



In re Estate of Marie Annick Gachecheh (Deceased) (Succession Cause E151 of 2023) [2023] KEHC 22113 (KLR) (Family) (3 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22113 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E151 OF 2023
EKO OGOLA, J
JULY 3, 2023
IN THE MATTER OF THE ESTATE OF MARIE ANNICK GACHECHEH (DECEASED)**

BETWEEN

EDWIN OMARI MONGERI PETITIONER

AND

MARIE JOSEE GACHECHEH & 3 OTHERS RESPONDENT

RULING

1. What is before this Court is a Citation to Accept or Refuse Letters of Administration Intestate dated 2nd February 2023 and a Petition for Grant of Letters of Administration Ad Litem dated 2nd February 2023.
2. The Petitioner through the Citation sought that Marie-Josee Gachecheh, Marc Timothy Gachecheh, Joseph Kenyau Gachecheh, and Marianne Muthoni Gachecheh, beneficiaries to the estate of the deceased being mother, brothers, and sister to the deceased respectively surviving the deceased do appear and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the deceased or show cause why the same should not be granted to the Petitioner.
3. The deceased died intestate on 15th July 2012. Before her death, she was party to Commercial Case No. E.147 of 2021 Marie Annick Gacheche vs. Marie Josee Gacheche & 6 others and a Succession Cause No. 661 of 2018 Re Estate of Robert Timothy Gacheche.
4. The Petitioner is presenting this Petition in his capacity as the advocate and creditor of the deceased. The Petitioner avers that the estate of the deceased owes him legal fees arising from the above-mentioned cases.



5. The beneficiaries to the estate include Marie-Josée Gacheche (mother), Timothy Gachecheh Joseph and Kenyua Gacheche (brothers), and Marianne Muthoni Gachecheh (sister) who are all respondents to both cases. Therefore, they cannot prosecute the said cases. The Petitioner states that he has no power to distribute the estate under this grant.
6. The Petition is supported by an Affidavit sworn by the Petitioner. He deposed that it is imperative that a grant of Letters of Administration Ad Litem is issued to him in respect of the deceased estate to enable him to continue with the prosecution of the above-stated suits so as to safeguard the interest of the deceased estate and by extension, his interest as a creditor of the deceased estate.
7. In response to the Citation to Accept or Refuse Letters of Administration Intestate and the Petition, the 1st Respondent Marie-Josée Gachecheh, mother to the deceased filed an Affidavit in Opposition sworn on 30th May 2023. She agreed that there are two pending suits where the Petitioner acted as counsel to the deceased. At the time of the deceased death, she was unmarried with no children, and is therefore survived by the mother, brothers and sister. She deposed that at the time of the deceased's death, she had no known properties, save for what had been bequeathed to her as a beneficiary of her father's estate Robert Timothy Gachecheh (deceased), an estate that is still pending distribution in Succession Cause No. 661 of 2018.
8. The 1st Respondent further deposed that she is in the process of applying for Letters of Administration of the deceased estate, hence, this instant Petition is premature and misadvised. The 1st respondent deposed that the Petitioner is neither a beneficiary of the deceased nor the next in line in terms of the order of priority set out in Section 66 of the Law of Succession Act thus the Citation as filed is untenable. Further Citations are only filed where there is no Petition filed in court. A Citation is, therefore, to trigger the process of applying for letters of Administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court on that behalf.
9. The 1st Respondent deposed that the Petitioner being the creditor will also sue the estate of the deceased to recover his legal fees, therefore, the Petitioner is not the appropriate person to be issued with Grants of Letters of Administration ad litem.
10. The 3rd Respondent Joseph Kenyua Gachecheh who is the deceased brother responded to the Citation and the Petition in his sworn Affidavit in Opposition dated 28th March 2023. The 3rd Respondent reiterated the averments in the 1st Respondent's Affidavit in Opposition and further deposed that indeed the Petitioner represented the deceased in the two suit.
11. The matter was canvassed by way of written submissions.
12. Mr. Mongeri referred to an Administrator ad litem as defined in the Black's Law Dictionary and *in Re the Matter of the Estate of Morarji Bhanji Dhanak (deceased)* (2000)eKLR. Counsel submitted that according to Rule 22 of the P&A Rules, 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. With that counsel submitted on three issues.
13. The first was, why should the citor/Petitioner be granted Letters of Administration ad Litem and be allowed to Petition for grant of letters of Administration Intestate. He submitted that he lodged the petition as a creditor of the estate of the deceased. Counsel cited the case of *Re Estate of Tahir Sheikh Said Ahmed (deceased)* (2-18) eKLR and submitted that as per Section 66 of the LSA, the court has the discretion to appoint certain persons to administer the deceased estate in the best interest of all concerned. Mr. Mongeri reiterated that there would be a conflict of interest if any of the beneficiaries



were to be granted letters of administration ad litem to prosecute Commercial case no. E147 of 2021 and Succession Cause No. 661 of 2018.

14. Counsel deposed that he is opposed to the appointment of a Public Trustee as administrator. Instead, the letters of administration should be granted to him in the best interest of the deceased estate.
15. On the second issue, why should this court not grant the letters of Administration ad litem and letters of administration to the respondents? He submitted that equity does not aid the indolent but the vigilant. He submitted that the respondents have been sleeping on their legal rights; that none of the respondents has applied for a full grant despite the fact that nothing is stopping them. These delays will affect the deceased cause of action in the two suits.
16. The last issue was on costs. Mr. Mongeri submitted that cost should be borne by the respondents.
17. Mr. Mugo learned counsel for the 1st Respondent submitted that the Petitioner should not be granted letters of Administration intestate in the estate of the deceased who is his former client. He referred to Section 66 of the LSA and submitted that the Petitioner is not in the hierarchy of people listed to benefit from the deceased estate. He further submitted that a creditor benefits after the beneficiaries.
18. Ms. Mogire Rebecca learned counsel for the 3rd Respondent submitted that the Citation is not tenable as the deceased was represented by the firm of Mongeri Kinyanjui & Company Advocates and not Edwin Omari Mongeri as an individual. He submitted that since the deceased had no children the 1st Respondent is the beneficiary of the estate. To buttress his claims, counsel cited the case of [Josiah Muli Wambua \(deceased\)](#) succession Cause No. 2557 of 2012 (2014) eKLR and [Re Estate of Priscila J. Malel \(deceased\)](#) (2021) eKLR. Counsel submitted that the Petitioner is a creditor and not a dependent.
19. On the issue of whether the Petitioner as a creditor of the estate of the deceased is entitled to petition for letters of administration ad litem, counsel submitted that a creditor is not in the list of those to be issued with grants of representation as stated in Section 66 of LSA. In order for the Petitioner to pursue his legal fees, he will be required to tax his bills against the deceased estate. Therefore, it is illogical that the Petitioner seeks to be issued with letters of administration in the deceased estate and at the same time pursue his legal fees.
20. On the issue of who is to administer the deceased estate, counsel submitted that none of the respondents should be given with limited grant of letters of administration ad litem as they are respondents in the two cases. Also, the Petitioner is not the appropriate person because when it comes to drawing the bill of costs, there will be a conflict because it will be akin to the Petitioner suing himself for fees.

Determination

21. I have considered the Petition, the Affidavits filed, and the Submissions by Counsel. The issues to be determined are as follows:-
 - a. Whether the Citation to Accept or Refuse Letters of Administration Intestate is tenable.
 - b. Whether the Petitioner should be granted letters of administration ad litem.

Whether the Citation to Accept or Refuse Letters of Administration Intestate is tenable.

22. The Petitioner's interest in the deceased estate is that he is a creditor since he represented the deceased in two aforementioned cases and he is therefore owed legal fees. Rule 22 (1) of the Probate and



Administration Rules provides at whose instance a citation can be and who can issue Citation. It provides 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.”

23. Section 29 (a) and (b) of the [Law of Succession Act](#) further provides:-

“For the purposes of this Part, “dependant” means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and”

24. Succession 66 of the [Law of Succession Act](#) provides that the court shall have final discretion as to the persons or person to whom grant of Letters of Administration shall in the best interest be made and states that preference should be given to certain persons to Administer the deceased estate where deceased died intestate. Section 66 of the [Law of Succession Act](#) provides:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- 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;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will”

25. So, has the Petitioner met the conditions required to warrant him being allowed to petition for the grant of letters of administration intestate over the deceased estate?

26. Under Rule 22(1), a citation can be issued at the instance of any person who would himself be entitled to a grant in the event of the other person cited, and who I believe, must be entitled, renounces his right thereto. The people who are entitled are mainly the “dependents” of the deceased as defined under Section 29. The others who are entitled are described under Section 66 of the [Law of Succession Act](#). That Section expands the list of the people entitled to be considered by the court in its determinations to who should petition for grant of letters of administration intestate to include apart from the deceased “Dependents” Public Trustee and creditors.

27. The Petitioner herein avers that he is a creditor to the deceased estate having represented her in two suits. For one to be a creditor, one has to have evidence of service rendered and accrued amount to be paid. In this case as an advocate, the Petitioner should have annexed copies of the taxed bill of costs that are to be paid by the estate. This has not been done. It is uncontroverted that indeed the Petitioner



acted for the deceased in the two cases, hence there could be accrued legal bills. Therefore, I find and hold that this Citation is not tenable.

28. The 1st and 3rd Respondents are awarded costs of the Citation.

Whether the Petitioner should be granted letters of administration ad litem.

29. Section 54 of the *Law of Succession Act* provides:

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.”

30. Rule 14 of the Fifth Schedule of the Probate and Administration Rules states that:-

“When it is necessary that the representative of a deceased person be made to 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 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 of suit, and until a final decree shall be made therein, and carried into complete execution”.

31. Rule 14 provides that where it is necessary that the representative of a deceased person be made a party to a pending suit and the person entitled to apply for letters of administration is unable or is unwilling to act, the court may grant letters of administration to a person named as a nominee of the deceased by a party in such a suit but limited for purposes of representing the deceased in the suit until the suit is concluded.

32. Further to this, Rule 14 aforementioned does not require the court to enquire into the validity of a suit before nominating a representative of the deceased Estate. It only requires the court to satisfy itself that there is a pending suit to which the deceased was a party and that the person entitled to take out letters of administration to his Estate is either reluctant or unwilling to do so.

33. In this case, the deceased was survived by four people; a mother, two brothers and one sister. They would have been the ones best suited to take up Letters of Administration and prosecute any pending suit for or against the deceased. However, since the respondents herein are also respondents to the two suits, there would be a conflict of interest if they acted on behalf of the deceased's estate.

34. The Petitioner has had conduct of the Commercial Case No. E.147 of 2021 and Succession Cause No. 661 of 2018 Re Estate of Robert Timothy Gacheche since its inception. He would be the one best fit to prosecute these two suits to completion since the respondents are incapable of prosecuting a matter where they are respondents. Section 55 (1) *Law of Succession Act* states:

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.”

35. From the foregoing, I allow the Petition for Grant of Letters of Administration Ad Litem dated 2nd February 2023 in the following manner:-

a. A Grant of Letters of Administration Ad Litem be and is hereby issued to Edwin Omari Mongeri.



- b. The Grant of Letters of Administration Ad Litem be Limited to the prosecution of Commercial Case No. E.147 of 2021 Marie Annick Gacheche vs. Marie Josee Gacheche & 6 others and a Succession Cause No. 661 of 2018 Re Estate of Robert Timothy Gacheche.
- c. The cost of this Petition be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY 2023

E.K. OGOLA

JUDGE

In the presence of:

..... for the Petitioner

Gisiele Muthoni Court Assistant

E.K. OGOLA J.

