



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO. 634 OF 2012**

**IN THE MATTER OF THE ESTATE OF M'NGITI M'NJIRU.....DECEASED**

**JAMES MARETE ..... CITOR**

**-VERSUS-**

**SAMSON MUREGA M'NGITI ..... CITEE**

**RULING**

The citor JAMES MARETE through a citation to accept or refuse probate to the citee Samson Murega M'Ngiti dated 17<sup>th</sup> September, 2012 sought that the deceased M'Ngiti M'Njira who died on 10<sup>th</sup> September, 2011 having made and duly executed his last will dated 31<sup>st</sup> March, 2004 appointing citee Samson Ntogaiti as his executor without naming therein any residuary legatee do show cause why letters of administration with the said will should not be granted to James Marete. The citee upon service with the citation filed a replying affidavit dated 24<sup>th</sup> October, 2012.

The citor in his summons brought under Rule 22 of the Probate and Administration rules seeks the following orders:-

1. That the citee who is named as the executor of the will of the deceased be deemed to have renounced his right as executor.
2. That the citor be allowed to petition for a grant of representation and/or he be appointed the legal representative of the estate of M'NGITI M'NJIRU (deceased)
3. That the last will made by M'Ngiti M'Njru on 30<sup>th</sup> January, 2004 be admitted as a valid will.
4. That the costs of this application be in the cause.

The application is based on the grounds that the deceased left behind a valid will and the citee was appointed by the deceased as the executor of his last will. That the citee has not taken out probate of the last will of the deceased. That the citee has renounced executorship.

The citor averred that the deceased died on 19<sup>th</sup> September, 2011 leaving a valid will and citee as his executor. He annexed copy of the purported will thereof as “JM1” and averred that since then the citee has refused to take out probate of the last will of the deceased. The citor averred that he is interested in the deceased estate as a son of the deceased and is desirous of obtaining probate of the deceased last will.

The citee on his part deponed that he is strongly challenging the validity of the purported deceased will and averred that the same is “doctored” will and is fraudulently produced or introduced. He further challenged it as far as it mentions him as an executor and a beneficiary. He further stated the will was kept by a stranger. He also challenged the spellings of the deceased names as Ngitu Nyiruu and Rinyiro Ngitu. He further averred that there is no provisions for substitution of any one in a will. The citee further averred that he is preparing to make an application to have the will declared null and void.

The citor did not specify the Sub-Rule of Rule 22 of the Probate and Administration Rules under which the summon is brought; however **Rule 22(3) of the Probate and Administration Rules provides:-**

**“22(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.”**

Further under **Rule 22(7) (c) of Probate and Administration Rules** it provides:-

**“22(7)(c) in the case of a citation under Sub-rule (3), apply by summons to the court for an order requiring the person cited to take a grant within a specified time or petition the court for a grant to himself or to some other person specified in the petition, and the application shall in each case be served on the person cited.”**

The citor in his application did not apply for citee to take a grant within a specified time or petition the court for a grant to himself or to some other person specified in the petition but seeks that the purported executor of the will of the deceased be deemed to have renounced his right as an executor and that he be allowed to petition for a grant of representation and/or be appointed legal representative of the estate of M’Ngiti M’Njiru and that the last will of the deceased be admitted as valid will.

In citation to propound a document of a will, **rule 23(1) and (2) of the Probate and Administration provides:-**

**“23. (1) A citation to propound a document as a will shall be supported by an affidavit in Form 23 and be directed to the executors named therein (if any) and still living and to all persons interested thereunder, and may be issued at the instance of any citor having an interest contrary to that of the executors or such other persons.**

**(2) If the time limited for appearance has expired and no person cited has entered an appearance in either the principal registry or the Mombasa registry, or if no person who has appeared proceeds with reasonable diligence to propound the document, the citor may petition the court for a grant as if the document were not a valid will and the court before making a grant may direct such inquiries and make such orders as it thinks fit”.**

In the instant application it is worthy noting that the citor did not file an affidavit in Form 23 directing it to the executor named therein and to all persons interested. In absence of compliance with **Rule 23(1) of the Probate and Administration Rules** no one has appeared hence it is premature for the citor to petition the court for a grant as if the documents were not valid will. Further the court before making a grant may direct for such inquiries and make such orders as it thinks fit.

In the instant application I have considered the fact that the citee is challenging the validity of the will terming it as a “doctored” will and “fraudulently introduced”. He further stated that it was made by

clever people who indicated that he was an executor so that he could not challenge the same. He averred the purported will has 1001 anomalies and that he intends to file an application to have the document declared null and void.

In view of the fact that the validity of the alleged will appointing the citee as an executor is challenged by the citee and the fact that the citor did not comply with Rule 23(1) of the Probate and administration rules; I would like to point out that before a will which is challenged is declared valid or lawful, it has to be proved as a valid testamentary disposition of the testator, and upon so doing, a court has to examine whether the formal requirements in making a will had been complied with, which includes whether the testator had the legal capacity to make a will and whether it was made voluntarily without any duress, undue influence or mistake. The court has also to consider whether the testator had revoked the will before his death. The validity of the will having been challenged by the named executor, I find no basis of the same being sought to be declared valid by the applicant who is not one of the executors. The validity of the alleged will has to be proved before it can be declared lawful. I therefore find and hold the citor's application to be premature and without legal basis.

I find the citor's application to be premature and not proved and the same is refused.

As the validity of the will is challenged by the citee the parties are at liberty to set this matter down for determination of the validity of the will or file an application for court to determine whether the will is valid or not.

As the parties are brothers I direct that there shall be no order as to the costs.

**DATED AT MERU THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2014.**

**J. A. MAKAU**

**JUDGE**

**Delivered in open court in the presence of**

**Mr. Mutuma for the citor**

**Citee in person**

**J. A. MAKAU**

**JUDGE**