



**Wabuti v Weyimi (Succession Appeal E010 of 2023)
[2024] KEHC 12628 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E010 OF 2023
S MBUNGI, J
OCTOBER 23, 2024**

BETWEEN

PETER AKHUSAMA WABUTI APPELLANT

AND

ABDALLAH MANYASI WEYIMI RESPONDENT

(Being an appeal arising from the ruling of the Honorable T. Obutu SPM delivered on 27th July 2023 at Mumias in Succession Citation Cause No. E010 of 2023)

JUDGMENT

1. The appellant herein filed a citation in the trial court seeking the court to order the respondent to file a succession cause, failure to which the appellant to file, so that the appellant could get the 3 acres of land that the sister is entitled to. The court dismissed the citation as the appellant had not demonstrated his proprietary interest and that the issues raised by the appellant could not be settled by way of citation.
2. The appellant herein, having been dissatisfied with the ruling, lodged an appeal vide a memorandum of appeal dated 31.07.2023 on the following grounds: -
 - a. The trial Magistrate erred in law and facts by not considering the facts that the replying affidavit filed by the Advocate of the Respondent herein was talking of L/P No.E.Wanga/Isongo/1888 and the search attached on it was of E.Wanga/Isongo/1183 all which are not the subject matter in the citation filed by the appellant.
 - b. The trial Magistrate erred in law and facts by not considering that the land Registrar made remarks on the Green card that there are 3 acres of land extra on land parcel No. E. Wanga/Isongo/1133 which was encroached from L/P No. E.Wanga/Isongo/1132 belonging to the appellant and the family of their late father which the Respondent should surrender to them after succession having been filed.



- c. The trial Magistrate erred in law and facts by not considering the facts that the Respondent and the entire family of Oseni Weyimi Kandia are aware of the encroachment of 3 acres on their land parcel E. Wanga/Isongo/1133 as the land Registrar made a remarks on the green card forms which was one of the supporting document in this case.
 - d. The trial Magistrate erred in law and facts by making a ruling on land parcel No.E.Wanga/Isongo/1888 which was not the subject matter on the citation as the suit parcel was L/P E.Wanga/Isongo/1133 and the appellant is entitled to 3 acres encroached from their land parcel No. E.Wanga/Isongo/1132.
3. The appeal was canvassed by way of written submissions.

Appellant's Case.

4. The appellant submitted that the trial magistrate failed to acknowledge that one of the properties to be litigated upon was registered in the late Respondent's father and no suit could be validly sustained against a dead defendant hence the filing of the citation.
5. It was the appellant's submission that the magistrate misdirected himself as what was before him was not a dispute on boundary but an issue regarding whether the respondent's rights to file succession in respect of his late father's estate ranked higher than the appellant's citing rule 22 of the Probate and Administration rules.
6. The appellant submitted that no succession cause had been filed by the respondent at the time the appellant filed the citation.
7. The appellant further submitted that as per rule 22 sub rule 7 of the Probate and Administration rules, the citation was correctly filed, since the land had been encroached by the late respondent's father and a substantive party could only be sued upon the succession of the estate.

Respondent's Case.

8. It was the respondent's submission that the appeal was baseless since the replying affidavit erroneously referred to land parcel number E/Wanga/Isongo/1188, the same was a typographical error as the annexure is a search dated 13.03.2023 for No. 1133 and therefore considering the entire response, there was no error made by the trial magistrate in considering the reply.
9. The respondent further submitted that the ruling by the trial court was in regards to land parcel 1133 and did not refer to the land parcel 1188 at all.
10. The respondent submitted that the appellant did not produce any surveyor's report to the court to prove the claim that their land was less.
11. The respondent further submitted the appellant's failure to lay basis on his alleged entitlement to three acres of land parcel No. E. Wanga/Isongo/1133 was well found by the trial court and the appeal herein should be dismissed with costs.

Analysis and Determination.

12. I have looked at the memorandum of appeal, the records from the lower court. I have also evaluated the lower court proceedings and the ruling from the lower court and the submissions filed by the counsels.
13. The issue of determination is whether the lower court was wrong to dismiss the citation filed by the appellant.



14. The law on citation is found in rule 22 of the Probate and Administration rules which states: -

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
2. Where power to make a grant to an executor has been reserved, a citation calling on him to accept or refuse a grant may be issued at the instance of the executors who have proved the will or of the last survivor of such executors or of any beneficiary under the will.
3. A citation in Form 35 calling on an executor who has intermeddled in the estate of the deceased to show cause why he should not be ordered to take a grant may be issued at the instance of any person interested in the estate at any time after the expiration of three months from the death of the deceased:

Provided that no citation to take a grant shall issue while proceedings as to the validity of the will are pending.

A person cited who is willing to accept or take a grant may petition the court for a grant on filing an affidavit showing that he has entered an appearance and that he has not been served by the citor with notice of any application for a grant to himself.

If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may—

- (a). in the case of a citation under subrule (1), petition the court (if he has not already done so) for a grant to himself;
 - (b). in the case of a citation under subrule (2), apply to the court by summons for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of the executorship have wholly ceased;
 - (c). in the case of a citation under subrule (3), apply to the court by summons on notice to the person cited for an order requiring such person to take a grant within a specified time or for a grant to himself or to some other person specified in the application.
- (6). An application under subrule (5) shall be supported by an affidavit showing that the citation was duly served and that the person cited has not entered an appearance.
- (7). If the person cited has entered an appearance but has not within 30 days after his appearance applied for a grant under subrule (4), or has failed to prosecute his application with reasonable diligence, the citor may—
- (a). in the case of a citation under subrule (1), petition the court for a grant to himself;
 - (b). in the case of a citation under subrule (2), apply by summons to the court for an order striking out the appearance and for the endorsement on the grant of such a note as is mentioned in paragraph (b) of subrule (5);



(c). in the case of a citation under subrule (3), apply by summons to the court for an order requiring the person cited to take a grant within a specified time or petition the court for a grant to himself or to some other person specified in the petition, and the application shall in each case be served on the person cited.

15. A citation is issued where a petition has not been filed by persons who are supposed to file and they are unwilling to file.
16. The citor should demonstrate that he/she has an interest in the estate where those who are entitled to petition have refused to petition or are unwilling to petition.
17. The appellant in his response to the replying affidavit sworn by the citee in the lower court on 17.04.2023 avers as follows in paragraph 2: -

“That- the subject matter in this cause is for the citee/respondent to file a succession in respect to above deceased and if he fail I be given a mandate to do so in order to get back the 3 acres surveyed into land parcel No. E.Wanga/Isongo/1133 which the land registrar confirmed as per the green card in this cause.”
18. The appellant can only ventilate his claim against the estate if the estate is succeeded, for this will identify the person(s) he can competently pursue as the legal representative(s) of the estate.
19. The lower court was not called to determine whether what the appellant alleged was true or not. Its duty was to satisfy itself whether the citee was connected to the estate of the deceased and ranked higher in priority when it comes to petitioning the estate than the citor, and secondly whether the citor had plausible interest in the estate of Weyimi Kandia Oseni, and thirdly whether the citee had refused or was unwilling to petition the estate.
20. From the lower court proceedings, it is clear that the respondent was not willing to petition the estate for he is adamant that the appellant has no stake in the estate of his deceased father.
21. After the court satisfied itself of the above (paragraphs 19 and 20), it was to be guided by the provisions of rule 22 of the Probate and Administration rules.
22. After looking at the ruling, I find that the court was not properly guided by the provisions of rule 22 of the probate and administration rules.
23. I therefore allow the appeal and substitute the order for dismissing the citation dated 06.03.2023 with an order that the citation is allowed and the citee is ordered to petition the estate of Weyimi Kandia Oseni within the next thirty (30) days from today. Failure of which the citor can petition.
24. Given the nature of the matter and the anticipated litigation, each party shall bear its own costs of the appeal and the costs in the lower court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Appellant – present in person

Respondent – present in person



Advocates for the parties - absent

Court Assistant – Elizabeth Angong'a

