

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
SUCCESSION CAUSE (CITATION) NO. E086 OF 2025
IN THE MATTER OF THE ESTATE OF THE LATE HENRY
JOHN KIPRONO TUIYOTT (DECEASED)

ADIJA

MBARAKA.....CITOR/APPLICANT

VERSUS

VICTORIA CHEMUTAI TUIYOTT.....1ST CITEE/RESPONDENT

ANTHONY KIPKOROR TUIYOT.....2ND
CITEE/RESPONDENT

RULING

1. This ruling is in respect of two (2) applications. The first one is the citation dated 4th March, 2025 and the second one is the notice of preliminary objection dated 11th September 2025.
2. In the citation dated 4th February, 2022 the Citor prays that the Citees do within fifteen days (15) days after service of the citation, cause an appearance to be entered on their behalf in the high court and accept or refuse grant of letters of administration of the deceased's estate. In default of their appearance, acceptance and extraction of letters of administration, the Citor prays that this court proceeds to

grant letters of administration of the deceased's estate to the Citees in their absence.

3. The citation is supported by a verifying affidavit sworn by the Citor on even date. She averred that she is the second wife of the deceased having been married to him from the year 1982 until his demise on the 29th January, 2023. She stated that the deceased was the registered and/or beneficial owner of all the parcels of land known as Uasin Gishu/Burnt Forest/S2, Waitaluk-Mabonde Block 6 Siliboi (Tensimo Farm), Land situated in Tumeiyo, Keiyo, ADC Kipsingori Farm, land in Neswit Settlement Scheme in Njoro, 1 Acre Plot in Milimani, Nakuru and land in Kalwal, Keiyo.
4. She further averred that in the subsistence on their marriage, the deceased bought land parcel number Uasin Gishu/Burnt Forest/52 where he built their matrimonial home and they relocated there from their earlier matrimonial home in Milimani estate in Nakuru. She added that the deceased left behind nine (9) children and that included the Citees/respondents herein who had failed to take out letters of administration. She urged the court to compel them to accept or refuse grant of letters of administration in respect of the deceased's estate for her benefit and the rest of the beneficiaries.
5. The citation is opposed vide the Citees/respondents' replying affidavit dated 14th October 2025. They averred that the Citor had not demonstrated why they should be cited. That according to her deposition that she is the 2nd wife to the deceased, she holds a position of priority under the law of

succession with regard to the table of consanguinity. Thus, her application ought to be disallowed as it has no bearing in the law of succession.

6. The preliminary objection dated 11th September, 2025 filed by the respondents/citees on the following grounds;

i. That the Citor from her affidavit in verification of proposed citation describes herself as a second wife to the deceased Henry John Kiprono Tuiyott hence a preferential person to administer the estate as provided under section 66 of the Law of Succession CAP 160 of the Laws of Kenya.

ii. That the citor has not come before this honorable court with clean hands.

7. Both applications were canvassed by way of written submissions.

Citor/applicant's submissions

8. The said submissions were by filed by Morgan Omusundi Law Firm and are dated 24th October, 2025. Counsel gave a brief background of the case and identified two issues for determination.

9. The first issue is whether the citation orders should issue against the Citees. Counsel submitted that the Citor is entitled to a grant in the event the Citees renounce their right to the estate of the deceased. That the Citees had brought their preliminary objection on the ground that the Citor described herself as a second wife to the deceased hence a preferential person to administer-the estate as provided under Section 66 of the Law of Succession CAP 160. However,

they admitted in their affidavit of being aware that the Citor had filed an application for temporary letters ad-litem and the same was dismissed due to lack of sufficient supporting documents hence the order made on 19th August 2024.

10. He cited Rule 22(1) of the Probate and Administration Rules which 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.”

11. He further submitted that a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence. That it was evident that the Citees had conceded that indeed the Citor is the 2nd wife of the deceased and is a beneficiary. He added that a preliminary objection only raises pure points of law, which are argued on the assumption that all facts pleaded by the other side are correct.

12. The court’s attention was drawn to the decision in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** in which Sir Charles Newbold rendered himself as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are Correct. It cannot be raised if any fact has to be ascertained or if what is sought is the

exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and on occasion confuses the issue. This improper practice should stop.”

See also; ***Oraro v Mbaja [2005]1 KLR 141***

13. Counsel asserted that the Citees and their siblings intentionally failed or neglected to take out letters of administration to distribute the estate yet they know the difficulties in obtaining proper documents required by the court and thus intend on frustrating the citor herein. He placed reliance on the decision in ***Imaet v Okodoi (Civil Appeal 66 of 2019) [2024] KECA 1198 2 (KLR)*** stated: -

“..a citation to accept or refuse a Grant is a method to attempt advancing the estate administration by forcing a party with a right to the Grant to act. As was held by the High Court in Josiah Muli Wambua [2014] eKLR: - “in intestacy, citations issue 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 grant after the citee fails to so apply.”

14. In conclusion, he urged the court to allow the citation as prayed and the costs be borne by the citees.

Citees/respondents' submissions

15. The said submissions were by filed by Obura Mbeche & Company Advocates on 20th November, 2025. Counsel gave a brief introduction and identified one issue for determination and which is whether the Citor's application is merited.

16. Counsel submitted that from the Citor's affidavit in support of her citation, she acknowledged being a wife of the deceased and the Citees being his biological children. Thus, in strict application of the law, she ranks in superior priority to the Citees. He placed reliance on rules 22 and 73 of the Probate and Administration Rules, section 47 of the Law of Succession and the decision in **Re Estate of Agwang Wasiro Deceased 2020 eKLR** where it was held as follows; ***"Section 66 of the Law of Succession Act sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply."***

See also; In the Matter of the Estate of LAK- (Deceased) [2014] eKLR.

17. Counsel asserted that from the averments in paragraphs 9 and 12 of the Citor's affidavit, the necessary legal document was grant ad litem and not a grant of representation. He placed reliance on the decision in **Helena Wangechi Njoroge (Deceased) [2015] eKLR** where the court held as follows;

"...It was limited to the purpose of filing suit to preserve the three assets of the estate. it is what is called a grant of letters of administration ad litem. The suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory application within probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defence the estate against third parties."

18. In conclusion, counsel submitted that no justifiable reason had been provided showing why the Citor should not take out letters of administration against the estate of the deceased. He urged the court to dismiss the citation as it lacked merit.

Analysis and determination

19. I have considered both applications, the affidavits and grounds in support and the submissions by the respective parties. I opine that the issue for determination by this court is whether both the applications or either of them is merited.

20. I will first deal with the preliminary objection raised on the grounds that the Citor claims to be the second wife to the deceased hence a preferential person to administer the estate as provided under section 66 of the Law of Succession CAP 160 of the Laws of Kenya.

21. It is trite law that for a preliminary objection to be valid, firstly, it must raise a pure point of law. Secondly, the objection is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (Supra)**, Law JA stated as follows:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. The Court will also take into account that a preliminary objection must stem from the pleadings and raises a pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information.

See the case of **Oraro v Mbaja [2005] 1KLR 141**, where it was held that:

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

23. The Citees/respondents contend that the Citor having claimed to be the second wife to the deceased, is a preferential person to administer the estate as provided under section 66 of the Law of Succession CAP 160 of the Laws of Kenya. The Citor disputed the said facts and argued that the Citees were aware that her application for grant of temporary letters ad-litem had been dismissed due to lack of sufficient supporting documents.

24. In view of the above, I find the ground on which the preliminary objection is based to be the fact that the Citor is the 2nd wife of the deceased and thus the preferred person to administer the estate as provided under section 66 of the Law of Succession CAP 160 of the Laws of Kenya. That fact is disputed by the Citor, and must therefore be tested by rules of evidence. This necessarily puts the matter outside the ambit of a preliminary objection as was in the **Obija case**(supra) where it was held as follows: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual

information which stands to be tested by rules of evidence”.

25. Consequently, I find that the Preliminary Objection dated 11th September 2025 is not merited and the same is dismissed.
26. The next application seeks to have the Citees appear in the high court within fifteen (15) days after service of the said citation, and accept or refuse grant of letters of administration of the deceased’s estate.
27. The law on citations is set out in Part VI of the Probate and Administration Rules (P&A Rules) where three types of citations are set out. The first citation is to accept or refuse a grant, while the second is to take probate on a will. The third one is intestacy and in this third category a person who is entitled to administer the estate of the deceased may be cited by the court to accept or refuse a grant of letters of administration. If the person cited refuses or fails to appear upon being cited or to apply for the grant, the citor may proceed to petition the court for grant.
28. In the case of **Josiah Muli Wambua (deceased), Nairobi Succession Cause No. 2557 of 2012 [2014] eKLR**. W. Musyoka - J stated the following at paragraph 9 of his ruling: -
“In intestacy, citations issue 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 grant after the citee fails to so apply.”

29. In **John Osicho v Hana Omolo Osewe & another [2013] eKLR** the court held as follows: -

“(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) citations 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.”

30. In the instant suit, the Citor has approached this court in her capacity as the second wife of the deceased. For purposes of the citation, it is sufficient for the Citor to show that he/she has a bonafide interest in the estate of the deceased to prompt the respondent to action. The Citor herein concedes that the respondents, are the ones entitled to petition for grant in respect of the estate of the deceased but had failed or neglected to so apply. It is also not in dispute that the beneficiaries of the deceased have never petitioned for grant of letters of administration with respect to the said estate.

31. Section 66 of the Law of Succession Act 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) The 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...

32. Further, Rule 22(1) of the Probate and Administration Rules provides 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.”

33. Rule 22 aforementioned is clear as to who is entitled to file a citation. That person must be of equal or the next in priority to the person cited. The Citees have responded to the citation and have also demonstrated to the court that they are not ready and willing to petition for grant of letters of administration intestate as children of the deceased

34. According to section 66 of the Law of Succession Act, the Citor being a spouse of the deceased has a superior right to administer the deceased's estate over the Citees. There is no evidence showing that she has been barred from petitioning for grant of letters of administration intestate.

35. In view of the foregoing, I find the Citation dated 4th March, 2025 to be devoid of merit. The same is dismissed with costs to the Citees.

36. The preliminary objection dated 11th September, 2025 is dismissed with no order as to costs.

37. Orders accordingly.

Dated and signed this 20th January, 2026 by:

**H. I. ONG'UDI
JUDGE**

**Delivered this 17th February 2026 in open court at
Nakuru by:**

**J. M. NANG'EA
JUDGE**