



**Kiptoo & 3 others v Kiptoo & 2 others; Makoha & 6 others (Interested Parties)  
(Succession Cause E045 of 2021) [2022] KEHC 10188 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10188 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE E045 OF 2021  
EKO OGOLA, J  
JUNE 27, 2022**

**BETWEEN**

**ESTHER JELAGAT KIPTOO ..... 1<sup>ST</sup> APPLICANT  
CAROLINE JEPKOSGEI KIPKURUI ..... 2<sup>ND</sup> APPLICANT  
HELLEN JEPCHUMBA KURUI ..... 3<sup>RD</sup> APPLICANT  
STANELY KURUI KIPKOECH ..... 4<sup>TH</sup> APPLICANT**

**AND**

**SAMWEL KIMUTAI KIPTOO ..... 1<sup>ST</sup> RESPONDENT  
KIMOI KIPKURUI ..... 2<sup>ND</sup> RESPONDENT  
CHIEF KITANY LOCATION (KIPSAT) ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MARY MAKOHA ..... INTERESTED PARTY  
GRACE KIPKURUI ..... INTERESTED PARTY  
DANIEL KURUI ..... INTERESTED PARTY  
SIMON KIPKURUI ..... INTERESTED PARTY  
REUBEN KURUI ..... INTERESTED PARTY  
RAEL JEMUTO KIPKURUI ..... INTERESTED PARTY  
KENNETH KIPKOSGEI KIMUTAI ..... INTERESTED PARTY**

**RULING**

1. The Notice of Motion before the Court dated 29/4/2021 prays for the following orders:-



- i) That pending the hearing and determination of this application the Court do make orders restraining the respondents jointly and severally by themselves, servants, employees, agents, representatives or any other persons acting under their instructions or their interests from entering and or staying in and or trespassing and or cultivating or any other persons acting under their instructions or their interests from entering and or staying in and or trespassing and or charging and or mortgaging and or pledging and or constructing upon and or fencing or in any other manner whatsoever interfering with the land parcel LR No. Sergoit/Sergoit/6 Block Moiben until the hearing and determination of this suit.
- ii) That pending the hearing of this application the court do issue orders invalidating the transaction and declaring the agreement of sale between the respondents and the estate of the deceased invalid as it was entered into before the grant of Letters of Administration hence offending the provisions of sections 45 and 82 of the [Law of Succession Act](#).

## **Background**

2. Before the said application could be heard, the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the 1<sup>st</sup> to the 7<sup>th</sup> interested parties filed a notice of preliminary objection dated May 7, 2021, objecting to the said motion as follows:
  - i. The application offends the provisions of Section 67 of the [Law of Succession Act](#) and Rule 36 of the [Probate and Administration Rules](#) 1980.
  - ii. The applicants have no loci standi to make any application in relation to the estate.
3. In opposition to the Preliminary objection, the applicants filed grounds of opposition dated September 29, 2021 together with a further affidavit by Esther Jelagat Kiptoo sworn on September 30, 2021.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondent and the 1<sup>st</sup> to 6<sup>th</sup> interested parties filed written submissions dated July 13, 2021 while the counsel for the 7<sup>th</sup> interested party opted not to file any submissions to the preliminary objection.

## **Issues for Determination**

5. I have read the Preliminary objection herein, the grounds of opposition, the further affidavit and the Written Submissions filed herein and I find that the primary issue for determination by this Court is whether the preliminary objection aforesaid has merit
6. The Supreme Court in [Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others](#) cited the leading decision on Preliminary Objections the decision in [Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.](#) (1969) EA 696, where the Court held 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”.



7. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

8. The 1<sup>st</sup> ground of the preliminary objection is to the effect that the application dated April 20, 2021 offends the provisions of Section 67 of the *Law of Succession Act* and Rule 36 of the *Probate and Administration Rules* 1980. This ground is a pure point of law that can dispose of the suit thus it is a proper ground to raise in a Preliminary Objection.
9. The 2<sup>nd</sup> ground of the preliminary objection is to the effect that the applicants have no loci standi to make an Application in relation to the estate.
10. I find that aforementioned grounds as raised in this preliminary objection are interrelated. I note that the failure to comply with the provisions of section 67 of the *Law of Succession Act* and Rule 36 of the *Probate and Administration Rules*, 1980 caused the Applicants to be bereft of loci standi. In the circumstances, I shall proceed to consider the Two (2) grounds jointly.
11. In *Daykio Plantations Limited v National Bank of Kenya Limited & 2 Others* [2019] eKLR the Court made the following observation as relates to locus standi being a ground for a preliminary objection:

In the case of *Law Society of Kenya ...Vs... Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that;-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of *Alfred Njau and Others Vs. City Council of Nairobi (1982) KAR 229*, the Court also held that;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit.

12. It is prudent for this court to outline the contents of the aforementioned provisions of the Law as follows:

Section 67 (1) of the *Law of Succession Act*:

- (1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.



- (2) A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.

Rule 36 (1) of the Probate and Administration Rules, 1980 is instructive and it provides as follows:

Grant ad colligenda bona under s. 67 of the Act

(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.

13. At this juncture it is important for this Court to outline the primary prayers contained in the application dated April 29, 2021 as follows:

- i. That pending the hearing and determination of this application the court do make orders restraining the respondents jointly and severally by themselves, servants, employees, agents, representatives or any other persons acting under their instructions or their interests from entering and or staying in and or trespassing and or cultivating and or ploughing and or delineating and or leasing, and or charging and or mortgaging and or pledging and or constructing upon and or fencing or in any other manner whatsoever interfering with the land parcel LR No. Sergolt/sergoit/6 Block Moiben until the hearing and determination of this suit.
- ii. That pending the hearing of this Application the Court do issue orders invalidating the transaction and declaring the agreement of sale between the Respondents and the estate of the deceased invalid as it was entered into before the Grant of Letters of Administration hence offending the provisions of sections 45 and 82 of the *Law of Succession Act*.

14. It is not disputed that the applicants do not have a grant of administration ad colligenda bona defuncti. In an attempt to explain why they proceeded to file the aforementioned Application without first seeking a grant of administration ad colligenda bona defuncti, the Applicants argued that they brought the instant claim in their capacity as beneficiaries and not as Administrators. The Applicants also argued that the provisions of Section 45 and 46 of the *Law of Succession Act* impute locus standi on the beneficiaries of an estate to save, secure and protect the estate without necessarily requiring a grant of administration ad colligenda bona defuncti.

15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 1<sup>st</sup> to 6<sup>th</sup> respondents relied on the decision in *Hawo Shanko v Mohamed UTA Shanko* [2018] eKLR where the Court observed as follows:

“The issue as to whether a party can file a suit involving a deceased’s estate before obtaining a limited grant has been the subject of several Court cases. The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased’s estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not



matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same.

16. The Court of Appeal in *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* (2014) eKLR, addressed itself on the issue of locus standi in succession matters as follows:

“ ... But in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of Letters of Administration in cases of Intestate succession.”

17. In *Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR the Court stated as follows as relates to the fate of succession claims filed by parties that lack loci standi:

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

18. The 1<sup>st</sup> and 2<sup>nd</sup> respondents and the 1<sup>st</sup> to 6<sup>th</sup> respondents submitted that the applicants’ claim herein ought to be dismissed noting that it was filed without the requisite limited grant.

19. In *Hawo Shanko* (Supra) the Court made the following observation that is instructive on how to handle succession claims filed by beneficiaries with no temporary grant:

There is no dispute that the plaintiff did not obtain a limited grant allowing her to file this suit. Such a grant is the key which allows the plaintiff access to the Court. Without a limited grant being issued allowing the filing of the suit, the plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the suit. The suit as initiated becomes void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant.

20. In the circumstances, I find that the preliminary objection dated May 7, 2021 has merit and the Applicant’s Notice of Motion application dated April 29, 2021 is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents and 1<sup>st</sup> to 6<sup>th</sup> interested parties and 7<sup>th</sup> interested party.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> OF JUNE 2022.

E. K. OGOLA

JUDGE

