

THE REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MACHAKOS  
SUCCESSION APPEAL NO E002 OF 2022

IN THE MATTER OF THE ESTATE OF BENJAMIN STEPHEN MBINDYO  
(DECEASED)

MILCAH  
MBINDYO .....APPELLANT KAMENE

-VERSUS-

BENJAMIN NDOLO .....1<sup>st</sup>  
RESPONDENT

YVONNE KOKI .....2<sup>nd</sup>  
RESPONDENT

(Being an Appeal from the Ruling and Order of the Hon. ERIC MUSAMBI ANALO,  
Senior Resident Magistrate, delivered on 23<sup>rd</sup> March 2022 sitting at the Chief  
Magistrate's Court at Machakos vide SUCCESSION CAUSE NO.181 OF 2021)

## **JUDGEMENT**

### **Introduction**

1. By a Memorandum of Appeal dated 20<sup>th</sup> April, 2022 the Appellant raises five grounds of appeal appealing against the ruling of the trial court in Machakos Magistrate's Court Succession Case No. 181 of 2021 as follows:
  - a) THAT the Learned Magistrate erred in law and in fact by finding that the Respondents had a locus standi to institute the Citation proceedings in the Lower Court despite them failing to demonstrate that they were indeed biological children of the deceased or otherwise dependants of the deceased immediately prior to his death and/or during his lifetime.
  - b) THAT the Learned Magistrate erred in law and in fact by failing to understand and appreciate the peculiar circumstances of the Respondent's Citation and the existence at the Machakos Chief Magistrate's Court, of Civil Suit No. E 187 of 2020, a suit which is pending hearing and determination and is challenging the paternity of the Respondents who purport through their Citation, to be children of the deceased herein.

- c) THAT the Learned Magistrate erred in law and in fact by allowing a prayer in the Respondents' Citation which had no legal basis of being granted, to take out letters of administration intestate in the event of failure by the Appellant to do so.
  - d) THAT the Learned Magistrate erred in law and in fact by finding that the Respondents are lawful heirs of the deceased entitled to administer it yet they are strangers to the deceased's estate.
  - e) THAT the Learned Magistrate erred in law and in fact by failing to appreciate that the principle of survivorship was very much applicable in the Citation since the properties jointly owned by the deceased and the Appellant automatically passed on to the Appellant without the need of her ever filing any Probate and Administration Cause.
2. The Appellant prays for the following orders in the appeal:-
- a) THAT the Appeal be allowed.
  - b) THAT the ruling and order of Honourable Eric Musambai Analo, Senior Resident Magistrate, delivered on 23rd March 2022 at the Chief Magistrate's Court at Machakos vide Succession Cause No. 181 of 2021 be set aside.
  - c) THAT costs of the Appeal be awarded to the Appellant.
  - d) Any further relief that this Honourable Court deems fit to grant to the Appellant

### **Factual background**

3. The Respondents who claim to be biological children of the **Benjamin Stephen Mbindyo** (deceased) herein filed a Citation dated 13<sup>th</sup> May 2021 at the trial court in Machakos Magistrate's Court Succession Cause No. 181 of 2021 against the Appellant who is the deceased's widow to accept or refuse to take out Letters of Administration over the Intestate Estate of **Benjamin Stephen Mbindyo** (deceased) and seeking for the Appellant to be directed to file Succession Cause of the Estate of **Benjamin Stephen Mbindyo**. The Respondents claimed to be biological children of the deceased.
4. The Appellant objected to the Citation vide an affidavit sworn on 21<sup>st</sup> May 2021 stating that she was the only widow of the deceased and together they had been blessed with 4 children only. She swore that neither she nor her family know the Respondents. The Appellant

swore that the issue of paternity was still pending determination before the court at Machakos in Civil Appeal Case No. 118 of 2021. She swore that in any event, the properties were held under joint tenancy between her and the deceased herein.

5. The Respondents filed a further supporting affidavit sworn on 18<sup>th</sup> February 2022 which was struck out by the court on 23<sup>rd</sup> February, 2022 for having been filed without the leave of the court.
6. The parties canvassed the Citation by way of written submissions following which the trial court delivered a ruling allowing the Respondent's Citation and ordering the Appellant to take out Grant of Letters of Administration within 45 days failure to which the Respondents would be at liberty to take out the Grant of Letters of Administration.
7. The Appellant being aggrieved by the said ruling preferred the instant appeal.
8. The appeal too was canvassed through written submissions. The Appellant's submissions were filed in June 2025 by the law firm of Fred K. Musyimi & Associates whereas the Respondents' submissions dated 7<sup>th</sup> July 2025 were filed by the law firm of Mulwa & Mulwa Advocates.

### **Appellant's Case**

9. The Appellant contends that she is the only surviving widow of the late **Benjamin Stephen Mbindyo**, the deceased herein, having celebrated their customary marriage in the year 1971 and in the 49 years of their union they have been blessed with only four children namely-Muema Musau born on the 17/07/1972, Koki Musau born on the 28/08/1973, Muthoka Musau born on the 30/09/1975, Muasya Musau born on 08/12/1976. That during the subsistence of their marriage, none of their in-laws and/or their larger extended family members have been aware of the fact that the Benjamin Ndolo and his sister Yvonne Koki, the Citors herein, were ever known to be part of the biological children of her deceased husband.
10. It is her case that the Citors were not being candid in claiming that her deceased husband was their biological father and the same is calculated move to hoodwink and mislead this Honourable Court as the Citee has filed a suit challenging the paternity of the Citors.

11. The Appellant asserts that for all intents and purposes, the Citors are not dependants of the deceased as provided for Under Section 29 of the Law of Succession Act and are clearly not entitled to any reasonable provision from the deceased's Estate, further that in any event, she is the only surviving spouse of the deceased legally entitled to any of the deceased's life share interest under the Law of Succession.
12. The Appellant maintains that all properties owned jointly by her and her late husband were held under a joint tenancy and thus when his husband passed away on the 17th day of November 2020, the same automatically passed to her without the need of filing any Probate and Administration Cause, as she is the sole surviving owner after his husband's death.
13. The Appellant argues that the Citors have failed to demonstrate that they were indeed biological children of the deceased or otherwise dependants of the deceased immediately prior to his death and/or during his lifetime and in the upshot the Citors are strangers to the Estate and lack the requisite standing to institute these proceedings.

#### **Respondents' case**

14. The Respondents' case is that beneficiaries of the Estate of **Benjamin Stephen Mbindyo (Deceased)** is not an issue to be determined by the court substantially at this stage. Furthermore, they argue that a Citor does not necessarily need to be a child of the deceased person. They aver that the issue of paternity was not at trial before the Magistrate's court and the said court did not pronounce itself on the same with finality. Thus, the same ought to not be subject of the appeal and that it is the creation of the Appellant that the trial Magistrate reached a final decision on the same. Consequently, the trial Magistrate cannot be said to have erred on the issues he never adjudicated upon and never made a decision on. The Respondents position is that the paternity issue has since been determined on appeal at the Court of Appeal in Nairobi COAAPPL/E101/2024.
15. The Respondents further assert that the issue of them being children of the deceased could not be raised and determined in a Citation. This issue could only be litigated fully in a Succession Cause which the Appellant was given a chance to file but has instead opposed the

decision of the trial court granting the Respondents leave to do so upon her failure to comply.

16. The Respondents state that the Appellant cannot be heard to claim that the Citors are not children of the deceased. They refer to Sections 39 and 66 of the Law of Succession Act that a spouse takes priority when it comes to applying for letters of administration intestate. That as children of the deceased, the Respondents/Citors have a right to file a succession of their late father if the Appellant/Citee is not willing to do so or if she is slow to file the Succession Cause. Reliance is placed on the authority of **Josiah Muli Wambua (deceased) Nairobi Succession Cause No 2557/2012 (2014) eKLR** (quoted in approval in the authority in **Re Timothy Kilonzo Kivumbu (Deceased) [2021] eKLR**) wherein the court stated that;-

***"In intestate, citation issues 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 the grant after the citee fails to apply".***

17. As regards the issue of joint ownership of property by the Appellant and the deceased and the fact that the said properties automatically passed to the Appellant by operation of law, the Respondents aver that no evidence has been adduced to confirm this assertion by the Appellant/Citee.
18. That it is obvious that the Respondents/Citors cannot lodge a Succession Cause for properties in the names of the Appellant/Citee and can only do so for properties in the names of their deceased biological father. That they will only file a Succession Cause for properties which belong to their deceased father. The issue whether those properties belong to the Appellant/Citee or the deceased is an issue to be determined by the court which will handle the Succession Cause. The Respondents argue that it will be very premature for that issue to be raised and determined at this stage.

### **Analysis and Determination**

19. A citation is a document issued by the probate registry, whereby the person issuing the document (the Citor) calls upon the person cited

(the Citee) to provide a reason why a particular step should not be taken in regard to the Estate of the deceased.

20. Citations occur in both contentious and non-contentious probate. In non-contentious probate, they serve the purpose of hurrying along or fast tracking the issue of a Grant of Letters of Administration. In contentious probate they resolve who should take up the Grant of Letters of Administration.
21. I have carefully considered the Appeal, the trial court's record, the ruling being appeal against and the parties' rival submissions as well as the authorities cited and attached. The only issue that arises for determination is whether this court can set aside the ruling of the trial Court in Machakos Magistrate's Court Succession Case No. 181 of 2021 allowing the Respondent's Citation and ordering the Appellant to take out Letters of Administration within 45 days failure to which the Respondents would be at liberty to take out the Grant.
22. In this case, the Appellant is the widow of Benjamin Stephen Mbindyo (deceased) while the Respondents claim to be biological children of the deceased. The Respondents filed a Citation dated 13<sup>th</sup> May 2021 at the trial court in Machakos Magistrate's Court Succession Case No. 181 of 2021 against the Appellant to accept or refuse to take out Letters of Administration over the Intestate Estate of **Benjamin Stephen Mbindyo** (deceased) and seeking for the Appellant to be directed to file Succession Cause of the intestate Estate of **Benjamin Stephen Mbindyo**. The Respondents claimed to be biological children of the deceased.
23. The Appellant objected to the Citation vide an affidavit sworn on 21<sup>st</sup> May 2021 stating that she was the only widow of the deceased and together they had been blessed with 4 children only. She swore that neither she nor her family know the Respondents. The Appellant swore that the issue of paternity was still pending determination before the court at Machakos in Civil Appeal Case No. 118 of 2021. She swore that in any event, the properties were held under joint tenancy between her and the deceased herein.
24. On the other hand, the Respondents argue that beneficiaries of the Estate of **Benjamin Stephen Mbindyo (Deceased)** is not an issue to be determined by the court substantially at this stage. Furthermore, they argue that a Citor does not necessarily need to be a child of the deceased person. They aver that the issue of paternity

was not at trial before the Magistrate's court and the said court did not pronounce itself on the same with finality. Thus, the same ought to not be subject of the appeal and that it is the creation of the Appellant that the trial Magistrate reached a final decision on the same. Consequently, the trial Magistrate cannot be said to have erred on the issues he never adjudicated upon and never made a decision on. The Respondents position is that the paternity issue has since been determined on appeal at the Court of Appeal in Nairobi COAAPPL/E101/2024. Proof of the same could not be adduced through submissions as the same was not placed before the trial court.

25. The Respondents further assert that the issue of them being children of the deceased could not be raised and determined in a Citation. This issue could only be litigated fully in a Succession Cause which the Appellant was given a chance to file but has instead opposed the decision of the trial court granting the Respondents leave to do so upon her failure to comply.
26. Part V of the Law of Succession Act and Section 39 of the said Act provide for the ranking of beneficiaries in the Estate of one who has died intestate.
27. As the law stands, this court has the final discretion as to whom a Grant of Letters of Administration should be issued to. The relevant provision is Section 66 of the Law of Succession Act which provides as follows:-

*“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

- (a) surviving spouse or spouses, with or without association of other beneficiaries;*
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
- (c) the public trustee; and*
- (d) creditors*

*Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.*

28. It is evident from the above that the Appellant ranks first in the order of preference. On the other hand, the Respondents who claim that the deceased was their biological father and thus his children, would rank second in the order of preference subject to proof of paternity with the deceased.
29. Guided by the above order of preference, I find that the Appellant is ranked higher in priority among the persons entitled to benefit or petition for Grant of Letters of Administration intestate to the deceased's Estate.
30. I find no reason for this court to deviate from the order of priority provided under Section 66 referred to above.
31. In addition to the above, I have keenly perused the trial court's record and have not come across any identified properties or any iota of evidence presented by the parties that may shed light on the properties comprising of the Estate of the deceased and more so, those properties that are jointly owned by the Appellant and the deceased herein for purposes of them being exempted from succession process. The Appellant therefore failed to demonstrate that any property jointly owned by her and her late husband automatically passed to her by virtue of the principle of survivorship.
32. The trial Magistrate could not have made a decision as to whether the jointly owned properties of the deceased had passed to the Appellant in a Citation in the absence of proof of the same. This could have required oral evidence for the court to determine the same with finality. The issue of properties can only be determined in a substantive Succession Cause. See **re Estate of Evanson Gakio Mwaniki (deceased) Miscellaneous Succession Cause E027 of 2023) KEHC 3506 (KLR)(12 April 2024) (Ruling)** where the court stated that:-

*"39. The Citees have opposed the instant Citation on the ground that the estate has no property available for distribution since the properties identified by the Citor were in fact co-owned by the deceased and they automatically devolved to the Citee's mother upon the death of the*

*deceased, while this allegation may as well be true and correct, like the previous issue, I do not find it appropriate for this court , in a Citation, to determine such a substantive dispute.*

*40. The matters raised by the Citees may need to be determined after taking viva voce evidence. Such disputes, including whether the estate, if any, and identification of the beneficiaries and their respective shares. Matters of inheritance are matters that may need oral evidence before being determined. In my view, and considering the circumstances of this case, resolution of such disputes would be best addressed in a Matrimonial Property Act intended to be filed by the Citor.*

*41. In the circumstances, and as for the previous issue, I decline to make a finding on whether the said properties have passed to the Citee's mother and therefore, in turn, whether the estate has any property available for distribution" Emphasis ours*

33. It is my view that the trial Magistrate correctly and justly exercised his inherent powers as provided for by Rule 73 of the Probate and Administrative Rules thus :-

*"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"*

34. As to whether the trial Magistrate erred in reaching his decision not to determine the issue of the properties of the deceased and whether the Respondents/Citors were beneficiaries of the deceased herein, it is crystal clear that my findings stated above would lead to a similar result. I therefore cannot fault the learned trial Magistrate in this respect. Consequently, the prayer for setting aside the Ruling and Order of Honourable Eric Musambai Analo, Senior Resident Magistrate, delivered on 23rd March 2022 at the Chief Magistrate's Court at Machakos vide Succession Cause No. 181 of 2021 is without merit.

### **Disposition**

35. I am persuaded that the appeal has no merit at all. I am also persuaded that from the material presented to me on the appeal, this is a proper case for me to exercise my discretion and determine the

right person who should administer the deceased's Estate. The Appellant being the spouse to the deceased herein ranks higher in order of preference within the acceptable order of priority provided under Section 66 of the Law of Succession Act and thus tops the said order of priority to take out Grant Letters of Administration intestate of the Estate of Benjamin Stephen Mbindyo (deceased).

36. Ultimately, my finding is that:

- a. This appeal is hereby dismissed in its entirety.
- b. The order made in the trial court's ruling delivered on 23rd March 2022 in the Chief Magistrate's Court at Machakos vide Succession Cause No. 181 of 2021 is upheld and is to be complied with.
- c. The issues of paternity of the Respondents to Benjamin Stephen Mbindyo (the deceased herein) and jointly ownership of properties by the Appellant and Benjamin Stephen Mbindyo (the deceased herein) can be addressed in the Succession Cause to be filed.
- d. Each party shall bear their own costs of the appeal.
- e. This file is closed.
- f. Orders accordingly.

JUDGEMENT WRITTEN, SIGNED & DATED AT MACHAKOS THIS 17<sup>TH</sup> SEPTEMBER 2025

**NOEL I. ADAGI  
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 17<sup>TH</sup> SEPTEMBER 2025

**In the presence of :**

Absent..... for Appellant

Ms. Kwoma..... for Respondent

Millygrace..... Court Assistant