



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE NO.695 OF 2011
IN THE MATTER OF THE ESTATE OF VITALIS OBETO – DECEASED
PANCRAS ODERO OBETO.....PETITIONER/RESPONDENT
VERSUS
MAURICE AMBIRO OKELLO.....APPLICANT/RESPONDENT
RULING

Background

1. By a Chamber Summons application dated **12th February 2015** brought under **Section 76 (a), (b) and (c)** of the **Law of Succession Act**, the Applicant seeks the following orders:

- 1. That this Honourable Court be pleased to certify this matter as urgent and service thereof be dispensed with in the first instance.**
- 2. That this Honourable Court be pleased to set aside, discharge and/or revoke its order dated 2nd December 2011 allowing the Respondent herein to take out Letters of Administration in respect to the Estate of the late Vitalis Obeto.**
- 3. That subsequent to the grant of the prayer 2 above, the Honourable Court be pleased to revoke the grant of Letters of Administration in Succession Cause No.695 of 2011.**
- 4. That the Applicant be granted leave to take out Letters of Administration in respect to his deceased father's estate, Vitalis Obeto.**
- 5. That the cost of this application be borne by the Respondent.**
- 6. That such further and/or orders be made as the court may deem fit and expedient.**

2. The application is supported by the Applicant's affidavit dated 12th February 2015 and the grounds on the body of the said application in which the applicant has stated that the Respondent obtained grant on 27th March 2012 following a court order dated 2nd December 2011, issued in citation proceedings initiated on 20th September 2011.

3. The Applicant further stated that the order allowing the Respondent to take out letters of administration

was obtained by making false statements of facts that the Applicant was the only surviving beneficiary of the estate of the Vitalis Obeto (deceased), and that the Respondent left out one beneficiary **JAMES OPIYO OBETO**.

4. The Applicant contended that the Respondent was neither a beneficiary of the estate of the deceased nor did he demonstrate his locus standi to claim part of the estate of the deceased on behalf of his grandfather **AMBIRO OKUMU – deceased**. The Applicant argued that the citation proceedings that resulted in the issuance of Letters of Administration on 27th March 2013 were null and void and thus incapable of being enforced. He further argued that there is no valid letters of administration issued to the Respondent that is capable of being confirmed and hence the court lacks jurisdiction and entertain the proceedings herein.

Applicant's affidavit evidence

5. In his affidavit sworn on **12th February 2015** the applicant expounds on the grounds on the body of the application and depones that he is the son of Vitalis Obeto (deceased), hence the lawful beneficiary of his estate and that he has an elder brother called James Opiyo.

6. The Applicant states that even though the Respondent cited him to take out letters of administration in respect to his late father's estate, the said citation pleadings were never served upon him and he only came to learn about their existence on 19th October 2012 when he was served with a hearing notice for confirmation of grant application herein thereby prompting him to appoint his advocates on record herein to act for him.

7. The Applicant depones that the Respondent is not a beneficiary of the estate of the deceased and neither has he proved that he is a lawful administrator of one **AMBIRO OKUMU – deceased** whom he alleges was his grandfather.

Respondent's affidavit evidence

8. In his replying affidavit filed on **6th May 2015**, the Respondent opposed the application. When the application came up for hearing on 8th July 2015, parties agreed to canvass it by way of written submissions.

Applicant's Submissions

9. In his submissions filed on **14th October 2015**, the Applicant gave the background of his application in which he repeated the circumstances under which the Respondent obtained grant of letters of administration in respect to the estate of the deceased Vitalis Obeto. The Applicant submitted that the court erred in allowing the Respondent to take out letters of administration without taking note that the Applicant was wrongly cited to take out the letters whereas his elder brother James Opiyo ought to have been the one cited in view of the fact that he ranked higher in priority to take out the letters of administration.

10. The Applicant contended that since the Respondent was not a dependant of the deceased, he ought to have been disqualified from taking out the letters of administration as his citation was remote and not supported by any documentary, oral or expert's evidence.

The Applicant contended that the Respondent did not have any recognizable interest in the deceased's estate so as to warrant him to benefit from the same and further that the Respondent had not obtained grant of letters of administration in respect to his (Respondent's) grandfather's estate so as to entitle him to make a claim on behalf of his grandfather.

11. In view of the above, the Applicant submitted that the Respondent lacked the legal capacity to commence the citation proceedings and therefore, the resultant grant of letters of administration issued

following the citation is null and void and incapable of being enforced or being confirmed. The Applicant therefore prayed for the orders sought.

Respondent's written Submissions

12. In the submissions filed on **15th October 2015** the Respondent submitted that the citation proceedings were conducted in a completely different cause being Succession Cause No.385 of 2011 and therefore the orders issued in that cause cannot be impeached in this instant Succession Cause since any errors, if any, made on the citation proceedings can only be corrected within the citation case.

13. The Respondent submitted that the Applicant's application is misconceived as seems to suggest that the court can revoke the grant on the basis of perceived faults in the citation proceedings.

The Respondent contended that the application does not meet the threshold for revocation of grant as no beneficiary has been excluded from the proceedings and in any event, the grant is still pending confirmation.

14. According to the Respondent, the issue of his locus standi to file the instant succession case had long been dealt with in the citation stage when he was allowed to institute this instant succession case and therefore the said issue has been overtaken by events. The respondent seeks the dismissal of the application.

Analysis and Determination

15. I have perused and considered the pleadings filed by the parties together with their respective written submissions.

The Applicant first and foremost seeks to have orders made on **2nd December 2011** in Kisii Succession Cause No.385 of 2011 set aside. The Applicant further seeks a stay of proceedings in this cause, a revocation of the grant issued to the Respondent herein on **27th March 2012** and leave to take out letters of administration respect to the state of the deceased.

16. From the pleadings filed in this case, it is clear that on 2nd September 2011, the Respondent initiated citation proceedings in Kisii Succession Cause No.385 of 2011 by notifying the Applicant to enter appearance and to accept or refuse letters of administration in respect to the estate of the deceased or to show cause why the same should not be issued to the Respondent.

17. I have perused the extract of the proceedings of 2nd December 2011 in respect to the said Citation Cause No.385 of 2011 which was annexed to the Applicant's application as '**POO2**' and it shows that indeed he was served with the citation papers and he appeared before the court in the citation case, was granted an opportunity to file for successions which opportunity he did not utilize thereby leaving the court with no option but to allow the Respondent the opportunity to take out the letters of administration.

18. The nature of citation proceedings are that they are initiated by persons who have a stake or a claim on the deceased's estate and are not necessarily heirs or dependants of the deceased, when the real heirs have failed, refused and or neglected to take out grant. The Respondent laid out his interest/claim in the estate of the deceased and gave the Applicant a chance to file the succession case.

19. The Applicant was aware of the citation proceeding and attended court when the same was being dealt with and never applied or objected to the Respondent's claim.

The right place and time at which the Applicant ought to have challenged the orders allowing the Respondent to take out letters of administration was in the Citation Case and 4 years ago when the said orders were made.

20. This court is now being called upon to set aside orders that were granted in a completely different case. To do so would be completely unprocedural and untenable.

On the claim that the Respondent obtained letters of administration by making false statements of fact or that he concealed some beneficiaries, I find that the Respondent did all that he could to pursue the grant of letters of administration by filing the citation proceedings and making the Applicant aware of his intentions. The citation proceedings and the subsequent succession cause provide a platform for all the beneficiaries and interested parties to bring forth their claims to the estate.

21. I am satisfied that the Respondent acted in good faith in filing both the citation and succession case with the full knowledge inclusion and notice of the Applicant. I also find that the issue of whether or not the Respondent or any other person would be entitled to inherit the estate of the deceased and their respective shares are issues to be determined during the confirmation stage of the case and not at the citation stage.

22. It is ironical that the Applicant herein, having been granted an opportunity to file for letters of administration way back in 2011 and having failed to do so, is now asking the same court to grant him leave to take out grant of letters of administration.

23. Having participated in the citation proceedings, the Applicant has all along known that the Respondent was granted letters of administration on 27th March 2012 which are to-date, pending confirmation. The Applicant's claim that he was not served with documents for the citation case is a clear manifestation of his dishonesty and lack of candour because the court proceedings reveal a different story altogether.

24. I am of the humble view that the applicant is challenging the outcome of the citation proceedings in this succession cause by asking the court to vary/revoke or set aside the outcome of the said proceedings.

25. This belated challenge is not supported by any legal procedure and orders sought tantamount to asking this court to sit on appeal on its own decision. The grounds listed by the Applicant in this application are the very grounds that he ought to have presented and argued at the hearing of the Citation.

26. In essence, this current succession case is a product of the earlier citation cause that was neither challenged nor opposed by the Applicant. The Applicant fully participated in the citation cause and therefore cannot be seen to back pedal on events that had already gone their full course through this kind of application

27. The Respondent obtained grant of letters of administration following a valid court order made on 2nd December 2011 allowing him to pursue the same. As I have stated hereinabove, the said order of 2nd December 2011 can only be set aside in the same cause or on appeal. No reasons have been advanced to convince me to stay the proceedings in this case or grant issued to the Respondent. In the final analysis, I find no merit in the applicant's application dated 12th February 2015.

28. The same is ordered dismissed with costs to the Respondent/Petitioner.

Dated, signed and delivered in open court this 10th day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

- The Petitioner in person
- Mr. Topot for Kwanga for the Applicant/Respondent
- Omwoyo: court clerk