



**SWK v JTK (Civil Miscellaneous Application E024 of 2021)  
[2023] KEHC 1130 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL MISCELLANEOUS APPLICATION E024 OF 2021  
CM KARIUKI, J  
FEBRUARY 23, 2023  
IN THE MATTER OF LWK (PERSON OF UNSOUND  
MIND)  
IN THE MATTER OF APPLICATION FOR APPOINTMENT OF NXT OF  
FRIEND, GUARDIAN, AND MANAGER OF THE  
ESTATE OF LWK (PERSON OF UNSOUND MIND)  
AND  
IN ORDER 12 RULE 7 OF THE CIVIL PROCEDURE ACT AND SECTION  
1A, 3A OF THE CIVIL PROCEDURE ACT**

**BETWEEN**

**SWK ..... APPLICANT**

**AND**

**JTK ..... RESPONDENT**

**RULING**

1. The matter before the court is an application by the Applicant dated March 10, 2021 seeking orders that:-
2. Spent.
  - i. That this honourable court do order or stay and/or vacate of orders issued on February 11, 2022 as the Applicant lacked *locus standi* in filing this application without letters of administration of Boniface Kariuki Murage (deceased) and the registered proprietor of the suit parcel of land.
  - ii. Spent



- iii. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the defendants by themselves, their agent, servants, and/or employees from subdividing, mapping, processing, and/or issuing title deeds demolishing structures, cutting trees, evicting and/or interfering with all that parcel of land known and described as LR/Nyandarua/Simbara/1054 registered in the name of Boniface Kariuki Murage (deceased) without having filed succession for his estate.
  - iv. That an order be issued compelling the OCS Shamata Police Station not to offer any assistance in demolishing temporary houses erected on the suit parcel of land LR/Nyandarua/Simbara/1054 as per orders issued on February 11, 2022.
  - v. That application costs be provided for by the Respondent/Applicant.
3. The application was supported by the annexed affidavit of JTK and the grounds on the face of the application stating as follows:
- i. That the LR/Nyandarua/Simbara/1054, the suit land herein, is registered under the name of Boniface Kariuki Murage, the deceased herein and whose succession is yet to be filed in court
  - ii. That the Respondent does not have *locus standi* of instituting any suit and/or a miscellaneous application on his behalf or on behalf of other beneficiaries of the deceased without letters of administration of the estate of the deceased, thus making this application and the orders issued on February 11, 2022 null and void and a waste of time for this honourable court.
  - iii. That the Respondent filed an application dated December 29, 2022 under a certificate of urgency which he never served the Applicant with the pleadings as purported in his affidavit of service sworn on February 1, 2022.
  - iv. On July 27, 2022, the Applicant was served with a copy of the court order issued on February 1, 2022 *vide* Whatsapp by Benson Wakiama, the Sub Chief of Kilimanjaro Location, Shamata, within Nyandarua County.
  - v. That the said court order was also directed to OCS Shamata Police Station to oversee the demolition of houses erected on the suit land by the deceased.
  - vi. In the said application, the Respondent indicated that he was the legal representative of the estate of one Lydia Wangari Kariuki, whom he purported to be deceased and of unsound mind bearing in mind that she is alive and living on the said suit property.
  - vii. The said application was filed out of malice and was bad in law, and the orders issued should be vacated for lack of merit as the suit land is still intestate and no succession cause has been filed for the estate of the registered owner who is deceased.
  - viii. In response, the Respondent filed two replying affidavits dated September 12, 2022 deponed by George Macharia Kariuki and Simon Wangai Kariuki, respectively, asserting that: -
  - ix. He was the deceased's son who had two wives, and he was from the first family and a brother to the Applicant. The deceased left several parcels of land, including the suit land.
  - x. The entire family recommended Lydia Wangari Kariuki (person of unsound mind); Lydia hereinafter remains on the property the deceased had left her.
  - xi. They allocated Lydia 1 acre of land on the suit land as they continue discussing the succession process, which is in the process of being filed.



- xii. The family has agreed to temporarily subdivide the property between the beneficiaries as they await letters of administration to be processed. The Applicant was allocated 6 acres which are most prime, and part of it is commercial plots.
  - xiii. The Applicant had been intimidating Lydia and her caregiver, stating that she has no right to inherit the land and that the Respondent herein has been taking care of Lydia as her trustee since their father's demise.
  - xiv. Both families recommend that the Applicant move out of Lydia's compound and live on his property.
  - xv. That the application herein is misconceived and without any merit in law and should be dismissed with costs.
4. Additionally, the Applicant filed a supplementary affidavit dated 4th November 2022.

### **Applicant's Submissions**

5. The Applicant submitted that the Respondent herein needed to be more informed in applying for injunctive orders in a miscellaneous application and that the nature of prayers sought should have been raised in a substantive suit through a plaint. If successful, the demolition orders would issue. That only a substantive suit could have anchored such orders. Reliance was placed on in [\*Re Estate of Njine Mwaura \(Deceased\)\*](#) [2020] eKLR
6. The Applicant pointed out that the Respondent was not equipped with the capacity to pursue any recourse touching on the estate as he was a mere beneficiary and not the legal executor of the deceased's estate. The Respondent filed the present miscellaneous application without the knowledge or the consent of the appointed executors and beneficiaries of the estate, knowing very well that the orders granted would affect them.
7. The Applicant reiterated that any person who wishes to deal with the estate of the deceased person must acquire the requisite locus standi in respect of that estate and that all pleadings filed by a person lacking locus standi are void ab initio therefore, the court lacked jurisdiction to hear and determine the Applicant/Respondent's miscellaneous application from the very beginning. Reliance was placed on [\*Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party\*](#) [2019] eKLR
8. It was asserted that the deceased left behind his last will dated 6th October 2018, appointing Kimachu Muchiri and Wambugu Kamahu as the executors of his estate. Therefore, the Respondent had no business interfering with the estate of the deceased. He should have waited for the appointed executors of the estate to pursue the requisite grant of probate and distribute the estate before he took the necessary steps to enable him to manage Lydia's estate to her benefit.
9. The Applicant asserted that the Respondent's actions of demolishing structures in the suit land were tantamount to intermeddling as per Section 45 of the [\*Law of Succession Act\*](#). Accordingly, reliance was placed on in [\*Re Estate of David Julius Nturibi M'ithinji \(deceased\)\*](#) [2012] eKLR.
10. It was submitted that if the orders sought are not granted, the Respondent will continue intermeddling with the estate before a grant of probate is issued to the appointed executors of the deceased's estate. That the application is merited and has a high probability of success, and the losses likely to be suffered following the actions of the Respondent are incapable of being compensated by an award of damages as the suit land holds an intrinsic and sentimental value that cannot be compensated. Reliance was placed in [\*Re Estate of Gideon Kibitok Tarus \(deceased\)\*](#) [2021] eKLR



11. The appellant submitted that on a balance of probabilities, there is no doubt that he and other beneficiaries have a legal right to inherit the estate of their late father and the same requires protection by injunction following the Respondent's actions of intermeddling thus the balance of probability lies with the Applicant.

### **Respondent's Submissions**

12. The Respondent asserted that the issue before the court is mainly based on power imbalances between the siblings. The application seeking to be appointed as the next friend and manager of Lydia's estate was in line with the deceased's will, which stipulated that the Respondent was to be the guardian/custodian of Lydia's property for life.
13. It was stated that if there was an issue of intermeddling, the Applicant was the initiator of the same by erecting the temporary structure on the deceased's estate, which the Respondent herein sought demolition. Reliance was placed in the *Re Estate of M'ngrihi M'miriti* [2017] eKLR that the Applicant is driven by greed and malice and has been interfering with the peaceful use and enjoyment of Lydia's parcel of land bequeathed to her by the deceased. That the need to seek appointment as next of friend was necessitated by the Applicant's action of erecting temporary structures on the part of land inhabited by Lydia instead of erecting the same on the portion bequeathed to him.
14. On *locus standi*, the Respondent stated that every beneficiary has a duty to protect and preserve the estate of the deceased from being destroyed or misused. That his actions in the matter should not be misinterpreted for intermeddling but that he was trying to defend the portion of land intended to be bequeathed to Lydia from being wasted by the Applicant. Reliance was placed on *John Marete Kirema & Another vs. Gladys Karimi Muthamia & 3 Others* [2013] eKLR.
15. The Respondent stated that he sought to have the structures demolished for Lydia's security purposes. Therefore, the assertion that he lacks *locus standi* is erroneous, noting that he is only interested in protecting his sibling from forcefully being forced to be evicted from the portion of land bequeathed to her.
16. In conclusion, the Respondent prayed that the orders granted on 11th February 2022 be reinstated pending the filing and issuance of a grant of representation to enable the Respondent to defend Lydia with authority.

### **Analysis and Determination**

17. Considering the instant application and the pleadings filed by both parties, the main issues that arise for determination are whether the Applicant has made a case for the stay and injunctive orders sought.
18. One of the main objections raised by the Applicant is that the Respondent needed to have *locus standi*. The Applicant submitted that the Respondent does not have locus standi of instituting any suit and/or a miscellaneous application on his behalf or on behalf of other beneficiaries of the deceased without letters of administration of the estate of the deceased, thus making this application and the orders issued on 11<sup>th</sup> February 2022 null and void and a waste of time for this honourable court.
19. Locus Standi is a Latin term that means 'place of standing' and refers to the right of a particular party to bring an action a suit. *Black's Law Dictionary 10<sup>th</sup> Edition* at, Paragraph 1084 defines the term 'Locus Standi' as follows:-



a.

“The right to bring an action or to be heard in a given forum.”

20. In trite law, pleadings filed in court by persons with no locus standi are void ab initio, and the court would have no jurisdiction in such actions. In *Ibrahim V Hassan & Charles Kimenyi Macharia*, [2019] eKLR the Court observed as follows:-
- “Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening to. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. I believe locus standi is critical preliminary issues that must be dealt with and settled before dwelling into other substantive issues”.
21. The orders of this court dated 11<sup>th</sup> February 2022 emanated from the Respondent’s application dated 14<sup>th</sup> September 2021, where the Respondent, the Applicant therein, sought to be appointed as the next friend, guardian, and manager of the affairs of Lydia, that Lydia’s estate including proceeds accruing to the estate from any source and or any properties jointly owned with other of her siblings shall be held by the Applicant and for the benefit of her and her beneficiaries and that temporary structures erected on Lydia’s property be demolished with the assistance of the OCS Shamata Police Station.
22. Consequently, *vide* the order of the court dated 1st February 2020, this court ordered that:-
- i. That the Applicant be and is hereby appointed as the next friend, guardian, and manager of the affairs of Lydia Kariuki Wangari
  - ii. That Lydia Wangari Kariuki’s estate, including any proceedings accruing to the estate from any source and or any of the properties jointly owned with other of her siblings, shall be held by the Applicant and for the benefit of her and her beneficiaries
  - iii. That the temporary structures erected on Lydia Wangari Kariuki’s property be demolished with the assistance of the OCS Shamata Police Station.
23. I find that the Applicant’s assertion that the Respondent lacked locus standi to institute the application baseless because, firstly, the Respondent is the brother to Lydia and therefore qualifies to apply to be appointed as next friend, guardian and manager of the affairs of Lydia Kariuki Wangari whether or not the deceased’s will stated so; a legal right that this court rightly conferred on him.
24. Section 26 of the *Mental Health Act* gives the court the power to make an order regarding the management of the estate of any person with a mental disorder to any relative or suitable person. However, preference will be given to a relative.
25. In any case, the Respondent is a beneficiary of the deceased’s estate and therefore has an established legal interest in the deceased’s estate.
26. The Respondent’s cause of action in filing the application was to protect and preserve Lydia’s interests and estate in view of the fact that she is a person of unsound mind, and upon consideration of the application therein, the court granted him the orders sought by the order dated 11<sup>th</sup> February 2022. Accordingly, I find that the Objector had locus standi in this matter, and moreover, the matter was properly brought before the court *vide* the miscellaneous application filed.



27. It seems that the Applicant's main contention is anchored on the consequential orders that the court granted on 11<sup>th</sup> February 2022, particularly the demolition of temporary structures erected on Lydia Wangari Kariuki's property with the assistance of the OCS Shamata Police Station.
28. From the instant application, it is clear that Lydia resides in a part of the suit land which belonged to the deceased, her late father. The Respondent stated that the beneficiaries allocated Lydia 1 acre of land on the suit land as they continue discussing the succession process, which is in the process of being filed. He sought to protect and preserve this portion because the Applicant had erected temporary structures on her portion despite having been allocated his portion of land.
29. I do not want to delve into issues of the deceased's succession through the determination of this application, although the Applicant's application and pleadings were convoluted with the same. The Applicant sought a stay of the orders dated 11<sup>th</sup> February 2022 and injunctive orders restraining the Respondent by themselves, their agent, servants, and/or employees from sub-dividing, mapping, processing, and/or issuing title deeds demolishing structures, cutting trees, evicting and/or interfering with all that parcel of land known and described as LR/Nyandarua/Simbara/1054 registered in the name of Boniface Kariuki Murage (deceased) without having filed succession for his estate and that an order be issued compelling the OCS Shamata Police Station not to offer any assistance in the demolition of temporary houses erected on the suit parcel of land LR/Nyandarua/Simbara/1054 as per orders issued on 11<sup>th</sup> February 2022.
30. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* (2014) eKLR, the court stated that the principles upon which injunctions can be granted in the following terms:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

Establish his case only at a prima facie level,

Demonstrate irreparable injury if a temporary injunction is not granted, and

Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles which the Applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd vs Afraba Education Society* [2001] Vol. 1 EA 86. Suppose the Applicant establishes a prima facie case that alone is not a sufficient basis to grant an interlocutory injunction. In that case, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the Applicant to injunction directly without crossing the other man between.”



31. Further, it is trite law that one who comes to equity must come with clean hands as the orders sought are discretionary. The Court of Appeal held in the case of *John Njue Nyaga v Nicholas Njiru Nyaga & Another* (2013) eKLR:-

“It is our view that one who comes to equity must come with clean hands, and equity frowns upon secrecy and underhand dealings.” Accordingly, the Applicant has not done so and is underserving of the orders he seeks.”

32. He who comes to equity must come with clean hands. First, the application for an injunction, being an application seeking equitable relief, must fail the moment the Court finds the Applicant’s hands are tainted. This is what was stated in the case; *Caliph Properties Limited -vs.- Barbel Sharma & Another* [2015] eKLR, where the Court stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff, in this case, betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. Plaintiff has not done that. Consequently, he has not done equity.”

33. The Applicant stated that the Respondent was intermeddling with the deceased’s estate by demolishing structures erected on the suit land. However, he failed to disclose that he erected those temporary structures, not the deceased. In any case, they were constructed on the portion of land that the estate’s beneficiaries had agreed to allocate Lydia before the succession process commences. He also should have disclosed that he had been allocated a portion of land in the suit land. The Applicant sought for an equitable remedy with unclean hands. He should have revealed to this court all relevant issues material to the consideration of this application to this court and is therefore undeserving of the remedy sought.

34. In as far as I am concerned, the demolition orders strictly extended to the temporary structures erected by the Applicant herein and not any of the structures that were left by the deceased and did not empower the Respondent to interfere with the suit land in any way that is adverse to the deceased’s estate. The demolition orders flowed from the appointment of the Respondent as the next friend, guardian, and manager of Lydia’s estate and the need to protect her place of residence. The executors of the deceased’s estate seem to have no objection. This application was brought by the person who erected the temporary structures interfering with Lydia’s occupation of the suit land.

35. Accordingly, I am of the considered view that the temporary injunction orders sought cannot be granted because the Applicant has not demonstrated any irreparable injury if a temporary injunction is not granted, and in any case, the Applicant is capable of being compensated by an award of damages for any loss suffered. Further, the Applicant did not establish that the balance of convenience is in his favour. Similarly, the Applicant has not established any factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant or any substantial loss that he will suffer if the orders sought are not granted.

36. Thus, the court makes the orders ;

i. In the premises, I dismiss the instant application for lack of merit with no orders as to costs.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 23RD DAY OF FEBRUARY, 2023.**

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**CHARLES KARIUKI**  
**JUDGE**

