



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CITATION NO. 5 OF 2015

IN THE MATTER OF THE ESTATE OF GEORGE STEVENS NGOMBO (DECEASED)

ALPHONCE KATANA KALAMA.....CITOR

VERSUS

1. STEVE KITHI GOMBO

2. CATHERINE KULTHUM NGOMBO

3. KENNETH MBAJI NGOMBO

4. PENINAH NGOMBO.....RESPONDENTS

RULING

1. The Citor through a citation to accept or refuse letters of administration intestate dated 20.5.15 sought to have the Citees Steve Kithi Gombo, Catherine Kulthum Ngombo, Kenneth Mbaji Ngombo, Peninah Ngombo accept or refuse letters of administration in respect of the estate of George Stevens Gombo (“the deceased”) who died in 2010 intestate leaving the Citees being his widow and children as persons entitled to share in his estate.

2. From the record, the Citor’s interest in the estate of the deceased is premised on legal fees of Kshs. 384,000/= paid to the deceased by one Marie Edith Clare (“the Creditor”) in the course of his legal practice to recover the sum of Swiss francs amounting to 76,000.00 from one Joe Mwenda. The deceased failed to act on the instructions prompting the Creditor to demand a refund of the legal fees paid. The deceased issued a cheque dated 15.4.97 for Kshs. 200,000/= and another dated 30.4.97 for Kshs. 184,000/= which cheques were both dishonoured. This led to the filing of a suit in Court and a Complaint in the Disciplinary Committee of the Law Society of Kenya against the deceased both of which were determined against the deceased.

3. The Citor claims that prior to his death, the deceased had introduced him to his son Steve Kithi Gombo, the 1st Citee and had directed him to pay the Citor the sum of Kshs. 384,000/=. The Citor claims that the 1st Citee paid the Disciplinary Committee a fine of Kshs. 50,000/= imposed upon the deceased and should therefore be able to pay the amount claimed herein. The Citor now wishes that the Court appoints an administrator of the estate of the deceased through which the sum owed would be paid.

4. The 1st Citee acknowledges that as a son of the deceased he is qualified to apply for letters of administration in priority over the Citor. He however states that the deceased did not leave any property capable of paying off any of his debts and applying for a grant to the deceased’s estate would only create

more debt for the state. It was submitted by the 1st Citee that the Citor purports to bring the Citation as an attorney of a third party yet filed the same in his own name. That the Citor failed to attach the alleged power of attorney and other supporting documents to his supporting affidavit and attached the same to his written submissions rendering the Citation defective. That the Affidavit in Support of the Citation was filed in the wrong cause namely Mombasa Resident Magistrate's No. 220 of 1998. That the jurat of the said Affidavit is on a separate page from the rest of the text. That the Citation was filed out of time as the Citor has been holding a judgement of the Disciplinary Committee since 23.10.96 and a warrant of arrest dated 28.3.00. That the warrant of arrest signifies that the deceased had no traceable assets and that the Citation is founded on *mala fides*.

5. For the 2nd and 4th Citees it was submitted that the deceased having been struck off the Roll of Advocates as a result of the complaint filed against him by the Creditor, he had sufficiently paid for his sins. It was argued that the claim by the Citor arose out of a professional engagement and cannot therefore be bequeathed to the heirs of the deceased the same way his legal practice could not have been bequeathed to the heirs. It was further submitted that the Citor was unable to execute his judgement because the deceased had nothing of value to be attached to satisfy the judgement debt. That the deceased left no known asset and that is why they have not taken out letters of administration in respect of his estate. It was further submitted that the Citor has mischievously raised issues in his submissions that were not in his pleadings instead of seeking to amend the pleadings.

6. For the 3rd Citee, it was submitted that the Citor has tried to create the impression that the dispute herein is between him a poor man and a wealthy man whereas the dispute is between the Creditor and her advocate the deceased herein. That the Citor is merely an agent of the Creditor vide the power of attorney. That the power of attorney authorises the Citor to do many things including filing suit for and in the name of the Creditor but not in his own name. That the Citor has forged a decree of the court which indicates the 1st Citee and the deceased trading as Ngombo & Company Advocates as defendant whereas the 1st Citee was at the time a university student. That the documents provided by the Citor contained irregularities including the different signatures of the Creditor. He urged the Court to dismiss the Citation and for costs.

7. I have considered the Citation and the Submissions by the parties herein. Several issues for determination have been raised herein. However, in my view, this Citation will turn on whether the Citor has the capacity to move this Court as he has. This Court notes that the said power of attorney was annexed to the written submissions of the Citor and not to the Supporting Affidavit. However the Citor is unrepresented and the Court being mindful of the provisions of Article 159(2)(d) of the Constitution, has made a decision to proceed without undue regard to procedural technicalities.

8. Section 66 of the Law of Succession Act makes provision as to whom preference shall be given to administer the intestate estate of a deceased. The section provides as follows:

When a deceased 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 interests 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.

9. The Citor seeks to move the Court as a creditor. He claims that he and the Creditor instructed the

deceased to discover the sum of Swiss Francs 76,000.00. However, from the documents annexed to the Citation and to his submissions, it is clear that the funds belonged to the Creditor. Indeed in a letter she wrote to the deceased dated 24.9.96, she stated “*And while I am away, I agree that Mr. Alphonse Katana Kalama shall collect the refund on my behalf.*”

10. Given that the Citor was to collect the refund on behalf of the Creditor, the question to be answered is whether he is entitled to a grant of letters of administration of the estate of the deceased herein to enable him file the Citation herein. Rule 22 (1) of the Probate and Administration Rules provides:

“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”.

11. The Citor is not himself a creditor of the estate of the deceased but an agent of the Creditor. He claims to be the attorney of the Creditor and produced a copy of a power of attorney donated to him by the Creditor. The power of attorney is a general power of attorney. It is not specific to the matter herein nor has it been approved by the Court. Further, by the said power of attorney the Creditor appointed the Citor with “*...full power and authority, for me and in my name...*” This Citation ought to have been instituted in the name of the Creditor the donor of the power of attorney. To the extent that the Citor filed the Citation in his own name and not in the name of the Creditor, he exceeded the power and authority donated to him in that power of attorney. He acted *ultra vires* the power donated to him by the Creditor. The Citor being neither a beneficiary nor a creditor of the estate of the deceased has no *locus standi* to file the Citation herein. In this regard, I am persuaded by the decision of Ogola, J in Mohammed Hassim Pondor & Another v Resident Travel Limited & 3 Others[2013] eKLR where he stated:

“For the foregoing reasons I find that the suit as it is discloses no contractual nexus between the Plaintiff and the Defendants, as it is not filed in the name of the donor as envisaged under the Power of Attorney” (emphasis added).

12. In view of the foregoing, I find that the Citation herein is incurably defective and the same is dismissed but with no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 17th May 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Citor**

..... **for the 1st Citee**

..... **for the 2nd & 4th Citees**

..... **for the 3rd Citee**

..... **Court Assistant**