



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CITATION CAUSE NO. 82 OF 2019

IN THE MATTER OF THE ESTATE OF PRISCILA J. MALEL (DECEASED)

AND

IN THE MATTER OF A CITATION TO ACCEPT OR REFUSE LETTERS OF ADMINISTRATION INTESTATE

BETWEEN

DANNY BILLY SANG.....APPLICANT

AND

KENNEDY KIBICHY MALEL.....RESPONDENT

RULING

[1] This cause was commenced vide the Citation Notice dated **26 July 2019** issued at the instance of the applicant, **Danny Billy Sang**, requiring the respondent, **Kennedy Kibichiy Malel**, to apply for and accept Letters of Administration Intestate in respect of the estate of **Priscilla J. Malel** (the deceased) in his capacity as the highest ranking son of the deceased. In his Supporting Affidavit sworn on **23 July 2019**, the applicant averred that, the deceased died in **2006**; and that during her lifetime, she was the registered owner of land parcel No. **PIONEER/LANGAS BLOCK 1/141**.

[2] It was further the contention of the applicant that, on or about **16 February 1999**, he entered into a sale agreement with the deceased in respect of the said land at a consideration of **Kshs. 420,000/=**; but that the deceased died before causing the land to be transferred to him. He exhibited a copy of the Sale Agreement as **Annexure DBS1** to the Supporting Affidavit. He further averred that, after the death of **Priscila J. Malel**, her daughter, **Esther Malel**, took out Letters of Administration as the administratrix of the deceased's estate; and that, since **Esther Malel** is also deceased, the respondent is the next beneficiary of the deceased who ranks in priority to the rest in terms of the continued administration of the estate of the deceased. It was consequently the applicant's prayer that the respondent be required to take the necessary steps to that end.

[3] Upon being served with the notice aforementioned, the respondent filed his response vide his Replying Affidavit, sworn on **2 March 2020**. His posturing was that he had been wrongly cited in this matter; and that, whereas he is a son to the deceased, **Priscila J. Malel**, his sister, **Esther Chebet Malel**, was appointed as the administrator with his consent; and that by the time **Esther** passed on, she had fully administered the estate. In his view, if there are any outstanding issues regarding the estate, then the right person for purposes of this Citation ought to have been the children of **Esther Malel**. He justified this proposition by averring that it was within his knowledge that the citor had filed a suit against **Esther Malel**, in respect of which he exhibited a copy of the Plaintiff as **Annexure KKM2** to his affidavit; and added that the citor is merely seeking to find a replacement for **Esther Malel** for purposes of the pending suit. It was therefore his assertion that, since he is also a party to that suit, he would not be a suitable substitute for **Esther Malel**. It was on the basis of the foregoing that the citee urged for the dismissal of this citation.

[4] The application was canvassed by way of written submissions, pursuant to the directions given herein on **21 September 2020**. Accordingly, in the written submissions filed by counsel for the citor, **Ms. Tirop**, made reference to **Sections 47, 66(d), 54 and 86 of the Law of Succession Act and Rule 22(1) of the Probate and Administration Rules**, as well as the case of **Re Estate of Josiah Muli Wambua (Deceased)** [2014] eKLR to support her argument that the Court has jurisdiction, in the circumstances presented herein, to issue a limited grant of representation to the citee for the purposes of representation in the pending suit before the Environment and Land Court concerning the estate of the deceased, **Priscila Malel**. She urged the position that the filing of this citation is intended to secure the interests of the deceased's estate and to expedite the finalization of the pending suit. She accordingly prayed that the application be allowed with costs, as costs often follow the event.

[5] On behalf of the citee, **Mr. Yego** relied on his written submissions dated **28 January 2021**. He reiterated the fact that Grant of Letters of Administration Intestate in respect of the estate of the deceased, **Priscilla J. Malel**, was issued vide **Eldoret High Court Succession Cause No. 97 of 2006** to the late **Esther Chebet Malel**; and that the citation has therefore been overtaken by events. He further pointed out that the said Grant was confirmed on **3 March 2011** and the estate was fully distributed thereafter. He, thus, posited that the citation is a gimmick by the citor to substitute the citee as a defendant in place of the late administratrix, **Esther Chebet Malel**, in **Eldoret Environment & Land Case No. 260 of 2016**. He further suggested that the only citation available in the circumstances would be in respect of the estate of the late **Esther Chebet Malel**; in which case the citee does not rank first in priority and cannot therefore be cited, since his deceased sister left behind her own progeny.

[6] Accordingly, **Mr. Yego** proposed the following issues for the Court's determination:

[a] Whether the Citation has been overtaken by events, in view of the fact that Grant of Letters of Administration Intestate was taken out on **17 December 2006** in respect of the estate of the late **Priscila J. Malel** vide **Eldoret High Court Succession Cause No. 97 of 2006** by the late **Esther Chebet Malel**.

[b] Whether the citation is mischievous in view of the existence of **Eldoret Environment & Land Case No. 260 of 2016** which has since abated in favour of the deceased administrator, **Esther Chebet Malel**.

[c] Who shall bear the costs of this citation?

[7] Having given due consideration to the Citation, the affidavits filed by the parties in respect thereof, as well as the written submissions filed by learned counsel, there is no dispute that the Citee is a son to **Priscila J. Malel**, who died sometime in **2006**. There is likewise no dispute that, in her lifetime, the deceased was the registered owner of all that piece of land known as **Land Parcel No. PIONEER/LANGAS BLOCK 1/141**, measuring 0.0400 Hectares; and that upon her demise, her daughter, **Esther Malel**, applied for and was issued with Grant of Letters of Administration Intestate in respect of the estate of her deceased mother.

[8] There is further no dispute that the citee consented to his sister, **Esther Malel**, being issued with Grant; or that **Esther Malel** has since died; or even that prior to the demise of **Esther Malel**, she had been sued alongside the Citee by the Citor in **Eldoret Environment and Land Court Case No. 260 of 2016: Danny Billy Sang vs. Kennedy Kibichy Malel & 6 Others**. A copy of the Plaintiff in that suit was exhibited by the Citee as **Annexure KKM2** to his Replying Affidavit.

[9] In the premises, the issues for determination by the Court, as aptly framed by **Mr. Yego**, are:

[a] Whether the citation has been overtaken by events, in view of the fact that Grant of Letters of Administration Intestate was issued on **17 December 2006** in respect of the estate of the late **Priscila J. Malel** vide **Eldoret High Court Succession Cause No. 97 of 2006** by the late **Esther Chebet Malel**.

[b] Whether the citation is misconceived in view of the existence of **Eldoret Environment & Land Case No. 260 of 2016**.

[c] Who shall bear the costs of this citation?

[10] On whether this Citation has been overtaken by events, **Rule 22(1)** of the Probate and administration Rules is explicit that:

“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.”

[11] The citor has approached this Court in his capacity as a purchaser for value; and therefore a creditor to the estate of the late **Priscila J. Malel**. This is manifest at paragraphs 4, 5 and 6 of the Supporting Affidavit; and to buttress those assertions, the citor also annexed to his Supporting Affidavit a copy of the Sale Agreement. He is therefore not a dependant for purposes of **Section 29** of the **Law of Succession Act**. Moreover, as a creditor, he is not ranked in parity with the citee or with any of the surviving children of the deceased; for **Section 66** of the **Law of Succession Act** provides that:

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

(a) The 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...”

[12] While it is noteworthy that, in paragraph 10 and elsewhere in the Supporting Affidavit, the citor made it clear that he took out the citation to compel the citee to petition for grant, **Rule 22** aforementioned is clear as to who is entitled to file a citation; that person must be of equal or the next in priority to the person cited. A creditor would therefore only fall in line after all the other beneficiaries of the deceased

and the Public Trustee have failed to take out a grant; and even then, would in effect be offering himself and not a third party, as the administrator. Hence, in Josiah Muli Wambua [2014] eKLR, **Hon. Musyoka, J.** explained that:

“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 persons 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.”

[13] Thus, to the extent that the citor 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**, this citation is untenable.

[14] There is a second and more important reason why this Citation is misconceived, and it is this. The parties are in agreement that Grant of Letters of Administration Intestate was indeed applied for in respect of the estate of the deceased **Priscila J. Malel**. The petition was made in **Eldoret High Court Succession Cause No. 97 of 2006** by a daughter to the deceased, **Esther Chebet Malel** who has since died. There is further no dispute that by the time of her demise, **Esther Chebet Malel** had administered the estate to conclusion and had the estate assets distributed to the beneficiaries of the deceased. A copy of the Certificate of Confirmation setting out the respective shares of the beneficiaries was annexed to the Replying Affidavit and marked **Annexure KKM1**.

[15] In those circumstances, it cannot be said that *the persons entitled to apply were not willing or slow in moving the court for grant to warrant a citation; and therefore, in the circumstances, a Citation simply does now lie and is ineffectual. Hence, I am in agreement with the position taken by Hon. Gikonyo, J. in Estate of Juma Yussuf (Deceased)* [2019] eKLR that:

“...a citation is issued to take up or refuse grant of probate or letters of administration of the estate. Once a cause has been filed in respect of the deceased, a citation is no longer necessary. In this case, a cause was filed at Isiolo in which the rightful heirs and estate of the deceased were identified and the estate distributed. Therefore, this citation became otiose. I so declare.”

[16] *The second issue for determination is the question whether the citation is misconceived in view of the existence of Eldoret Environment & Land Case No. 260 of 2016.* From the Plaintiff annexed to the Replying Affidavit, dated **8 September 2016**, it is apparent that a third party, one **Julius Kiptarus Mzee**, sued as the 4th defendant in that suit, is presently the registered owner of the disputed piece of land. It is further instructive that this particular property, land parcel number **PIONEER/LANGAS 1/141**, is not included in the Schedule of Properties appended to the Certificate of Confirmation dated **3 March 2011**; and therefore may not have been available for distribution as part of the free disposable assets of the deceased. Consequently, the best forum for interrogating the citor’s allegations is the Environment and Land Court, where the parties are already litigating. That being the case, no useful purpose would be served by re-opening this cause.

[17] Even assuming, as was suggested herein, that the grant is necessary for the purposes of progressing the ELC suit, the Citation would still be indefensible. Counsel for the citor referred the Court to **Section 54** of the **Law of Succession Act**, which states that:

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.

[18] Since full grant had already been given in **Eldoret Succession Cause No. 97 of 2006**, the question of limited grant would not arise. In any case, the same considerations come into play, for **Paragraph 14** of the **Fifth Schedule**, which counsel for the citor hinged his arguments on provides, in a plain manner, that:

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.” (emphasis supplied)

[19] It is for the foregoing reasons that I find the Citation entirely misconceived in so far as the estate of **Priscila J. Malel** (Deceased) is concerned. The same is hereby dismissed with an order that each party shall bear their own costs thereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF MARCH, 2021

OLGA SEWE

JUDGE