



REPUBLIC OF KENYA

High Court at Kisii

Probate & Administration 177 of 2012

JOHN OSICHO ODONGO CITOR

AND

HANA OMOLO OSEWE 1ST CITEE

MARGARET ANYANGO OSEWE 2ND CITEE

RULING

1. The citor herein John Osicho Odongo filed a chamber summons pursuant to **Rules 22 (5) (A)** of the **Probate and Administration Rules** dated 5th December 2012 seeking:-

a) *That applicant herein be allowed to file and be granted Letters of Administration intestate to the estate of Eliud Osewe Nyawire (deceased).*

b) *Costs of this application be provided for.*

2. The application was supported by an affidavit sworn by the citor who is admittedly a nephew to the deceased. He avers that the deceased Eliud Osewe Nyawire died on 29th January 2000 at Kendu Adventist Hospital; the deceased was the eldest son in the family of George Odongo Nyawire (now deceased) and Cyprian Oketch Nyawire who were his younger brothers and was by virtue of his status in the family registered as proprietor of the family land LR. SOUTH SAKWA/WAWARE/276 holding the same for himself and the entire family; that none of the persons in the lead entitled to take out letters of Administration in respect of the deceased's estate has done so despite numerous demands made by beneficiaries.

3. He further avers that he himself and his siblings are lawful beneficiaries of the said estate for which the citees have refused to take out letters of administration and that the citees' refusal to take out letters to administer the estate of the deceased is exposing the property thereunder to plundering, waste, unlawful alienations and/or dispositions.

4. The 1st citee on her part filed a notice of appointment of advocates on 1st February 2013 and a replying affidavit dated 12th February 2013 confirming that the citor is indeed a nephew of the deceased and was not the eldest son in the family of George Odongo Nyawire (deceased) and Cyprian Okech Nyawire who were his younger brothers. She further avers that the deceased was registered as the first absolute proprietor of land parcel title no. South Sakwa/Waware/276 and not as a trustee of anybody; that the deceased was the eldest son in the 2nd house of the late Nyawire Mbogo and Pesila Ongige (late) and

that his other siblings Richard Oyugi Nyawire, George Odongo Nyawire (late) and Cyprian Okech Nyawire all have their own children.

5. Furthermore, she avers that the application herein is superfluous, an abuse of court process, null and void on the face of it as no demand had been made on her to take out letters of administration either by the citor or the Area Assistant Chief; that neither the citor nor his siblings are beneficiaries to the estate of the deceased, that between the deceased and the citor there are so many other relatives (apart from the citees) who come first in order of consanguinity before the citor and none have been cited along with the citees; that the citor cannot become a beneficiary based on trust, that the citor and two of his brothers have themselves intermeddled with the estate of the deceased by cutting down trees which they mill into timber and by damaging the citees' houses and driving them away from their homestead.

6. When the matter came up before me for hearing on 19th April 2013, Mr. Nyasimi for the citor submitted that prior to filing of the instant application, the citor had filed a notice of motion supported by an affidavit dated 12th April 2012 and had issued it to the citees herein to accept or refuse probate. That the citees have shown through their replying affidavit that they are not willing to take out the grant, that the citor is equally entitled to apply for grant as a beneficiary of the deceased's estate and now that the 2nd citee is unwell, the matter of the grant has become urgent and the citor should be allowed to take out a grant and that it is in the interests of justice that the estate of the deceased be administered for the good of both citor and citees.

7. Mr. Gembe for the citees in response opposed the application and submitted that:-

Ø There is no capital "A" of the rule 22 (5) of the P&A rule under which the application is purportedly brought.

Ø The rule is only applicable if citees fail to enter appearance.

Ø There is no proof that citees have refused or are not interested in making the petition.

Ø The earlier replying affidavit does not state that they are not interested in taking out the grant.

Ø There are several other beneficiaries who rank higher than citor and they should have been cited along with citees or given consent to cite.

Ø Citor has not shown how he is a beneficiary of the deceased's estate.

Ø The deceased was not registered as trustee of the suit land for family but as absolute proprietor.

8. In conclusion Mr. Gembe urged the court to find that the application lacks merit and to dismiss it with costs.

9. Mr. Nyasimi in reply to the above submissions contended that both the application and notice were properly before this court, and cannot be faulted adding that the overriding principle of civil practice and procedure should apply. He further submitted that whether a citor is a beneficiary or not is not a requirement for taking out letters of administration and matters of degree of consanguinity will be dealt with after the letters of administration have been issued.

10. The following are the issues to be determined by this court:-

1) *What is the purpose of a citation in succession law?*

2) *Whether the application by the citor is premature.*

11. A citation is a document issued by the probate registry, whereby the person issuing the document (the citor) calls upon the person cited (the citee) to provide a reason why a particular step should not be taken.

12. Citations occur in both contentious and non-contentious probate. In non-contentious probate, they serve the purpose of hurrying along or fast tracking the issue of a Grant of Letters of Administration.

13. With regard to the second issue, namely whether or not the instant application by the citor is premature; it is undisputed that the citor had filed an application in verification of proposed citation to accept or refuse probate dated 12th April 2012, the citees in turn filed a joint replying affidavit with no date opposing the citor's application but which was received by court on 20th April 2012.

14. In the matter of the estate of **Stephen Mwangi Mbugua (deceased) Mombasa High Court Civil Case NO.1 of 2003**, (Sergon J) held:-

“When the deceased's mother was served she filed through the firm of

Gachiri Kariuki and Company Advocates a replying affidavit and a Notice of Appointment of Advocates. This is not what is anticipated under the provisions of rule 21 (5) of the Probate and Administration Rules which provides:

“A person who has been cited to appear may within 15 days of

service of the citation upon him, inclusive of the day of such service, or at any time thereafter if no application has been made by citor under rule 22 (5) or rule 23 (2), enter appearance by filing form 27 and shall forth with thereafter serve on the Citor a copy of that form sealed with the seal of the Registry.”

Provided that the Registrar may in any case at the time of issue if the citation increase the period of 15 days to such period as he thinks fit.”

15. Applying the provisions of the above rule to this case, I find that the citees have not complied with the same. They decided to file documents which were not recognized by the rules. On the face of it they did not enter appearance as required and in turn there was no application pending for leave to extend time for entering appearance as envisaged under **rule 21 (5)**.

16. Since there was no appearance on the part of the persons cited in the application dated 12th April 2012, the citor's next step was to make this application under **rule 22 (5)** of the **Probate and Administration Rules**. The chamber summons dated 5th December 2012 was therefore properly brought to this court as the citor had already notified the citees to take out grant of letters of administration but the citees had failed to do so.

17. In addition, the letter from the Assistant Chief Waware sub location addressed to the Chief's Office confirms that indeed the citor is to be considered as a beneficiary once succession has taken place. The citees' only reason why they think this application is unsustainable is because the citor has not made a demand upon them and especially upon the 1st citee, to take out Letters of Administration. In paragraph 5 of the citees' joint replying affidavit filed in court on 20th April 2012, the citees say that each family has their portion of their lands and all that remains is succession to let each family have their own title deeds. What comes out from that affidavit is that though the citor and his family have their share of the land on the ground, they do not have it on paper, hence the necessity to have the deceased's estate succeeded.

18. In conclusion, I am satisfied that this application is properly before this court and that the same is merited. Accordingly I allow citor herein to file and be granted Letters of Administration Intestate to the estate of Eliud Osewe Nyawire (deceased). In doing so, the citor shall bring on board all beneficiaries of the deceased's estate, including the 2 citees. The costs of this citation shall abide the outcome of the succession cause.

Dated and delivered at Kisii this 23rd day of May, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. Nyasimi (present) for the Citor

Mr. Gembe (absent) for the Citees

Mr. Bibu - Court Clerk

HC (KISII) SUCCESSION CAUSE NO. 177 OF 2012