHIAMBO OKATCH AND JOSEPH OTWERA
OTIENO – CITEES**

AND

GEORGE ODUOR OBADHACITOR

CITATION TO ACCEPT OR REFUSE LETTERS OF ADMINISTRATION INTESTATE

(CORAM: J.A. MAKAU -J.)

RULING:

1. **GEORGE ODUOR OBADHA** through a citation to accept or refuse letters of administration intestate pursuant to Rule 21 of the Probate and Administration Rules dated 9th October 2015 sought that **PAUL ODHIAMBO OKATCH** and **JOSEPH OTWERA OTIENO** beneficiaries to the estate of the deceased being brother and son to the deceased respectively surviving the deceased do appear and accept or refused 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 citor **GEORGE ODUOR OBADHA**.
2. The Citor's interest over the deceased's estate is based on a sale agreement dated 6.4.2015 between **KENNEDY ODUOR OKOTH** (*deceased*) and the citor over a portion of **KENNEDY ODUOR OKOTH** of inheritance over Parcel No. **Siaya/Mur Ngiya/1167** as per annexed agreement marked **GOO** and official search marked **GOO**. The Citor's claim is further based on the ground that the said **KENNEDY ODUOR OKOTH** died before effecting transfer of the said portion leaving both his only brother **Paul Odhiambo Okatch** surviving him, who has not taken any letters of administration of the estate of their late father.
3. The Citor in his affidavit has deponed that he is a creditor (*which he referred to as liability*) to the Estate of Kennedy Oduor Okatch (*deceased*) a beneficiary of the Estate to the deceased herein and who was desirous of obtaining letters of administration of the deceased's estate.
4. The Citees did not file an appearance, however at the time of the hearing of this application the 2nd Citee appeared in person and sought to be heard by Court in opposition of the application.
5. Mr. Ooro, Learned Advocate appearing for Citor, who was absent, urged that the Citees were served

and that since the death of the deceased they have not filed petition for issuance of letters of Administration intestate of the deceased's estate nor have they responded to the Citation despite service nor filed response. He urged the application is unopposed adding that the Citor is not a creditor to the deceased's estate but a purchaser of interest of Kennedy Oduor Okoth (**deceased**) and uncle to the 1st Citee. That he has been enjoined in this Citation as he has filed a caution over the deceased's estate and has actively been resisting the efforts of Citor to get his portion hence defeating Citor's interest. He added there was a criminal case against Kennedy Oduor Okoth (**deceased**) for refusing to effect transfer and which case was withdrawn after he promised to transfer, the land to the Citor however, that never occurred as he died before transfer.

6. The 2nd Citee countered the Citor's application urging that he is young brother to **JAMES OKATCH**, whose estate is subject of this Citation. He denied being aware of the sale of the deceased's property to the Citor urging he placed a restriction to the deceased's land as he wanted to share the land to the children of **JAMES OKATCH (deceased)** and further as he is settled on the land he has an interest over the same and shall be seeking a share of it. He stated that he will petition for the grant and that he is not agreeable to Citor's Petitioning for the grant.

7. **Rule 22 (1) of the Probate and Administration Rules** provides at whose instance a citation can be and who can issue Citation. It provides as follows:-

“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.”

8. **Section 29 (a) and (b) of the Law of Succession Act** provides:-

“For the purposes of this Part, “dependant” means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and”

9. **Succession 66 of the Law of Succession Act** provides that the court shall have a final discretion as to the persons or person to whom grant of Letters of Administration shall in the best interest be made and states that preference should be given to certain persons to Administer the deceased estate where deceased died intestate. **Section 66 of the Law of Succession Act** provides:

“When a decease 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 interest of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference- ”

a. 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;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will”

10. I have carefully considered the citor's affidavit, and rival submissions on behalf of the Citor and that by the 2nd citee. The issue for consideration is whether the citor has met the conditions required to warrant him being allowed to petition for grant of letters of administration intestate over the deceased estate?

11. Under **Rule 22(1), of the probate and Administration Rules** a citation can be issued at the instance of any person who would himself be entitled to a grant in the event of the other person cited, and who I believe, must be entitled renounces his right thereto. The people who are entitled are mainly the “**dependants**” of the deceased as defined **under Section 29 of the Law of Succession Act**. The others who are entitled are described under **Section 66 of the Law of Succession Act**. That Section expands the list of the people entitled to be considered and by court in its determinations to who should petition for grant of letters of administration intestate to include apart from the deceased “**Dependants**” Public Trustee and creditors.

12. The Citor in the present application is a creditor (**or as he refers to himself a liability to the estate of Kennedy Oduor Okatch**) but not the deceased person **JAMES OKACH OTIENO**. He is not a dependant nor a beneficiaries nor a Public Trustees and nor a creditor to the deceased estate. He is a total stranger and/or intermeddler to the deceased estate. That his claim is pegged on the share, that may be granted to Kennedy Oduor Okatch (**deceased**), who sold a portion of the deceased's estate to the citor when he had no capacity to do so, as the law do not recognize potential beneficiary's interest nor can a future beneficiary purport to sell what he does not yet have transferred into his name. It is unfortunate that the citor bought a share which had not been determined and transferred to the seller. He will have to wait for shares of Kennedy Oduor Okach (**deceased**) to be determined and lodge his claim or await for the persons entitled to petition for grant to do so and an share is awarded to Kennedy Oduor Okoth pursue his claim in a civil court otherwise he has no claim known in law against the deceased's estate for now

13. The upshot is that the citation to the citees to accept or refuse letters of administration intestate is without merits and is rejected. The Citees are hereby at liberty to proceed to petition for grant of Letters of Administration intestate in respect of the deceased's estate.

14. The 2nd Citee is awarded costs of the application limited to his attendance that he made to the court to be agreed with the Citor or to be assessed by the Deputy Registrar of the High Court.

DATED SIGNED AND DELIVERED AT SIAYA THIS 19TH DAY OF MAY 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

Citor in person – present

Citees in person – 1. present

2. present

Court Clerk: Kevin Odhiambo

Court Clerk: Mohammed Akide

J. A. MAKAU

JUDGE