In re Estate of Stephen Macharia Murai (Deceased) (Succession Cause E008 of 2023) [2023] KEHC 27038 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27038 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

SUCCESSION CAUSE E008 OF 2023

CW GITHUA, J

DECEMBER 19, 2023

IN THE MATTER OF THE ESTATE OF STEPHEN MACHARIA MURAI (DECEASED)

BETWEEN

THOMAS KIMANGU MURAI ..... APPELLANT

AND

SARAH WANJIRU MWANGI ..... RESPONDENT

(An Appeal from the Judgement of Hon. S. Mwangi (S.R.M) delivered on 31st May,2023 in Murang'a Succession Cause No E139 of 2022)

RULING

1. This ruling is in respect of a preliminary objection filed by the respondent dated 29th of June,2023 but before addressing the issues raised in the objection, it is important to give a brief outline of the background against which it was filed.

2. By a memorandum of appeal dated 9th June 2023, the appellant, Thomas Kimangu Murai challenged the Judgement dated 31st May 2023 delivered in Murang'a Succession Cause No. E139 of 2022 by Hon. S. Mwangi (SRM) in which the learned trial magistrate upheld the validity of a will executed by the late Stephen Macharia Murai who was the appellant's brother. It is apparent that in the said will, the Respondent was appointed as the executor of the deceased's Estate and the sole beneficiary of assets comprising the Estate.

3. Contemporaneous with the filing of the appeal, the appellant filed a summons under a certificate of urgency also dated 9th of June,2023 seeking inter alia, stay of execution of orders issued by the trial court in the impugned judgement; stay of proceedings in the cause subject of the appeal and orders of inhibition against titles of the two parcels of land comprising the deceased's Estate.

4. In response to the appeal and the summons, the respondent, Sarah Wanjiru Mwangi filed ground of opposition dated 3rd July,2023 contesting the aforesaid summons and a notice of preliminary objection (the objection) challenging competence of the appeal on grounds that;

    i. The appellant lacked locus standi to institute the appeal since he was not a party to the succession proceedings which gave rise to the impugned judgement namely, Murang'a Succession Cause No. E139 of 2022 (hereinafter the Succession Cause).

    ii. That the trial court in the Succession cause had disqualified the appellant from substituting the deceased objectors in a ruling dated 11th October,2022 which had not been appealed against.

    iii. That the appeal and the application were fatally defective in substance and in form.

    iv. That the appeal and the application are otherwise frivolous, vexatious and an abuse of the court process.

    v. That the appeal is bad in law, lacks merit and should be struck out with costs to the Respondent.

5. In opposition to the preliminary objection, the appellant filed a replying affidavit sworn by his learned counsel, Ms. Elizabeth Gatuhi on 11th July 2023 in which she mainly deponed that the grounds anchoring the preliminary objection did not constitute pure points of law as the court needed to establish from facts in the succession cause whether the appellant was a party thereto; that the appellant was a party by virtue of Rule 16 (1) of the *Probate and Administration Rules* (P&A Rules) and was recognised as an objector by the trial court and the respondent in her written submissions. It was the appellant's contention that the appeal and application were properly before this court and the objection ought to be dismissed with costs to pave way for hearing of the appeal and the application on their merits.

6. Although the court record shows that the court directed the parties to argue the preliminary objection orally, the parties chose to file skeleton written submissions which they highlighted orally before me on 4th October 2023.

7. In their written and oral submissions, Ms. Gatuhi who appeared for the appellant instructed by Ms. Ndungu, Njoroge & Kwach Advocates and Mr. Mwangi appearing for the respondent instructed by Ms. Triple N.W & Co Advocates LLP reiterated and expounded on the positions taken by their respective clients in support and in opposition to the objection.

8. Having considered the objection and the rival submissions made on behalf of the parties as well as the authorities cited and having also read the record of the trial court, I find that the only issue that arises for my determination is whether the objection is merited.

9. The starting point is a consideration of what in law constitutes a preliminary objection. Sir. Charles Newbold in the celebrated case of *Mukisa Biscuit Company v West End Distributors ltd* [1969] EA 696 defined a preliminary objection 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 has to be ascertained or if what is sought is the exercise of judicial discretion."

10. The Supreme Court in *Aviation & Allied Workers Unions Kenya v Kenya Airways Limited & 3 others* [2015] eKLR also weighed in on the definition of a preliminary objection after citing with approval the test laid down in the Mukisa Biscuit case. The court concluded that;

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

11. Having set out the definition of a preliminary objection, the question that now begs an answer is whether the grounds raised in the respondents objection met the legal threshold of a Preliminary Objection.

After perusing the notice of Preliminary Objection as filed, I agree with the appellant's submissions that Grounds 2,3,4 and 5 do not qualify to be Preliminary points of law within the meaning enumerated above. Ground 2 appears to be a further exposition of ground 1 in which the respondent challenged the legal capacity or locus standi of the applicant to lodge the instant appeal.

12. Grounds 3,4 and 5 are drafted in vague and general terms. They do not disclose which law the appeal and the application had offended in order to make them bad in law or fatally defective. The claim that the appeal is frivolous, vexatious and an abuse of the court process is one that cannot be canvassed and determined in the context of a preliminary objection. Given the limited scope of a preliminary objection, such claims ought to be raised during hearing of the appeal so that the court after hearing both sides and scrutinising the record of appeal can determine whether or not the appeal is merited or is frivolous, vexatious and an abuse of the court process.

The respondent appears to have appreciated this position as she appears to have abandoned grounds 3,4 & 5 when prosecuting the objection as she made no reference to them in her submissions.

13. Flowing from the foregoing, I have come to the conclusion that the only objection that qualifies to be a Preliminary point of law is the claim made in ground I that the appellant lacks *locus standi* or legal capacity to file the instant appeal since it's not only capable of disposing of the appeal summarily but it also questions the jurisdiction of the court to entertain the appeal.

14. I am fortified in this finding by the Supreme Court's decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR in which the court rendered itself thus;

> " The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In *Mary Wambui Munene v Peter Gichuki Kingara and Six Others*, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a "pure question of law," and should be resolved on a priority basis."

15. In her submissions, the respondent asserted that the appellant lacked locus standi to file the appeal since he was not a party to the Succession case subject of the appeal given that his application to substitute the objectors who had filed objections to the respondent's petition for grant of probate and had died in the course of the proceedings was dismissed by the trial court in the ruling delivered on 11th October,2022; that the said ruling still stood as the appellant did not appeal against it nor did he apply for review. Reliance was placed on the Court of Appeal authority in *Attorney General v George Bala* Nairobi Civil Appeal No. 223 of 2017[2023] KECA 117(KLR) which I will address later in this ruling.

16. Further, the respondent argued that besides not being a party to the succession cause, the appellant did not qualify to be an aggrieved party as the estate in question belonged to his brother and his name did not feature in the titles that were cancelled subsequent to the court's judgement.

She invited the court to dismiss both the appeal and the application with costs.

17. The appellant in his submissions though admitting that ground 1 in the respondent's objection amounted to a preliminary objection maintained his position that the same lacked merit since the court had to dwelve into the facts of the succession cause to establish whether or not the appellant had locus standi to institute the appeal and the application and re-iterated all the other averments made in the replying affidavit filed on his behalf. In support of his submissions, the appellant relied on the persuasive authorities of *Daykio Plantations Ltd v National Bank of Kenya Ltd & 2 others* [2019] eKLR and *Margaret Njeri Gitau v Julius Mburu Gitau & 2 others* [2022] eKLR.

18. On my part, I take the following view of the matter:

First, i wish to state at the outset that *locus standi* is a legal term used to refer to a person's' right to appear or to be heard in court or other legal proceedings. That right is separate and independent of the strength or otherwise of the case desired to be presented before the court.

19. The Court of Appeal in *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR when discussing the issue of *locus standi* in succession causes stated as follows:

> " .....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."

It is the grant of full or limited letters of administration in intestate succession or grant of probate in testate succession that gives a litigant locus standi to deal with all affairs related to the Estate of a deceased person. This must be why Section 82 of the *Law of Succession Act* (the Act) lists powers of personal representatives to include the power to enforce by suit or otherwise, all causes of action which by virtue of any law survives the deceased or arise out of his death for his estate.

20. In this case, it is not disputed that the appellant was not the appointed executor of the contested will nor did he petition or obtain a full or limited grant to the deceased's Estate. Secondly, it is also not disputed that he did not file an objection the respondent's petition for grant of probate and his application to substitute the deceased objectors was dismissed by the trial court. His claim that he was a party to the succession cause by virtue of being an objector under Rule 16 (1) of the *P&A Rules* and therefore had a right to institute the appeal is with due respect misconceived or misplaced because under Section 2 of the P & A Rules, an objector is defined as

> " a person who has lodged an objection under Rule 17 to the issue of a grant,'

From this definition, it is clear that a person only qualifies to be an objector if he or she had filed an objection under Rule 17 of the *P & A Rules* which the appellant had not done.

21. Besides, Rule 16 (1) of the *P & A Rules* which form the basis of the appellant's claim to locus standi to lodge this appeal only allows a person who has information which is relevant to an application for a grant of representation and who wishes to bring such information to the notice of the court to do

so through filing of an affidavit before a grant is made or confirmed. Rule 16 (3) proceeds to state as follows;

> " Upon the filing of such a statement, the Registrar may take such action thereon as he deems fit."

A reading of Rule 16 as a whole clearly reveals that what is envisaged by the rule is not the filing of an application or an objection but an affidavit which should initially be dealt with administratively by the court's Deputy Registrar. The information although it might eventually be placed before the judge or magistrate seized of the succession proceedings is meant for use by the Registrar in his or her discretion and that's why the Rule expressly refers to the Registrar and not the court. It is therefore my opinion that the provision does not qualify a person who supplies the information contemplated under the Rule to be an objector as argued by the appellant in this case.

22. Flowing from the foregoing, it is my finding that the appellant was not a party to the succession cause since he was not the Petitioner for grant of probate or for full or limited grant of letters of administration to the deceased's estate and although the trial courts record shows that he testified as a witness in support of the objectors' case, he was not an objector within the meaning of Section 2 of the P & A Rules.

23. The fact that the learned trial magistrate in her judgement referred to him as an objector and even referred to his testimony is neither here nor there since this by itself did not automatically catapult him to the status of an objector. Consequently, I fully agree with the respondent's submission that the appellant was not a party to the succession cause.

24. Having found as I have above, did the appellant have a right to file the appeal given that Section 50 of the *Law of Succession Act* which provides for the right to appeal to the High Court from decisions of the lower court does not specifically provide for who can exercise that right of appeal. In my considered view, this provision should not be read in isolation. It should be read together with the other provisions of the Act and the Rules which provides for persons who have a right to be heard in succession proceedings who would in turn have a right to appeal to the High Court if dissatisfied with an order or decree made by the trial court which order or decree would be determining the rights or interests of litigants involved in succession proceedings.

25. It is therefore my take that the right of appeal bestowed by Section 50 of the act is limited to parties involved in litigation in succession proceedings in the trial court. In this case, the appellant was only a party to the application seeking substitution of the deceased objectors given that he was the applicant and he therefore had *locus standi* to appeal against the trial court's decision dismissing his application if he was aggrieved by it which right he chose not to exercise. As stated earlier, he was not a party to the petition for grant of probate which resulted into the decision he wished to appeal against.

26. The Court of Appeal in *Attorney General v George Bala* (*Supra*) which was cited by the respondent has recently laid down a general rule answering the question of who qualifies to exercise the statutory right of appeal to a superior court against decisions made by a trial court. The court expressed itself as follows:

> " .....The right to appeal was a creature of statute and an appeal could be presented only;
>
> i. By a party in the suit if he was aggrieved by the Judgement, or
>
> ii. By a person who was not a party but who was aggrieved by the Judgement if he sought and got leave of the court to prefer an appeal against the judgement.

As I have already held, the appellant was not a party to the succession cause and if for whatever reason he was aggrieved by the trial court's decision, he did not seek or obtain the trial court's leave to appeal against its Judgement.

27. For all the above reasons, I have arrived at the conclusion that the appellant lacked locus standi to institute the instant appeal.

The respondent's preliminary objection is therefore merited to the extent specified above and it is upheld. This finding in effect means that the appellant's appeal is incompetent and cannot be sustained. It is accordingly struck out with costs to the respondent.

28. Since the application was filed within the appeal which now stands struck out, I do not find it necessary to make any orders concerning the same since it has automatically fallen by the way side.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 19TH DAY OF DECEMBER, 2023.

C. W GITHUA

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JUDGE