



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CITATION CAUSE NO. 672 OF 2013

IN THE MATTER OF THE ESTATE OF MUINDI MBOLE (DECEASED)

AND

**IN THE MATTER OF AN APPLICATION TO ACCEPT OR REFUSE LETTERS OF
ADMINISTRATION INTESTATE**

BONIFACE MUNYAO MUINDE.....CITOR

VERSUS

MUTINDA MUINDI

KIMATU MUINDI

MAWEU MUINDICITEES

RULING

The Citor herein, Boniface Munyao Muinde, claims that he is a debtor of the deceased Muinde Mbole (hereinafter referred to as “the deceased”), by virtue of being entitled to a portion of title No. WOTE/IIANI/415. He filed a citation dated 9th September 2013 seeking that the Citees herein, Mutinda Muindi, Kimatu Muindi and Maweu Muindi, accept or refuse Letters of Administration for the estate of the Deceased, or show cause why the same should not be granted to the Citor for purpose of recovering three (3) benches out of the afore-stated property, pursuant to a sale agreement dated 5/7/2009.

The Citor in a supporting affidavit he swore on 9th September 2013 averred that Plot No. WOTE/IIANI/415 is registered in the name of Muindi Mbole (the deceased) who was husband to Kaesa Muindi, and that on 5/7/2009 he purchased part thereof from the 2nd Citee at a purchase price of 23,500/=, and some three (3) benches from Kaesa Muindi (who is since deceased), at a purchase price of Ksh 70,000/=, and entered into written agreements which he annexed with translations thereof. Further, that upon purchase he took possession and has used the part he purchased to date.

The Citor stated that after the Citees’ mother’s died, the Citees have refused him access to the said portion of land and to take out letters of administration to hive or excise my three benches he bought. Further, that the Citees are intending to re-sell the three (3) benches he bought at a higher price, despite some having witnessed their mother receive purchase price.

The 1st Citee filed a replying affidavit and a further affidavit sworn on 7th March 2013 and 18th July 2014 in response, wherein he admitted that the Citees are the sons of Muindi Mbole who was their father, and

Kaesa Muindi who was their mother, and who are both deceased. He averred that their late father's parcel of land is No. MBOONI/IIANI/415 and not WOTE/IIANI/415, and he attached a copy of official search to this effect. According to the Citees, their deceased mother Kaesa Muindi sold three benches of parcel No. MBOONI/IIANI/415 to the Citor at a price of Ksh 70,000/=, and was given a deposit of Kenya Shillings thirty five thousand (Ksh. 35,000/=) leaving a balance of Ksh. 35,000/= which has not been cleared to-date.

Further, that after consulting neighbors on the purchase price of parcels of land at their home area, they were informed that the three benches their mother had sold were being sold at a price of Ksh. 150,000/= per bench, hence, the three would have been sold at a price Ksh. 450,000/= instead of Ksh. 70,000/=.

The Citees allege that they then called the Chief of Wanzauni location, members of the family, and the Citor, to discuss how they would refund him the deposit of the purchase price he had paid their deceased mother. An agreement was thereupon reached in writing, a copy of which the Citees annexed. However, that the Citor has declined to collect his money after having been called. The Citees also denied that the Citor is in possession of the said piece of land, as the sale was rescinded after agreeing that he be refunded his money back.

The Issues and Determination

The Court directed that the Citation be heard by way of affidavit evidence and written submissions. The learned counsel for the Citor, J.M Tamata, filed submissions dated 14th May 2015, while the Citees filed submissions dated 5th August 2015. The Citor submitted that this is not the time for the Citees to challenge or rewrite the sale agreement he entered into with their mother on 5th July 2009 with respect to the portion of land belonging to the deceased, and should challenge it after taking out letters of administration. The Citees on the other hand argued that the said sale agreement was null and void, as their mother had not obtained letters of administration with respect to their father's estate at the time of the said sale, and the Citor can claim a refund of Kshs 35,000/= from their mother's estate.

I have read and carefully considered the pleadings and submissions made by the Citor and Citees. The issue to be determined is whether the citation sought can issue, and if so on what terms. This Court has power under section 70 of the Law of Succession Act to issue a special citation to any person appearing to have reason to object to the application for grant of representation before the making of such grant. In addition, Rule 22 of the Probate and Administration Rules provides as follows with regard to citations to accept or refuse to take a grant:

(1) 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.

(2) Where power to make a grant to an executor has been reserved, a citation calling on him to accept or refuse a grant may be issued at the instance of the executors who have proved the will or of the last survivor of such executors or of any beneficiary under the will.

(3) A citation in Form 35 calling on an executor who has intermeddled in the estate of the deceased to show cause why he should not be ordered to take a grant may be issued at the instance of any person interested in the estate at any time after the expiration of three months from the death of the deceased:

Provided that no citation to take a grant shall issue while proceedings as to the validity of the will are pending.

(4) A person cited who is willing to accept or take a grant may petition the court for a grant on filing an affidavit showing that he has entered an appearance and that he has not been served by the citor with notice of any application for a grant to himself.

(5) If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may—

(a) in the case of a citation under subrule (1), petition the court (if he has not already done so) for a grant to himself;

(b) in the case of a citation under subrule (2), apply to the court by summons for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of the executorship have wholly ceased;

(c) in the case of a citation under subrule (3), apply to the court by summons on notice to the person cited for an order requiring such person to take a grant within a specified time or for a grant to himself or to some other person specified in the application.

(6) An application under subrule (5) shall be supported by an affidavit showing that the citation was duly served and that the person cited has not entered an appearance.

From the foregoing provisions it is evident that the person who is applying for a citation to refuse or accept a grant, should also have an interest in the estate of the deceased, and that the person being cited has a superior right to administer the said estate. The priority in the right to administer an intestate deceased's estate is stated in section 66 of the Law of Succession Act, which 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:

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. “

In the instant citation, the Citor claims to have bought a portion of the deceased's land, namely WOTE/IIANI/415 from the deceased's wife. He did not exhibit any evidence to show that the said land was owned by the deceased or the deceased's wife at the time of the alleged sale. In addition, if indeed the said property was owned by the deceased at the time of the sale as he alleges, the law of Succession Act at section 55 provides as follows with regard to disposition of capital assets of a deceased persons estate:

“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant.

The Citor did not bring any evidence that Kaesa Muindi, with whom he entered into a sale agreement, had a confirmed grant of representation with respect to the Deceased's estate at the time of the alleged sale of the land known as WOTE/IIANI/415 on 5th September 2009. It is thus my finding that a portion of the said parcel of land could not have been legally sold to the Citor by the said Kaesa Muindi, and any purported sale of the said land is thus of no legal effect.

The Citor therefore does not qualify to be a creditor of the deceased within the meaning of the section 66 of the Law of Succession Act, as he did not purchase the said portion of the deceased's land from the deceased, or a person authorized to sell the said property, and on the contrary actually intermeddled with the estate of the deceased contrary to section 45 of the Law of Succession Act. He therefore has no interest in the estate of the deceased to entitle him to cite the Citees, and his Citation dated 9th September 2013 is thereby dismissed with costs to the Citees.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 25th day of July 2016.

P. NYAMWEYA

JUDGE