



REPUBLIC OF KENYA



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**In re Estate of Asha Robi Buddery (Deceased) (Succession Cause
834 of 2015) [2023] KEHC 19388 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 834 OF 2015**

JN KAMAU, J

JUNE 29, 2023

PUBLIC TRUSTEE ADMINISTRATION CAUSE NO 174 OF 2015

**IN THE MATTER OF THE ESTATE OF ASHA ROBI BUDDERY
(DECEASED)**

AND

**AN APPLICATION UNDER RULES 44 AND 73 OF THE PROBATE &
ADMINISTRATION RULES. 1980 OF CAP 160**

**FOR REVOCATION OF THE CONFIRMATION OF GRANT OF
LETTERS OF ADMINISTRATION INTESTATE TO THE ESTATE OF
ASHA ROBI BUDDERY (DECEASED) MADE ON 28 TH OCTOBER 2019**

AND

**FOR THE GIVING OF ACCOUNT BY THE PUBLIC TRUSTEE UNDER
SECTION 83(E) OF THE LAW OF SUCCESSION ACT RULE 40(1) OF
THE PROBATE AND ADMINISTRATION RULES OF CAP 160**

RULING

Introduction

1. In their Summons For Account application dated September 23, 2022, the Applicants therein sought for orders that M/S Walker Kontos Advocates do immediately transfer to the Public Trustee, the proceeds of the sale of Kisumu/Municipality/Block 11/85(hereinafter referred to as the “subject property”) in the sum of Kshs 60,000,000/= and further that the Public Trustee be prohibited from making any deductions or payments from the proceeds of sale of the said subject property pending the Public Trustee’s accounting to the court and to all the beneficiaries on the completed sale thereof under Section 83(e) of Cap 160.



2. They also prayed that the Certificate of Confirmation of Grant issued on October 28, 2019 before sale of the sole asset of the estate pursuant to the orders of this court made on December 17, 2020 be revoked and be set aside pending issuance of a correct confirmed grant stipulating the correct value upon the Public Trustee giving account under Section 83(e) of Cap 160 and that the Public Trustee do within such time as this shall be directed produce to the court and to all the beneficiaries a full and accurate account under Section 83(e) of Cap 160 of the completed sale of the subject property before distribution of the proceeds thereof.
3. On September 30, 2022, the 1st Respondent filed a Preliminary Objection dated September 29, 2022 against the aforesaid Applicants' application. It averred that the Applicants lacked *locus standi* to institute and file the present application on behalf of the estate of John Hayden Buddery (Deceased) without Grant of Letters of Administration and that the Office of the Public Trustee, Kisumu was the administrator of his estate herein and was mandated by law to distribute his estate to his legal beneficiaries in accordance with the *Law of Succession* Cap 160 (Laws of Kenya).
4. The 1st Respondent's Written Submissions were dated October 14, 2022 and filed on October 12, 2022 (sic). The Applicants' Written Submissions were dated October 31, 2022 and filed on November 1, 2022 while those of the Beneficiaries were dated January 27, 2023 and filed on January 30, 2023. The 1st Respondent's Reply to the Beneficiaries' Submission to the Preliminary Objection was dated February 13, 2023 and filed on February 14, 2023. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

5. The 1st Respondent submitted that it was evident from the affidavit of George Odhiambo Buddery that he was one of the surviving children of the late John Hayden Martin Buddery and a grandchild of the deceased herein and therefore it was trite that he should procure a grant of letters of administration because without it, he had no capacity to institute the present application on behalf of his father's (deceased) estate. In this regard, it placed reliance on the case of *Ephantus Njuguna Mura vs Lucy Wanjiru & 5 Others* [2018]eKLR where it was held that *locus standi* was a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued rendered the suit incompetent.
6. It was emphatic that the Applicants' application was incompetent, misconceived and bad in law. It confirmed that the proceeds of the sale in the sum of Kshs 60,000,000/= (less the monies of land rates, land rent, advance to one beneficiary (Kshs 100,000/=) and advocate legal fees were deposited in the Administration account for administration and distribution to the beneficiaries. It pointed out that the law firm of M/S Kontos Advocates were only appointed for purposes of sale of the subject property. It termed the instant suit an abuse of the court process as the Applicants lacked the *locus standi* to institute and/or maintain it hence urged the court to dismiss the same.
7. On their part, the Applicants submitted that the 1st Respondent's Preliminary Objection was premised on a misapprehension of the law and was therefore flawed and incompetent.
8. They asserted that having been accepted by the court on October 7, 2019 after it verified their identities from their identity cards and birth certificates and recorded their presence as the children of their late father whose mother was the deceased herein and having been engaged in that capacity throughout the succession cause as evidenced between correspondences exchanged with the 1st Respondent, it was logical to conclude that the 1st Respondent's objection to their locus standi was informed by their calling to question his avoidance of his statutory obligations to the court and to the beneficiaries to give account of his management of the estate rather than any genuine objection to their participation in the proceedings.



9. They contended that the court's acceptance of the next generation children of a deceased beneficiary into succession cause proceedings without requiring them to hold letters of administration for the estate of their late parent was demonstrated in the cases of *Cleopa Amutala Namayi vs Judith Were* [2015]eKLR and *Ibrahim vs Hassan & Charles Kimenyi Macharia, Interested party* [2019]eKLR where the common thread was that a child of a deceased beneficiary had locus standi to approach the court in succession proceedings in which the child's late parent was a beneficiary.
10. They pointed out that aforesaid principle distinguished the said cases from the case relied upon by the 1st Respondent, *Ephantus Njuguna Mura vs Lucy Wanjiru & 5 Others* (Supra) in which the applicant whose *locus standi* was the subject of the objection was not the child of a deceased beneficiary of the estate concerned. They pointed out that the aforesaid case was therefore irrelevant to this matter.
11. They were categorical that the objection was to their participation in the proceedings and not to their inheritance of their late father's share of the deceased's estate. They were emphatic that such an objection was untenable and must fail as they had acquired an interest in their grandmother's estate by virtue of their late father's share. They therefore argued that in the premises their application was indeed properly before the court and they could not be muzzled but had to be heard and the Preliminary Objection therefore ought to be dismissed with costs.
12. They invoked Section 83 of Cap 160 Laws of Kenya (sic) and contended that the 1st Respondent was avoiding its statutory obligations to deliver transparency and accountability to the court and to the beneficiaries. They added that the strategy of avoidance was occurring against the backdrop of more protests at its conduct of the estate with the most recent taking the form of an application by a third party company, Lake Estate Agency Ltd, claiming to be an agent engaged by it and seeking from the deceased's estate payment of Kshs 2,784,000/=.
13. They asserted that the 1st Respondent could not purport to avoid his duty to produce a full and accurate account of all dealings with the estate as required by Section 83 of the Cap 160 (sic) and that it was bound by the national values and principles of governance set out in Article 10 of the *Constitution* and particular sub-article 2(c) stipulating good governance, integrity and transparency and by the values and principles of public service as set out in Article 232(1)(e) and (1)(f) of the *Constitution* stipulating accountability for administrative acts, transparency and provision to the public of timely, accurate information.
14. They contended that contrary to the above mentioned values and principles the 1st Respondent's conduct after the sale of the subject property had been opaque as it had been communicating with only a selected number of beneficiaries and it resisted to provide a full and accurate account to all the beneficiaries or to the court for which there were statutory consequences. They added that where its actions were revealed to have not been grounded on good faith, it would not enjoy the statutory protection afforded by Section 92 of Cap 160 and that where it was established that it had misapplied any asset of the estate or subjected it to loss or damage by Section 94 (sic), it would be liable to make good any loss or damage.
15. They were categorical that the 1st Respondent's refusal to produce an account exposed it to criminal liability under Section 95(b) of Cap 160 (sic) and that its casual mention in its submissions of the sum the property was sold for and a few expenses it had met was a reckless production of a partial and false inventory within the meaning of Section 95(c) of Cap 160 for which it apparently sought the court's sanction and endorsement which was itself insulting of the dignity and authority of this court.
16. They urged the court not to bar them from prosecuting their application and the 1st Respondent's Preliminary Objection be dismissed with costs



17. On their part, the beneficiaries submitted that the 1st Respondent's Preliminary Objection was baseless, brought in bad faith and intended to defeat justice. They added that the objection jettisoned the rights guaranteed under Article 35 of the [Constitution of Kenya 2010](#) and manifested fraud and lack of transparency on the part of the 1st Respondent.
18. They contended that *locus standi* was the right to appear or be heard in court or other proceedings. In this regard, they placed reliance on the case of [In Re Estate of Self Abdalla Mohammed \(Deceased\)](#) [2021] eKLR where it was held that the *locus standi* denotes the legal right or capacity of a person to institute an action in a court of law when his or her right was trampled upon by somebody or authority. They pointed out that the Applicants brought the application on behalf of their father (deceased) and as grandchildren of the deceased herein and that their interest emanated from the fact that their father (deceased) was a beneficiary to the estate of the deceased who was his mother. As children of the deceased herein, they affirmed their support on the part of the Applicants.
19. They further contended that when determining the issues of account, revocation and annulment of grants, the courts ought to be guided by Section 76 of the [Law of Succession Act](#) which they stated provided that a grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides either on an application by an interested party or of its own motion. They argued that the said Section did not say that the interested party must have letters of administration otherwise there would be nobody to challenge the administrators or executors leaving an estate for squanderers and embezzlers.
20. They asserted that having demonstrated that they are grandchildren of the deceased whose parent pre-deceased the deceased, the Applicants had locus standi to file their application as they had not renounced their rights to the estate and that the Respondents had not rebutted the fact that the Applicants were the deceased's grandchildren. They argued that it would be a travesty of justice for the court to drive away the Applicants from the seat of justice on a preliminary manner for failure to take out letters of administration for their father's estate. They added that the court was endowed with powers under Article 195 with overriding interest to deal with situations that would be tantamount to sacrifice of justice at the altar of procedural technicalities.
21. They were categorical that a grandchild was a direct heir to the estate of the grandparents where the parent predeceased the grandparent. In this respect, they placed reliance on the cases of [Re Estate of Wabome Njoki Wakagoto](#) [2013]eKLR, [Ibrahim vs Hassan & Charles Kimenyi Macharia, Interested Party](#) [2019]eKLR and [In Re Estate of Hellen Wangari Wathiai \(Deceased\)](#) [2021]eKLR where the common thread was that the only time grandchildren inherited first directly from their grandparents was when their own parents were dead. They added that the Applicants herein had been admitted as the grandchildren of the deceased by Cherere J on October 7, 2019.
22. They further submitted that the Public Trustee like any other personal representative was subject to jurisdiction and supervision of the court and that the court would not shy away from making any orders that may be expedient and necessary for the ends of justice and to prevent abuse of powers conferred to them under Sections 53 and 79 of the [Law of Succession Act](#) as was held in the case of [In Re Estate of Njue Kamunde \(Deceased\)](#) [2018] eKLR. They added that where there was an allegation of mismanagement or fraud and where the public trustee was merely raising a preliminary objection to sanitise their illegality, the court was under a duty to ensure that the culprits are made to account or removed through revocation of the grant as they were in a fiduciary position regarding the property of the deceased and that they were expected at all times to act to the best interest of the estate and that there should be no conflict of interest or act contrary to Section 82 and 83 of [Law of Succession Act](#).



23. They were emphatic that rendering of accounts was a statutory duty that any administrator owed to the beneficiaries of an estate and to the court and that an account should be rendered even without any order from the court or demand by the beneficiaries as was held in the case of *In Re Estate of David Kyuli Kaindi (Deceased)* [2016] eKLR. They asserted that the administrator herein being a public trustee was bound by Article 10 and 232 of the *Constitution of Kenya* on national values, principles of governance and public values and principles. They argued that the 1st Respondent had failed in its constitutional and statutory duties. They also relied on Article 35 of the *Constitution* and contended that the Applicants and the beneficiaries were entitled to the information that the 1st Respondent had.
24. It was their argument that the Public Trustee as established under the *Public Trustee Act* Chapter 168 (Laws of Kenya) enacted in 1925 was a corporation hence governed by the principles of corporate governance and more so for the fact that the Public Trustee was in a fiduciary position. They pointed out that the body was supposed to be an effective and responsible for governance separate and independent of management to promote accountability, efficiency and effectiveness, probity and integrity, responsibility and transparent and open leadership.
25. In that respect, they relied on the cases of *In Re Estate of Kipruto Arap Arusei (Deceased)* [2018]eKLR and *In Re Estate of Julius Mimano (Deceased)* [2019]eKLR where the common thread was that the personal representative would stand in a fiduciary position so far as the property was concerned and owed a duty to the beneficiaries to render an account to them of their handling of their property that they held in trust for them.
26. They asserted that under the *Law of Succession Act* Cap 160 (sic), the vesting of the estate of the deceased on the administration by virtue of Section 79 of the Act flows from the instrumentality of the grant of representation and that upon representation being made, the grant holder then became entitled to exercise the statutory powers conferred upon administrators by Section 82 and incurs the duties imposed on them by Section 83 of the Act (sic).
27. They were emphatic that the 1st Respondent’s Preliminary Objection was an abuse of the court process. In this regard, they relied on the case of *Satya Bhama Gandhi vs Director of Public Prosecutions & 3 Others* [2018] eKLR where the court held that it was trite law that the court had an inherent jurisdiction to protect itself from abuse or to see that its process was not abused. It was their contention that the Preliminary Objection was only geared towards delaying justice and as such meant to frustrate and annoy the original Applicants and urged the court to dismiss the same.
28. In its reply to the above submissions, the 1st Respondent reiterated its earlier submissions and added that the deceased, John Hayden Buddery, died after his mother, the deceased herein, had died and that when this cause began, he was alive. It pointed out therefore that as per the law of succession, once a beneficiary had died his or her beneficiaries had to substitute the names on the deceased beneficiary which the Applicants had not done as per the court record.
29. A preliminary objection has been defined by the courts in a number of cases, the celebrated one being *Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd* [1969] EA 696 where the court defined it as:

“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 the suit.... 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”.



30. It was trite law that pleadings filed in court by persons with no locus standi were void ab initio and the court did not have jurisdiction over such. As was rightfully held in the case of *Ibrahim vs Hassan & Charles Kimenyi Macharia, Interested Party* (Supra) that locus standi was the right to be heard in court and if he lacked, he could not be heard despite having a case worth listening to.
31. Notably, the Applicants brought their application dated September 23, 2022 before this court as children of the late John Hayden Martin Buddery whose mother was the deceased herein and as such they were her grandchildren. A reading of the proceedings showed that on October 7, 2019, Cherere J verified their identity cards and recorded their presence as the children of the aforesaid late beneficiary John Hayden Martin Buddery.
32. A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents as was enunciated in the case of *Re Estate of Wabome Njoki Wakagoto* (Supra) where it was held that the only time grandchildren inherited directly from their grandparents was when their own parents were as they stepped into the shoes of their parents and took the share that ought to have gone to their parents.
33. The position in law regarding locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno vs Ougo* [1986-1989] EALR 468 where it was that an administrator was not entitled to bring any action as administrator before he had taken out letters of administration and that if did, then the action was incompetent as of the date of inception.
34. Having said so, Section 76 of the [Law of Succession Act](#) provides:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion...”
35. It was evident from the above provision of the law that applications for revocation of grant were not limited to only beneficiaries but that any interested party could seek revocation and annulment of a grant of letters of administration intestate and that it was not therefore necessary that they first obtain a grant of letters of administration intestate to safeguard their interests or that of the estate of a deceased person.
36. The Applicants' interest emanated from the fact that their father was a beneficiary of the deceased's estate and were consequently dependants of his estate that he acquired from his mother, the deceased herein, by virtue of the provisions of Section 29 of the [Law of Succession Act](#).
37. It was not necessary for them to obtain a grant of letters of administration intestate to represent their father in the proceedings herein as they were not seeking to enter into his shoes as an administrator of the deceased's estate. Rather, they were claiming the deceased's estate in their capacity as grandchildren of her estate.
38. In any event, where a petitioner and/or administrator to an estate died during or after issuance of a grant of letters of administration intestate and confirmation thereof, any beneficiary could apply to substitute such a deceased petitioner and/or administrator without taking out a grant of letters of administration intestate. However, such a person could not institute proceedings in any court on behalf of a deceased person without first having obtained a grant of letters of administration, a position that the 1st Respondent correctly articulated but which clearly was distinguishable from the facts of this case.



39. It was therefore this court's view that the Applicants' application was properly before this court as they had the locus standi to file the same to fight for the interests of the estate of their late father with regard to their deceased grandmother's estate. This court was thus not persuaded that the Preliminary Objection was merited.

Disposition

40. For the foregoing reasons, the upshot of this court's decision was that the 1st Respondent's Preliminary Objection dated September 29, 2022 and filed on September 30, 2022 was not merited and the same be and is hereby dismissed. Costs will be in the cause.

41. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF JUNE 2023

J. KAMAU

JUDGE

