



In re Estate of the Late Mwasame Simiyu (Deceased) (Succession Appeal E009 of 2023) [2024] KEHC 705 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E009 OF 2023**

PJO OTIENO, J

JANUARY 26, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE MWASAME
SIYUYU (DECEASED)**

BETWEEN

**LUKA MWASAME 1ST APPELLANT
MUKONAMBI MATAYO MWASAME 2ND APPELLANT
JULIUS WUMBA MURULE 3RD APPELLANT
ANTONY SHIVI SIYUYU 4TH APPELLANT**

AND

**THOMAS KINYANJUI KABULA 1ST RESPONDENT
TOM WALUBENGO MASAKHA 2ND RESPONDENT**

(Being an appeal from the ruling of Hon. Z.J.Nyakundi (SPM) in Butali Succession Cause No.E129 of 2021 delivered on 27th September 2022)

JUDGMENT

1. In their capacities as purchasers of the estate of the late Mwasame Siyuyu (“deceased”), the respondents moved the trial by way of a citation in Citation Case No E10 of 2021 to have the appellants, who are beneficiaries of the deceased’s estate, to petition the court for a grant of letters of administration intestate. The trial magistrate noted in his ruling that on 1/7/2021, the court granted the appellants two months to file succession proceedings and when the matter was mentioned before court on 30/8/2021, the appellants did not attend court and had not initiated succession proceedings and the respondents were thus granted leave to file the same.



2. The respondent then filed a petition for the grant of letters of administration dated 1st September, 2021 on which petition, grant was issued on 12th October, 2021.
3. By an application by way of summons for revocation of grant dated 18th October, 2021, the appellants moved the court to have the said grant issued to the respondents revoked for the reason that the grant was obtained in secrecy without informing other beneficiaries.
4. The application was opposed by the 1st respondent vide an affidavit sworn on 19/4/2022 in which it was contested that the trial court with the full knowledge of the appellants gave the respondents the go ahead to institute succession proceedings hence it could not be honest that the same was conducted secretly.
5. In a ruling of the trial court delivered on 27/9/2022, it was a finding by the court that the succession proceedings were commenced with the knowledge of the appellants and that they were included in the affidavit in support of the petition, where duly acknowledged as beneficiaries entitled in inheritance, and the application for revocation was thus dismissed.
6. It is that ruling that has provoked the instant appeal in which the Appellant faults the court on the following seven grounds of appeal;
 - a. The learned Principal Magistrate erred in law and fact in failing to have regard to the provisions of sections 62, 68 and 70 of the Law of Succession Act in his ruling.
 - b. The learned Principal Magistrate erred in law and fact by failing to consider the provisions of section 62 and 70 of the Law of Succession Act in his determination.
 - c. The learned Principal Magistrate misdirected himself in failing to consider that the appellants have priority in law to be issued with grant of letters of representation of the deceased estate.
 - d. The learned Principal Magistrate erred in law and fact in failing to consider what the Law of Succession Act states with regard to preference as to who gets to administer the estate of the deceased.
 - e. The learned Principal Magistrate erred in law and fact by holding that the names of the Objectors are captured in the Grant and hence no necessity to comply with the provisions of the Law of Succession Act.
 - f. The learned Principal Magistrate misdirected himself when he failed to recognize the fact that the Respondents are not beneficiaries to the estate of the deceased and hence no capacity to apply for letters of administration to the estate of the deceased.
 - g. The learned Principal Magistrate erred in law and fact by failing to consider the Appellant's Counsel written submissions.
 - h. The learned Principal Magistrate erred in law and fact in failing to consider the cases and authorities cited the Appellants' counsel in the objection proceedings hence conducting them irregularly and in contravention with the Probate and Administration Rules.
7. Even when set as seven grounds, a ready of the memorandum show that grounds 1,2,3, and 5 indeed question the decision for failure to consider and apply the provisions of the Law of Succession Act at sections 62, 68 and 70 on the priority of the appellants in relation to the respondents; grounds 6 questions the standing of respondents as beneficiaries while ground 7 and 8 fault the court for failure to consider the submissions filed and the law cited to court thus contravening the Probate and Administration Rules.



8. For the above reasons the appellants are seeking for orders that the appeal be allowed, the decision dismissing the application be set aside and substituted with an order allowing the application be allowed.
9. The appeal has been canvassed by way of written submissions as directed by the court.
10. It is the submission by the appellant that the trial court granted the citors the grant without considering their relationship with the deceased yet the respondents were not creditors to the deceased estate but buyers from a dependant of the deceased and that they ought to have had audience in another court but not in a succession cause. They argue that the orders of the trial court were akin to intermeddling under section 45 of the *Law of Succession Act*.
11. For the respondent, it is the submissions that prior to the filing of the citation cause, the appellants had on many occasions been approached by the respondents to take up letters of administration to no avail. They further submit that the succession process was concluded by the respondents who proceeded with the transmissions and obtained various titles.

Issue, Analysis and Determination

12. From the grounds of appeal and the submissions by the parties, the issue that arises for determination by this court is whether a citor who does not fall among the list of persons listed under section 66 of the *Law of Succession Act* can initiate succession proceedings, by way of citation, in respect of the estate of a deceased person. The corollary question is whether, there was occasioned any injustice in the manner the cause was prosecuted and concluded.
13. Where a person dies intestate, section 66 of the *Law of Succession Act* lists the persons that can administer the estate of the deceased in the order of preference to be; (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.
14. In this matter, the question is what avenue is available to a claimant who with a claim against a beneficiary to the estate of a deceased but falls outside the categories identified under section 66 of the Act.
15. The answer resides in Rule 7 Sub rule 7 of the *Probate & Administration Rules* which provides that such person shall move the court for a grant of administration intestate but before the making of the grant he or she shall furnish the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—
 - (a) renounced his right generally to apply for a grant; or
 - (b) consented in writing to the making of the grant to the applicant;
 - (c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.
16. This provision is reiterated in Rule 22(1) of the *Probate and Administration Rules* which provides that 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. Being an intestate succession, Rule 22(5)a and (7)a permit that if the citee fails to enter appearance or apply for the grant, the citor may apply for and be issued with the grant provided the citee is served with the application.



17. From the record of the proceedings, there is nothing on how the citation proceedings were taken and if the basic dictates of the law on timelines and demand for compliance with right to be heard by being served, was met. In fact, even the affidavits of the respondents and the oral evidence given before the trial court did not avail such evidence. It was therefore a finding based on no evidence that the appellants had been served and failed to apply for the grant. There is also no evidence that the petition for grant, when filed, was served upon all the dependants of the deceased or indeed the four dependants who objected to the grant by the respondents, as citees. A judicial discretion upon a contested and disputed facts must flow from the fact proved by evidence. Where the decision is not supported by evidence, the same sits not in consonance with the norm of administration and an appellate court is entitled, out of basic demands of justice, to set the same aside. An appellate court ought to interfere with the conclusions of the trier of facts whenever it is demonstrated that the conclusions reached by the trier of facts cannot be reasonably drawn from the primary facts.¹ In addition where the conclusions are based on no evidence or outright misapprehension of the evidence led, the appellate court must intervene to correct such error.²
18. It is therefore the finding of the court that even though the respondents, as citors, could have initiated the citation proceedings as alluded to by the trial court, such needed proof in the petition for the grant and in the consequent objection proceedings. The court finds no proof of such facts and thus finds the assertion by the appellants that they were not served with the petition to have been sufficiently proved and not controverted. For that reason the finding leading to the dismissal of the objection proceedings was pervasive and against the weight and direction of the evidence on record. Such call for disturbance on appeal as of course.
19. The next question is whether, the claim by the respondent was an inheritance claim liable and fit to be pursued in a succession cause and made the foundation of distribution. The answer to that question must be a resounding No As pleaded, from the word go, the claim put forth was one by persons alleging to have bought portions of the estate, not from the deceased so as to be liabilities of the estate, but from persons claiming as beneficiaries. The act of dealing with the deceased's estate prior to grant of representation and without authority of the court, was an outright act of intermeddling with the estate and thus a criminal act. Such an illegality ought to have been frowned upon by the court rather than being blessed and made a basis to grant portions of the estate to the two intermeddlers.
20. To this court, while the respondent were entitle to initiate the citation proceedings as they did, merely that they became administrators did not qualify them as persons entitled to shares in the estate. The most they could have derived from being administrators was to get a person to sue in the event that a cause laid against the estate through its administrators. In this case however, the demonstrated claims were against individuals other than the deceased and the respondents ought to have pursued those individuals outside the succession cause. Their claim was one of claim over land and not inheritance.
21. Arising from the discussion, the reasons set out above and the conclusions so reached, it is the finding by the court that the appeal is wholly merited and is thus allowed. The consequence is that the decision of the trial court dismissing the application for revocation of the grant is set aside and in its place substituted and order allowing the same.
22. Having so allowed the objection by the appellants it is directed that the file be remitted back to the trial court for purposes of moving the matter towards the conclusion of the distribution.
23. On costs, the same goes to the appellants as the successful parties.

¹ [Gracegirde v Oxley](#) (1947) 1, All ER 126

² [Mwangi v Wambugu](#)(1984)KLR 453



DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF JANUARY, 2024.

PATRICK J O OTIENO

JUDGE

In the presence of:

Ms. Mtunda for Appellant

No appearance for the Respondent

Court Assistant: Polycap

