



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CITATION NO. 32 OF 2018

IN THE MATTER OF CITATION TO ACCEPT OR REFUSE

LETTER OF ADMINISTRATION INTESTATE

IN THE MATTER OF THE ESTATE OF ANTHONY GEORGE KIMANTHI (Deceased)

ROSE WATHIEGENI G.....CITATOR

RULING

1. This citation relates to the estate of Anthony George Kimanthi (deceased) who died on 1.1.2018 at the age of 56 years. Vide certificate of urgency and citation dated 14.8.2018 directed to Annah Nduku Mutisya and Richard Mutua Mutisya by the citator.
2. In her affidavit in verification of the proposed citation to accept or refuse letters of administration intestate, the Citor states that the deceased was personally known to her and is the registered owner of Title No. Mavoko Town Block 12/36 and that she paid Kshs 4,685,000/- towards the purchase of the same however she discovered that the deceased secretly was selling the suit property at a higher price and she was prompted to file ELC 232 of 2015 against the deceased. However the suit failed to take off due to the failing health of the deceased. She averred that seven months had been wasted and the family of the deceased had not taken out letters of administration in respect of the estate of the deceased and that dealings on the suit property have continued hence the citation to the biological mother of the deceased and the brother of the deceased compelling them to take up or refuse to take up the petition for letters of administration or to show cause why the Citor should not take out the letters of administration intestate.
3. The Citation is opposed by the citee, Anna Nduku who filed her replying affidavit with consent of her son on 26th September, 2018. She averred that a perusal of the pleadings in ELC 232 of 2015 indicated that the Citor breached the terms of the agreement in respect of the suit property and that this court is not the proper forum to discuss the merits and demerits of the Citor's case. She averred that the intention of the citation is to drag the Citees into a suit in respect of property that they have no beneficial interest and further that they have been wrongly cited hence the citation ought to be dismissed.
4. On record is an application that Patricia Nduku Kimanthi be enjoined as an interested party which was allowed by consent. In her affidavit, Patricia Nduku Kimanthi averred that she had beneficial interest in the suit property and that she was the daughter of the deceased and that she was willing to apply for letters of administration in respect of the deceased's estate for purposes of being substituted in place of her deceased's father and defending the suit against him. However only recently she was able to get the death certificate in respect of the deceased. She attached a copy of her birth certificate. The court directed that the parties file submissions. However none were filed and the matter was reserved for ruling.
5. From the pleadings, the issue for determination by this court is who is entitled to take out the letters of administration intestate to the estate of the deceased with the **ELC case No. 22 of 2015** in view?. Should it be the Citor or the citee or the interested party?. In her affidavit, the interested party indicated that she is the right person to be granted the letters of administration ad litem to defend the suit against her father while the citee says that she has been wrongly cited thereby implying that she should not be granted the letters of administration intestate to the estate of the deceased herein. The Citor says that she should be granted letters of administration in respect of the estate of the deceased so that her case against the deceased should not lapse for want of substitution.
6. After a careful analysis of the pleadings and the rival affidavits, it is clear that the letters of administration is geared towards substitution of the deceased who was a defendant in the **ELC case No. 232 of 2015**. Before I make the final pronouncement on who should be granted letters of administration of the deceased's estate, it is important to refer to Section 54 of the Law of Succession Act which provides that a Court may limit a grant of representation ***which it has jurisdiction*** to make in any of the forms described in the Fifth Schedule Paragraph 14 of the Fifth Schedule provides:

“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.

7. In light of the foregoing provision, an applicant armed with a limited grant of representation for the estate of the deceased may represent the deceased in the pending suit.

8. From the pleadings, I find and hold that the Citor is not the appropriate person and it would not be safe to grant the letters of administration her. I say so because in the **ELC No. 232 of 2015** she is the plaintiff and there is a possibility of conflict of interest in that the Citor might end up actually suing herself and eventually achieve what she had sought for in the ELC case to the detriment of other beneficiaries. It would not be appropriate for her to wear two hats as it were! On the other hand, the interested party who is a daughter of the deceased is willing to take up the letters of administration *ad litem* and she is the right person to take up the limited grant in order to go and defend the estate in the ELC case. At this juncture this court cannot delve into the said ELC case as it doesn't have jurisdiction.

9. The law on citations is set out in part VI of the Probate and Administration Rules (P&A Rules) where three types of citations are set out. The first citation is to accept or refuse a grant, while the second is to take probate on a will. The third one is intestacy and in this third category a person who is entitled to administer the estate of the deceased may be cited by the court to accept or refuse a grant of letters of administration. This is what the Citor seemed to have in mind in this case. If the person cited refuses or fails to appear upon being cited or to apply for the grant, the Citor may proceed to petition the court for grant. In the case of **Josiah Muli Wambua – deceased, Nairobi Succession Cause NO. 2557 of 2012 [2014] eKLR** *W. Musyoka – J* stated the following at paragraph 9 of his ruling:-

“9. In intestacy, citation 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.”

10. In the instant case, the interested party responded to the citation and has also told the court that she is ready and willing to petition for grant of letters of administration *ad litem* so as to be substituted and be able to defend the suit in ELC No. 232 of 2013 as she only recently got the death certificate in regard to the deceased. Once she does that then the Citor's concerns will be taken care of as she will prosecute her case to conclusion. The citation herein will then become spent. I also think that the *raison d'être* behind the filing of this citation was to secure the deceased's family member to join the suit as a defendant so as to fast tract the matter and not to wade into the estate of the deceased as administrator. I find that the citation is misconceived and is dismissed with no order as to costs. Accordingly I direct that the interested party do petition the court for the grant of letters of administration *ad litem* to the estate of the deceased within sixty days from the date of this ruling. This matter shall be mentioned in sixty days to confirm compliance.

Orders accordingly.

Dated and delivered at **Machakos** this 5th day of **November, 2019**.

D. K. Kemei

Judge