



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Citation Cause 714 of 2007

IN THE MATTER OF THE ESTATE OF SIMON MUNZATSI DECEASED

A N D

THOMAS CHANGILWA MULUHYACITOR

V E R S U S

DEINA KAMAYI MUNZATSICITEE

R U L I N G

On the 30th August, 2007, the citor, **THOMAS CHANGILWA MULUHYA**, filed a citation, by which he asked the citee, **DEINA KAMAYI MUNZATSI**, to either accept or refuse letters of administration in respect to the estate of the late **SIMON MUNZATSI**.

By the said citation, the citor indicated that the deceased, Simon Munzatsi, was the 2nd defendant in KAKAMEGA HCCC. NO.20 of 2003.

Following the demise of the said Simon Munzatsi, the citor felt that justice could only be done if the citee, who is the widow, substituted him, as his legal representative in that suit. It was the citor's view that once the cite substituted the deceased, the suit could thereafter proceed to hearing and determination, on merit.

In the event that the citee failed to accept the letters of administration, the citor asks the court to require the citee to show cause why the letters of administration should not be granted to the citor.

After the cite was served with the citation, and after the period within which she ought to have accepted or refused the letters of administration lapsed, the citor filed an application for Directions.

Upon service with the application for Directions, the citee filed a Notice of Preliminary Objection, which was in the following terms:

“ 1. The citor, Thomas Changilwa Muluhyia, lacks the necessary locus standi to cite and or prosecute the citation against the citee.

2. The purpose for which the citation was made is in itself an abuse of the process of this court.

3. The citation was filed after inordinate delay.

4. There is no valid suit to be substituted for Simon Munzatsi as Kakamega Civil Suit No.20 of 2003 abated on the 22nd December, 2006 as against the deceased Simon Munzatsi.”

In my understanding, the law governing preliminary objections is now well settled. First, they ought only to be raised on issues of law. Secondly, the factual basis should either be one of consensus between the parties, or alternatively the court must assume that the person raising the objection accepts as correct, the facts as set out by the other party. Thirdly, the issue or issues ought to be such that the determination thereof would bring out the determination of the substantive action between the parties.

In this case, the citor states that the deceased, SIMON MUNZATSI, was the 2nd defendant in Kakamega High Court Civil Suit No.20 of 2003. The citor is the plaintiff in that suit.

As the 2nd defendant is deceased, the plaintiff in that suit is unable to prosecute the suit until and unless the said 2nd defendant was substituted.

It was for that reason that the citor wishes the citee to either accept or refuse the letters of administration for the estate of the 2nd defendant.

In the event that the citee refuses to take out the letters of administration, the citor asks that this court should give him the authority to take out the said letters of administration.

At this stage, the substantive citation has not yet been canvassed before me. Indeed the citee believes that there would be no need for the citation to be canvassed substantively as the citor lacks locus standi to prosecute the citation.

To my mind, the issue as to whether or not the citor has the requisite locus to file and prosecute the citation, is not one which can be answered without first delving into matters of fact.

At present, this court is not aware whether or not the claim by the citor, in the Kakamega High Court Civil Suit No.20 of 2003 is founded upon his contention that he was a creditor.

If that were the position, and if the citor was able to prove that the deceased was indebted to him, he may well be able to show that pursuant to **section 66 (d)** of the Law of Succession Act, he could be entitled to apply for letters of administration, if those who rank in priority over him did not take out letters.

But then, the citee contends that the claim against the deceased had abated before the citation was filed.

According to the citor, the deceased passed away on 22nd December 2005. Thereafter, the citation herein was filed on 30th August 2007.

By virtue of the provisions of **Order 23 rule 3 (2)** of the Civil Procedure Rules, a suit shall abate if no application is made within one year, to substitute the deceased plaintiff.

By virtue of **Order 23 rule 4 (3)** a suit shall abate against a deceased defendant if within one year of his death, no application is made by the plaintiff to cause the legal representative of the said defendant, to substitute him.

But a suit which has abated may be revived by the court, after hearing an application in that regard.

Therefore, although as at the time the citation was filed, the suit may have abated against the 2nd defendant, that is not necessarily the end of the road for the plaintiff. There is a possibility that the plaintiff could persuade the court to revive the suit.

Meanwhile, the question of delay, and whether or not the same was so inordinate as to be sufficient to deprive the citor of the prayers sought, is a matter of discretion. Accordingly, the fact of the alleged delay is not a proper ground for shutting out the citor on the strength of a preliminary objection.

The most difficult issue before me is whether or not the purpose for which the citation was made constituted an abuse of court process. I say so because, ordinarily, the court would be expected to exercise its discretion in determining what constituted an abuse of the process of the court. There might be situations or circumstances which appear, on the face thereof, to constitute an abuse of the court process. However, it is possible that a party may offer a satisfactory explanation, which could persuade the court otherwise.

In this case, if the citor were permitted to take out letters of administration, he would end up as both the plaintiff and the 2nd defendant in Kakamega High Court Civil Suit No.20 of 2003. Obviously, that appears untenable, because it is probable that the citor could thereafter compromise the suit, to the detriment of the estate of the deceased.

But then again, the court cannot help but wonder why the citee refuses to take out the letters of administration, or to have any other member of her family do so, with a view to safeguarding the estate. If the citee did not wish to permit the citor to have the possibility of compromising the suit, to the detriment of the estate, the citee should readily accept the letters of administration. As she has not accepted the opportunity to take up the letters, one wonders if it is perhaps not the citee who seeks to abuse the process of the court.

On the other hand, if the citor were to take out the letters of administration, he would have to persuade the court how he can be both the plaintiff and the 2nd defendant simultaneously.

In the result, I hold that that issue is very much arguable. It is not an issue to be determined summarily, through a preliminary objection.

Therefore, the preliminary objection is unsuccessful. It is struck out. However, the costs thereof shall abide the outcome of the substantive citation herein.

Finally, I wish to make it clear that all the issues raised before me, during the preliminary objection, remain alive for determination.

Dated, Signed and Delivered at Kakamega this 7th day of July, 2008

FRED A. OCHIENG

J U D G E