

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CITATION NO. E130 OF 2024

IN THE MATTER OF THE ESTATE OF CHANGWONY CHUMO

KIBORE (DECEASED)

ESTHER JEMUTAI KESECITOR/APPLICANT

VERSUS

MOSES CHEPSIOLEI CHANGWONY

MICHAEL KIPLAGAT CHERUTICHCITEES/RESPONDENTS

RULING

1. This citation relates to the estate of **Changwony Chumo** (Deceased) who died on 4th March, 2007 at the age of 91 years. The Citor/Applicant, Esther Jemutai Kесе has filed a citation against Moses Chepsiolei Changwony and Michael Kiplagat Cherutich. The citation is supported by the Citor/Applicant's Affidavit dated 5/08/2024.

2. In her affidavit in verification of the proposed citation to accept or refuse letters of administration intestate, the Citor states that the deceased was survived by:
 - a) Moses Chepsiolei Changwony
 - b) Michael Kiplagat Changwony
 - c) Esther Jemutai Kесе
 - d) Amos Kipkosgei Mwangong
 - e) Stanley Rop Changwony

- f) Fredrick Kipchumba Changwony
- g) Nancy Jepkogei Changwony
- h) Philister Jepjurui Changwony
- i) Gladys Jepkorir Changwony
- j) Jessicah Jeruto Changwony
- k) Sila Kiptoo Changwony
- l) Sheila Jelagat Changwony
- m) Noah Kiprono Changwony

3. The Citor contends that since then letters of administration to administer his estate have not been taken out since the persons cited herein have refused and/or neglected to sign consent to the making of a grant of letters of administration intestate to a person of equal or lessor priority thereby stalling the filing of the cause hereof.

4. She deposed that she is the widow of the deceased and she is desirous of obtaining letters of administration of the deceased.

5. She further deposed that the deceased left the following assets:

- a) Irong/Kitany/233;
- b) Tembeleo/Elgeyo Border Block 5 (Ex-tooley)/15;
- c) Tembeleo/Elgeyo Border Block 13 (Kaplogoi)/29

6. She further contends that the said Moses Chepsiolei Changwony & Michael Kiplagat Cherutich have failed to take positive steps to actualize the above arrangement in spite of several reminders from her part and that it is now over 15 years since the deceased died and the estate has never been shared and/or administered by the beneficiaries.

7. She observed that in light of the provisions of the Section 66 (d) of the Law of Succession Act as read together with Rule 22 (1) of the Probate and Administration Rules she has the locus standi to bring this application as a widow hence beneficiary of the deceased, that this Honourable Court has the jurisdiction, inherent power and discretion under Rule 73 of the Probate and Administrative Rules, 1980 to issue orders sought and allow this citation and that this Honourable Court has the jurisdiction, inherent power and discretion under Section 47 of the Succession Act, CAP 160 to pronounce and make such orders as may meet the ends of justice.

Moses Chepsiolei Changwony's Replying Affidavit

8. The Citation is opposed by the 1st Citee vide his Affidavit sworn on 28/01/2025, in which he deposed that he is the son of the deceased whose estate relates to the matter herein and that he denies the contents of the Citation dated 5/08/2024.

9. He further deposed that the Citor has not exposed to this Court that he did not deliberately refuse to sign the consent forms as she alleges, that Citor has further not disclosed to the Court that there is a family dispute revolving around the deceased's property, which should be settled amicably first before settling on filing of succession proceedings. According to the 1st Citee it is unfortunate that the Citor has refused to amicably settle the issues raised by other beneficiaries before embarking on petitioning for a grant of letters of administration.

10. He maintained that the deceased herein having died intestate, it is legally recognized that all the children of the deceased and the surviving spouses ought to inherit equally from the deceased's free estate and that it is quite

disheartening to bring forth to this Honourable Court that the Citor/Applicant has the intention of disinheriting other beneficiaries of the deceased, a fact which she had hidden from the court.

11. According to the 1st Citee, the draft petition for the Grant of Letters of Administration as attached on the Citation herein is maliciously drafted so as to sugar-coat the evil intentions of the Petitioners. He added that at no given point in time has he and the 2nd Citee refused to file succession proceedings of the deceased herein and the Citor has the intention of distributing the estate of the deceased to herself to the detriment of other beneficiaries and that the Citor left out other properties of the deceased for her own benefit.

12. He further deposed that at the time of his demise, the deceased had the following properties;

- a) **TEMBELEO/ELGEYO BORDER BLOCK 5 (EX-TOOLEY)15**
- b) **TEMBELEO/ELGEYO BORDER BLOC 13(KAPLOGOI)29**
- c) **IRONG/KITANY/233**
- d) **IRONG/KIPKOI FOREST/165**
- e) **IRONG/KITANY/208**

13. He added that it is not in dispute that the deceased did not leave behind any wishes as to the distribution of his estate, although he had distributed most of his properties to his wives and children, on which they had settled. He urged that the mode of distribution to be adopted at the confirmation of grant in the estate of the deceased herein should be as the deceased had distributed some of his properties to the beneficiaries, as it

is on the ground. He maintained that the beneficiaries have settled on the distributed properties and have established homesteads thereon, therefore interfering with the way in which they have established their homesteads will be detrimental to them and the estate at large.

14. He highlighted that the mode of distributions should be as follows:

- a) **TEMBELEO/ELGEYO BORDER BLOCK 5(EX-TOOLEY)15;** - that the land was shared equally between the 2nd and 3rd house and that there is no dispute on this parcel of land.

- b) **TEMBELEO/ELGEYO BORDER BLOC 13(KAPLOGOI)29;** - that the land was shared equally among the 1st, 2nd and 3rd houses with the 1st house getting a larger share, that each house has settled on the land and acquired their respective individual title deeds and that the same should not form part of the estate of the deceased, that the titles were issued to Fredrick Changwony (3rd House), Alex Kipchirchir(2nd House) and Elizabeth Tunoi(1st), that the land was duly deliberated by the extended family and clan members to the above conclusion and that there is no dispute on this land.

- c) **IRONG/KIPKOI FOREST/165;** - that this was given to the 2nd house and that there is no dispute on the same.

- d) **IRONG/KIPKOI FOREST/208;** - that this was given to the 3rd house, that the same was registered in the name of Chepkurgat Chumo (Deceased),who was the brother to the deceased herein, that it does not form part of the estate and there is no dispute on the same.

e) **IRONG/KIPKOI FOREST/223**; - that this property is disputed, that the 3rd house had fraudulently transferred and registered the same in favour of the Citor, that the property was partly allocated to the 1st House by the deceased herein before his demised and that the 1st house and the family of Chepkurgat Chumo stay on the property.

15. The 1st Citee proposed that the following persons be appointed as Administrators of the deceased estate;

- a) **1st house – Vincent Kosgey Ambani**
- b) **2nd house – Michael Kiplagat Cherutich**
- c) **3rd house- Esther Jemutai Kесе**

16. He further proposed that Moses Bore be appointed as surety on behalf of the 1st and 2nd houses.

Michael Kiplagat Cherutich’s Replying Affidavit

17. The Citation was equally opposed by 2nd Citee vide his Affidavit sworn on 28/01/20235 and the contents thereof are a replica of the 1st Citee’s Affidavit and thus I find no reason to reproduce the same here.

Esther Jemutai Kесе’s Supplementary Affidavit

18. The Citor also filed a Supplementary Affidavit dated 5/03/2025, in response to the contents of the Replying Affidavits filed by the Citees. She deposed that the contents of the said affidavits are deliberately misleading and full of falsehoods with the ulterior motive of misleading and arm twisting the Honourable Court and the beneficiaries of the

deceased and that it is now more than 18 years since the demise of the deceased and attempts to institute succession proceedings over the estate of the deceased have been thwarted and frustrated by the Respondents herein who are out to ensure that the estate remains unadministered.

19. She added that it is mandatory and necessary that Succession proceedings are initiated to facilitate the distribution of the estate hence the culmination of the citation herein. She maintained that the allegations that she has caused Irong/Kitany/233 to be registered under her name are in bad faith, malicious, sensational, alarming and without legal basis as the property is duly registered in the name of the deceased and charged with AFC.

20. She further deposed that she the sole surviving widow of the deceased and thus she ranks higher in priority to the Respondents as per the proviso of Section 66 of the Law of Succession which grants her preference to administer the estate of the deceased herein.

21. The Citor is vehemently opposed to the proposal to have Vincent Kosgey Ambani appointed as Administrator for the following reasons; that he is grandchild of the deceased and ranks lower than her and the children of the deceased under Section 66 of the Law of Succession Act and that he colluded with her deceased mother by intermeddling with the estate of the deceased by illegally transferring Tembeleo/Elgeyo Border Block 13(Kaplogoi)/29, 5 years later after the demise of the deceased and which issue shall be revisited in the substantive cause.

22. She added that the issues revolving around what assets constitutes assets of the deceased and distribution are premature and can only be addressed in the main Succession Cause and the current Citation.

Further Affidavits

23. The 1st and 2nd Citees also filed a Further Affidavits dated 10/3/2025, in which they basically reiterated the contents of their Replying Affidavits save for adding that Section 66 of the Law of Succession Act entitles them to administer the estate of the deceased herein as they are children of the deceased. They also sought that they be included as administrators of the estate of the deceased as they are representatives of the 2nd house.

Hearing of the Citation

24. The parties were directed to file written submissions on the Citation. The Citor filed submissions on 14/04/2025 through the firm of **Messrs Limo R.K. & Company Advocates** whereas the Citees filed submissions on 19/04/2025, through the firm of **Messrs. Chepseb Lagat & Associates**.

Citor's Submissions

25. Counsel for the Citor submitted that has never intermeddled in any way whatsoever with the estate of the deceased and in particular and specifically that property known as Irong/Kitany/233 which property is registered under the deceased's name as demonstrated by the official search dated 5/02/2025 and that the allegations of intermeddling are therefore baseless and made in bad faith. Counsel added that the Citees herein are the children of the deceased and ranks lower to the Citor who is spouse to the deceased and the Citor herein therefore qualifies to be appointed as an administration in all aspects.

26. Counsel observed that the Citees herein have Vincent Kosgey Ambani as one of the administrators alongside the Citor and the Citees herein and the

Citor is vehemently opposed to the same for the following reasons:- that first the aforesaid Vincent Ambani has not been cited in these proceedings, that it is not in dispute that he is a grandchild the deceased and ranks lower to the Citor and the Citees who are the Spouse and sons respectively to the deceased within the meaning of Section 66 of the Law of Succession Act and that the said Vincent Ambani has largely intermeddled with the estate of the deceased in contravention to 5.45 of the Law of Succession Act by colluding with her deceased mother to fraudulently transfer that property known as Tembeleo/Elgeyo Border Block 13(Kaplogoi)/29 as demonstrated by annexure EJK2 in the Supplementary Affidavit being the green card for the said property which clearly illustrates that the said property was transferred 5years later after the demise of the deceased without the authority of the court into his mother's name. His appointment shall risk wastage of the estate of the deceased.

27. Counsel cited Nairobi Succession Cause No.537 of 2004 in the Estate of Jared Gitau Gichuhi (deceased) 2021eKLR it was held:-

31. Regarding the aspect of intermeddling with the estate, Section 45 (1)of the Law of Succession is clear. That section provides that:

a. "Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person".

Sub Section (2) provides that intermeddling is a criminal offence and anybody found liable is fined to Kshs.10,000/=in default serve one year imprisonment or both.

28. Counsel submitted that the Citees' proposition to appoint the said Vincent Ambani as one of the administrators is therefore unmerited, misconceived and untenable. Counsel therefore urged the Honourable Court to proceed and appoint the following as the administrators:-

a) Esther Jemutai Kese - Spouse and Citor herein.

b) Moses Chepsiolei Changwony - the 1st Citee and son to the deceased.

c) Michael Kiplagat Cherutich- the 2nd Citee and also a son to the deceased herein.

Citees' Submissions

29. Counsel for the Citees only framed one issue for determination, that is whether Vincent Kosgei Ambani should be included as an Administrator in the estate of the deceased. In that regard Counsel submitted that

30. is not in dispute that Vincent Kosgei Ambani is the grandson of the deceased herein and also the administrator in the estate of Grace Jepkemboi Ambani (Deceased) vide an order issued by Hon. Barnabas K. Kiptoo in Moiben MCSUCCMISC/E001/2025, that the said Grace Jepkemboi Ambani was the mother of Vincent Kosgei Ambani and also the only child in the first house of Changwony Chumo Kibore (Deceased).

31. Counsel cited Section 66 of the Law of Succession Act and submitted that in line with the said provision, this Court is vested with full and final discretion to decide who is to Administer the Estate of a person who died intestate. Counsel further submitted that this discretion should be exercised in the best interest of all concerned meaning in the best interest of all the beneficiaries. Counsel pointed out that in relation to the administration of the Estate of Changwony Chumo Kibore (Deceased), the deceased was polygamous with three wives and died intestate.

32. Counsel also cited Section 40 (1) of the Law of Succession and submitted that all the beneficiaries in the Estate of Changwony Chumo Kibore (Deceased), who are divided into the three (3) houses are entitled to benefit from their fair share in the Estate. Counsel urged the Honourable court to exercise its discretion as per Section 66 of CAP 160 in holding that it would be fair for each house of the deceased to be represented by a person belonging to that house. Counsel suggested that the Estate should be administered by the following as Administrators in order to ensure that each house is fully represented; -

- a) Esther Jemutai Kese – 3rd House
- b) Moses Chepsiolei Changwony & Michael Kiplagat Cherutich- 2nd House
- c) Vincent Kosgei Ambani- 3rd House

Determination

33. Having appreciated the parties pleadings on record, I find that the only issue for determination is **“whether the Citor has the legal capacity to bring the Citation.”**

34. 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.”

35. From this provision, it should be noted that the emphasis is that is that a person making a citation would himself be entitled to a grant in the event the person cited renounces his right thereto. The question the Court needs to answer in determining the issue drawn as being for determination is whether the Citor is one such person.

36. Hon. Sitati, J considered the purpose of citation proceedings in the case of John Osicho v Hana Omolo Osewe & Another [2013] eKLR where she held that: -

“(11) A Citation is a document issued by the Probate Registry, whereby the person being the claimant (Citor) calls upon the person cited (Citee) to provide a reason why a particular step should not be taken;

(12) Citation occur in both contention and non-contentious probate. In non-contention Probate, they serve the purpose of bullying along or fast tracking the issue of a grant of letters of administration.”

37. Under Part V, of the Law of Succession Act, Section 39 makes the following provision on the priority of beneficiaries of a deceased estate under the circumstances listed;

38. Section 66 of the **Law of Succession Act** provides as follows on 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.

39. From the pleadings before this Court, it is not in dispute that the deceased herein was a polygamous and that the Citor is the deceased wife from the 3rd house while the Citees are sons of the deceased from the 2nd House. While it is not in dispute that the Citor ranks in higher priority than the Citees, the Citees enjoy an equal right to petition for the Grant herein as they are representatives from the 2nd House.

40. In the present case is not disputed that the deceased herein died intestate on 4/03/2007, and that since then no one has petitioned Court for the Grant of Letters of Administration as per the prerequisites of the law. Without a doubt, 18 years have lapsed since the demise of the deceased. It must be noted that the purpose of succession proceedings is to ensure that the estate of the deceased devolves to the right beneficiary of the deceased's estate.

41. It further noted that in the instant case, there has been allegation and counter allegations of intermeddling with estate of the deceased which assertions have not been substantiated and cannot be substantiated at this juncture. Be that as it may, it worth reminding parties that as per Section 45 of the Law of Succession Act, intermeddling with the estate is a criminal offence.

42. Regarding, one Vincent Kosgey Ambani being appointed as one of the Administrators herein, it is not disputed that he is a grandson of the deceased. However, Section 66 of the Law of Succession Act is very clear in terms of who ranks in priority when it comes to succession matters. Over years, Courts have indeed developed profound jurisprudence with regard to the issue surrounding grandchild in intestate matters. Section 39 of the Law of Succession Act makes grandchildren heirs in intestacy, where their own parents, who are biological children of the deceased, are dead. Section 41 of the Law of Succession Act is the provision that enables grandchildren to step into the shoes, of their own parents, and to step into those shoes they need not take out letters of administration.

43. **In re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR** (Musyoka J), held that; a grandchild of the deceased was not entitled

directly to the estate of their late grandfather in intestacy, so long as their own parents, being children of the deceased, were alive and were taking their rightful share. The argument was that such a grandchild would take indirectly through her own parents. The Court went on to state that a grandchild would be entitled to inherit directly from the intestate of their grandparent where his or her own parent, the child of the deceased, was dead, and, therefore, not available to take their share directly. In such case, the grandchild would be entitled to take directly by virtue of section 41 of the Law of Succession Act, Cap 160, Laws of Kenya.

44. In re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR (T. Matheka J), the court pronounced a grandchild to be a direct heir to the intestate estate of their grandparent, where his or her own parents have predeceased the grandparent, or, should I add, the parent dies before the estate is distributed. The court asserted that such a grandchild steps into the shoes of the deceased parent so as to take the share that such parent would have taken from the estate of the grandparent's estate. See also **Cleopa Amutala Namayi vs. Judith Were [2015] eKLR (Mrima J)**.

45. In Re Estate of Wahome Njoki Wakagoto (2013) eKLR, the Court held that;

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from

the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

46. From the foregoing, it is clear that grandchildren can only inherit directly from their grandparents where the grandchildren’s own parents are dead. From the pleadings on record it is clear that Vincent Kosgei Ambani is a grandchild of the deceased from his 1st house. Further, it also not in dispute that Vincent Ambani Kosgei’s mother, one Grace Jepkemboi Ambani (Deceased) was the only child of the deceased from the 1st house and thus Vincent Ambani directly steps into his mother’s shoes in the instant case.

47. Section 47 of the **Law of Succession Act** gives the Court the power to pronounce itself on any Application before it in a manner that it considers just and expedient. It provides that:

a. **“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”**

48. Further, **Rule 73 of the Probate and Administration Rules** provides as follows;

a. **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.**

49. In view of the above analysis, I am well satisfied that the Citor has the requisite legal standing to bring this citation against the Citees who the Citor alleges have refused to petition Court for the Grant of Letters of Administration Intestate, in respect of the deceased's estate, a fact that is clearly apparent from the proceedings herein.

50. Having considered the citation pursuant to Section 66 of the **Law of Succession Act** and Rule 73(1) of the Probate and Administration Rules, the same be compromised to the extent that the following beneficiaries be nominated to petition for Grant of letters of administration to administer the estate of the estate of the deceased Changwony Chumo:

- a) **Esther Jemutai Kese – Citee and widow representing the 3rd House**
- b) **Moses Chepsiolei Changwony – Son representing the 2nd House**
- c) **Michael Kiplagat Cherutich – Son representing the 2nd House**
- d) **Vincent Kosgei Ambani- Grandson representing the 1st House**

51. That in terms of this appointment this Citation be and is now hereby marked as spent and the file closed. The Succession proceedings are to be commenced by opening a Probate Cause file in the Family Registry within the next 90 days from the date of this Ruling failure of which the Citor, Esther Jemutai Kese is at liberty to apply.

Read Dated and Signed at ELDORET on 19th December 2025

E. OMINDE
JUDGE

