



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2536 OF 2012

IN THE MATTER OF THE ESTATE OF ZAKI OGANA DICKSON (DECEASED)

RULING

1. The deceased herein died on 14th September 2012.
2. On 22nd October 2012, an affidavit was lodged at the registry by Nancy Atieno Ogana, hereinafter referred to as the citor, in her purported capacity as the second wife of the deceased. She sought to have Pamela Atieno Ogana, hereinafter referred to as citee, served with citations requiring her to accept or refuse letters of administration in respect of the estate of the deceased. The registry duly processed a citation which was executed by the Deputy Registrar on 1st November 2012.
3. It is not clear from the record whether the said citation was ever served on the citee. There is however correspondence exchanged between counsel for the two sides, copied to the court, on matters relating to the papers filed in court. Eventually, the citee's advocates filed a notice of appointment on 14th January 2013.
4. Subsequent to that, the citee lodged in court a summons dated 9th October 2013, premised on Rule 49 of the Probate and Administration Rules. She sought in principal the striking out of the proceedings filed by the citor, on the grounds that the citor did not have legal standing with respect to the estate of the deceased for she was not a spouse of the deceased. She also sought several orders touching on intermeddling with the estate by the citor and return of documents. The application was served and the citor responded to it by way of a replying affidavit sworn on 22nd October 2013, and filed herein on the same date, responding to the issues raised by the citee.
5. Directions were subsequently given on 9th July 2014 that the citation be heard orally. Further directions followed on 29th September 2015 that the application dated 11th October 2013 be disposed of by way of oral evidence, with witness affidavits to be filed and exchanged within thirty (30) days.
6. The matter was placed before me for hearing on 9th March 2016. I allowed the citee to proceed upon being satisfied that there was proper service. The matter did not proceed by way of *viva voce* evidence, contrary to the directions given earlier; instead it was urged by way of oral submissions. Counsel appearing urged the court to grant the orders sought in the application dated 9th October 2013.
7. These proceedings commenced by way of a citation. The law and procedure on citations is set out in Part VI of the Probate and Administration Rules. Rule 21 deals with the form of the citation, while Rule 22 provides for the circumstances under which a citation may be issued. Essentially, under Rules 22 and 23, a citation may issue to a person entitled to apply for representation requiring him to either to accept or refuse to accept a grant, or to propound a document as a will. Rule 22(4) (5) (6) and (7) of the Probate and

Administration Rules give details of the procedure after the service of the citation on the citee. A citee who is willing to take up the grant, is expected to enter an appearance and to file an affidavit indicating his willingness to petition for the grant. In fact, the language of the provision suggests that he ought to file a petition simultaneously with the appearance and affidavit. Where the citee fails to appear or to file the petition for grant, the court, on application, would allow the citor to go ahead and petition. Where the citee appears but does not petition for grant within thirty (30) days, the court ought to allow the citor to petition for a grant.

8. It ought to be made clear that the citation is a device for prompting a person who is entitled to apply for representation, and who has failed or neglected to do so, to so apply. The citation does not initiate proceedings that would require a formal hearing. A court faced with a citation ought not to conduct a formal hearing, instead it should give directions on who ought to file petition for representation. In view of the foregoing, there cannot have been any basis for the directions made on 9th July 2014 and 29th September 2015. At this stage of the probate and administration proceedings there are no pleadings in place, and therefore there cannot be any basis for conducting an oral hearing. Pleadings in the probate matters take the form of a petition, answer to petition and a cross-petition. As it is there is no suit yet in this cause to warrant the conduct of oral hearings.

9. I need to say something about the summons dated 9th October 2013. The said summons is interlocutory, yet it was filed prior to the filing of the substantive pleadings, the ones that I have alluded to above. Some of the orders it seeks can only be granted on an application by the holder of a grant. Section 79 vests the property of the estate on the holder of the grant, and prayers on intermeddling and surrender of documents can only be at the instance of the grant holder. Neither the applicant nor the respondent holds a grant in respect of the estate herein, so neither of the two can prosecute the other for intermeddling or even demand any documents from the other party. The said application cannot in the circumstances be properly before the court.

10. The other concern on the said application is the fact that it raises issues that ideally ought to be raised at the stage of objections. The applicant ought to have waited for a petition to be lodged at the registry by the respondent, so that upon its gazettment she files an objection, an answer to the petition and a cross-petition, as required by sections 68 and 69 of the Law of Succession Act, Cap 160, Laws of Kenya and Rule 17 of the Probate and Administration Rules. Alternatively, the applicant ought to have filed the petition for grant herself, whereupon the respondent would have had liberty to file objections on the grounds that she was also a spouse of the deceased and entitled equally to representation to the estate.

11. The long and short of it is that the application dated 9th October 2013 is premature, incompetent and an abuse of the court process. It should suffer the fate of being struck out, and I do hereby strike it out. This being a family matter, I shall not condemn the applicant to costs.

12. The matter needs to be moved forward, consequently I shall give the following directions:-.

(a) That the citor and the citee, either jointly or severally, shall petition for representation to the estate of the deceased within thirty (30) days of the date of this order;

(b) That the party who will not have filed a petition in terms of (a) above, for whatever reason, shall, upon gazettment of the petition to be filed under (a) above, file objection, answer to petition and cross-petition in accordance with Rule 17 of the Probate and Administration Rules;

(c) That in the event of both parties filing petitions, directions shall be given on the disposal thereof; and

(d) That the matter shall be mentioned after thirty (30) days for compliance.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE