REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

FAMILY DIVISION

PROBATE & ADMINISTRATION CAUSE E929 OF 2024

IN THE MATTER OF THE ESTATE OF DANIEL MBARATHI KANGETHE (DECEASED)

MICHAEL NJOROGE NJUGUNA ..... CITOR/RESPONDENT

VERSUS

BEATRICE WAIRIMU MBARATHI ..... CITEE/RESPONDENT

AND

KENNETH KANGETHE MBARATHI..... BENEFICIARY/APPLICANT

RULING

1. On 11 November 2024, the Citor/Respondent filed a Citation against the Citee to accept of refuse Letters of Administration Intestate. In his Affidavit, the Citor averred that the Deceased herein passed away on 16 September 2024 in Nairobi, and that the Citee had not taken out Letters of Administration of the estate. The Citor presented the Citation in his capacity as son of the Deceased, born out of a relationship between the Deceased and Lucy Wangui Kinuthia. He stated that subsequent to that relationship, the Deceased got married to the Esther Wambui Mbarathi (deceased) in 1976, with whom he had 5 children, namely; KENNETH KANGETHE MBARATHI, JOYCE NJOKI MBARATHI, SAMUEL MWAURA MBARATHI, TABITHA MBARATHI and JAMES MBUGUA MBARATHI.

2. According to the Citor, Esther Wambui Mbarathi died in 2016. The Deceased herein then married BEATRICE WAIRIMU MBARATHI, the Citee, and had 2 children; MICHELLE NJOKI MBARATHI and LEWIS KANGETHE MBARATHI.

3. By its Ruling of 26 November 2025, this Court allowed the citation.

4. The Applicant then filed the current application dated 6 December 2024, seeking:

   (i) THAT the Honourable Court be pleased to vacate and/or set aside the *ex parte* orders granted on 26th November 2024 in their entirety.
   (ii) THAT the Honourable Court be pleased to make contingency orders as to the *status quo* of the Estate of Daniel Kangethe Mbarathi (Deceased).
   (iii) THAT the Honourable Court be pleased to strike out or dismiss the citation on record.
   (iv) THAT the costs of this application be provided for.

5. The Application is premised on the grounds set out on the face thereof and is supported by an Affidavit sworn by the Applicant, as well as a Further Affidavit sworn on 16 April 2025.

6. The Application is opposed by the Citor through his lengthy Replying Affidavit sworn on 21 January 2025.

7. On her part, the Citee filed a concise Replying Affidavit sworn on 21 February 2025, in which she clarifies her position and gives a crucial undertaking to this Court.

8. The Application was canvassed by way of written submissions.

The Applicant's Case

9. The Applicant's primary challenge is that the *ex parte* orders granted on 26 November 2024 were obtained irregularly and in breach of mandatory procedure. He avers that the Court record, specifically the Affidavit of Service filed by the Citor's Advocate, confirms that the Citee was served with the Citation on 13 November 2024. The Applicant submits that under Rule 21(5) of the Probate and Administration Rules, the Citee had a statutory entitlement to 15 days to enter appearance. He argues that this period was due to lapse on 28 November 2024. By setting the matter down for an *ex parte* hearing and obtaining orders on 26 November 2024, the Citor acted prematurely and unlawfully curtailed the Citee's statutory right to respond, thereby occasioning a grave miscarriage of justice. The Applicant's position is that an order obtained in such irregular circumstances must be set aside *ex debito justitiae* without the Court having to consider the merits of the case.

10. Secondly, the Applicant mounts a fundamental challenge to the Citor's standing to institute this citation cause. Her asserts in no uncertain terms that the Citor is not a son of the Deceased. The Applicant avers that the Citor's paternity is questioned by none other than the Citor himself. The Applicant has annexed pleadings from Milimani Chief Magistrate's Court, Family Cause NO. MCFC E060 of 2024. This suit was filed by the Citor on or about 24 September 2024, shortly after the passing of the Deceased on 16 September 2024. The Citor sought, *inter alia,* an order allowing him to obtain tissue samples from the body of the Deceased for purposes of conducting a DNA test to determine paternity. The Applicant submits that this act, in itself, is an admission by the Citor that he lacks the certainty of paternity required to ground a claim in succession.

11. The Applicant further addresses the Citor's reliance on a consent order that was subsequently recorded in that file. In his Further Affidavit, the Applicant deposes that this consent was irregularly and unlawfully obtained and, crucially, has since been *set aside* by a formal ruling of the lower court delivered on 26 March 2025.

12. The Applicant's case is, therefore, that any purported proof of paternity or recognition that the Citor relied upon has been nullified by a competent court, leaving him with no *locus standi* to maintain these proceedings.

13. Flowing from this, the Applicant accuses the Citor of having approached this Court with unclean hands and of acting in bad faith. He contends that the Citor, when applying for the *ex parte* orders on 26 November 2024, deliberately concealed the existence of the pending paternity suit in *MCFC E060 of 2024*. He also claims that the Citor, despite having sued the Applicant personally in September 2024, deliberately and calculatingly excluded him and his siblings from this Citation Cause, only to promptly serve them with the *ex parte* orders and threats of contempt proceedings once they were irregularly obtained.

14. Finally, the Applicant categorically denies all allegations of wasting or intermeddling with the estate. He clarifies that Afritech General Supplies Ltd is a a corporate entity with its own legal personality and that he and his brother are directors. He further deposes that any and all rental proceeds from the Deceased's personal properties are deposited into the Deceased's personal accounts, over which the beneficiaries have neither access nor control.

The Citor/Respondent's Case

15. The Citor submits that the Applicant is jumping the gun. He argues that the orders of 26 November 2024 were purely interim preservation orders, not final orders, granted under the Court's wide and expedient powers under section 47 of the Law of Succession Act. The Citor submits that this section grants the Court sweeping powers to make such orders as may be expedient to protect an estate, especially in view of the threat and danger of waste. He argues that this power is overriding and that the Court was justified in acting swiftly. He also notes that the Citee herself has not disputed being served.

16. The Citor categorically maintains that he is the first-born son of the Deceased. His entire claim to locus standi is rooted in section 3(2) of the Law of Succession Act, which defines a child in relation to a male person as including any child whom a deceased person has expressly recognised or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. The Citor's case is that he was in fact accepted by the Deceased and the entire family. To support this, the Citor presented a substantial volume of evidence including a consent order dated 25 September 2024 in Family Cause No MCFC E060 of 2024, the funeral program and obituary in which he is listed as a son and screenshots of a message purporting to show his contribution for the wedding of his brother, James Mbugua Mbarathi.

17. In his submissions, the Citor addresses the Applicant's claim that the consent was set aside. He submits that the Citor has a pending appeal against the ruling, lodged in High Court Family Appeal No. HFCA E052 of 2025. His argument is that the issue is legally alive.

18. The Citor claims the preservation orders are more than ever necessary. He deposes that the Citee (the widow) informed him that on 16 September 2024, the day of the Deceased's death, the Applicant broke into the bedroom of her matrimonial home and took possession of vital key documents related to the

estate, including title deeds, bank records, and personal identification documents. He further alleges that the Applicant is actively pressuring the Citee to vacate the matrimonial home and has taken over the Deceased's motor vehicles.

The Citee/Respondent's Case

19. The Citee is the surviving spouse and the person with the first priority to apply for letters of administration under section 66 of the Act. In her Replying Affidavit, the Citee explicitly states that at no point has she refused to take out letter of administration of the estate. She gives a clear and unequivocal undertaking to the Court, stating that she intends to file for letters of administration and in any event, the same shall be filed before the appropriate court with competent jurisdiction within a month from the date of swearing the Affidavit.

Analysis & Determination

20. Having carefully considered the Application, the extensive Affidavits in support and opposition, and the rival submissions, this Court frames the following five issues for determination:

    (i) Whether the *ex parte* orders granted on 26 November 2024 were procedurally irregular, and if so, whether they must be set aside *ex debito justitiae*.
    (ii) Whether the Citor/Respondent has demonstrated *prima facie locus standi* as a child within the meaning of Section 3(2) of the Law of Succession Act to institute this Citation;
    (iii) Whether, in light of the findings on issues (i) and (ii), and considering the cross-allegations of intermeddling, this Court should issue fresh or revised orders for the preservation of the Estate of the Deceased.
    (iv) Who shall bear the costs of the Application.

21. On the issue of the regularity of the orders of 26 November 2024, the Appellant argues that the hearing was conducted, and orders were issued, before the expiry of the statutory period of appearance. The Applicant refers to the Citor's own Affidavit of Service, which confirms that the Citee, was served with the Citation and the accompanying application on 13 November 2024.

22. By a simple and plain calculation of time, and being inclusive of the day of such service as the Rule mandatorily requires, the 15-day period commenced on 13 November 2024 and expired at the close of business on 27 November 2024.
The Citor, by his own admission, moved the Court and obtained the *ex parte* orders on 26 November 2024. This was Day 14 of the 15-day period. The orders were, therefore, obtained prematurely, one day before the time limited for the Citee to enter appearance had expired.

23. The Citor's argument that Section 47 of the Act grants the Court an overriding and expedient jurisdiction is, in this context, a misdirection. While Section 47 confers a wide and vital jurisdiction upon the Court to protect an estate, that jurisdiction is not a charter for procedural anarchy. It must be exercised judicially, respecting the mandatory rules of procedure and the sacrosanct principles of natural justice, chief among them the right to be heard. The 15-day period prescribed by Rule 21(5) is a statutory safeguard of that very right, and it cannot be wished away, even in the face of alleged urgency, unless the Citor had made a separate, specific application for the abridgment of time, which he did not.

24. The law draws a sharp and clear distinction between orders that are set aside as a matter of discretion and those that must be set aside as a matter of right. Where an order is regularly obtained, the Court retains a wide and unfettered discretion to set it aside. In such cases, the Court will be guided by

the celebrated principles articulated in ***Shah vs Mbogo & Another EA 93,*** which require the applicant which require the applicant to demonstrate, *inter alia*, a meritorious defence or position.

25. However, where an order is *irregularly* obtained, as in this case, by being procured prematurely in breach of a mandatory statutory timeline, the Applicant is entitled to have it set aside *ex debito justitiae*. The Court has no discretion in the matter. The order is a nullity.

26. I am guided by the Court of Appeal's decision in ***Fidelity Commercial Bank Ltd v. Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 eKLR***, where the principle was affirmed that a judgment entered prematurely is irregular, and the defendant is entitled to have it set aside *ex debito justitiae* without being required to show a defence on the merits. The same principle applies with equal force to *ex parte* orders obtained in succession proceedings in clear breach of the Probate and Administration Rules.

27. I, therefore, find that the orders of 26 November 2024 were obtained irregularly, having been sought and granted prematurely before the expiry of the 15-day period stipulated by Rule 21(5) of the Probate & Administration Rules. Consequently, the said orders are hereby vacated and set aside *ex debito justitiae*.

28. I now turn to the Applicant’s second, and more drastic prayer: that the entire Citation cause be struck out *in limine* for want of *locus standi.*

29. The power of the Court to strike out pleadings is a draconian one, which must be exercised sparingly and only in the clearest of cases. The seminal authority for this principle is ***D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another [1980] KECA 3 (KLR)***. In that case, the

Court of Appeal held that no suit ought to be summarily dismissed "*unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment*." The Court must not, at this interlocutory stage, conduct a mini-trial on the affidavit evidence.

30. The question for this Court, therefore, is not to make a final determination on whether the Citor is or is not a son of the Deceased. The sole question is whether his claim to be a son is so hopeless, frivolous, or vexatious that it amounts to an abuse of process and must be summarily terminated. The Citor's claim to *locus standi* is a child of the Deceased. The applicable statute is section 3(2) of the Law of Succession Act, which provides:

> *"References in this Act to "child" or "children"... in relation to a male person, [shall include] any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.*

31. This definition is broad and goes far beyond mere biology. It explicitly provides for a child who has been accepted. The Citor's entire case is squarely founded on this limb: that he was in fact accepted by the Deceased and the family. The Applicant's main argument for striking out is that the Citor's own paternity suit (Family Cause MCFC E060 of 2024) and the subsequent setting aside of the consent fatally undermines this claim and proves it is vexatious.

32. This Court finds that the Applicant's argument on this point to be a misapprehension of the legal test for striking out, for several reasons. First, the Citor's claim to *locus* is not, and has never been, based on the consent in Family Cause No MCFC No E060 of 2024. His claim appears to be based on

a lifetime of alleged acceptance in fact as detailed in his 67-paragraph Affidavit. The consent order was merely one piece of evidence to support that pre-existing claim.

33. Second, the fact that this consent was entered into by the Applicant and later set aside (which is now, according to the Citor's submissions, the subject of an appeal, *HCFA/E052/2025*) does not extinguish the Citor's claim. On the contrary, it demonstrates that there is a live, complex, and substantial triable issue between the parties regarding the Citor's paternity and, more importantly, his recognition. It is the very opposite of a hopeless or frivolous claim.

34. Third, the Citor has presented a wealth of *prima facie* evidence of acceptance in fact, including the funeral program, the wedding contributions, long-standing correspondence, and family photographs. This evidence, when placed against the Applicant's strenuous denials, creates a classic factual dispute that can only be resolved by *viva voce* evidence at a full hearing, where credibility can be tested under cross-examination.

35. Fourth, and most fatally for the striking-out application, the Applicant, in his own Further Affidavit sworn on 16 April 2025, makes a critical concession. At paragraph 11, in reference to the Citor's detailed averments of acceptance (paragraphs 35 to 67 of the Citor's affidavit), the Applicant deposes:

"THAT the contents of paragraphs 35 to 67 are pure falsehoods and the allegations therein can only be proved at a full trial with evidence tested on cross-examination."

36. The Citor is correct to seize upon this. The Applicant cannot, in one breath, state that the issues require a full trial with cross-examination, and, in the

next, pray for a summary dismissal. He has, by his own averment, conceded that the matter raises triable issues.

37. I am guided by the holding in ***In re Estate of G N C (Deceased) [2017] KEHC 2303 (KLR),*** where the Court grappled with the definition of child under section 3(2) and the nature of evidence required to prove acceptance. The Citor has presented more than sufficient *prima facie* material to be allowed to proceed to trial and attempt to discharge his burden of proof. His claim is not one that can be summarily dismissed.

38. This Court is now in a peculiar position. I have set aside the *ex parte* preservation orders of 26 November 2024 on grounds of procedural irregularity. However, I have also found that the Citor has the requisite *locus standi* to maintain his suit, which alleges waste and intermeddling. In prayer 4 of the Application, the Applicant himself invites this Court to make contingency orders as to the *status quo* of the estate. In his submissions, the Citor prays that the preservation orders be enhanced.

39. It is clear that all parties are apprehensive about the estate and agree on the need for preservation orders. The Court's primary duty in all succession matters is the protection and preservation of the deceased's estate from waste, diminution, or intermeddling. This duty is anchored in Section 47 and the Court's inherent jurisdiction under Rule 73 of the Probate and Administration Rules. The record is replete with serious and credible cross-allegations of intermeddling, which is a criminal offence under section 45. The Citor accuses the Applicant of seizing key estate documents and the Deceased's personal motor vehicles. The Applicant denies this and in turn alleges the Citor is a stranger attempting to gain access to the estate.

40. In such circumstances, the Court cannot vacate the irregular orders and leave a vacuum. To do so would be an abdication of its judicial duty and

would leave the estate vulnerable to the very intermeddling that all parties fear. The most constructive and judicially sound path forward is to acknowledge the Citee's undertaking to this Court. In her Affidavit of 21 February 2025, she, being the person with first priority under Section 66, has undertaken to take out the Letters of Administration. The Court shall hold her to this undertaking.

41. The proper forum for final determination of the Citor's status is in that cause. He can lodge a claim as a dependant under section 29 and prove his status as a child of the Deceased.

42. Therefore, in place of Prayer 4, and in exercise of this Court's inherent jurisdiction, I shall issue fresh, comprehensive preservation orders directed at all parties to preserve the *status quo* and, most importantly, to facilitate the filing of the main petition.

43. For the avoidance of doubt, and for the reasons adumbrated in the analysis above, this Court makes the following final orders on the Beneficiary/Applicant's Notice of Motion dated 6 December 2024:

    (i) Prayer 3 of the Notice of Motion dated 6 December 2024 is hereby allowed. The *ex parte* orders of this Court issued on 26 November 2024 are consequently vacated and set aside in their entirety.

    (ii) Prayer 5 of the Notice of Motion dated 6 December 2024, seeking to strike out the Citation, is hereby dismissed.

    (iii) **I**n place of Prayer 4 of the said Application, and in exercise of the Court's powers under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, the following orders for the preservation of the Estate of DANIEL

MBARATHI KANGETHE (Deceased) are hereby issued *suo motu* and shall be binding upon the Applicant, the Citor, and the Citee, their servants, agents, and representatives:

a) A temporary injunction is hereby issued restraining the Applicant the Citor and the Citee, whether by themselves or through their agents, from selling, leasing, charging, transferring, disposing of, or in any other manner dealing with any of the immovable or movable assets of the Estate of the Deceased pending the issuance of a Grant of Letters of Administration.

b) The Citee is hereby directed to file a petition for Letters of Administration in respect of the Deceased's estate within thirty (30) days from the date of this Ruling.

c) The Applicant and the Citor, and any other beneficiary in possession, shall, within seven (7) days from the date of this Ruling, surrender any and all documents of ownership or identification belonging to the Deceased or his estate (including, but not limited to, title deeds, bank records, vehicle logbooks, the Deceased's National Identity Card, and Death Certificate) to the firm of **P.K. Kivuva & Associates Advocates**, being the advocates on record for the Citee, for the sole purpose of facilitating the filing of the Petition for Letters of Administration as ordered in (b) above.

d) Pending the issuance of a Grant, all income, rent, and profits derived from the assets of the Deceased's estate shall be collected and paid into a joint interest-earning bank account to be opened in the names of the Advocates for the Applicant (Ndegwa Kiarie & Co. Advocates), the Citor (Wanam Sale & Oningo Advocates), and the Citee (P.K. Kivuva & Associates Advocates).

e) Upon the filing of the Succession Cause as ordered in (b) above, the Citor shall be at liberty to lodge his claim as a dependant/beneficiary therein, where his status shall be determined on the merits.

(iv) Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 14 DAY OF NOVEMBER 2025

HELENE R. NAMISI
JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Applicant:	N/A
Citor/Respondent:	Mr. Odhiambo h/b Lwande
Citee/Respondent:	N/A
Court Assistant:	Lucy Mwangi