



**Kasuve v Muteti (Family Appeal E005 of 2021)
[2024] KEHC 5 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 5 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
FAMILY APPEAL E005 OF 2021
TM MATHEKA, J
JANUARY 11, 2024**

BETWEEN

TITUS MUTUKU KASUVE APPELLANT

AND

WINFRED JONES MUTETI RESPONDENT

*(Being an appeal against the ruling dated the 27th August 2021 of the Honourable
Mayamba C.M Principal Magistrate in the Kilungu PMC Citation Cause No. E36 of 2021)*

JUDGMENT

1. Titus Mutuku Kasuve filed Citation Cause no. 36 of 2021 dated 21st June 2021. He cited Winfred Jones Muteti as the wife of the deceased and the intended administrator. The citation was supported by a Supporting Affidavit sworn on the same date, and annexures therewith.
2. The citor depones that he is a liability to the estate of Jones Musyoka Muteti (deceased) for the reason that he:

“bought share certificate no 0421 Malili Ranch Limited from Jones Musyoka Muteti(the Deceased) registered owner on the 28th February 1989”

He annexes the share certificate and a sale agreement between him and the deceased . He depones further that the certificate represented the ownership of LR no. Konza North/Konza North Block 2(Malili) 1501. That the deceased died before he (the deceased) balloted for the actual parcel of land and the Citee went ahead and balloted well aware that the Citor had bought the share certificate. He depones that the Malili Ranch Limited confirmed his purchase of the certificate. He depones further that the deceased was the registered proprietor of the property LR no. Konza North/Konza North Block 2 (Malili) 1501 and attaches a search certificate to that effect.



3. In response to the citation the Citee filed a replying affidavit and a Notice of Preliminary Objection on the grounds that
 - a) The citation is an abuse of the court process and a waste of the Court's time as his claim against the estate of the deceased became time barred in 1998 hence the citor is in breach of s. 7 of the Limitation of Action Act
 - b) This court lacks jurisdiction to ascertain a statute barred action
 - c) The Citation is incurable defective for lack of a verifying affidavit as required by rule 2(2) of the P&A Rules.
4. In the affidavit she depones that she has advocate's counsel that the citor's claim is time barred as the agreement was entered into 32 years ago, and in any event the claim became time barred in 1998 12 years after the signing of the agreement.
5. That the deceased died in 2016 and all this time the Citor never tried to enforce the alleged contract. A copy of the death certificate is annexed.
6. That in any event her son had been in occupation of the said parcel of land since 2009 and had established his homestead there. Photographic evidence is annexed
7. The Citor filed a replying affidavit where he deponed that he bought 5 shares from the deceased representing 10 acres out of Malili Ranch Limited. That the deceased executed the transfer which was submitted to the company but died before he balloted. He attached audio recordings of his deliberations with the citee to establish that he had tried

“all humanly possible to reach out to the citee...who had remained adamant and refused to cooperate.”

I tried to listen to the CD on the device I have but there was no sound.
8. The court proceeded to hear the P.O.
9. In a ruling dated 27th August 2021 the Hon C A Mayamba PM, HSC allowed the P.O on the 3rd ground, and found that the citor had no locus to file the citation and dismissed the same with costs.
10. The Citor was aggrieved. He filed an appeal on the following grounds;
 - i) That the learned Trial Magistrate erred in law and in fact by failing to make a finding that there is no provision under the *Law of Succession Act* or the Probate and Administration Rules, 1980 which allows the filing of a Preliminary Objection in a succession cause.
 - ii) That the learned Trial Magistrate erred in law and in fact by allowing the respondent's Preliminary Objection dated 8th July, 2021 and dismissing the appellants citation cause in the lower court trial.
 - iii) That the learned Trial Magistrate erred in law and in fact by making a finding on extraneous matters in his ruling which matters had not been raised either by the citor or the citee in the lower court.
 - iv) That the learned Trial Magistrate erred in law and in fact by making a finding that a citation can only be maintained by the person listed under section 66 of the *Law of Succession Act*.



- v) That the learned Trial Magistrate erred in law and in fact by failing to consider the submissions of the appellant who was the citor in the lower court.
 - vi) That the learned Trial Magistrate erred in law and in fact by failing to make a finding that the preliminary objection before him did not satisfy the requirements set out in *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696*
 - vii) That the learned Trial Magistrate erred in law and in fact by failing to make a finding that if the citee was not going to file a succession cause then her continued stay on the property belonging to the deceased would also be tantamount to intermeddling with the estate of a deceased person.
 - viii) That the Learned Trial Magistrate erred in law and in fact by dismissing the appellant's citation cause with costs to the respondent herein.
11. In his submissions the appellant raised the following issues
- i) Whether or not the Trial Magistrate erred in law and in facts by allowing the respondents' preliminary objection dated 8/7/2021 and dismissing the appellants' citation cause in the Trial Court and whether or not the Trial Magistrate erred in law and in facts by making a finding that a citation cause can only be maintained by the person listed under Section 66 of the [Law of Succession Act](#)?
 - ii) Whether or not the Trial Magistrate erred in law and in facts by failing to make a finding on extraneous matters in his ruling and which matters had not been not raised either by the Citor or the Citee in the Trial Court and whether or not the Trial Magistrate erred in law and in facts by failing to consider the submissions of the Appellant who was the Citor in the Trial Court?
 - iii) Whether or not the Trial Magistrate erred in law and in facts by failing to make a finding that the preliminary objection before him did not satisfy the requirement set out in *Mukisa Biscuit Manufacturing Case* and whether or not the Trial Magistrate erred in law and facts by failing to make a finding that if the Citee was not going to file a succession cause then her continued stay on the property belonging to the deceased would also be tantamount to intermeddling with the Estate of the deceased person?
 - iv) Whether or not the Trial Magistrate erred in law and in facts by dismissing the appellant's citation cause on the ground that the citation was incurably defective for lack of a verifying affidavit with costs to the respondent herein?
12. The appellant relied on s. 66 of the [LOSA](#), rule 26 of the P&A Rules and argued that Rule 7 (7) of the P&A Rules requires that the person with a lesser priority right must obtain the consent of the person with the superior right to administration, get them to renounce their right or cause citation to issue on them requiring them to either apply for representation in the estate or renounce their right to apply for the same.
13. It is argued that the appellant's right was that of a creditor having purchased the deceased's Malili property. It is also submitted that the issue of the appellant's membership to the Ranching Company is pending determination in Machakos ELC n0 75 of 2013.
14. It was argued that the Preliminary objection cited the wrong provisions of the P&A Rules as there is nothing about the verifying affidavit at rule 2 of the P&A rules, and that there is no rule 2(2). It is submitted that the citation was supported by an affidavit supporting citation. Further that the issue of limitation would have required the calling of evidence and therefor it was not a proper P.O. It was also



argued that the deceased died in 2016, the title deed was issued in 2017 and 12 years had therefor not lapsed, and in any event ‘a claim for succession cannot be said to be time barred’.

15. It was also submitted that the finding that the appellant did not have the locus standi to file the citation was outrageous because the appellant is a creditor of the estate who was following the procedure under rule 21 of the P&A Rules, and that in any event the rightful heirs by not filing a succession cause are acting in violation of the s. 45 of the *LOSA* by intermeddling in the estate of the deceased. The appellant urges the court to allow the appeal so that the learned trial magistrate can order the filing of a succession cause in which it can be established whether or not he is a creditor of the estate.

16. It is evident that the respondent speaks of Rule 22(2) of the P&A rules and cites Rule 21(2) of the P&A rules which provides for the mode of filing of a citation, and the mandatory requirement for a verifying affidavit. The respondent submits that the trial court rightfully struck out the citation and relies on *David Kirinya Michael & 2 Others vs Sabella M’Kirmania & 3 others [2014]* eKLR where the court held that;

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 and 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 Rule. (emphasis added)

17. It is further submitted for the respondent that the learned trial magistrate acted correctly by citing *Josiah Muli Wambua [2014]* eKLR, where Hon. Musyoka J. explained

“In intestacy, citations issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the person entitled to apply are not willing or are slow in moving the court in that behalf. The Citor should not be a person who has himself already applied for the grant, for the citor should only apply for grant after the citee fails to so apply.”

18. It is argued that the citor (the appellant) is neither a beneficiary of the estate nor next in line in terms of the order of priority as set out in s. 66 of the *LOSA*. It is submitted that the learned trial magistrate was right and therefor the appeal should be dismissed,

19. I have carefully considered the appeal, and the rival the submissions. It is noteworthy that the appellant did not argue all the grounds as set out on the appeal. It is however important to point out that that P.O raised herein was on a point of law and the alleged failure on the part of the appellant to comply with the same. The issue for determination is whether the P.O was merited. In making that determination consideration must be made of the issue whether citation as filed by the appellant was merited, whether the appellant had the locus to file the citation, whether the issue of limitation of his claim against the estate was relevant.

20. The P&A rules at Rule 21 provide for Citations generally

(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.

21. Rule 22 provides for the who in citations.

22. Citation to accept or refuse or to take a grant

- (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.

22. Section 66 of the LOSA provides for the who with respect to grants;

- (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:

23. The appellant alleges that he is a creditor of the estate. His claim is based on the allegation that he purchased land from the deceased 32 years ago on the basis of the displayed share certificate. It is not in dispute that at the time of the demise of the deceased, the said parcel of land was not in the name of the deceased and as title had not passed to the deceased. The evidence demonstrates that the documents presented here as transfer documents for the share certificate were never registered with the land registrar when the transaction is alleged to have taken place. As a result, the title to Konza North/ Konza North Block 2(Malili) 1501 was issued in the name of Jones Musyoka Muteti (the deceased). The appellant's alleged status as a creditor on the basis that he purchased that parcel of land from the deceased is therefore not established. It appears from his own averments that he has filed a suit to determine his membership to the Malili Ranch Limited.

24. The appellant has, prima facie, demonstrated that he may have a claim against the estate of the deceased however he has not demonstrated that he would himself be entitled to a grant in the event of the person cited (the respondent) renouncing her right thereto.

25. The provisions of rule 21(2) of the P&A rules are mandatory. The citation was not properly supported and I agree with the holdings in the persuasive authorities cited herein above on that issue. That the appellant was required to support his citation with a verifying affidavit. Failure to do so rendered it incompetent. The learned trial magistrate did not err on this.

26. It is trite that the purpose of citation is to trigger the filing of a succession cause in the interest of the beneficiaries of the estate of the deceased. In this case, the widow of the deceased deponed in her affidavit sworn on the 4th August 2021 that she was in the process of filing for letters of administration.

27. I find that the Citation was incompetent in which circumstances, the appeal is dismissed with no orders as to costs.

28. I am of the view that the respondent has the obligation to file a petition for letters of administration. The Respondent, if she has not done so already, is directed to file, within 60 days hereof, the succession



cause with respect to the estate of Jones Musyoka Muteti (deceased). In default, the grant will issue to the Public Trustee to take up the administration of the estate of the deceased.

29. Orders accordingly

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 11TH DAY OF JANUARY 2024

MUMBUA T MATHEKA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

M M Mutua & Company Advocate

Advocates for the appellant

Email: [particulars withheld]

Emmanuel Wanyonyi & Company Advocate

Advocates for the Respondent

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