



Kanyi v Estate of Stephen Kinini Wang'onde & another (Miscellaneous Application E017 of 2022) [2023] KEHC 21196 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION E017 OF 2022**

FN MUCHEMI, J

JULY 27, 2023

**IN THE MATTER OF THE ESTATE OF JOSEPH KANYI
(DECEASED)**

BETWEEN

SUSAN KANYI APPLICANT

AND

ESTATE OF STEPHEN KININI WANG'ONDU 1ST RESPONDENT

REGISTRAR OF LANDS NYERI COUNTY 2ND RESPONDENT

RULING

Brief Facts

1. The 1st respondent raised a preliminary objection dated October 18, 2022 against the summons general dated July 18, 2022 on two grounds. Firstly, that the applicant has no *locus standi* to institute the Summons General dated July 18, 2022 for she is not the administrator of the Estate of Joseph Kanyi (Deceased)
2. Secondly, it was argued that the application is frivolous, a monumental procedural and substantive legal nullity, fatally and irredeemably incompetent, abuse of the court process, vexatious, mischievous and a proper candidate for dismissal and striking out with costs.
3. Parties disposed of the preliminary objection by way of written submissions.

The 1st Respondent's Submissions

4. The 1st respondent submits that the applicant has no locus standi to file the miscellaneous application dated July 18, 2022 as she is not the administrator of the estate of Joseph Kanyi. The applicant has stated that she is the daughter of the late Joseph Kanyi and further that her mother, Eva Kanyi, was



the sole administrator of the estate of the deceased. The 1st respondent further submits that attempts to have an amended certificate of confirmation of grant be amended once more did not succeed. As such, the 1st respondent argues that the miscellaneous application is bad in law and a non-starter and ought to be struck out. In support of its submissions, the 1st respondent relies on the cases of Mumo Matemtu vs Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR and Edema & 2 Others vs Edema & 5 Others [2022] eKLR.

The Applicant's Submissions

5. The applicant submits that she is a daughter of the late Joseph Kanyi and a beneficiary of his estate within the meaning of Section 29 of the Law of Succession Act. She relied on the case of Ibrahim vs Hassan & Charles Kimenyi Macharia [2009] eKLR and argued that her application is properly before this court.
6. The applicant further submits that the administrator, Eva Kanyi, had no capacity to own or transfer land as she was not a Kenyan National. Thus, her purported transfer to the 1st respondent was without a legitimate interest in the property and the law dictates that in such a scenario the estate must revert to the beneficiaries.
7. The applicant argues that where the assets of an estate have been misapplied by personal representatives and those assets are traceable into the hands of a particular person, the law allows the beneficiaries to follow the said assets into the hands of those holding such property. The applicant submits that she has invoked the jurisdiction of the court as a beneficiary seeking to protect property that was irregularly transferred by the administrator of her father's estate.
8. In response to the applicant's submissions, the 1st respondent filed rebuttal submissions and argued that the applicant's legal interest as a beneficiary does not confer anyone with power to institute, commence, take out and or defend proceedings over matters alleged to be related to the estate of a deceased person without being armed with the requisite grant issued by a court of law. The 1st respondent submits that the applicant could have secured a grant of letters of administration ad litem, but she has not furnished the court with the same.
9. The 1st respondent submits that the applicant's attempts and proposition to seek refuge under Section 29 of the Law of Succession Act cannot breathe life into the dead miscellaneous application. The said section can only be invoked in the context of succession proceedings and it is not to be used as a carte blanche for commencing proceedings outside the scope of a succession cause without the requisite grant.
10. The 1st respondent further submits that the authority cited by the applicant, Ibrahim vs Hassan & Charles Kimenyi Macharia [2019] eKLR does not lend credence to the applicant's case but only supports their submissions that Section 29 of the Law of Succession Act applies within succession proceedings.
11. Moreover, the 1st respondent submits that one cannot challenge a title deed through a miscellaneous application and without the leave of the court. As such, the 1st respondent argues that the commencement of these proceedings in the manner the applicant has approached the court is an outright misapprehension of the law and the anomaly cannot be cured by obtaining the requisite grant at the current stage.
12. The 1st respondent cites the case of Trouisik Union International & Another vs Mrs Jane Mbeyu & Another CA Civil Appeal No 145 of 1990 (unreported) cited with approval in Judith Gathoni Willie



vs George Kihara Muchuki & 2 Others [2010] eKLR and submits that where a party seeks to file a suit on behalf of the estate of a deceased person, they must obtain letters of administration.

The Law

Whether the preliminary objection is sustainable.

13. The case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

"....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."

14. Sir Charles Newbold P stated:-

"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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop."

15. Similarly the Supreme Court in the case of *Hassan Ali Jobo & Another vs Suleiman Said Shabal & 2 Others* SCK Petition No 10 of 2013 [2014] eKLR held that:-

"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."

16. Further in the case of *Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others*, [2014] eKLR the court held that:-

"Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

17. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

18. The 1st respondent contends that the applicant has no locus standi commencing the proceedings vide her miscellaneous application as she does not possess grant of letters of administration. Locus standi has been defined in the *Blacks Law Dictionary* 10th Edition at paragraph 1084 as follows:-

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

19. The position in law as regards locus standi in succession matters is well settled. In the Court of Appeal decision in *Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama* (2014) eKLR the court stated as follows:-

"But in our view the position in law as regards locus standi in succession matters is well settled. A litigant clothed with locus standi upon obtaining limited grant or a full grant of



letters of administration in cases of intestate succession. In *Otieno vs Ougo* [1986-1989] EALR 468, this court differently constituted rendered itself thus;

"...an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

20. It is not in dispute that the applicant is a daughter and beneficiary of the estate of Joseph Kanyi (Deceased). It is also not in dispute that the administrator of the said estate is the applicant's mother Eva Kanyi. The applicant herein has argued that she has filed the current proceedings in her capacity as a beneficiary seeking to preserve her father's estate. The court record shows that the letters of administration intestate was issued to Eva Kanyi on August 5, 2002 and confirmed on July 12, 2004. The amended certificate of confirmation of grant shows that the petitioner was the sole administrator and beneficiary of the estate of the Joseph Kanyi. However, the said properties could not be registered in her name for she was not a citizen of the Republic of Kenya she then filed an application to have the certificate of confirmation of grant amended and issued to her son George Kariuki Kanyi. In the said application, the administrator stated that the applicant was a daughter to the deceased. This fact was supported by the Chief's letter dated May 11, 2000. As such, it is not only an administrator who can bring an application in a Succession Cause. An aggrieved beneficiary cannot be shut out of the doors of justice. The facts of this case is distinguishable from that of *Rajesh Prajinvan* relied on by the respondent because the applicant is not bring new proceedings or a new cause. The application herein is purposed to pursue her interest as a beneficiary. The respondent is the current administrator of the estate having taken over from his mother.

Conclusion

21. It is my considered view that the Preliminary objection is not based on a point of law and is in my view misplaced.
22. Consequently, the Preliminary objection is hereby dismissed with no order as to costs.
23. The application dated July 18, 2022 to be fixed for hearing.
24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JULY, 2023.

F. MUCHEMI

JUDGE

