



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION NO. 766 OF 2012**

**IN THE MATTER OF THE ESTATE OF KIRIMANIA MATHA(DECEASED)**

**DAVID KIRIINYA MICHAEL**

**ISAIAH KAIGERA MUCHEKE.....CITORS**

**KARURU ROSALINE**

**VERSUS**

**SABELLA M’KIRIMANIA**

**GITONGA M’KIRIMANIA**

**PETER MURIUKI KIRIMANIA.....CITEES**

**STEPHEN KIOGORA KIRIMANIA**

**RULING**

The citor through a citation to accept or refuse letters of administration intestate dated 3<sup>rd</sup> December, 2012 brought pursuant to Rule 21 of the Probate and Administration Rules sought that the citees do accept or refuse letters of administration in respect of the estate of Kirimania Matha who died in 1973 intestate leaving the citees being his children and wife respectively as persons entitled to share in his estate. The citors interest is premised on a sale agreement made in 2000 between the 1<sup>st</sup> citor and one David Kirimania in respect of ¼ an acre out of his entitlement from Nyaki/Nkabune/186. The 1<sup>st</sup> citor claimed that he lives on the said land and has acquired equitable ownership of the said portion, however his rights over the same hangs on the balance since he has not acquired title of the said portion due to indolence of the citees.

The 1<sup>st</sup> citee filed Memorandum of Appearance on 15<sup>th</sup> January, 2013 together with a preliminary objection based on the following objections.

1. *All the supporting affidavits annexed to the citation are disclosing a commercial suit based on contract for sale of land and not a succession matter.*
2. *All the sale of land agreements annexed as exhibit provides a default clause which has not been exhausted before filing this citation.*
3. *Neither the deceased nor the 1<sup>st</sup> respondent was a party to the sale agreements annexed as*

- exhibits to the supporting affidavit.*
4. *The citation is incurably defective for lack of verifying affidavit(s) as required by rule2(2) of the Probate and Administration Rules.*
  5. *This Honourable court lacks jurisdiction to accept or entertain this citation and the same should be struck out with costs to the 1<sup>st</sup> respondent.*

When the preliminary objection came up for hearing only Mr. A. G. Riungu learned Advocate for the 1<sup>st</sup> citee appeared and though M/S Kaume &Co. Advocates were duly served they did not show up hence the preliminary objection proceeded ex-parte.

The citees argued that the affidavit annexed in support of the citation discloses a commercial suit and not a succession matter for which in default the citors are entitled to a remedy as per terms and conditions of the sale agreement dated 9<sup>th</sup> December, 2000 by paying the innocent party Kshs.200,000/- as liquidated damages. It is further submitted on behalf of the citee that the 1<sup>st</sup> citee was not a party to the sale agreement and that the citation is incurably defective for lack of verifying affidavit as required and the court lacks jurisdiction to accept or entertain the citation. The 1<sup>st</sup> respondent prayed the citation be struck out with costs.

**Rule 21(2) of the Probate and Administration Rules** provides:-

***21. (1) Every citation shall be drawn by the applicant in one of the Forms 31 to 36 as appropriate and settled by the registrar of the registry from which, upon payment of the prescribed fee, it is to be issued.***

***(2) Every averment in a citation, and such other information as the registrar may require, shall be verified by an affidavit in one of the Forms 20 to 24 as appropriate sworn by the citor or, if there are two or more citors, by one of them:***

***Provided that the registrar may in special circumstances, for reasons to be recorded, accept an affidavit sworn by the citor's advocate."***

It is apparent from the above-mentioned rule that every averment in a citation and as such other information as registrar may require shall be verified by an affidavit in one of the Forms 20 to 24 as appropriate sworn by the citor. This requirement is couched up in a mandatory form and information is required to be verified by an affidavit in one of the forms 20 to 24. The present application is not supported by verifying affidavit but by a supportive affidavit contrary to Rule 21(2) of the Probate and Administration Rules.

**Rule 22(1) of the Probate and Administration Rules** provides:-

***"22. (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.***

The above rule is clear that citation may issue at the instance of any person who would himself be entitled to a grant in the event of the citee renouncing his right thereto.

The persons entitled to grant are specifically spelled out under Section 66 of the Law of Succession Act which provides:-

***"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.”***

The citor is a purchaser of an interest from one of the beneficiaries and not the 1<sup>st</sup> citee. The sale agreement was made over the deceased property in 2000. The deceased is said to have died in 1974, that is 37 years before the citor entered into an agreement of sale of land with one Stephen Kiogora Kirimania, described as a legal representative to the estate of M’Kirimania Matha. The said vendor is not a legal representative to the deceased estate as envisaged by **Section 3 of the Law of Succession Act which defines “administrator” as meaning a person to whom a grant of letters of administration has been made under the Law of Succession Act. A “personal representative” on the other hand means the executor or administrator of a deceased person.**

In view of the foregoing the citors being not within the category of the persons entitled to the deceased estate as envisaged under Section 66 could not in view of Rule 22(1) of the Probate and Administration Rules issue citation to persons entitled to the deceased estate they being not entitled to a grant. The citors are strangers and/or intermeddlers to the deceased estate. The citors claim is based on a contract between themselves and a third party. This is a succession matter which can only deal with matters related to the administration of the deceased estate but not on issues of breach of contract which issue can be dealt with in another forum other than in a succession matter.

In view of the foregoing I find the citation issued to 1<sup>st</sup> citee and others misplaced and bad in law. The upshot is that the preliminary objection is upheld and the citation is struck out with costs to the 1<sup>st</sup> citee.

DATED, SIGNED AND DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF MAY, 2014

**J. A. MAKAU**

**JUDGE**

Delivered in open court in the presence of:

1. Mr. A. G. Riungu for the 1<sup>st</sup> respondent/citee
2. M/S M. G. Kaume for the citor

**J. A. MAKAU**

**JUDGE**