



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CITATION CAUSE NO. HC 45 OF 2017**

**IN THE MATTER OF THE ESTATE OF MAA – DECEASED**

SA.....1<sup>ST</sup> CITOR

FA.....2<sup>ND</sup> CITOR

**VERSUS**

TTK.....1<sup>ST</sup> CITEE

LMA.....2<sup>ND</sup> CITEE

**AND**

SR.....INTERESTED PARTY

**RULING**

1. The citors (**SA and FA**) filed a citation dated 16<sup>th</sup> November 2017 in which they sought orders against the 1<sup>st</sup> and 2<sup>nd</sup> citees (**TTK and LMA**) to compel them to take out letters of administration with respect to the estate of **MAA** (the deceased) or refuse letters of administration of the said estate or show cause why the same should not be issued to the petitioners being of equal or lesser priority to enable them administer the estate.

2. The deceased died on 25<sup>th</sup> January 2016 and left behind two assets namely **Kitale Municipality L.R No. [xxxx] situate within Milimani Estate, Kitale Township**. After the demise of the deceased the citors filed the citation and disclosed all the beneficiaries. The 1<sup>st</sup> citee and her children reside in the said property.

3. The citors and the interested party relied on the affidavit sworn on 18th July 2018, further affidavit sworn on 5th December 2018 and supplementary affidavit sworn on 11th February 2019. They also filed written submissions where they argued that the interested party was married to the deceased on 13<sup>th</sup> July 1980 under Islamic law and separated on 7<sup>th</sup> July 1994 and eventually divorced on 31<sup>st</sup> July 2002 at Kadhi's court Eldoret. She has participated in the proceedings to ensure the citors, who are her children and beneficiaries to the estate get their rightful inheritance. Out of the said marriage with the deceased they were blessed with 3 children and one grandson namely;

**i) JA (deceased)**

**ii) SA**

**iii) FA**

**iv) NK (Grandson)**

4. During subsistence of the marriage they jointly acquired property where the matrimonial property is being built being **LR No. [xxxx] Kitale in 1992 and West Pokot/Siyoi/[xxxx] (later West Pokot/Siyoi/[xxxx])**. The 1<sup>st</sup> citee moved into the said property late 1999 after the interested party's separation. At the time she was legally married to **HNK** as demonstrated by an affidavit of marriage sworn by both of them on 9<sup>th</sup> November 1996 and annexed as SR1-6. The marriage has never been dissolved.

5. The 2<sup>nd</sup> citee sued the 1<sup>st</sup> citee and one **AKA**, the brother to the deceased in **Kitale ELC case no. 107 of 2016** which was withdrawn to pave way for succession proceedings.

6. The citors and the interested party do not object to the 1<sup>st</sup> citee inheriting part of the share of the deceased. She acquired 2 properties from the relationship which she has not denied in her submissions. They point out that whereas the 1<sup>st</sup> citee stated in her reply to citation affidavit sworn on 23<sup>rd</sup> August 2018 that she ranks in priority with her children to inherit the said property and she contradicts this in her further replying affidavit sworn on 30<sup>th</sup> January 2019 that she has not stated so in her pleadings. That the 1<sup>st</sup> citee stated in the same further affidavit that she started cohabiting with the deceased in 1998 therefore it is impossible that she was present when the deceased purchased the property in 1996. Their contention is that this confirms that she moved into the matrimonial home and contradicts paragraph 8 of the said further affidavit.

7. The citors have identified all the beneficiaries and the 1<sup>st</sup> citee is identified for the benefit of her children. It is their case that the 1<sup>st</sup> citee has been collecting a monthly rent of kshs. 60,000/- from the said property since the demise of the deceased on 25<sup>th</sup> January 2016. The marriage certificate produced as TTK2 is described as an afterthought and should have been produced in the first instance.

8. It is also argued that the former wives did not participate in the acquisition of the said property and their children were not born on the said property. Further that, **SA Company and ST Company** are different entities and the interested party annexure SR1-3 contains a search that shows the interested party is still in the records of the registrar of business names whereas the citors, their late brother and the 1<sup>st</sup> citee's name does not appear anywhere in any of the two. It is submitted that the 1<sup>st</sup> citee is neither a dependant nor a beneficiary since she came into the deceased's life in 1999. She has benefitted from monthly collection of rent and ought to account for the same.

9. The citors submitted that the interested party is a former wife of the deceased and at the time of the deceased's death the subject matter which is matrimonial property, had not been divided between her and the deceased by the matrimonial court.

10. The interested party produced documents relating to the acquisition of the said property and construction of the same as annexures SR1 and 2. She further submitted that the 1<sup>st</sup> citee has failed to do so and the documents relating to the companies that she produced do not favour her yet she continues to run the business to date.

11. That the interested party has proven that her divorce took place on 22<sup>nd</sup> February 2003 and until then she was legally married to the deceased. The 1<sup>st</sup> citee insists that the divorce took place on 13<sup>th</sup> June 1994. Both parties presented evidence to the court. The contention is that the house was completed before the 1<sup>st</sup> citee moved into the matrimonial home of the interested party. Further that the interested party proved she participated in construction of the matrimonial homeland to justify that her share ought to be given to the citors herein and her grandson.

12. It was further submitted that **section 6 of the Matrimonial Property** applies to the property acquired with the joint efforts of both spouses but in this case it is different as the 1<sup>st</sup> citee stormed into a home that did not belong to her. She also acquired other properties during the subsistence of her marriage. The case of **PWK vs JKG [2015] eKLR** is cited to support the position that it favours the interested party's participation in the construction of the matrimonial home.

13. The evidence of the 1<sup>st</sup> citee that the interested party ceased to be a partner of **SA company** is contested as being inadmissible as it is not authentic and does not bear the stamp of the registrar of business registry and is rebutted by annexure SR1-3 which is a search of the company dated 27<sup>th</sup> May 2016 and has not been rebutted.

14. It is argued that the 1<sup>st</sup> citee's marriage to **HNK** has never been dissolved thus the alleged marriage to the deceased was illegal and she ought to be held responsible for bigamy. Further, the citors fear the citee will intermeddle with the property by her conduct of collecting monthly rent without involving them. They sought orders to preserve the estate in this regard. They maintain that the deceased did not die testate and did not leave behind a will.

15. The 1<sup>st</sup> citee filed submissions in opposition to the citation on 1<sup>st</sup> February 2019. She also filed a reply to the citation, a further replying affidavit and a witness statement.

16. She contends that the 1<sup>st</sup> interested party produced a certified court order issued by the Kadhi's court, Eldoret on 31<sup>st</sup> July 2002 which ordered that the divorce was granted and effective from 11<sup>th</sup> June 1994 and was to be registered as such. The citors and the interested party have failed to substantiate their claim that the divorce was valid from a date later than 11<sup>th</sup> June 1994. The court order was issued by a court and the court ought to take judicial notice of its validity.

17. That the deceased expressed interest in purchasing LR No. [xxxx] on 8<sup>th</sup> September 1992 when he had already separated from the interested party. The argument here is that there has been no evidence tendered to prove the property was bought by the deceased and the interested party from the proceeds of the business entity, **SA company**. It is also submitted that the 1<sup>st</sup> citee has brought evidence which proves there was a notice of change dated 25<sup>th</sup> October 1990 showing that the interested party ceased to be a director of the business entity and if it is proved the property was bought using the proceeds, the interested party had no interest therein as she was not a director of the business entity. Secondly, the deceased and interested party were separated in 1991, divorced in 1993 which was officially effected by the Kadhi's court in 1994 and the property was registered in the deceased's name on 19<sup>th</sup> March 1993. Consequently, that it does not qualify as matrimonial property as it was acquired after their separation under the Matrimonial Property Act. It was not jointly owned and it was not acquired during the subsistence of the marriage between the deceased and the interested party. She relied on the cases of **PWK v JKG (2015) eKLR and BNM v GMK [2018] eKLR**.

18. The 1<sup>st</sup> citee further submitted that the deceased leased out the property to tenants to supplement their income due to financial constraints. There is a charge registered over the property as security for a loan advanced to the deceased. Thus, there is no risk of the property being disposed of.

19. She submitted that she had not intermeddled with the deceased's estate and what she has is what was in her possession before the death of the deceased and does not amount to intermeddling.

20. The 1<sup>st</sup> citee cohabited with the deceased in 1998 and formalized their marriage in 2004 in accordance with Muslim rights of marriage. They swore an affidavit of marriage to that effect dated 30<sup>th</sup> September 2005 and were blessed with two issues, **LA and DA**. At the time of solemnizing the marriage, both of them had divorced their spouses and had the capacity to enter into new marriages. The validity of a Muslim marriage was discussed in **SMK v RHH [2015] eKLR**.

21. The 1<sup>st</sup> citee submitted that she was a dependant under section **29 of the law of Succession Act** and is entitled to the deceased's property **Eldoret Municipality Block [xxxx]**. She further submitted that the deceased filed a notice of change dated 25<sup>th</sup> October 1990 with the Registrar of companies seeking to remove the interested party as a director. The business was razed to the ground in 2007 and the deceased started a new business entity under the name **ST Company** on 19<sup>th</sup> January 2007 where the subscribers were the deceased, **SA, FA and NA** to the exclusion of the interested party. The business entity the 1<sup>st</sup> interested party claims to be a proprietor no longer exists.

22. Referring to section 62 of the Law of Succession Act, it is contended that the deceased died testate therefore it would have been prudent to read the will and find out who the deceased appointed as executors before any application for citation can be instituted. It is also pointed out that the citors already applied for letters of administration in **Kitale Succession Cause no. 13 of 2016** wherein they failed to obtain the consent of the 1<sup>st</sup> citee knowing she ranked higher in priority and there were other dependants whom they excluded.

### **ISSUES FOR DETERMINATION**

1. Whether the property is matrimonial property
2. Whether the Applicants have shown cause as to why the grant of letters of administration should be issued to them

### **WHETHER THE PROPERTY IS MATRIMONIAL PROPERTY**

The Matrimonial Property Act defines matrimonial Property as;

**(1) For the purposes of this Act, matrimonial property means—**

**(a) the matrimonial home or homes;**

**(b) household goods and effects in the matrimonial home or homes; or**

**(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.**

23. In this particular instance the definition that is to be determined is that of property jointly owned and acquired during the subsistence of marriage. The property in the dispute is the home sitting on L.R [xxxx].

The property was acquired in 1992 as per the transfer documents annexed as SR-1 to the affidavit filed by the interested party on 19<sup>th</sup> July 2018. There is also an affidavit of marriage proving that the 1<sup>st</sup> respondent was married to the deceased in 1996. There is no proof as to when the construction of the house commenced and when it was completed. This therefore brings into question whether the home was a matrimonial home. I am guided by the court's decision in **PWK v JKG (2015) eKLR** where the court cited the case of **Echaria vs Echaria** where it was held;

***Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.***

The interested party did not prove contribution and the property is registered in one name yet can the court ignore the provisions that there exists a rebuttable presumption that the registered spouse was holding the property in trust for the other whose name was not entered into the register

The court order issued by the Kadhi's court, Eldoret on 24<sup>th</sup> February 2003 ordered that the divorce was granted and effective from 11<sup>th</sup> June 1994 and was to be registered as such. This has no bearing on the property as the marriage was still valid at the time of acquisition of the land.

### **WHETHER THE 1<sup>ST</sup> CITEE WAS VALIDLY MARRIED TO THE DECEASED**

The 1<sup>st</sup> citee has provided an affidavit of marriage marked as **TKK2** as proof of marriage between herself and the deceased. They were married in 2004. The Citors and the interested party claim that the 1<sup>st</sup> citee was married to a **HNK** and the marriage was never dissolved. They referred to annexure **SR1-6** as proof of the same. The annexures do not contain an affidavit of marriage or any proof that she had been married to anyone else at the time she was married as alleged. I therefore find that she as validly married to the deceased.

### **WHETHER THE CITORS HAVE SHOWN CAUSE AS TO WHY THE GRANT OF LETTERS OF ADMINISTRATION**

## SHOULD BE ISSUED TO THEM

The 1<sup>st</sup> citee has intimated that there is the existence of a will and that it is in the possession of Kidiavai advocates who she seeks to be ordered to produce the will. There has been no proof of this and therefore I find that it is a mere allegation.

The 1<sup>st</sup> citee has also indicated to the court that the property known as L.R [xxxx] was leased by the deceased to enable the dependants meet financial obligations.

In **re Estate of Kiprono Sitienei (Deceased) [2018] eKLR** the court held;

As was rightly pointed out by **Musyoka, J.** in *Nairobi Succession Cause NO. 2557 of 2012 [2014] eKLR*:

***“... 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.”***

The applicant’s succession cause filed in Kitale Succession Cause No. 13 of 2016 was merely for grant of letters of administration ad litem and not for administration of the estate therefore that does not limit them from applying for a citation.

The 1<sup>st</sup> citee is open to having the citors appointed as an administrator to the estate which is an indication of willingness to have the matter settled.

The 1<sup>st</sup> citee has shown that there are other material facts the applicants have failed to disclose that are material to the cause including other former wives and beneficiaries more specifically the children whose birth certificates were annexed as TTK3 in the reply to the citation. The citors and the interested party seem to be focused on one piece of the estate yet administration must cover the whole estate. Almost each party in this matter is breathing hot and cold at the same time

From what is presented, I hold that it is prudent to have the citors included as administrators is merited.

b) The 1<sup>st</sup> Citee **TTK** is directed to render a statement of accounts for the rent collected from the property **No KITALE TOWN [xxxx] since 25<sup>th</sup> January 2016 to date.**

c)The other issues touching on the children and deposit of monies in my view cannot be resolved by affidavits and require viva voce evidence the witnesses statements on their own elicit several questions calling for cross examination, that must be listed for mention on 23<sup>rd</sup> May 2019.

**DELIVERED, SIGNED AND DATED THIS 8<sup>TH</sup> DAY OF MAY 2019 AT ELDORET.**

**H. A. OMONDI**

**JUDGE**