

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

SUCCESSION CAUSE NO. 2 OF 2020

**IN THE MATTER OF THE ESTATE MARK WASWA NAMWOSO
(DECEASED)**

**ABDULMALIK WASWA NAMCHANJA.....1ST PETITIONER/
APPLICANT**

**MARY DORIS NAFULA WASWA.....2ND
PETITIONER/APPLICANT**

**MAURICE WAFULA NETIBO.....3RD
PETITIONER/APPLICANT**

VERSUS

MARGARET MWAMKITA

HELLEN LIYALE NASIPWONDI WASWA

ELIZABETH NABWILE

WASWA.....RESPONDENTS

RULING

1. Mark Waswa Namwoso, hereinafter referred to as the deceased, died on 14th August 1980. On 28th May 2020, forty years later, Abdulmalik Waswa Namchanja, a grandson hereinafter referred to as the first applicant; Mary Doris Nafula Waswa, the deceased's daughter, hereinafter referred to as the second applicant (now deceased); and Maurice Wafula Netibo, the deceased's

brother, hereinafter referred to as the third applicant, filed a petition for Letters of Administration Intestate seeking a grant of letters of administration of the estate of Mark Waswa Namwoso.

2. In their joint affidavit in support of the petition, they list the persons who survived the deceased at paragraph 4. The deceased left behind 2 widows, namely Rebecca Nalika Waswa (1st wife- 1st house) and Valerie Nakhumicha Waswa (2nd wife- 2nd house). He had 8 children with his 1st wife and 6 children with his 2nd wife. The 1st applicant is a grandson from the 1st house. His father was the deceased's son from the 1st house. The 2nd applicant is the daughter of the deceased from the 1st house. The 3rd applicant is a brother of the deceased and therefore an uncle to the 1st and 2nd applicants.
3. According to the affidavit supporting the petition, the deceased owned one asset, namely Land Parcel No. East Bukusu/North Kanduyi/299 ('parcel no. 299'), valued at approximately Kshs. 20 million.
4. The 1st, 2nd, and 3rd applicants filed a citation simultaneously with the petition for letters of administration. The citation to accept or refuse the letters of administration intestate is brought under section 62 of the Law of Succession Act and Rules 21, 22, and 23 of the Probate and Administration Rules. The citation is against the following persons, namely: Valerie Nakhumicha Waswa, Margaret Nekesa Mwamzita, Moses Wafula

Waswa, Scholastica Nanjala Waswa, Hellen Liyale Nasipwondi, Everlyne Waswa, Elizabeth Nabwile Waswa, Viloet Nabalayo Waswa, Geoffrey Chebeti Waswa, Mnawar Mohamed Waswa, and Namwoso Kizito Waswa. The applicant states that these persons are the deceased's 2nd wife and persons entitled to share in his estate. The applicants in their citation state that the persons named should accept or refuse letters of administration of the estate, which by law devolves to and vests in the personal representative of the deceased, or show cause why the same should not be granted to the 1st, 2nd, and 3rd applicants.

5. On 7 September 2020, the 1st, 2nd, and 3rd applicants applied to 13 Respondents and three interested parties seeking various orders regarding Land Parcel No. East Bukusu/North Kanduyi/299.
6. On the 22nd of September 2020, a Notice of Intention to Raise a Preliminary Objection was filed by Edwin Wekesa and Moses Chingano. They raised the following points of law: that the applicants lack locus standi and capacity to contest the suit; additionally, that the registered proprietor is still alive, therefore, the jurisdiction of this Court is ousted to the Land and Environment Court. They also argued that the petition is ill-founded and made in bad faith.

7. On the 22nd of September 2020, Justice Riechi, upon hearing the submissions by the Counsels who were present in court, made the following orders;

- i. The beneficiaries and or dependant of the estate to apply for grant of letters of administration with the widow Valerie Nakuminja Waswa to represent her house and another son or daughter to represent the house of the 1st house Rebecca to be agreed by sons and daughters from that house within 14 days.*
- ii. There issue a restraining order to the Land Registrar restraining any transaction, transfer, sale, or in any other manner dealing with the said land. North Kandunyi/ North Bukusu/299 until the cause is heard and finalised.*
- iii. Mention on 8/10/2020 to confirm compliance and further direction.*

8. On the 8.10.2020 the matter was adjourned to the 21.10.2020. On 30.10.2020, Justice Riechi set aside the orders of 22.9.2020 and ordered that the Citation proceed to a hearing.

9. Parties filed affidavits following the directions of 30.10.2020. The citation is supported by the 1st applicant's affidavit dated 20.5.2020. Margaret Nekesa Mwamkita submitted a replying affidavit dated 28.4.2023 and a further affidavit to the affidavit of Maurice Wafula Netibo dated 23.8.2023.

10. The first applicant deposes as follows: he is one of the petitioners in the estate of the deceased. He is a grandson of the deceased, being the son of Charles Francis Kulinjira Namachanja, who was the child of the deceased. The deceased had two wives and beneficiaries from each, all of whom are entitled to share in the estate. The Citors have failed to apply for letters of administration of the estate. He is seeking to obtain such letters of administration.

11. Margaret Nekesa Mwamkita, a daughter of the deceased from the first house, stated that her father had two wives and children from each wife. Her father left two parcels of land: no. 299 measuring 2.6 hectares, occupied by the first house, and Land Parcel No. East Bukusu/ North Kandunyi/255 (' Parcel no. 255'), occupied by the second house. Their father sold two acres from parcel no. 299 for his son Charles Francis Kulinjira Namachanja to go abroad, and upon his return, Charles purchased land in Mabanga where he resides with his mother and siblings. The third applicant is her uncle and owns Land Parcel No. East Bukusu/ North Kandunyi/301; he cannot serve as administrator. Currently, parcel no. 299 is registered in the names of Moses Waswa Wafula, a family member of the first house. She does not know how he acquired it, as the succession has not been carried out. Parcel no. 255 is registered in the name of Linus Wekesa Namwoso, following confirmation and issuance of a title deed on

15.1 January 2021. Parcel no. 301 is in the name of the third applicant. Therefore, no claims have been made over the deceased's estate by the Citees. In her further affidavit, she reiterates the contents of her first affidavit and adds that the two houses of the deceased are not in conflict, as they are content with the current titles. She states that parcel no. 299 is held by someone alive, and as of 28 May 2020, the Citees from the estate had no land at that time. No member of either of the deceased's two families has chosen to initiate succession proceedings in court.

12. The citation was canvassed by way of written submissions. I have read and considered these submissions. The applicants filed written submissions dated 14.9.2023. The applicants have raised two issues for determination: whether the applicants or citors are entitled to take out letters of administration intestate to the estate of the deceased, and whether the suit land, East Bukusu/North Kanduyi/299, was fraudulently transferred and issued with a title deed to Moses Wafula Waswa. Reference was made to Part VI of the Probate and Administration Rules (P&A Rules). It was submitted that the objectors, in collaboration with most of the listed beneficiaries, colluded and fraudulently transferred the deceased's estate to Moses Wafula Waswa in 2015 before applying for and obtaining the grant of representation to the deceased, as required by the law of succession. The

objector/citors defied the court order issued by Judge Riechi on 1.10.2020. None of the beneficiaries of the deceased's estate had applied for, nor were interested in applying for, a grant of representation of the estate. The applicants/citors applied for letters of administration to protect the estate from intermeddling and/or claimed to have purchased or leased parts of the land to the objectors. Moses Wafula Waswa lacked the capacity to deal with the estate without the consent of all beneficiaries, which constitutes intermeddling. Reliance was placed on sections 45 and 55 of the Law of Succession Act Cap 160 ('the Act'). The objectors cannot validate what is illegal, null, and void. The first applicant/petitioner/citor, being a son of a beneficiary of the deceased, is entitled under section 51 (2) (g) of the Law of Succession to the share of the estate that, by law, devolves to his late father, Charles Francis Kulinjira Namachanja (deceased).

13. The objector/ citee filed written submissions dated 29th September 2023. The issues raised in the citee's submissions are whether the citee can bring the matter before the court and whether the citation is misconceived. On the first issue, it was submitted that the Citors lack locus standi to initiate the application, as they are not beneficiaries of the estate, either as close family members or purchasers. Rule 22 of the Probate and Administration Rules clearly states who is entitled to file a

citation; the person must be of equal or next in priority to the person cited. The first applicant is a grandson, and the third applicant is the brother of the deceased. The person citing should possess the same capacity as the administrator if the deceased died intestate. The Citors have failed to demonstrate, through evidence, their qualification as Citors. Reliance was placed on section 66 of the Act. Regarding the second issue, it was submitted that the citation is frivolous, vexatious, and a waste of judicial time, as it does not disclose any action or is otherwise premature, given that the land parcels have owners and have exchanged hands with different title deeds; the subdivision was carried out by their father during his lifetime, and the Citors have already been allocated their respective shares. Reliance was placed on the case of the Estate of Juma Yussuf (Deceased) [2019] eKLR. The objector/citee sought to have the citation dismissed.

ANALYSIS AND DETERMINATION

14. I have considered the rival affidavits filed by the Citors and Ctiees, their written submissions, and the law as provided under the Law of Succession Act Cap 160 of the Laws of Kenya and the Probate and Administration Rules. The law on citations is set out in Part VI of the Probate and Administration Rules. The main issue is whether the citors have the locus to file this cause and whether they are entitled to the orders sought.

15. Whether the citor has the legal capacity to make the citation. The relevant provision of the law that on citations is Rule 22(1) of the Probate and Administration Rules and it states as follows; **“A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.”**
16. This provision emphasises that the person making a citation would be entitled to a grant if the person cited renounces their right to it. The Court needs to decide whether the citing person is such an individual.
17. According to Part V of the Law of Succession Act, Section 39 stipulates the following regarding the priority of beneficiaries of a deceased estate under the listed circumstances: Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—(a) father; or if dead (b) mother; or if dead (c) brothers and sisters, and any children of deceased brothers and sisters, in equal shares; or if none (d) half-brothers and half-sisters, and any children of deceased half-brothers and half-sisters, in equal shares; or if none (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares. (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the

net intestate estate shall devolve upon the State, to be paid into the Consolidated Fund.

18. Further Section 66 of the Law of Succession Act states that when a deceased has died intestate, the court shall, unless otherwise expressly provided, have final discretion regarding the person or persons to whom a grant of letters of administration shall be made, in the best interests of all concerned. However, without prejudice to that discretion, the court shall generally follow the order of preference: (a) surviving spouse or spouses, with or without 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 estate shall be granted to any executor or executors who prove the will.

19. The citees have indicated the names of the surviving beneficiaries who, under the provisions of Section 39(1), are recognised. It is also not denied that the father of the citor was a son of the deceased and that he too is deceased. It is not in dispute that the estate of the citor's grandfather has never been distributed to cater for the interests of all the children of the deceased, whether living or dead, and that subsequently, no property comprising the estate has been distributed so far.

20. Under Section 41 of the Law of Succession Act, if the estate has already been distributed and the children of the deceased have been provided for, then the 1st citor would have inherited the portion allocated to his deceased father. The section also states that any residue of the estate of a deceased that devolves upon a child shall be held in trust for all the children of the estate as well as the issues of such children. The provision further explains: Property devolving upon a child to be held in trust. When this Act refers to the "net intestate estate" or its residue that devolves upon a child or children, the property shall be held in trust, in equal shares in cases involving more than one child, for all or any of the children of the intestate who reach the age of eighteen years or, if female, marry before that age. It also applies to the issue of any child of the intestate who predeceases him and who either attains that age or marries; in these cases, the issue will take through degrees, in equal shares, the share that their parent would have received had he not predeceased the intestate.

21. In the Matter Of the Estate of Imoli Luhitse Paul (Deceased), Justice Musyoka held that section 39 of the Law of Succession Act states that grandchildren are considered heirs in cases of intestacy when their direct parents, who are the biological children of the deceased, have passed away. Section 41 of the Law of Succession Act allows grandchildren to assume the position of their

parents, and to do so, they are not required to obtain letters of administration.

22. In light of my findings as above, I am well satisfied that the citor has the requisite legal standing to bring this citation against the citees, whom the citor alleges possess the title deed to the land comprising the deceased estate, which is with the son of the deceased, who is still alive.

23. Given that a son of the deceased is still alive, the Court under the provisions of Section 47 and Rule 73 herein above cited directs that the citees Margaret Nekesa Mwamkita, Hellen Liyali Nasipondi Waswa, Elizabeth Nabwile Waswa, Moses Wafula Waswa, proceed with obtaining the requisite Letters of Grant to administer the estate of the deceased within the next 45 days, failure to which the 1st citor Abdulmalik Waswa Namachanja is at liberty to apply. Each party shall bear their own costs.

**Dated , signed and delivered at Bungoma this 28th
day of October 2025.**

R.E. OUGO

JUDGE

In the presence of;

1st Citors - Absent

Magaraget Nekesa Mwakita - 1st Objector

Hellen Liyali Waswa - 2nd Objector

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