



In re Estate of Evanson Gakio Mwaniki (Deceased) (Miscellaneous Succession Cause E082 of 2023) [2024] KEHC 4525 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS SUCCESSION CAUSE E082 OF 2023**

JRA WANANDA, J

APRIL 12, 2024

BETWEEN

DANIEL KARANJA 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. The background thereof is that the deceased, Evanson Gakio Mwaniki, died intestate on 24/11/2012 at the age of 71 years. In the instant Citation dated 23/06/2023 filed through Messrs Stanley Henry Advocates, the Citor seeks that the Citees be compelled to either accept or refuse to take out Letters of Administration over the estate of the deceased.
2. In his Affidavit filed in support of the Citation, the Citor has listed the survivors of the deceased as being 2 houses - the 1st house with 4, including the Citor, and the 2nd house with 3, including the two Citees. He deponed that the Citees have not taken out Letters of Administration over the estate and are not ready to apply for the same, and that all the other 3 members of the 1st house have nominated the Citor to apply for the Letters of Administration. To the Affidavit, the Citor attached copies of, among others, a letter from the Chief listing the survivors and also mentioning properties owned by the deceased.

Replying Affidavit

3. Both Citors opposed the Citation and each filed an individual Replying Affidavit. Both Affidavits were filed on 4/10/2023 through Messrs Mukabane & Kagunza Advocates.



4. In his Affidavit, the 1st Citee, Nelson Mwaniki Gakio, deponed that the Citation is a gross abuse of the Court process given that a similar Application regarding the same estate has been filed vide Eldoret Misc. Application No. E027 of 2023 by one Grace Wairimu Gakio who is the Citor's mother, and that the Citor is on a fishing expedition. He deponed further that the Application is bad in law as the alleged estate properties do not belong to the deceased and were acquired and owned jointly by the deceased and the Citee's late mother, Dorcas Njoki Mwangi, that the deceased was a joint tenant with the Citee's mother of the properties hence the deceased's interest automatically passed to the Citee's mother upon death of the deceased, that the Citees have filed Succession proceedings in respect to the estate of the Citee's late mother vide Eldoret High Court Succession Cause No. E077 of 2022, that the Citor lacks locus standi to institute the instant Citation and that the deceased has no properties available for distribution.
5. As aforesaid, the 2nd Citee, Naomi Wanjiru Gakio, also swore her own separate Replying Affidavit. The same is however a word-for-word replica and reproduction of the 1st Citee's Replying Affidavit raising the question why a second Replying Affidavit was even filed in the first place. The only difference is that this 2nd Affidavit contained exhibits, namely, a copy of the Citation said to have been filed in Eldoret Misc. Application No. E027 of 2023 by one Grace Wairimu Gakio and copies of title documents relating to the properties referred to above

Hearing of the Application

6. It was then agreed, and I then directed, that the matter be canvassed by way of written Submissions. Both parties then filed their respective Submissions on 21/11/2023.
7. I however note that in addition, the Citor "sneaked in" a purported Further Affidavit filed on the same 21/11/2023. This matter has come up in Court on several occasions and the Court record does not indicate that the Citor's Counsel at any time sought or was granted leave to file such Further Affidavit. In the circumstances, I decline to consider the same and proceed to expunge it from the record.

Citor's Submissions

8. Most of the matters stated in the Citor's Submissions are those arising from his purported Further Affidavit which I have already expunged and as such, I will not recite the same.
9. The Citor's Counsel has however added that, in respect to the allegation that the present Citation is similar to that in Eldoret Misc. Application No. E027 of 2023 by one Grace Wairimu Gakio, the facts and details are as clear as daylight. He then submitted that there is plain admission by the Citees that no letters of administration had been taken out in respect to the estate of the deceased, and that neither has any declaration been made by any Court that the estate is insolvent.

Determination

10. Upon examination of the pleadings filed, including the Affidavits and respective parties' Submissions, I find the issue that arises for determination to be "whether this Court should grant this Citation".
11. In answering the said issue, it is important to note that 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."



12. 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.
13. The Citee has 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, I do not find it appropriate for this Court, in this Citation, to determine such a substantive dispute.
14. 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 be best addressed in the substantive Succession Cause that may be filed, if and when the Court eventually gives the greenlight for such proceedings to be instituted.
15. I may however also just mention that I have my doubts whether it was even necessary for this Citation to have been filed in the first place. This is because, as already stated, the logic behind a Citation is for a person (Citor) to move the Court to compel the person cited (Citee) to accept to take out letters of administration of an estate in which the Citee has 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. In this case, the Citor and the Citees are all children of the deceased and thus all of them rank at the same hierarchy or possess equal priority in respect to their rights as potential Petitioners. Citation proceedings are, in my view, not meant to be invoked against a person (Citee) with whom the Citor has the same or equal priority or even a lower one in the hierarchy of applying for letters of administration. Indeed, this was the observation by W. Muyoka J in the case of *In Re Estate of Dorcas Wairimu Riitho (Deceased)* [2013] eKLR I which he remarked as follows:

“..... Secondly, citations issue at the instance of a person who has an inferior right to administration. This means that the citor should be a person with a lesser right to administration than the citee. In this case, the petitioner is the surviving spouse of the deceased, according to Section 66 of the *Law of Succession Act*, as read with Section 35 of the said *Act*, he has a superior right to administration over his children. Consequently, he did not have to issue citations to them before taking out letters. Clearly, the citations issued in the matter served no purpose.”

16. Where therefore, as herein, two people have equal priority in applying for letters of administration, and one is reluctant to take out letters of administration or is unwilling to participate in such proceedings, the willing party would be entitled to apply for the letters of administration on his own without the need to file a Citation against the other. In taking out the letters of administration, he may seek and obtain the consent of the unwilling party and file such consent with the Petition. Even where the unwilling party refuses to grant such consent, the willing one may still go ahead and take out the letters of administration on his own. The only requirement, in that case, would be that the party petitioning



must then, upon filing the Petition, serve or notify the unwilling party of the filing thereof so as to grant the other an opportunity to respond. In this case therefore, since all the parties rank equally, there was no proper reason why the Citor took out the Citation.

17. However, since no objection was taken on the above ground and since it will not make a big difference in any case, I will not hold this argument against the Citor.
18. I also consider that since the estate remains unadministered to date yet the deceased died in the year 2012, 12 years ago, it will be in the interest of all the parties that the issue of whether or not there are any properties comprising the estate be now determined once and for all. If, as alleged by the Citees, the estate has zero property available for distribution, then that fact needs to be fully and finally determined and the matter then brought to a closure. As aforesaid, in the circumstances of this case, my view is that the proper forum for resolution of such disputes would be in a substantive Succession Cause.
19. In the circumstances, and since it is not disputed that no letters of administration has been taken out in respect to the estate to date, I find that there is nothing before this Court to justify denial of the Citation and I so grant it.

Final Orders

20. In the premises, I direct as follows:
 - i. The Citees are given a period of sixty (60) days from the date hereof within which to file a Succession Cause seeking to be granted Letters of Administration over the estate of the late Evanson Gakio Mwaniki. In the event of default, the Citor will be at liberty to proceed, by himself, to file for or take out the Letters of Administration over the estate.
 - ii. Pending filing of the said substantive Succession Cause, an order is hereby issued to be in force for a period of one hundred and twenty (120) days from the date hereof restraining or barring the sale, transfer, mortgage or charging of, or in any other way parting with, the title for the properties known as Eldoret Municipality Block 13/278, Eldoret Municipality Block 13/284 and Eldoret Municipality Block 15/(Huruma)33.
 - iii. 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

