



**Okode v Osomo & another (Family Appeal E010 of 2023)
[2024] KEHC 6243 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
FAMILY APPEAL E010 OF 2023
RE ABURILI, J
MAY 30, 2024**

BETWEEN

NOBERT AGUYO OKODE APPELLANT

AND

DORINE ATIENO OSOMO 1ST RESPONDENT

MAXWEL OTIENO 2ND RESPONDENT

(Being an appeal from the Ruling of the Honourable G.C. Serem delivered on the 1st September 2023 at the Chief Magistrate's Court at Kisumu in Kisumu Citation Cause No. E056 of 2022)

JUDGMENT

1. The appellant herein Nobert Aguyo Okode filed a citation against the respondents herein to accept or refuse letters of administration as against the respondent. It was his case that he was the administrator of the estate of Marikus Okode Nyuogi who had been in active possession of the suit land, Kisumu/Chiga/1708 even during the lifetime of the registered proprietor Guda Okode.
2. The 1st respondent vide a replying affidavit sworn on the 6th October 2022 deposed that her husband was the brother to the deceased, Guda Okode, the registered proprietor of the suit land and that the deceased was holding the said title in trust for his two brothers Curilus Okode Osome and Patrick Okode all who were now deceased and that the suit land was to be shared equally among themselves. It was her case that the appellant had neither proprietary nor beneficial rights to the suit parcel.
3. One Wilychister Ngeso Okode, the mother to the deceased Guda Okode, the registered proprietor of the suit parcel of land swore an affidavit dated 6th October 2022 in which she stated that the original owner of the suit parcel was her late husband Sabians Okode Njagwa who transferred it to their son Guda Okode, the deceased herein, to hold in trust for his other two brothers Curilus Okode Osome and Patrick Okode. It was her deposition that the appellant had neither a proprietary nor beneficiary



- right to the suit parcel having trespassed onto the suit parcel in the year 2020 and started cultivating the same.
4. The trial magistrate after hearing the viva voce evidence of all the parties herein found that the appellant was an in-law to the deceased Guda Okode who did not rank in priority to the respondents and further that there was a dispute as to who owned the suit parcel, an issue that had to be determined before the succession could be undertaken. The trial court found that the citation lacked merit and dismissed it.
 5. Aggrieved by the trial court's finding, the appellant lodged this appeal vide a memorandum of appeal dated 14th September 2023 raising the following grounds of appeal:
 - i. That the trial magistrate erred in law and fact in holding that there was a dispute as to who owned the land an issue that was never raised during the hearing as such she veered off from the proceedings.
 - ii. That the learned trial magistrate erred in law and fact in failing to appreciate the principle of citation thereby arriving at an erroneous decision based on extraneous facts not forming part of the proceedings.
 - iii. That the learned trial magistrate erred in law and in fact in relying on extraneous evidence thereby arriving at the decision not supported with evidence.
 - iv. The learned trial magistrate erred in law and fact in making the findings which were a total misdirection and legal deviations from the express provisions of the law.
 - v. The learned trial magistrate erred in law and fact in failing to find that the evidence cited was uncontroverted the cite having failed to call any witness to testify.
 - vi. The learned trial magistrate erred in fact and law in making adverse inference in her ruling not backed by any evidence.
 6. The parties agreed to file submissions to canvass the appeal but the respondent did not file any submissions in the e-filing system as at the time of writing this judgement.

The Appellant's Submissions

7. It was submitted that the Respondent/Citees never filed a reply to the citation, however there was a Replying Affidavit of one Wilychister Ngeso Okode who despite not being a party filed a replying affidavit. The appellant submitted that the persons cited to take out the letters in respect of the estate of Guda Okode were the people closest to him who are alive despite the fact that they failed to respond to the Citation.
8. The appellant submitted that the replying affidavit by a person not a party to the proceedings steered off addressing issues raised in the citation application which issues were never denied nor confirmed.
9. It was submitted that the appellant occupied the land parcel number Kisumu/Chiga/1708 and that he was entitled to assert the prescriptive right of the adverse possession. He further submitted that his claim in so far as section 66 of the *Law of succession Act* can be termed as a creditor by the estate owing to the fact that the deceased's rights over the land had been extinguished due to the doctrine of Adverse possession under the *Limitation of Actions Act* and that the deceased was thus holding the land in trust for the appellant.
10. The appellant submitted that the citation is in itself was not an end but a means to the end given that after the citation was taken out, those entitled to take out letters can give reasons why they did not take



out the letters failure to which the citor be permitted to take out letters and pursue their interest as against or for the estate.

11. On costs, the appellant submitted that the same follow events but that the same is exercised by discretionary power which the court ought to exercise judiciously.

Analysis and Determination

12. I have considered the issues raised in this appeal and the submissions filed by the appellant. The issue for determination is whether the appeal has merit.

13. Rule 22(1) of the Probate and Administration Rules is explicit on citations 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.”

14. The appellant herein concedes that the respondents are the ones entitled to petition for grant in respect of the estate of Guda Okode but that they have failed or neglected to so apply. The appellant further contends that he also has a right to the deceased’s estate by virtue of the doctrine of adverse possession because his family have been in possession of the suit parcel before 1979, during the lifetime of the registered proprietor, the now deceased Guda Okode.

15. For purposes of the citation, it was sufficient for the appellant to show that he has a bona fide interest in the estate of the deceased to prompt the respondent to action. The scope of a citation, in my view, is limited and therefore cannot be the forum for determining the respective claims and rights or identities of the beneficiaries.

16. In *John Osicho v Hana Omolo Osewe & Another* [2013] eKLR, Sitati J had this to say on citations:

“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; ... Citations occur in both contentious and non-contentious probate. In non-contentious Probate, they serve the purpose of bullying along or fast tracking the issue of a grant of letters of administration.”

17. In *Josiah Muli Wambua* [2014] eKLR, Hon. Musyoka, J. explained that:

“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.”

18. Examining the material placed before the trial court, it is undeniable that the appellant is an in-law to the deceased Guda Okode. In addition, the appellant claims that he cited the respondents because the respondents had declined to petition for grant which would then have enabled the appellant to claim for his entitlement to the estate of the deceased by virtue of being in adverse possession of the land belonging to the deceased.

19. The appellant is an in-law to the deceased, from the evidence on record. The question is whether as an in-law would himself be entitled to a grant in the event of the person cited renouncing his right thereto.



20. In my view, the answer is NO. An in-law is not in the nearest degree of consanguinity to the deceased as provided for in section 39 (1) of the [Law of Succession Act](#), where there are living persons who are related to the deceased in the nearest degree as blood relatives or kindred. The same fate would befall the 1st respondent. It is only the 2nd respondent who the evidence adduced identifies as a nephew of the deceased, Guda Okode proprietor of the suit parcel.

21. Section 66(a)-(d) provides for preference be given to certain persons to administer a deceased person's estate where the deceased died intestate: -

“ 66. 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”

22. Part VII, dealing with making of grants under Rule 26(1) and (2) of the [Probate and Administration Rules](#) provides that:

“ 26.

- (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

23. Under Part V referred under Section 66(b), the persons given priority over an intestate are the surviving spouse and children. That where the intestate has unfortunately left no surviving spouse and children, the provisions of Section 39 of the [Law of Succession Act](#) comes in handy, stipulating that the net intestate shall devolve up to the kindred of the intestate in manner of order of priority.

24. Section 39(1) and (2) provides that:

“ 39.

- (1) 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 child or children of deceased brothers and sisters, in equal shares; or if none
 - (d) half-brothers and half-sisters and any child or 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, and be paid into the Consolidated Fund.”
25. The *Black's Law Dictionary*, Eight Edition defines consanguinity as the relationship of persons of the same blood or origin.
 26. The same dictionary defines affinity as the relation that one spouse has to the blood relatives of the other spouse; relationship by marriage or any familial relation relating from marriage.
 27. The law requires that generations be counted from the intestate beginning with the parent up to the common ancestor and then down to the particular relation.
 28. It is a mistake, therefore, to assume that all next of kin will be related to the same level of common ancestor. Therefore, if a person is claiming to be a next-of-kin situation, he/she must account for all the reason-able possibilities of relationship in equal degrees derived from each different level of common ancestors (see Daniel F. Carmack, *Common Problem in Administration of Decedents' Estates*, 14 Clev.-Marshall L. Rev. 179 (1965).
 29. In other words, the term "next of kin," for intestate succession purposes only, is understood in the primary sense of those nearest to the intestate by blood.
 30. Thus, the dispute between the appellant and the respondents can be resolved by examining the degree of consanguinity and affinity so as to determine who between the respondents herein is nearest by blood to the deceased. An examination of the consanguinity and affinity Table [Annex I]annexed to this judgment as used by Mativo J (as he then was) in *Immaculate Wangari Munyaga v Zachary Waweru Ileri* [2016] eKLR (HC SUCC Cause No. 4 of 2015 –Nairobi) will be of help.
 31. It is evident from the consanguinity and affinity Table found at the back of the Probate and Administration Rules that none of the respondents fall in the 1st or even second degree of consanguinity or affinity.
 32. Accordingly, I find that the appellant lacked locus to file the citation before the trial court asking the lower court to cite the respondents to take out letters of administration of the estate of the deceased Guda Okode. The trial magistrate ought to have dismissed the citation on this ground alone.
 33. The above position notwithstanding, I note that in response to the citation filed, one Wilychister Wilychister Ngeso Okode swore a replying affidavit opposing the citation, although she was not one



of the Citees. This deponent describes herself as the mother of the deceased intestate, Guda Okode, She also identifies the 1st respondent as the wife to one of her sons who was deceased and who was the brother to Guda Okode, the intestate herein, while the 2nd respondent is her grandson hence a nephew to her deceased son.

34. That being the case, under the Consanguinity and affinity Table pursuant to Rule 7(1) (iii) of *the Probate and Administration Rules*, Wilychister Ngeso Okode ranks in the First degree kindred of the deceased Guda Okode and therefore the correct surviving person to have been issued notice to take out letters of administration intestate and in default, to be cited. That did not happen.

35. Accordingly, I find and hold that the appellant cited wrong persons for a grant and therefore the trial magistrate was correct in dismissing the citation.

36. The appellant's main reason for filing the citation as pleaded and submitted on was based on the doctrine of adverse possession. The *Law of Succession Act* at section 47 provides for jurisdiction of the High Court in respect of matters falling under the *Act* as follows:

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.

37. Rule 41(3) of the *Probate and Administration Rules* provides that: -

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

38. In the case of *Priscilla Ndubi and Zipporah Mutiga v Gerishon Gatobu Mbui*, Meru Succession Cause No. 720 of 2013, held: -

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

39. In my view, the appellant was misguided and from the submissions, it appears that he believed that the citation would have given him the right to get title directly from the deceased to himself on account of adverse possession, as opposed to going through a complete circle of succession proceedings.

40. Regarding the ownership of the suit parcel claiming adverse possession, it is my finding that the same can only be determined by the Environment and Land Court. The appellant's claim would thus also fail on this ground.

41. In the end, I find that this appeal lacks merit and therefore it is hereby dismissed. I uphold the trial Court's holding dismissing the citation.



42. Each party to bear their own costs of this appeal.

43. The file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2024

R.E. ABURILI

JUDGE

Annex I: Consanguinity and Affinity Table [Rule 7(1) (e)(iii)]

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JUDGE

