



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CITATION NO. 89 OF 2013

IN THE MATTER OF THE ESTATE OF DAVID K. C. HERMAN (DECEASED)

BETWEEN

MARY JEROP KIPTOO CITOR/PETITIONER

VERSUS

PHILLIS JEBOR KOMBELEL 1ST CITEE/ RESPONDENT

KIPLAGAT KIPTUGEN 2ND CITEE/RESPONDENT

RULING

The deceased David Koech Chesire died intestate on 26th December, 2012 and left behind two wives and five children.

A citation to refuse or accept the letters of administration was filed on 13th June, 2013 by one of the deceased's wives, namely Mary Kiptoo addressed to the other widow, Phylis Kombelel.

The direction in the citation was that the Citee (Phylis Kombelel) do within fifteen (15) days after service enter appearance to refuse or accept Letters of Administration of all the estate which vests in the personal representative of the deceased or show cause why they should not be granted to Mary Kiptoo.

In the Supporting Affidavit the Citor adds that she had prepared the Petition for Letters of Administration but the Citee had refused to sign it. She further added that she is unable to pay school fees for the children amongst other needs because she cannot access any of the deceased's money without the Letters of Administration.

A Replying Affidavit was filed by the Citee on 28th June, 2013. She confirmed receiving the citation herein. She however denied that she had been served with any application for Grant of Letters of Administration. She stated that, by the time of the death of the deceased, he was only married to one wife – herself. She stated that the Citor had been masquerading as the deceased's widow. In this respect she annexed a Decree Nisi (annexture PJK 11 (b)) and Decree Absolute (Annexture PJK.11 (a)) arising from **NAIROBI HIGH COURT DIVORCE CAUSE NO. 153 OF 2006 – MARY J. KIPTOO -VS- DAVID KOECH**, as prove that the Citee was divorced with the deceased. She stated that herself together with the deceased's brother, Moses Kiplagat Kiptugen are pursuing a Petition for Grant of Letters of Administration.

The Citor filed a further Replying Affidavit sworn on 29th July, 2013 in which she deponed that

she was married to the deceased in December, 1994 and had two issues with him namely M A C and S K C. She stated that she fully participated in the funeral arrangements of the deceased. In this regard, she annexed a copy of the deceased obituary as annexure MJK-1. It was her contention that herself and the Citee are mandated by the law to Petition for Grant of Letters of Administration.

The Citor further stated that the Chief, in his letter has, recognized her as the deceased's first wife – See annexure MJK-2. She stated that she was not aware of any family meeting in which it was agreed that the Citee and one Moses Kiptugen Petition for the Grant of Letters of Administration.

She said that her children are direct beneficiaries of the estate of the deceased, and that in any event, they are named as such in the deceased insurance cover with Madison Insurance Company and with the Ministry of Health.

She stated that under S. 60 of the Law of Succession Act, Court has the discretion to determine who can petition for the Grant of Letters of Administration.

On 12th August, 2013 the Citor filed a Notice of Motion under a Certificate of Urgency in which she, among other orders, sought that the money held by NHIF be released to meet the school fees and school related expenses together with the medical insurance cover for the deceased's family and that the said money be apportioned between the two families.

This citation was canvassed by filing of written submission. On the part of the Citor, she reiterated what she deponed in both the Supporting Affidavit and Further Replying Affidavit. She however added that the matrimonial property was not distributed upon her divorce with the deceased and as such she is entitled to it.

On the part of the Respondent, she submitted that once the Citor divorced with the deceased, she ceased to be a member of the family. She summarized the following as issues for consideration in this citation;

1. Whether the Citor was wife of the deceased.
2. Whether the Citor had already divorced the deceased, the owner of the estate in question.
3. Whether the Citor qualifies as a dependant under both the Constitution and the Law of Succession Act.
4. Whether, in view of the above, the citor qualifies to Petition for Grant of Letters of Administration.

She submitted that under S. 29 of Cap 160 a divorced wife is not categorized as a dependant.

As to the undistributed matrimonial property, the Citee submits that the Citor ought to have gone to the appropriate court.

She also stated that under Rule 22 (1) and (7) of the Probate and Administration Rules, she had not renounced her right to institute a Petition for Grant of Letters of Administration. In this respect she cited the cases of **RE: ESTATE OF JOHN KABARU GICHERU (DECEASED) - SUCCESSION CAUSE NO. 172 OF 2013 AND RE: ESTATE OF AGNES MORURI OSINDI (DECEASED) – SUCCESSION CAUSE NO. 129 OF 2008** in which it was held that a person cited must first enter appearance at the Principal Registry by filing Form 27 which is then sealed and used by the person entering appearance to Petition the Grant of Probate.

In light of the foregoing, she urged the court to appoint her and one of the Citor's children as

administrators of the estate.

DETERMINATION

Under Rule 22 (1) of the Probate and Administration Rules “*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.*”

In the instant case, the Citor, notwithstanding that she has cited the Citee, also claims equal rights of inheritance as the Citee. Therefore the first question for determination is whether under the definition of a dependant under Cap 160, she is a dependant with equal priority as a beneficiary with the Citee.

Section 29 of Cap 160 gives the meaning of a dependant as;

“29. For purposes of this part “dependant” means-

(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

In addition under Section 3 of Cap 160 a 'wife' is defined as;

“Includes a wife who is separated from her husband and the terms 'husband' and 'spouse', 'widow' and 'widower' shall have a corresponding meaning.”

In my most considered interpretation of the above provisions, nothing stops a divorced wife from petitioning for grant of Letters of Administration. If the word “former wife” were to be strictly applied, then it includes a divorced wife, the bracket under which the Citor falls. Under Section 29 a 'former wife' has equal priority of dependancy as a current wife of the deceased.

It may be argued correctly though as noted by W. M. Musyoka in his book “***Law of Succession***” **at page 159** that citation is used where a person (whether in intestacy or testate succession), who has an entitlement to a grant prior to that of the Citor, delays or declines to take a grant, but at the same time fails to renounce his or her right to a grant so as to enable persons with inferior right to take out a grant in his or her place.

This statement by W. M. Wambua echoes the provision of Rule 22 (1). And according to the Citee, she has not renounced her right to petition for the Grant of Letters of Administration. According to her, she holds the superior right over the Citor to petition for Grant.

But strictly interpreting S. 29, none of the two parties has a superior right over the other to petition for the Grant of Letters of Administration. They are both dependants with equal superior rights over the estate of the deceased. None is inferior to the other. They stand on equal ground of priority to petition.

May I note that, each of the parties is determined to secure what she feels belongs to her and her children. The boundaries on what each one of them can claim shall be demarcated at the time of distribution of the estate.

Further, it is only after the petition has been filed, and the estate ascertained that any one of them can seek interlocutory orders for release of any monies to the benefit of the children. Such an application shall be considered on merit at the optune time.

Having said so, I determine this citation as under;

1. Both the Citor and Citee shall jointly petition for Grant of Letters of Administration in respect of the deceased's estate.
2. The Petition should be filed within the next forty five (45) days.
3. In the event that any of the parties refuses to co-operate the court should be moved appropriately for necessary orders.
4. Each party shall bear its own costs of this citation.

DATED and **DELIVERED** at **ELDORET** this 24th day of June, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

No appreance for Chemwok Advocate for the Applicant/Citor

Mr. Onkoba holding brief for Wanyonyi for the 1st & 2nd Respondents/Citees