



**Lokere & another (Suing as Executors of the Will of Lokoriongor Lokore) v Tong'okwang & 2 others (Environment & Land Case 37 of 2022) [2023] KEELC 16904 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16904 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 37 OF 2022**

**FO NYAGAKA, J  
APRIL 20, 2023**

**BETWEEN**

**BENSON LOSIALIMA LOKERE ..... 1<sup>ST</sup> PLAINTIFF  
JACKSON MNANG'AT KORII ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS EXECUTORS OF THE WILL OF LOKORIONGOR LOKORE**

**AND**

**JULIUS TONG'OKWANG ..... 1<sup>ST</sup> DEFENDANT  
CHINA NATION AERO-TECHONLOGY ..... 2<sup>ND</sup> DEFENDANT  
INTERNATIONAL ENGINEERING CORPORATION ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Plaint dated November 23, 2022 the Plaintiffs brought this suit on December 13, 2022 against the Defendants, claiming that the latter had trespassed onto their late father's land which constituted of a share in the Kanyarkwat Group Ranch which is situate in West Pokot. They identified the share as constituting number M/S 547 owned under his membership number 187. They claimed that the 1<sup>st</sup> Plaintiff was the executors of the will of their late father, one Lokoringorio Lokere. They prayed for general damages against the defendants and an order of injunction against them.
2. The 1<sup>st</sup> Defendant entered appearance and filed a Defence dated December 19, 2022 on the same date. After denying the allegations in the Plaint, at paragraph 3 of the pleadings he averred that the Plaintiffs had no locus standi to bring the suit in that they had not obtained probate over the purported will of the late Lokoriongor Lokere hence the suit was incompetent and for striking out. He averred that he would be raising a preliminary objection to that effect.



3. Indeed, on the December 20, 2022 the 1<sup>st</sup> Defendant filed a Preliminary Objection dated December 19, 2022. Although it was indicated that it had two grounds thereto, the two grounds revolved on one issue, that the Plaintiffs had not obtained a grant of probate as per the law of succession hence the suit they instituted was incompetent and should be struck out.
4. The 2<sup>nd</sup> Defendant too entered appearance on January 23, 2023. After that it opted to support the Preliminary Objection raised by the 1<sup>st</sup> Defendant.
5. The Court directed parties to canvass the Preliminary Objection by way of written submissions. The 1<sup>st</sup> Defendant submitted in support of the objection as summarized herein. He submitted that he sought the striking out of the suit on that ground that the Plaintiffs had not obtained a grant of probate over the purported will of Lokoriongor Lokere. He repeated that at paragraph 1 of the Plaintiffs pleaded that they sued the Defendants as the executors of the last will of the deceased which they alleged was made on May 4, 2009 (as shown in the written statement).
6. He argued that the Plaintiffs had not filed a succession cause founded on the will. He submitted that if the Plaintiff's ever filed the succession cause it would have been gazetted. He stated further that the mere naming of a person as an executor of a will does not afford a locus standi to such named person to sue without first filing succession proceedings for the grant of probate. They relied on the cases of Kitale ELC No 100 of 2015, *Musa Tapem v Samson Ariworeng*. He submitted that the Court discussed in the matter the aspect of locus standi which is based on letters of administration or grant of probate. He also relied on Kitale ELC No 22 (E018) of 2021, *Caleb Imbuye v Nangabo Cooperative Society*. In regard to this matter they stated that a preliminary objection was raised regarding filing of suit without first obtaining letters of administration and struck out the suit for want of that status. He annexed to the submissions both authorities.
7. The 2<sup>nd</sup> Defendant too submitted in support of the preliminary objection. It started by first summarizing the case for the Plaintiff and the grounds of the preliminary objection. Then it stated two issues for determination on the Preliminary Objection. The first issue was whether the 1<sup>st</sup> Defendant's objection was on a point of law. It cited the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA wherein a preliminary point of law was defined.
8. About the issue, it submitted that the preliminary objection was on a pure point of law in that the Plaintiffs filed the suit relying on a purported Will of their deceased father, one Lokoriongor Lokere, without first seeking to obtain a grant of probate over the said will. They argued that the action was contrary to Sections 54 and 67 of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya and paragraph 14 of the 5<sup>th</sup> Schedule to the Act. It relied on the authority of *Hawa Shanko v Mohammed Uta Shanko* (2018) eKLR and submitted that in the matter the Court held that without a grant of letters of administration, no one can deal with the property of a deceased person. It then submitted that the Plaintiffs ought to have first filed an application to be given the grant of probate in order to have locus to bring the suit.
9. Regarding whether the Plaintiffs had locus standi to institute the suit, they submitted that the Blacks Law Dictionary defines locus as the right to bring an action or to be heard in a given forum. It then relied on the cases of *Julian Adogo Onguga v Francis Kiberenge Aboro*, Civil Appeal No 119/2015. They submitted that in the persuasive authority the Court was emphatic that locus standi was cardinal in any matter. It also relied on the case of *MaFoy v United Africa Co. Lts* (1961) 23 All ER 1169 at 1172 where Lord Denning L.J. stated as follows, "if an act is void it is in law a nullity. It is not only bad but incurably bad. There is no need for an order... the Court to investigate by way of evidence."



10. It then concluded that the Plaintiffs did not obtain a grant of probate in the matter and therefore their suit was incurably defective since they lacked locus standi to institute it. It stated that the point they raised was not a mere technicality but it went to the root of the suit. Without it the suit could not be sustained. It prayed for the striking out of the suit.
11. On their part, the Plaintiffs submitted that the Preliminary objection was not merited. They began their submissions by first summarizing claim. They also stated that they had filed an application for injunction but before it could be determined the 1<sup>st</sup> Defendant raised a preliminary objection on the entire suit. They also summed the two grounds in support of the preliminary objection. They too relied on the seminal case of Mukisa Biscuit case (supra). But they cited a paragraph therein as opined by Sir Charles Newbold JA which they were of their view that it supported their contention that the preliminary objection was unnecessary. The paragraph is to the effect that “The improper raising of points by way of preliminary objections does nothing but unnecessarily (add) the costs and on occasion, confirms the issues. The improper practice must stop.”
12. They then quoted and relied on Section 80 of the *Law of Succession Act*. Their view was that the provision was clear that an administrator of the estate of a person who had died intestate derives power to sue on behalf of the estate by virtue of a grant of letters of administration. Any suit short of that is incompetent. But in the instant case, the Plaintiffs were executors of a Will of the deceased Lokoriongor Lokere and not administrators. Thus, under Section 80 of the *Act*, they derived their authority from the Will of the testator. Further, that by virtue of the Will, an executor has the capacity to and can sue on behalf of the estate of the testator before obtaining a grand of probate. They relied on the case of Nicholas William Bentley-Buckle & another (Suing in their capacity as executors of the estate of Anthony *William Bentley-Buckle (deceased) v Custody Registrars Services Limited* [2016] eKLR which they submitted the point that an executor of the will can bring suit before the filing of succession proceedings to obtain a grant of probate.
13. Further, they relied on the case of *Osman Tahir Sheikh Said & another (suing as executors of the will of Tahir Sheikh Said Ahmed) v Nomad Energy Limited; Sabir Tahir Sheikh Said & 5 others (Interested Parties)* [2019] eKLR. In the matter it was held that the executors of the Will of the deceased were at liberty to file proceedings to protect the property of the deceased even before grant of probate.” In it the Court repeated the contrast between Sections 80(1) and 80(2) of the *Law of Succession Act* where it was held that an executor of the will derived his title from the Will itself and could do the actions appertaining his office, including filing of suit before the grant of probate. They then distinguished the two authorities relied on by the 1<sup>st</sup> Defendant and summed up the respective suits without letters of administration. They submitted that the Preliminary Objection was without merit and should be dismissed with costs.

### **Issues, Analysis and Determination**

14. I have considered the preliminary objection herein. I have also given due and deep thought about the pleadings herein and the submissions of the parties. The only two issues before me for determination are whether the Plaintiffs have locus standi to bring this suit, and who to bear the costs of the application.
15. Regarding the first issue, the Plaintiffs brought this suit, claiming that they were they did so as the executors of the Last Will of Lokoriongor Lokere (deceased) whose date of death they did not plead. But they pleaded that he left a Will naming them as executors of the same. They alleged that when the defendants commenced the actions complained of they (Plaintiffs) then were compelled to move the Court as the position is. By then they had not obtained probate.



16. The Defendants having entered appearance and Defence seized the opportunity to bring the instant Preliminary Objection. They contended that the Plaintiffs lacked the capacity in their present status to bring the suit. Theirs was the view that the Plaintiffs ought to have moved the Court with the jurisdiction to deal with succession matters, been granted probate therein and then brought the instant suit. To the defendants since the Plaintiffs did not do so the suit was incompetent and a candidate for dismissal. This turns me to the crux of the argument in the Preliminary Objection.
17. The requirement of one to have locus standi to bring a suit, claim or matter, where the law requires it to be so cannot be gainsaid. I do not have to belabor the meaning of the term, suffice it to say that it is the position in law that gives one the pillar of raising the matter or issue before a Court or tribunal. Thus, I now turn to the main issue before me. It is a Preliminary Objection on a point of law that the suit cannot stand.
18. A Preliminary Objection was defined in the seminal case of *Mukisa Biscuit Manufacturing Co. Ltd - v- West End Distributors Ltd* (1969) EA 696. The Court stated as follows:

“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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
19. In a Preliminary Objection, only points of law which can be clearly discernible from the pleading/s are raised due to necessary implication. It should never depend on reliance on facts for that would mean it is a vague argument and it calls on determining evidence. This is dangerous to decide on at that stage because the individual who shall have presented the evidence to be relied on to determine it may or may not be credit-worthy. Again, the evidence itself may be true or false. In both instances, it shall not have been tested, especially by way of cross-examination, if the Court were to use it to bring to a determination of the preliminary objection. In any event, the said evidence shall not have been made part of the proceedings of the Court in accordance to the rules of evidence regarding receiving of evidence. Therefore, by calling on the Court to consider a preliminary objection based on putting to its aid the of evidence means that the issue raised is vague and requires clarification.
20. Thus, in *Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya* [2017] eKLR the Court of Appeal has held that:

“We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue .... We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned.”
21. Also, in *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, the same Court stated as follows:

“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them.



We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

22. Additionally, in *Susan Wairimu Ndiangui v Pauline W. Thuo & Another* [2005] eKLR Musinga J. as he then was held that

“a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

23. With the above analysis and position of the law in terms of case law in mind, this Court has the following to find. The *Law of Succession*, Chapter 160 of the Laws of Kenya deals with issues of succession throughout Kenya, save the exceptions it provides for. Where it applies, the Act contemplates two scenarios of succession where death has occurred. The first one is where the deceased leaves a Will while the second is where he dies intestate, that is to say, without a will. For the purpose of the instant Preliminary Objection, this Court limits its analysis to the former instance. This is because the allegations herein are that the late Lokoriongor Lokere died leaving a Last Will of Testament. As to the validity or otherwise of the Will this Court has no jurisdiction to determine it. Thus, it takes it that there is an existing Will made to the Plaintiffs.
24. The issue then is whether, armed with a Will the Plaintiffs had the requisite capacity to institute suit. That being the issue, this Court finds that the authorities relied by the Defendants to support their arguments, that is to say, the case of Kitale ELC No 100 of 2015, *Musa Tapem v Samson Ariworeng* and Kitale ELC No 22 (E018) of 2021, *Caleb Imbuye v Nangabo Cooperative Society*, and of *Hawa Shanko v Mohammed Uta Shanko* (2018) eKLR are distinguishable on the issue. This is because they all dealt with situations wherein the deceased persons did not leave Wills.
25. Regarding Sections 54 and 67 of the *Law of Succession Act*, and paragraph 14 of the 5<sup>th</sup> Schedule to the Act, which the Plaintiffs relied on, the simple and quick interpretation thereto in relation to the issue before the Court is that Section 54 deals with the power of the Court to limit grants of representation. In that regard, since it is common ground that the Plaintiffs herein had not moved the succession Court, the provision is inapplicable. Of Section 67, the import thereof is that it provides for the publication of a notice of an application of grant which should be made 30 days before the application is made, except in cases of an application being made limited only for the purpose of preservation or collection of the assets of the deceased. To the extent that the Defendants argue that the Plaintiffs ought to have first made the application limited for that purpose the Section is relevant. But above that, it is not. Regarding Paragraph 14 of the 5<sup>th</sup> Schedule, it provides for situations where a nominee, being only a beneficiary of an estate of a deceased person, may be given letters of representation limited to a certain property of the deceased where the deceased left no general representative or there existed one or more but they are unwilling to act. That provision is inapplicable in this case.



26. Having made the findings above, the only relevant provision left to analyse is Section 80 of the Act, which was cited by the Plaintiffs. It provides as follows:

“(1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.”

27. The Section relates to where persons entitled to take out letters of administration or probate move the relevant Court and are granted the same respectively. Thus, the provision takes care of the two situations I alluded to in paragraph 23 above. Subsection (1) basically validates the Will, and hence the actions of the executors of the same, from the date the Will was made. Subsection (2) gives the validity of the actions done regarding the estate of a person who died intestate, from the date the grant of letters of representation is given. To that extent, I find the authorities relied on by the Plaintiffs relevant and applicable to the instant case. These are the case of *Nicholas William Bentley-Buckle & another (Suing in their capacity as executors of the estate of Anthony William Bentley-Buckle (deceased) v Custody Registrars Services Limited [2016] eKLR and Osman Tabir Sheikh Said & another (suing as executors of the will of Tabir Sheikh Said Ahmed) v Nomad Energy Limited; Sabir Tabir Sheikh Said & 5 others (Interested Parties) [2019] ekLR.*

28. I will quote one particular holding from the case of *Nicholas William Bentley* (supra). The learned Judge held as follows:

“...the case of *Kothari v Qureshi* 1967 EA 564 wherein at P. 566 it is stated:-

“Where a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of the death of the testator, unless the executor renounces the executorship, and if he had intermeddled in the estate he cannot renounce executorship.”

29. From the two authorities and my interpretation of the Section 80 above, I find that it was not obligatory for the Plaintiffs to first obtain a grant of probate before they bring this suit. Thus, the Preliminary Objection by the Defendants is baseless and unmeritorious. It is hereby dismissed with costs to the Plaintiffs.

30. This suit shall be mentioned virtually on May 8, 2022 for further directions. The interim orders of injunction granted on December 20, 2022 remain in force until then.

31. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 20<sup>TH</sup> DAY OF APRIL, 2023**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

