



In re Estate of Evanson Gakio Mwaniki (Deceased) (Miscellaneous Succession Cause E027 of 2023) [2024] KEHC 3506 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS SUCCESSION CAUSE E027 OF 2023**

JRA WANANDA, J

APRIL 12, 2024

IN THE MATTER OF THE ESTATE OF EVANSON GAKIO MWANIKI (DECEASED)

BETWEEN

GRACE WAIRIMU GAKIO CITOR

AND

NELSON MWANIKI GAKIO 1ST CITEE

NAOMI WANJIRU GAKIO 2ND CITEE

RULING

1. This matter, although described as a Miscellaneous Application, is actually a Citation to accept or refuse Letters of Administration *ad litem*. This Ruling is a composite one as it is in respect to the Citation itself, the Citor’s Application for orders of provision for medical expenses and sustenance allowances and also the Citees’ Notice of Preliminary Objection.
2. The background of the matter is that the deceased, Evanson Gakio Mwaniki, died intestate on 24/11/2012 at the age of 71 years. In the instant Citation dated 12/06/2023 and filed through Messrs Stanley Henry Advocates, the Citor seeks orders that the Citees be compelled to either accept or refuse to take out Letters of Administration over the estate of the deceased for the purposes of the Citees being made the Respondents in a yet to be filed intended suit.
3. This Cause is related to another one, namely Eldoret High Court Miscellaneous Succession (Probate & Administration) Cause No. E027 of 2023 in which I am today also separately delivering a Ruling. That other Cause is also, as herein, a Citation seeking that the same Citees as herein be compelled to take out Letters of Administration for administering the estate of the same deceased as herein. The difference however is that in that other Cause, the Citor is the son of the Citor herein. The other difference is that in that other Cause, the Citor therein seeks the Citation for the purpose of administering the estate, and not to file a suit as herein.



4. Coming back to this matter, in his Affidavit filed in support of the instant Citation, the Citor has listed the survivors of the deceased as being 2 houses - the 1st house with 4, (including the Citor as the widow), and the 2nd house with 3 (including the two Citees). He deponed that upon the demise of the deceased, both houses have tried as much as possible to co-exist together, that however, upon demise of the widow from the 2nd house, Dorcas Njoki Mwangi on 4/12/2019, all the children of the deceased (both houses) held several meetings to agree on distribution of the estate of the deceased but which process the Citees progressively pulled away from and have now ordered all tenants in the properties, namely, Eldoret Municipality Block 13/284 and Eldoret Municipality Block 15/(Huruma)33, to pay rent to bank accounts that only the Citees have control,
5. The Citor pleaded further that on follow-up, she came to realize that the Citees had already, vide Eldoret High Court Succession Cause No. E077 of 2022, filed a Petition for grant of letters of administration in respect to their mother's estate and that a grant was issued to them, that in support of their Petition, the Citees included an Affidavit disclosing that their late mother owned a ½ share in the said properties which declaration was supported by certificates of official searches showing that indeed the Citees' mother was a co-owner of the said properties with the deceased, that the Citor having been married to the deceased in the year 1964 and the marriage formalized in 1974 when the mother property measuring 5 acres was acquired and having made both direct and indirect contributions towards acquisition thereof, the Citor intends to file an Originating Summons for a declaration that she is entitled to 50% share thereof, that for effective representation and for justice to not only be done but also to be seen to be done, it will serve the ends of justice if the Citees who are members of the 2nd house, are cited to defend the action of the deceased as they will be adversely affected by a decision of the Court in the intended Originating Summons.

Citees' Replying Affidavit

6. The Citees Citors opposed the Summons and each filed an individual Replying Affidavit. Both Affidavits were filed on 18/07/2023 through Messrs Mukabane & Kagunza Advocates.
7. In his Affidavit, the 1st Citee, Naomi Wanjiru Gakio, deponed that the Summons is an abuse of the process, that the Citation is incurably defective as the properties listed do not belong to the deceased due to the principle of survivorship, that the properties were acquired and owned jointly by the deceased and the Citees' late mother, that the deceased was a joint tenant with the Citees' mother hence the deceased's interests automatically passed to the Citees' mother upon the demise of the deceased, that the intention of the principle of survivorship and/or *jus accrescendi* is to remove jointly owned property from the operation of the Law of Succession Act upon the death of the joint tenants, that this Court's jurisdiction is limited to only dealing with properties already ascertained for distribution among the lawful beneficiaries, that filing of Succession in respect to the estate of their late mother is well anchored in law, that the allegations by the Citor that she is a wife of the deceased are not backed up with any evidence thus the Citor lacks *locus standi* in the first place to institute this instant Citation, that the Citor concealed material facts from this Court, that the Citor is on a fishing expedition.
8. The 2nd Citee's Replying Affidavit is a word for word replica of the 1st Citee's Affidavit. For this reason, there is no use in reciting it.

Citor's Further Affidavit

9. On 21/11/2023 the Citor filed a Further Affidavit deponing that the contents of the Replying Affidavit are diversionary and meant to obfuscate the real issue in the Citation, that the bone of contention of the Citation is to seek orders that the Respondents be the Defendants to the Citor's intended suit,



that throughout the life of the deceased and even after his demise, the Citees' mother never presented herself as having any superior right of ownership over and above the right of a usual widow, that she used to deposit all income from the estate properties into the joint account for the use of all until her demise, that it is now clear that the Citees, as well as their mother, had concealed the introduction of their mother into the titles as a joint holder and that the Citees had filed Eldoret High Court Succession Cause No. E007 of 2022 wherein the Citees' mother was described as owning 50% share in the properties, that with the benefit of hindsight, it is now clear why the Citees had clandestinely refused to avail the documents in respect of the properties claiming that that they were not aware of the titles' whereabouts.

10. The other matters deponed are basically a repeat of those already stated in the initial Supporting Affidavit. I will not therefore repeat the same.

Citor's Summons Dated 19/12/2023

11. Further to the Citation, the Citor subsequently also filed the Summons Dated 19/12/2023 seeking orders as follows:
 - i. [spent]
 - ii. [spent]
 - iii. [spent]
 - iv. The Respondents be and are hereby directed to pay all the monthly rental incomes drawable from Land Title No. Eldoret Municipality Block 13/277, Eldoret Municipality Block 13/284 and Eldoret Municipality Block 15/(Huruma)33 to the joint account No. [.....] at NIC Bank (now NCBA) operated by all sons and daughters of Evanson Gakio Mwaniki (deceased) including the Citees.
 - v. The Respondent be and are hereby directed to account for all monthly rental income drawn in from Land Title Eldoret Municipality Block 13/277, Eldoret Municipality Block 13/284 and Eldoret Municipality Block 15/(Huruma)33.
 - vi. The Applicant's future sustenance and medical expenses be paid from the rent income drawn in from Land Title Eldoret Municipality Block 13/277, Eldoret Municipality Block 13/284 and Eldoret Municipality Block 15/(Huruma)33.
12. The Summons is expressed to be brought under the provisions of Rule 49 of the *Probate and Administration Rules* and is supported by the Affidavit sworn by the Citor.
13. In the Affidavit, the Citor reiterated the matters already deponed in her earlier Affidavits. She however added that investigations uncovered the transfer of the said properties to the joint names of the deceased and the Citees' mother, that the Citees had directed all tenants in the properties of the deceased to be depositing or paying rent into an account held by the Citees exclusively, other than the joint account operated between the Citor's children and the Citees, that for several years now the Citor has been enduring a chronic health condition incurring a monthly bill of Kshs 25,000/- in medical expenses, that her sustenance expenses averaging Kshs 30,000/- per month and medical bills aforesaid have been paid from the rent income collected from the said properties and paid into the joint account, that on 29/11/2023, she was admitted in hospital and incurred Kshs 217,979/- and which monies needs to be refunded to those who financed it, that even in 2014 when she was admitted at hospital, the bill of over Kshs 800,000/- incurred was paid from the rent income and it is the Citees' mother who transferred Kshs 700,000/- from the rent account to settle the bill, that the properties have been



drawing in a monthly rental income of over Kshs 400,000/- and the Citees have therefore collected over Kshs 3,000,000/- therefrom from April 2023 to date, that in case the orders are not granted, her life will become unbearable as she will continue to live at the mercy of her benefactors and will not have means to refund the hospital costs nor foot her sustenance expenses which may aggravate her medical condition.

Citee's Notice of Preliminary Objection

14. The Citees opposed the Summons and in doing so, on 15/01/2024 filed the Notice of Preliminary Objection of the same date. In the Notice, it is stated that this Court lacks jurisdiction to hear the Summons and/or grant the substantive orders sought vide a Citation Cause as it is evident that the issues raised are a preserve of the Environment & Land Court, that the Citation has already been overtaken by events following the filing of Eldoret High Court Successiin Cause No. E007 of 2022 by the Citees, that the Citation and the Summons contravene Order 2 Rule 15 of the Civil Procedure Rules as the same do not disclose any reasonable cause of action known in law, that the Citation is incompetent and would not serve any purpose since the deceased has no properties available for distribution in view of the principle of *jus accrescendi* given that the share that was co-owned between the deceased and the Citees' mother went to the Citee's mother upon the demise of the deceased, that there is no provision in the Law of Succession Act under which the Summons is premised and that the Application is anchored on wrong provisions of the law which do not donate any power to this Court to issue the orders sought thus making the Application fatally defective.

Hearing of the Application

15. Both parties then also filed their respective Submissions on 21/11/2023.

Citor's Submissions

16. The matters contained in the Citor's Submissions are basically the same as those already stated in the Citor's Affidavits. I will not therefore recite the same.

Citees' Submissions

17. The Citees' Submissions, too, contain the matters already stated in the Citees' pleadings referred to above. However, in respect to the principle of survivorship and/or *jus accrescendi* the Citees' Counsel added that the intention of the principle is to remove jointly owned property from the operation of the law of succession upon death of the joint tenant. He cited the case of *In re Estate of AMK (Deceased)* [2015] eKLR.
18. Regarding jurisdiction, he submitted that the Application is an abuse of the process given that it is not disputed that a substantive Eldoret Succession Cause No. E077 of 2022 exists and where issues can be addressed thereby ousting the jurisdiction of this Court to issue any orders in this Citation, that in the said Succession Cause commenced by the Citees, the properties forming the cause thereof are the same properties forming part of this Citation and to that end, this Court cannot subject the Citees to take out Letters of Administration again. He cited the case of *Juma Yussuf (Deceased)* [2019] eKLR.
19. Counsel submitted further that the Court's jurisdiction herein is limited to only dealing with properties already ascertained for distribution among the lawful beneficiaries, that where issues of ownership of land arises, the same can only be handled at the Environment & Land Court and not by this Court sitting as a Succession Court. He cited Article 162(3) of the Constitution of Kenya, Section 13 of the Environment & Law Court and also the case of *Alexander Mbaka vs Royford Muriuki Rauni & 7 Others* [2016] eKLR in which, he submitted, the Citor was said not to have crystallized her claim



in the family Court. He argued further that the allegations by the Citor that she is a wife of the deceased are not backed up with any evidence thus the Citor lacks the *locus standi* to institute the Application, that Rule 22 of the [Probate and Administration Rules](#) specifies who is supposed to file a Citation and Section 66 of the [Law of Succession Act](#) specifies who can move the Court by way of Citation.

20. In conclusion, Counsel reiterated that the orders sought by the Citor are untenable, that she is out on a fishing expedition and is dealing with a property which is not in the name of the deceased.

Determination

21. Upon examination of the pleadings filed, including the Affidavits and respective parties' Submissions, I find the issues that arise for determination to be the following:
- i. Whether this Probate Court, possesses the jurisdiction to hear and determine this matter or whether the same is a preserve of the Environment & Land Court.
 - ii. Whether the Citor's Summons is anchored on wrong provisions of the law and therefore whether it is fatally defective.
 - iii. Whether the filing of Eldoret Succession Cause No. E077 of 2022 by the Citees renders the instant Cause otiose.
 - iv. Whether the allegations by the Citor that she is a wife of the deceased are backed up with sufficient evidence and therefore whether the Citor possesses the *locus standi* to bring these proceedings.
 - v. Whether the estate herein has no properties available for distribution, the ownership thereof having passed to the Citees' mother and therefore whether the principle of survivorship or *jus accrescendi* applies,
 - vi. Whether this Court should grant the Citation compelling the Citees to accept or refuse Letters of Administration *ad litem* over the estate herein.
 - vii. Whether the Citees should be directed to pay all the monthly rental incomes collected from the properties in issue herein into the family joint bank account, and account for all monthly rental income collected as aforesaid and whether the Citor's future sustenance and medical expenses should be paid from the rental income aforesaid.
22. I now proceed to answer the said issues.

Whether This Probate Court Possesses The Jurisdiction To Hear This Matter

23. Counsel for the Citees cited Article 162(3) of [the Constitution](#) of Kenya and Section 13 of the Environment & Law Court and submitted that as a Probate Court, this Court's jurisdiction is limited to only dealing with properties already ascertained for distribution among the lawful beneficiaries, and that where issues of ownership of land arise, the same can only be handled at the Environment & Land Court (ELC).
24. I agree with the Counsel's said general restatement of the law save that in this matter, the substantive prayer is for issuance of a Citation to compel the Citees to take our Letters of Administration *ad litem* over the estate of the deceased. The prayer has been made under the clear provisions of the [Law of Succession Act](#) and is sought on the basis that the Citor wishes to file a suit under the [Matrimonial Property Act](#) to seek a declaration that, as a wife, she is entitled to 50% of the properties herein. The Citor therefore wishes to name the Citees as the Defendants in that case once this Court grants her that leave.



It will be absurd to argue that a Citation application such as the one herein should be made before the Environment & Land Court (ELC). Whether the action intended to be filed under the Matrimonial Property Act will be sustainable is not a different matter and is not for this Court to determine.

25. In the circumstances, I find that this Cause is properly before this Court.

Whether The Summons Dated 19/12/2023 Is Fatally Defective

26. The Citees' Counsel has argued that there is no provision in the Law of Succession Act under which the Summons is premised, that the Summons is anchored on wrong provisions of the law which do not donate any power to this Court to issue the orders sought and that the same is therefore fatally defective.

27. As already stated, the Summons is expressed to be brought under the provisions of Rule 49 of the Probate and Administration Rules. The same is premised as follows:

“Applications not otherwise provided for

A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”

28. It is therefore true that Rule 49 aforesaid does not donate to this Court powers to grant prayers but only addresses the procedure to be adopted in filing Applications under the Law of Succession Act. Does this therefore render the Application fatally defective?

29. In answering the above question, I resort to the provisions of Section 47 of the Law of Succession Act and also Rule 73 of the Probate and Administration Rules which provide as follows, respectively:

Section 47 of the Law of Succession Act

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

.....”

Rule 73 of the Probate and Administration Rules

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

30. The two provisions clearly cloth this Court with wide discretion to do what is necessary to ensure that the ends of justice are met (see the decision of C. Kariuki J in the case of Millicent Mbatia Mulavu & another v Annah Ndunge Mulavu & 3 others [2018] eKLR).

31. In any event, I am of the view that the overriding objective in litigation is a policy issue which the Court invokes to obviate hardship, expense and delay and instead, places focus on substantive justice. Apart from the Court's inherent powers as aforesaid, there is also Article 159(2)(d) of the Constitution of Kenya, 2010, whose introduction changed the way in which Courts operate. I believe that by introducing the overriding objective principle in litigation, the Court is now mandated to consider aspects like the delay likely to be occasioned and the cost and prejudice to the parties when called upon to summarily reject actions. In short, the Court has to weigh one position against another for



the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2)(d) makes it clear that the Court ought to render justice “without undue regard to technicalities of procedure”. Of course, this does not mean that procedural lapses should be ignored at will. What it means is that the Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party before sending away a litigant from the seat of justice without hearing him on merits. This is how a Court is enjoined to exercise its judicial discretion.

32. I therefore find that while it is true that the Citor’s said Summons is anchored on wrong provisions of the law, the same does not however render the Summons fatally defective.

Whether The Filing Of Eldoret Succession Cause No. E077 Of 2022 By The Citees Renders The Instant Cause Otiose

33. Counsel for the Citees also argued that this matter is an abuse of the process because a substantive Cause, Eldoret Succession Cause No. E077 of 2022, already exists and in which the Citees have already been appointed as the Administrators and the properties forming the instant Cause are the same properties forming part of this Citation. For this reason, Counsel has submitted that this Court cannot subject the Citees to take out Letters of Administration again. According to Counsel, all the issues raised herein can be addressed in that existing Cause thereby ousting the jurisdiction of this Court.
34. I beg to differ with Counsel since Eldoret Succession Cause No. E077 of 2022 clearly only deals with the estate of the Citee’s mother, not the estate of the deceased. Since the Citor states that she wants to join the estate of the deceased as a Respondent in the intended *Matrimonial Property Act* suit, appointment of Administrators in Eldoret Succession Cause No. E077 of 2022, clearly cannot be of any effect to the instant Citation.
35. I therefore find that the filing of Eldoret Succession Cause No. E077 of 2022 by the Citees does not in any way render the instant Cause as unsustainable.

Whether The Allegations By The Citor That She Is A Wife Of The Deceased Are Backed Up With Sufficient Evidence

36. My view is that the issue of whether or not the Citor was “a wife” to the deceased would be better addressed in the main *Matrimonial Property Act* suit that the Citor states that he intends to institute. I do not believe that a question of that nature is capable of being determined on Affidavit evidence and in a Citation.
37. Since I do not want to therefore prejudge that issue, I may only mention, in passing, that in my view, the Citor has at least established a *prima facie* basis for the purposes of this Citation, in arguing that she was a “wife”. I say so because she has exhibited a letter from the Chief in which the Chief states that the Citor was the 1st wife of the deceased. The Citor has also exhibited copies of email communication indicating the existence of a close family relationship between the parties. I have also not come across any denial in the Citees’ Affidavits of the Citor’s status as a “wife” of the deceased. As aforesaid, I only make these observations in passing since I believe that the conclusive and final determinations on this aspect should be reserved for the trial Court in the intended suit. My statements hereinabove should not therefore be in any way construed as binding that trial Court.
38. I therefore decline the Citees’ invitation to make a conclusive finding on whether the Citor was a wife to the deceased. The Citor therefore “crosses” this further hurdle since I have reserved that determination for the trial Court.



Whether The Estate Has Any Properties Available For Distribution

39. The Citees have opposed the instant Citation on the ground that the estate has no property available for distribution since the properties identified by the Citor were in fact co-owned by the deceased and the Citee's mother as joint tenants and that as such, the properties automatically devolved to the Citee's mother upon the death of the deceased. While this allegation may as well be true and correct, like the previous issue, I do not find it appropriate for this Court, in a Citation, to determine such a substantive dispute.
40. The matters raised by the Citees may need to be determined after taking of viva voce evidence. Such disputes, including whether the estate has any properties, identification of the properties comprising the estate, if any, and identification of the beneficiaries and their respective shares of inheritance are matters that may need oral evidence before being determined. In my view, and considering the circumstances of this case, resolution of such disputes would also best be addressed in the *Matrimonial Property Act* intended to be filed by the Citor.
41. In the circumstances, and as for the previous issue, I decline to make a finding on whether the said properties have passed to the Citees' mother and therefore, in turn, whether the estate has any property available for distribution.

Whether this Court should grant the Citation herein

42. Filing of a Citation to accept or refuse to take a grant is provided for under Rule 22(1) of the *Probate and Administration Rules* which is premised as follows:

“ 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.”
43. In this instant case, the deceased died in the year 2012 and it is clear that to date, no letters of administration has been taken out in respect to his estate. Basically, the mandate of a Probate Court in a Citation is to determine whether or not to compel a Citee to accept to take out letters of administration over an estate in which the Citee may have a superior right or priority in hierarchy over the Citor to so apply but for which the Citee has not taken steps to apply or is reluctant to do so. Should the Citee refuse to take out the letters of administration, then the Citor may be permitted to apply in the Citee's place. The same may also be ordered where the Citee accepts to apply, is then granted timelines to do so as a result, but fails or ignores to so comply.
44. In this case, the scenario is slightly different. This is because the Citor seeks the Citation, not because she wants to be allowed to administer the estate, but to enable her sue the estate of the deceased, whom she states to be her late husband. The position is therefore that at present, the Citor has no existing Respondent to sue. What the Citor therefore seeks is to make the Citees to be the Respondents as legal representatives *ad litem* of the deceased in the intended *Matrimonial Property Act* suit in which she intends to pray for a declaration that she is entitled to 50% share of the properties listed herein and which are currently registered in the joint names of the deceased and the Citees' mother.
45. As to why the Citor has chosen or identified the Citees as the suitable and appropriate persons to be so cited as aforesaid and to be the persons to defend the intended suit against the deceased, the Citor states that the Citees will be the persons to be adversely affected by a decision of the Court in the intended suit. This Citation attracts the question whether the Citees can thus be compelled to assume the status of “Respondents” in the intended suit.



46. The *Law of Succession Act* does not expressly address the scenario herein. Further, neither of the parties has presented any authority on the subject, a great disservice to the Court. The one remotely related provision is Section 37(1) of the *Civil Procedure Act* which provides as follows:

“37(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.” [Emphasis mine]

47. The above provision allows a decree-holder to pursue a person who has intermeddled with the estate of the deceased Judgment-Debtor for execution of the decree. This provision may not however apply to the facts of this case since it only refers to the situation where a suit had already been filed before the Defendant died and Judgment already obtained. It does not therefore address the situation herein where the intended Defendant is already dead and the suit has not yet been filed. Secondly, the *Civil Procedure Act* may not even apply to proceedings under the *Law of Succession Act*.

48. There is also Paragraph 14 of Schedule 5 of the *Law of Succession Act* which provides as follows:

“Administration limited to suit

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

49. Again, it is debatable whether the above provision, insofar as it refers to the order being “granted to the nominee of a party in such suit”, would be applicable to this matter.

50. Be that as it may, upon careful consideration of the matter, I agree that the Citees will be the persons who shall be affected by any orders that may be made in the said intended suit. This is because the intended suit, if filed, will be seeking prayers for interference with the 100% ownership of the properties currently claimed by the Citees to have devolved to their mother (upon the death of the deceased) and upon whose estate the Citees are now the Court appointed Administrators.

51. Further, the Citees’ Counsel has not seriously submitted on this particular issue and I get the feeling that the Citees are not too averse to the Citor being permitted to make them the Respondents in the intended suit. My own view is that it will in the interest of the Citees to actively participate in the intended suit, once filed.

52. In the circumstances, and since it is not disputed that no letters of administration has been taken out in respect to the estate of the deceased to date, I find that there is nothing before this Court to justify denial of the Citation and I so grant it.

Whether The Citees Should Be Directed To Pay All The Monthly Rental Incomes Collected From The Properties In Issue Herein Into The Family Joint Bank Account, And Account For All



Monthly Rental Income Collected As Aforesaid And Whether The Citor's Future Sustenance And Medical Expenses Should Be Paid From The Rental Income Aforesaid

53. The Citor has submitted that during the lifetime of the deceased and even after his death, the Citor's sustenance expenses were always derived from the rental income collected from the properties listed herein. The Citor submitted that, after the demise of the deceased, the Citees' mother (who was supposedly the Citor's co-wife) continued with the same tradition and that the Citees' mother used to deposit all the rental income into a family joint bank account before the same was distributed. The Citor states further that she has been ailing and that even her medical expenses were always catered for from the same rental income with the Citees' mother religiously ensuring that the same was paid at all times. The Citor stated that her monthly sustenance allowance has been about Kshs 30,000/- and her monthly medical expenses, about Kshs 25,000/-.
54. According to her, the situation suddenly changed when the Citees' mother died and the Citees then took over management of the properties, including rent collection. The Citor has stated that the Citees have now instructed all the tenants to stop making rent payments into the family joint account but to instead, pay rent into a new separate bank account unknown to the Citor, that the Citees have also stopped remitting any funds in settlement of the Citor's monthly expenses. She states further that she has accumulated heavy hospital bills and seeks refund from the Citees. She added that the properties have been drawing in a monthly rental income of over Kshs 400,000/- and that the Citees have therefore collected over Kshs 3,000,000/- therefrom between April 2023 and December 2023 when this Citation was filed. She stated further that she was recently admitted in hospital and incurred a sum of Kshs 217,979/- and which amount needs to be refunded to those who paid the same on her behalf.
55. These matters and allegations have not been seriously denied nor controverted by the Citees and I presume the same to be a correct representation of the prevailing situation.
56. As aforesaid, the title documents for the properties from which the rental income is derived are all in the joint names of the deceased and the Citees' mother. The Citor's name does not feature therein. Being the legal representatives for the estate of their mother, *prima facie* therefore, the Citees have a first claim over the properties. Unless the Citor successfully proves her ownership claims in a substantive suit to be filed, for now the Citees have the right to manage the properties and collect the rent.
57. Be that as it may, I note that the Citor is a senior citizen of more than 80 years of age and is ailing. Although she has 3 adult children who may be capable of taking care of her upkeep and medical costs, I feel that it is unfair and against the tenets of the African family set-up for the Citees to suddenly stop the Citor's allowances and render her destitute. The Citor is said to be the step-mother of the Citees. If true, then it behoves upon the Citees to treat her as such, particularly now that she is in her sunset years. Surely, the Citees cannot be contented sitting back and watching their step-mother descend into such suffering when the Citees are collecting enough rent that can easily sustain the Citor's upkeep. The Citees ought to act humanely.
58. As aforesaid, the Citor seeks orders that she be allowed to make the Citees the Defendants in a suit intended to be filed under the [Matrimonial Property Act](#) to seek a declaration that the Citor is entitled to 50% ownership of the said properties and I have already granted her leave to do so. In the circumstances, pending the filing of such suit and to prevent the Citor from sinking deeper into debt and despair, I find that it is justifiable to compel the Citees to continue making some token payments to the Citor on a temporary basis. I will however limit the payments to a period of 6 months which period should be sufficient for the Citor to file the said intended suit and seek therein, appropriate orders, including extension or re-issuance of the orders that I have made herein, at least on an interim basis.



59. The amount of Kshs 217,979/- said to have been incurred for the Citor's hospitalization bills and which the Citor states was loaned by third parties also needs to be refunded.
60. The rest of the prayers made by the Citor are better suited for determination by the Court that shall hear the substantive intended suit and accordingly, I decline to grant them.

Final Orders

61. In the premises, I order as follows:
- i. The Citees are granted a period of thirty (30) days from the date hereof within which to file for and/or seek Letters of Administration over the estate of the late Evanson Gakio Mwaniki. In the event of default, the Citor will be at liberty to, by herself, proceed to apply for such grant of letters of administration *ad litem* to be issued in the names of the Citees.
 - ii. Pending filing of the said intended Matrimonial Property Act suit and the giving of further directions therein, the Citees shall for the next 6 months pay, at the end of each month, to the Citor, a monthly allowance of Kshs 55,000/- out of the collected rental income, to cater for the Citor's upkeep and medical expenses. The 6 months payment shall commence as from 31/03/2024 (now past and which shall still be payable in arrears).
 - iii. Further, the Citees shall, within a period of fourteen (14) days, from the date hereof, pay to the Citor the sum of Kshs 217,979/- being the amount said to have been incurred as hospital bill during the Citor's hospitalization at Coptic Hospital between 29/11/2023 and 6/12/2023.
 - iv. This being a family matter, I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF APRIL 2024

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WANANDA J. R. ANURO

JUDGE

