



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**SUCCESSION CAUSE NO. 4 OF 2019**

***(CORAM: F.M. GIKONYO J.)***

**IN THE MATTER OF ESTATE OF LENKONOMA OLE PAREIYO (DECEASED)**

**JOSEPH OLOPONU PAREIYO.....CITOR**

**VERSUS**

**NASHURU ENE LOLEPAREI.....CITEE**

**RULING**

**Citation**

[1] The Citor herein **Joseph Oloponu Pareiyo** has filed notice of motion dated 14<sup>th</sup> February, 2019 seeking for the following orders;

*(a) That Nashuru Ene Loleparei who is the widow of the above named Lenkonoma Ole Pareiyo who died in the year 1983 do show cause why she should not take out letters of administration to the deceased's estate and that in default of doing so, this honorable court do compel her to do so as to enable the estate of the deceased to be administered effectively.*

*(b) That in the alternative, this honourable court does authorize the petitioner/applicant herein to take out letters of administration to the deceased's estate.*

*(c) That this honourable court be pleased to issue such other and or further orders that it may deem fit and just in the interest of justice.*

*(d) That costs of this application be provided for*

[2] The Citor filed an Affidavit in support of the application in which he deposed the following issues: -

*(a) That the deceased was the registered proprietor of parcel NO. CIS /MARA /SAKUTIEK/253 where his widow and her children are beneficiaries entitled to a share within his estate.*

*(b) That on 9<sup>th</sup> April 2000 he entered into a sale agreement with the deceased's widow for the sale of approximately 12 acres in that parcel of land known as CIS/MARA/SAKUTIEK/253.*

*(c) That he paid the full purchase price to the Citee who was a seller and her sons were witnesses during the transaction. He moved in and assumed vacant and peaceful possession of the portion sold to him after having it surveyed and beacons.*

*(d) The widow of the deceased and her sons were present when the surveyors attended the ground for purposes for surveying and curving out the 12 acres out of the parcel leaving the remainder intact for them to share amongst the beneficiaries of the deceased's estate.*

*(e) That he has been in occupation and possession where he also developed the said 12 acres where besides fencing off, he has been ploughing the same for 10 years now.*

(f) That the citee is the person entitled to take out letters of administration for the deceased's estate as she is the surviving spouse to enable him get his share from the deceased's estate which she has vehemently declined despite numerous oral demands thus denying him his rights from the estate.

(g) That it is only fair that the Citee takes out letters of administration or in the alternative show cause why the same should not be given to him to enable him curve out the said 12 acres out of the deceased's estate.

(h) That in default of the Citee so appearing and accepting and extracting letters of administration, this honourable court has the powers and discretion to proceed to grant letters of administration of the said estate to him.

### **Objection**

[3] Upon receipt of the Application, the court directed the Citor to serve the Citee. The Citee thereafter duly entered an appearance through her learned counsel M/s Kiplenge & Kurgat and Co Advocates.

[4] The Citee also filed a notice of preliminary objection dated 23<sup>rd</sup> April 2021 seeking the application to be struck out with costs on the following grounds;

*(a) That the said application has been filed in complete disregard to rule 21 of the probate and administration rules 1980 and therefore cannot be used to institute and sustain citation proceedings*

*(b) That moreover, the instant application has not been prosecuted since its filing in February 2019 and thus ought to be dismissed under order 17 rule 2 of the civil procedure rules.*

### **Claim of intermeddling**

[5] During the hearing of the application, Mr. **Mutai**, the legal counsel for the Citee stated that there is no estate to administer, hence, the citee will not file any succession cause. Mr. **Mutai**, nonetheless urged the court to consider the citation, their objection and determine the matter.

[6] On the other hand, the counsel for the Citor argued that the Citor is a purchaser for value of the property which was in the name of the deceased. The counsel questioned how properties in the name of the deceased were transferred from the deceased to third parties after the death of the deceased without a grant. Counsel gave specific details; that the land in question was registered from the deceased to third parties on 17/11/2009 yet the deceased died in 1983.

## **ANALYSIS AND DETERMINATION**

### **Issues**

[7] From the pleadings and oral submissions before this court, the issues for determination by this court are;

*a) Whether the objection meets the threshold for a preliminary objection.*

*b) Whether Citee should be ordered to take out Letters of Administration intestate to the estate of the deceased which failing the CITOR to so apply.*

### **Threshold for preliminary objection**

[8] According to the Court of Appeal in **MUKHISA BISCUITS MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD [1969] EA 696**:

*“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”*

[9] Applying the test, the first point of the objection is purely on form. Want of form, although a procedural lapse, does not rout the essential substance of the matter at hand. The potency of such procedural technicality to defeat substantive justice was considerably deflated by article 159(2)(d) of the Constitution. The objection therefore fails. Nonetheless, legal counsels should adhere to Rule 21(2) of the Probate and Administration Rules which governs citations in order to avoid such objections being raised. With deprecation, I do not understand why counsel for the Citor did not adopt the procedure prescribed in the said rule.

[10] The second ground of the objection will require factual evaluation to prove. Thus, it is not a true preliminary objection. Consequently, I will not strike out the application herein.

### **Possibility of intermeddling**

[11] Other than stating that there is no estate to administer, the Citee did not respond to the specific issues raised by the Citor especially that land registered in the name of the deceased was transferred after the death of the deceased without letters of administration. The claims

border on intermeddling with the estate of the deceased. Such is so serious a matter that it should never be swept under the carpet lest we should open estates of deceased persons to wanton waste and dissipation. The seriousness is buttressed in law; intermeddling is a criminal offence. See section 45 of the Law of Succession Act as well as the wide powers of the court on the preservation of the estate of the deceased. See also Musyoka, J **IN THE MATTER OF THE ESTATE OF VERONICA NJOKI WAKAGOTO (DECEASED)** [2013] eKLR that:

***“[T]he property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.***

[12] In light thereof, and drawing from section 47 and rule 73 of the Law of Succession Act and Probate and Administration Rules, respectively, I direct: -

- a) The Citor to obtain and file record of all transactions in respect of L.R NO. CIS /MARA /SAKUTIEK/253 from 1983 to date within 30 days of today.***
- b) The land Registrar to provide the certified record thereof to the Citor upon payment of all attendant fees by the Citor.***
- c) Upon filing of the said record, and it having been served upon the respondent, the court will determine the citation on merit.***

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 12TH DAY OF MAY, 2021.**

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**F. GIKONYO**

**JUDGE**

**In the Presence of:**

1. Mutai for Citee

2. Kilele for Citor

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**F. GIKONYO**

**JUDGE**