



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO. 65 OF 2016**

***In the matter of the Estate of MWANIKI MITAMBO (Deceased)***

**DAVID MURIITHI NJOKA.....APPLICANT/CITOR**

**VERSUS**

**JOSEPH RUTERE MWANIKI..... 1ST RESPONDENT**

**BEDAN MUGENDI MWANIKI..... 2ND RESPONDENT**

**CITEES MOSES KINYUA MWANIKI.....3RD RESPONDENT**

**EMILIO NJIRU MWANIKI..... 4TH RESPONDENT**

**R U L I N G**

1. For purposes of this application the applicant will be referred to as the citor while the respondents will be the citees.
2. The citor was represented by Muthoni Ndeke & Company Advocates while Mugambi Njeru & Company are on record for the citees.
3. The parties recorded a consent that the citation be disposed of by way of written submissions which were accordingly filed.
4. The citor states that he is a purchaser of the land of the deceased Mwaniki Mitambo LR. NO. NGANDORI/KIRIARI/ 877 while the citees are the children of the deceased.
5. The citor depones that the deceased sold to him a portion of 0.30 ha. before he died at a consideration of Kshs.570,000/=. On execution of the agreement the citor paid KShs.410,000/= and later paid Kshs. 130,000/= leaving a balance of Kshs.30,000/=. The sale agreement and acknowledgments of the money paid are annexed to the citation.
6. Prior to his death the deceased executed the transfer forms in favour of the citor but was yet to obtain the consent from the Land Control Board.
7. The citor has approached the citees to file a succession cause for the estate of the deceased without success. For this reason, he urges the court to allow him to file the said cause so as to protect his interest.
8. In the replying affidavit sworn by Bedan Mugendi Mwaniki, the citees opposed the citation on ground that their father was a drunkard and that the citor is a bar owner who influenced his father to drink himself

silly and unknowingly offered his land for sale to him.

9. The citees state that they had cautioned the land on behalf of the deceased's family and wrote a letter to the County Commissioner complaining of the sale of the land by the father. It was further stated that the Land Registrar summoned them together with other family members for hearing of the caution.

10. It is further stated that a succession cause is a sensitive matter and the citor should not be allowed to force the family to hurriedly commence it on the basis of a forged agreement.

11. The citees argue that the applicant is stranger and not a beneficiary to the estate and should not be allowed to file the succession cause.

12. It was alleged that the citation is also *res judicata* since it was determined in favour of the citee in Runyenjes succession No. 35 of 2015.

13. In his submissions the citor explained that the Runyenjes court cited lack of jurisdiction in striking out the citation and therefore the application is not *res judicata*. This evidence was not controverted by the citees.

14. It is not disputed that the applicant was buying land from the deceased and had paid KShs.410,000/= as shown in the annexed agreement. He says that at the time of the deceased's death, he had paid a total of Kshs.540,000/=.

15. The citees are children of the deceased. In the replying affidavit, it was said that the wife of the deceased who is their mother passed on. This places them first in rank as potential administrators of the estate. It is argued that they are being hurried up to file the succession cause.

16. The applicant/citor in this case has already established his interest in the estate. It is in the interest of justice that the said interest be addressed expeditiously.

17. The citees did not explain what they wanted to wait for. Even if they were to wait for ten (10) years, they will still file the cause and the citor will still pursue his interest.

18. As for the issue of the citation being *res judicata*, the citees presented no evidence. Neither did they controvert the citor's evidence that the citation was not heard and determined by the court.

19. Rather it was struck out for lack of jurisdiction. Such a matter cannot be said to be *res judicata* for it does not fall within the description of Section 7 of the Civil Procedure Act.

20. I find that the citor has established that he has a substantial interest in the estate of the deceased. I therefore allow the citation in the following terms:-

(i) That the citees or any of them do file the succession cause within 30 days failure to which the citor is at liberty to institute the proceedings.

(ii) That each party meets its own costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF FEBRUARY, 2017.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Applicant**

**Respondents**