



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CITATION NO.3 OF 2019**

**IN THE MATTER OF THE ESTATE OF CESARY GACHINA KANGWAE (DECEASED)**

**CHARLES MWANGI MUTURI.....CITOR**

**-VERSUS-**

**PAULINE MURUGI GACHINA.....CITEE**

**R U L I N G**

The only issue for consideration before me is, who should bear the costs of the citation proceedings filed herein on 16/3/2019 by the Citor, Charles Mwangi Muturi against the Citee, Pauline Murugi Gachina.

Mr. Maina, Counsel for the Citor gave a background of the case; In 2016, the Citor filed a suit on behalf of Moses Njoroge as his representative. He holds a power of attorney from the said Moses Njoroge. The dispute is over Plot.No.44, Kahiho Township between Moses Njoroge Ngaruro and the citee, Cesary Gachina; that an order of injunction was issued barring the deceased, Cesary Gachina from constructing on the Plot (ELC.150/2018); that the said suit was withdrawn in November, 2017 when it was realized that the applicant's power of attorney was defective. The deceased Cesary Gachina was awarded costs; that during execution for costs, another party came on board, Paul Muthee, as an objector and both were represented by the firm of Ndegwa Wahome Advocate; that the court set aside the attachment for being unlawful and they paid the Cesary his costs Kshs.145,000/=.

Thereafter, the Citor wrote to Waichungo Advocate demanding their costs for wrongful attachment but Waichungo Advocate wrote back on 7/1/2019 that Cesary had died and the Advocate needed to get instructions; that the Citor had regularized the position by filing a new suit against the deceased (Cesary) ELC 396/2018, and that the letter stating that the deceased had died was received on 07/01/2019 after the suit had been filed. The Citation was filed in March, 2019; that at the time the Citor filed the citation, the family of Cesary had not taken any steps to be enjoined to the suit; that the suit was filed by creditors of the Citee so as to provoke the family of late Cesary to file suit; that the Citee filed a Replying Affidavit opposing being forced to take out Letters of Administration; that later, the Citee conceded and filed a petition and took out letters of administration. According to the Citor the Citation succeeded and the Citor is entitled to the costs of the Citation. Counsel relied on Section 27 & 63 of Civil Procedure Act. He urged that the award of costs is an exercise of the court's discretion which must be exercised judiciously. Counsel made reliance on the decision in *John Osicho Odongo v Hana Omolo Osewe and Another P & A.177/2012* which defined the purpose of taking out a Citation, that is, to fast track taking out grant of letters of administration.

Mr. Waichungo, counsel for the Citee opposed the claim for costs. Mr. Waichungo argued that the facts presented by Mr. Maina do not reflect what happened because the Citor filed a suit against the deceased *Nya.CMCC.7/2016* which was later assigned **ELC.150/2018** and it was withdrawn on 5/9/2018. Costs were awarded to the late Cesary. Before his death, the late Cesary tried to attach a vehicle which belonged to the Citor but objection proceedings were filed by Paul Muthee and the attachment was lifted Muthee was awarded costs of unlawful attachment. A demand for costs was issued to the late Cesary before his demise and reference was made to ELC.150/2018 and counsel replied that he had no instructions in the matter; that soon after that response, another citation was filed on 6/3/2019 calling on the Citee to take out letters of administration and substitute her husband in **ELC.396/2018**; that the Citee was not aware of the pleadings in ELC.396/2018 as they were not attached to the demand letter for costs; that the Citee replied denying knowing of the existence of **ELC.396/2018** which issue was raised at the hearing of the Citation and the Citor sought leave to file a further affidavit attaching proceedings in **ELC.396/2018** which had been filed in December, 2018. The Citee had not been formally notified of the existence of the suit. Counsel also submitted that at the time of filing the suit, the late Cesary was still alive and had not been served. Counsel submitted that it was the duty of the Citor to notify the Citee that a fresh suit had been filed as it is not normal for one to take out letters of administration immediately a person dies.

Counsel distinguished the facts in *John Odongo's Case (Supra)* because in that case, parties were related but not so in the instant case. He urged the court to order that costs be awarded to the Citee who was unnecessarily dragged to court.

In a rejoinder, Mr. Maina submitted that it had been deponed in the affidavit and Supplementary Affidavit filed on 6/5/2019 that the Citor

instructed a Process Server to serve pleadings in **ELC.396/2018**; that **ELC.396/2018** is the same as **CMC.150/2016** of which the Citee had knowledge of and that the Citor was rushing against time to cite the family.

I have considered the rival submissions on the issue of, who should meet the costs of the Citation that was filed by the Citor herein **Charles Mwangi Muturi** dated 6/3/2019.

Justice Sitati considered the purpose of citation proceedings where she said that;

***“(11) A Citation is a document issued by the Probate Registry, whereby the person being the claimant (Citor) calls upon the person cited (Citee) to provide a reason why a particular step should not be taken;***

***(12) Citation occur in both contention and non-contentious probate. In non-contention Probate, they serve the purpose of bullying along or fast tracking the issue of a grant of letters of administration.”***

There is no doubt that the Citor had filed **CMC.ELC.150/2018 (CMCC.7/2016)** against Cesary Gachina Kangwae who was the husband of the present Citee, Pauline Gachina. It is also not in dispute that the said suit was withdrawn by the Citor on 5/9/2018, and costs were paid to the Citee on 5/12/2018.

**Cesary Gachina Kagwae**, the defendant in 150/2018 died on 6/1/2019. It is evident that by then, the Citor had filed **CM.ELC.396/2018. Charles Mwangi v Cesary Gachina Kagwae on 20/12/2018**. The question is whether the said Cesary Gachina had been served with the pleadings in **C.M.ELC.396/2018**. Although the Citor submitted that the said pleadings had been served on Cesary Gachina, I have perused the file, the annexures to the affidavit in support of the Citation and the Supplementary Affidavit dated 6/5/2019 but there is no evidence that Cesary had been served with the said pleadings. The Citor deponed that by the time the Process Server went to serve, he learnt that the defendant (Cesary) had died the previous night which may have been about 7/1/2019. Having found that the said Cesary had died on 6/1/2019, it means that Cesary had never been served with the pleadings in **ELC.396/2018** and was not aware of it.

The next question is whether the Citor notified the Citee of the said intention to cite her to take out Succession proceedings in respect of her husband's (Cesary) estate.

The Citee does not deny having been aware of the suit that had been withdrawn **CM.ELC.150/2018**. Indeed that is what she deponed to in her affidavit in reply to the Citation. When the Citation was filed on 5/3/2019, the Citor only attached to the Citation his affidavit, and a power of attorney. He did not attach a copy of the pleadings in **ELC.396/2018**.

As pointed out by Mr. Waichungo, it is after the parties appeared before the court on 4/2019 that the Citor sought leave to file a further affidavit which was filed on 6/5/2019 and it is to that affidavit that the pleadings in **ELC.376/2018** were annexed. That is when the Citee became aware of the pleadings in that suit. No formal letter or notice had been served on the Citee informing her of the pleadings in **ELC.376/2018** and she had not declined to Petition the court for grant. Indeed the Citee has already taken out Limited Grant of Letters of Administration issued to her on 5/8/2019.

I agree with the observation in **John Osicho Odongo's** case, that the Citor has to follow the due process. A Citor cannot rush to court without finding out whether or not the person to be cited is opposed to taking out Letters of Administration of the subject estate. The person to be cited must be notified first.

From the foregoing, I find that the Citor rushed to court, cited the Citee without any notice of the **ELC.396/2018** to her. The Citee was dragged to court without prior notice and it is my view that the costs of the Citation must be borne by the Citor. It is so ordered.

**Dated, Signed and Delivered at NYAHURURU this 7<sup>th</sup> day of May, 2020.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Maina – Citor - absent

Mr. Waichungo – for Citee

Eric – Court Assistant