



**Nderi v Wazir Auto Limited (Miscellaneous Succession Cause  
E030 of 2023) [2023] KEHC 23239 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23239 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS SUCCESSION CAUSE E030 OF 2023**

**G MUTAI, J**

**SEPTEMBER 27, 2023**

**IN THE MATTER OF SUCCESSION CAUSE NO. E033 OF 2023 (IN THE  
MATTER OF THE ESTATE OF HOSEAH KAREITHI NDERI (DECEASED))**

**AND**

**IN THE MATTER OF SECTIONS 47 AND 86 OF THE LAW OF SUCCESSION ACT**

**AND**

**IN THE MATTER OF RULE 49 OF THE PROBATE AND ADMINISTRATION RULES**

**AND**

**IN THE MATTER OF PROTECTION /PRESERVATION OF THE  
DECEASED'S ESTATE FROM WASTING AWAY AND/OR LOSS**

**AND**

**IN THE MATTER OF IMMINENT REPOSSESSION OF MOTOR VEHICLE**

**REGISTRATION NUMBER KDL 721M RANGE  
ROVER VOGUE FROM THE DECEASED'S ESTATE**

**BETWEEN**

**CHARITY WAWIRA NDERI ..... APPLICANT**

**AND**

**WAZIR AUTO LIMITED ..... RESPONDENT**

**RULING**

1. The applicant filed the Chamber Summons dated 18<sup>th</sup> July 2023 vide which she seeks the following orders: -



- a. Spent;
  - b. That pending hearing and determination of this application interpartes, this honourable court be pleased issue an order of injunction restraining the respondent either by itself, auctioneers, agents or any other person acting under their instructions and directions, from repossessing, taking away, selling, either by way of public auction or private treaty, or in any way dispossessing the deceased's estate of motor vehicle registration number KDL 721M;
  - c. That pending hearing and determination of Mombasa High Court Succession Cause No.E033 of 2023; In the Matter of the Estate of Hoseah Kareithi Nderi (Deceased), this honourable court be pleased issue an order of injunction restraining the respondent either by itself, auctioneers, agents or any other person acting under their instructions and directions, from repossessing, taking away, selling either by way of public auction or private treaty, or in any way dispossessing the deceased's estate of motor vehicle registration number KDL 721M;
  - d. That an order do issue that the respondent's outstanding sum of Kes.3,00,000/- being a liability against the deceased's estate, shall be liquidated from the deceased's estate upon confirmation of grant to the executors; and
  - e. That costs of this application be provided for.
2. The application is premised on the grounds stated in the body of the application and also on the supporting affidavit sworn on 18<sup>th</sup> July 2023. The applicant stated that she is one of the beneficiaries, and a named executor of the last will of Late Hoseah Kareithi Nderi (deceased). She stated that she is also the petitioner in the Succession Cause No. E033 of 2023(In the Matter of the Estate of Hoseah Kareithi Nderi (Deceased)). She deposed that prior to the deceased's demise he had purchased motor vehicle registration number KDL 721M Range Rover Vogue from the respondent at Kes. 12,500,000/- out of which he paid sum of Kes. 9,500,000/- leaving a balance of Kes. 3,000,000/-. The said motor vehicle has been listed as part of the deceased's estate and the debt arising therefrom acknowledged as part of the liabilities attaching against the deceased's estate. Despite giving reassurance on the payment of the debt the respondent has been adamant that it will repossess the said motor vehicle yet the estate cannot satisfy any liabilities until the grant is confirmed.
  3. The applicant further stated that the respondent vide a letter dated 3<sup>rd</sup> July 2023 demanded for payment of the outstanding sum within seven days failure to which the respondent would repossess the motor vehicle. That for the respondent to repossess the motor vehicle without an option of refund of any part of the sum already paid not only prejudices the estate but also amounts to unjust enrichment. That the respondent instructed auctioneers to trace the motor vehicle and it may be repossessed at any time rendering this application an academic exercise.
  4. She stated that unless the orders sought are granted the estate of the deceased will suffer irreparable loss. She urged that the respondent would suffer no prejudice as the law protects creditors of an estate.
  5. In response the respondent filed a notice of preliminary objection, grounds of opposition and a replying affidavit.
  6. The notice of preliminary objection is premised on the grounds that the applicant has no authority and locus standi to institute and prosecute this application against third parties without obtaining grant of letters of administration ad litem. The Respondent further argued that the deponent of the supporting affidavit is a stranger to the application, unknown to the court and the parties herein and has no proof of authorization from the estate and or beneficiaries to even swear the affidavit in the first place. It is urged that the application is an abuse of the court process, incompetent and fundamental



flawed and that the application is fatally defective and is unsustainable and must be struck out with costs to the respondent.

7. The replying affidavit was sworn by one Zia Ur Rehman, the director of the respondent. He reiterated the grounds in the grounds of opposition and stated that the Kes. 3,000,000/- referred to in paragraphs 3 and 4 of the supporting affidavit was to be paid in one instalment on or before 27<sup>th</sup> April 2023, in default a 30% penalty would apply per month. He stated that ownership of the motor vehicle was to remain with the seller the respondent herein until the full payment of the purchase price. He deposed that the applicant has without any justifiable cause breached the terms and conditions of the agreement by failing to pay the agreed instalments as and when it fell due.
8. In response to paragraph 5, 6 and 7 of the supporting affidavit he stated that it was the respondent had the right to repossess the suit motor vehicle.
9. He further stated that this court should not be used to sanitise breach of contract. He urged the court to dismiss the application with costs.
10. Have considered the application, the responses therein and the issues that arise for determination are;
  - a. Whether the applicant has locus standi;
  - b. Whether an order for injunction should issue; and
  - c. Whether the outstanding sum of Kes. 3,000,000/- should be liquidated from the deceased estate.
11. On whether the applicant has locus standi, the court in the case of *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR stated: -

“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. 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. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.

The position in law as regards 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 v Ougo* [1986-1989] EALR468, the Court 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.”

12. In this case the applicant has stated that she is the executor of the last will of the late Hoseah Kareithi Nderi-Deceased and the petitioner in the Succession Cause No. E033 of 2023 (in the matter of the Estate of Hoseah Kareithi Nderi-Deceased). However, she has not produced a copy of the alleged will neither has she produced any evidence of a grant of probate or grant ad litem. Accordingly, it's my view that the applicant has no locus standi and thus cannot bring the application in the absence of the same.



I am guided by the case of *Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 others* [2021] eKLR where the court stated: -

“Exercising extreme caution as guided by the wisdom of the Justice Madan (as he then was) in D T Dobie case, I find that this matter cannot be saved. It is plain white – the Plaintiff has no locus and has not exhibited any cause of action. He has no mandate to bring the suit in the absence of letters of grant of administration. Justice will be served to this case if the parties are left to pursue the succession of the estate and as any intermediate preservative orders can still be obtained from the said probate Court.”

13. The upshot of the above is that I uphold the Preliminary Objection dated 7<sup>th</sup> August 2023. Consequently, the Chamber Summons filed herein is hereby dismissed with no order as to costs. Filed closed.

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023 VIA MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

No appearance for the Applicant;

No appearance for the Respondent; and

Mr. Arthur Ranyondo – Court Assistant

