



**In re Estate of Pius Kimani Mwaura (Deceased) (Miscellaneous Application E051 of 2022) [2022] KEHC 14916 (KLR) (Civ) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14916 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL**

**MISCELLANEOUS APPLICATION E051 OF 2022**

**MA ODERO, J**

**OCTOBER 28, 2022**

**BETWEEN**

**JULIET WAMBUI NG'ANG'A ..... 1<sup>ST</sup> CITOR  
FRANCIS NG'ANG'A MIRINGU ..... 2<sup>ND</sup> CITOR**

**AND**

**JOHNSON MWAURA KIMANI ..... 1<sup>ST</sup> CITEE  
MOSES KINYANJUI KIMANI ..... 2<sup>ND</sup> CITEE  
ELIZABETH WANJIRU KIMANI ..... 3<sup>RD</sup> CITEE  
MONICA NJOKI KIMANI ..... 4<sup>TH</sup> CITEE**

**RULING**

1. Before this Court for determination is the Notice of Preliminary objection dated May 5, 2022 filed by Johnson Mwaura Kimani, Moses Kinyanjui Kimani, Elizabeth Wanjiru Kimani And Monica Njoki Kimani the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent/Citees.

“ 1. That the Honourable court has no jurisdiction to grant any of the substantive orders sought in the Application the same being matters reserved for Environment and Land Court and/or specific magistrate’s gazetted to handle matters. That the Honourable court cannot entertain the application as brought in this current miscellaneous application having regard to the pending succession cause over the estate of Pius Kimani Mwaura (Deceased) paragraph 5 of the supporting affidavit jointly sworn on March 15, 2022 by the applicants.



2. That the application as brought is irredeemable incompetent it not being premised on any substantive cause known to the *Law of Succession Act* or the Rules made thereunder.
3. That none of the applicants in their personal capacity as alleged survivors, son and/or wife of the alleged Jackson Miringu Kimani (Deceased) is clothed with the requisite locus standi to institute and prosecute the Application as brought.
4. That these proceedings instituted by the Applicants themselves as concerning the estate of Pius Kimani Mwaura (Deceased) are not open for prosecuting matters concerning the estate of Jackson Miringu Kimani (Deceased) who is a totally different person.”

2. The 1<sup>st</sup> and 2<sup>nd</sup> Citors/Applicants opposed the Preliminary Objection. The matter was canvassed by way of written submissions. The Respondents filed the written submission dated June 23, 2022 whilst the Applicants relied upon their written submissions dated May 16, 2022.

### **Background**

3. This Succession Cause relates to the estate of the late Pius Kimani Mwaura (hereinafter ‘the Deceased’). The Applicant herein Juliet Wambui Nganga and Francis Nganga Miringu who are the widow and son of the late Jackson Miringu Kimani who was the Father to the Deceased filed the Chamber Summons dated March 15, 2022 seeking injunctive orders to restrain the Respondents from interfering with the parcel of land known as LR No. Kiganjo/nembu/1056 which land the Applicants claim had been allocated to the Deceased herein by his late Father Jackson Miringu Kimani. The said Jackson Miringu Kimani died on January 18, 2022. The Death Certificate Serial Number 1232XXX is annexed to the supporting Affidavit (LW ‘1’).
4. The Applicants claim that they have been farming on the suit land for the past ten (10) years. They further state that the Deceased did in his Written Will dated September 9, 2014 bequeath the suit land to his son Jackson Miringu Kimani.
5. The Applicants lament that upon the demise of Jackson Miringu Kimani notwithstanding the existence of this Succession Cause the Respondents on March 12, 2022 moved into the suit land and began to cut down trees and uproot crops. The Applicants seek interim orders to prevent any further interference by the Respondents on the suit land.
6. The Respondents in response to the application filed this Notice of Preliminary Objection. As stated earlier the Preliminary Objection was opposed.

### **Analysis and Determination**

7. I have carefully considered the Notice of Preliminary Objection as well as the submissions filed by both parties. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Ltd vs West End Distributors Ltd* [1969] EA in which it was 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.”



8. Therefore a preliminary objection firstly must comprise of a point of law and secondly must arise out of the pleadings and may dispose of the entire suit.
9. The Respondent have challenged the jurisdiction of this court to hear the matter. It is trite law that jurisdiction is everything. Without requisite jurisdiction the court must immediately down its tools (see *Owners of Motor Vessel "Lillian S" v Caltex Oil (k) Ltd* [1989]KLR).
10. It is a fact that this court is sitting as a Probate Court with the mandate to oversee the distribution of the estate of the Deceased. *In Re Estate of GKK (Deceased)* [2017] eKLR it was stated that:-

“The primary function of a Probate Court is distribution of the estate of a Deceased person.”
11. Where as in this case a dispute arises as to whether a particular asset belongs to the estate of the Deceased or to a third party then that dispute must be heard and determined in the relevant court.
12. Having said that, I note that this Succession Cause is yet to be substantially heard. The Will is yet to be proved. Obviously, where a dispute arises over ownership of a property alleged to be an asset of the estate that dispute must be resolved before the estate is distributed. The dispute herein is whether the suit land forms part of the estate of the Deceased or if it belongs to the estate of his Father. The dispute herein involves the beneficiaries and survivors of the estate. It does not involve an outside or third party. In the circumstances, I hold that this court sitting as a Probate Court would have the requisite jurisdiction to determine the matter.
13. However before the question of which estate the suit land belongs can be determined the question of whether the applicants have locus standi must be addressed. The term ‘locus standi’ is a Latin term which literally means ‘place of standing’. It refers to the right of a party to appear and be heard in the suit in question.
14. The Applicants herein claim to be the wife and son of Jackson Miringu Kimani who was the Father to the Deceased in this cause. The Applicants have filed this application seeking to claim the suit land on behalf of and for the benefit of the estate of the said Jackson Miringu Kamani. In other words, they have filed the application as representatives of the estate.
15. The Applicants have not availed any Grant authorizing them to act or sue on behalf of the estate of Jackson Miringu Kimani. None of them holds a Grant of representation in respect of that estate. Accordingly, the Applicants could be termed as ‘busy bodies’ as they have no legal authority to represent that estate.
16. In order to prosecute their application the Applicants must first seek and obtain a legal Grant of representation in respect of the estate of Jackson Miringu Kimani. Without such Grant their application is a non starter and cannot be entertained by the court. I find that the Applicants have no locus standi to file this Miscellaneous Cause.
17. The only remedy available to the Applicants is to first obtain the requisite Grant and thereafter to file their application in the main Succession Cause.
18. Based on the foregoing, I find merit in this Preliminary Objection. The same is allowed. The Chamber Summons dated March 15, 2022 is hereby struck out. I make no orders on costs.

**DATED IN NAIROBI THIS 28TH DAY OF OCTOBER, 2022.**

.....  
**MAUREEN A. ODERO**



**JUDGE**

