



REPUBLIC OF KENYA



**In re Estate of Anderson Wamuthenya alias Anderson Wamuthenya
Kangeri alias A K Wamuthenya (Deceased) (Succession Cause
1036 of 2011) [2022] KEHC 14299 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 1036 OF 2011**

JN NJAGI, J

OCTOBER 26, 2022

**IN THE MATTER OF THE ESTATE OF ANDERSON WAMUTHENYA ALIAS
ANDERSON WAMUTHENYA KANGERI ALIAS A.K. WAMUTHENYA (DECEASED)**

BETWEEN

**MESHACK MBOGO WAMBUGU T/A PAN AFRICA HIGH
SCHOOL APPLICANT**

AND

KANGERI WAMUTHENYA ADMINISTRATOR

AND

DAPHINE WANGARI GICHURU 1ST RESPONDENT

EVYLINE WANJIRU WAMUTHENYA 2ND RESPONDENT

JANE MULOKO KATHILU 3RD RESPONDENT

KANGERI WAMUTHENYA 4TH RESPONDENT

RULING

1. The applicant filed summons for revocation of grant dated June 28, 2021 seeking that the grant of letters of administration intestate made to Kangeri Wamuthenya and confirmed to him on the December 20, 2018 be revoked and/or annulled on the grounds that:
 - 1) That the administrator concealed material facts from the court on the actual possession and exclusive use of plot known as Karatina Town Block II/55 (formerly plot no. 7235/388 - Karatina) by the applicant since 1970s.



- 2) That the grant was thus obtained and confirmed fraudulently by the making of a false statement or by concealment from the court of something material to the case.
 - 3) That the grant was obtained and confirmed by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
2. The respondents raised a preliminary objection dated October 6, 2021 on the grounds that:
- a) The application herein offends “the primary function of a probate court which is to distribute the estate of a deceased person”.
 - b) The applicant has no relationship with the deceased, he is not a beneficiary of the estate of the deceased nor a dependant and by law has no locus to invoke the powers of this honourable Court;
 - c) By dint of sub-clauses (a) and (b) above this honourable court lacks jurisdiction to entertain the application herein on ground that the applicant claims purchaser’s interest as opposed to dependency of the estate: (these matter to be determined “in limine” pending hearing and determination of the applicant).
3. The respondents argue that the court lacks jurisdiction to entertain the application herein on the grounds that the applicant claims purchaser’s interest as opposed to dependency of the estate.
4. The application was supported by the affidavit of the applicant sworn on June 28, 2021 in which he deposes that the county council of Nyeri, who are the registered proprietors of the suit premises confirmed that the ownership of the suit premises passed from the deceased, who is the 1st allottee, to him vide their letter dated December 14, 1979 written by Karatina town clerk A. J. Kariuki & Co. Advocates informing them not to pursue the deceased herein in rates arrears in Karatina Civil Case No. 150 of 1978 - *Karatina Town Council vs A. K. Wamuthenya* - since the property no longer belonged to the deceased. Thus the applicant avers that he has locus standi in the instant proceedings.
5. The applicant further contends that his locus and the respondents’ material misrepresentations and fraud are matters of evidence well laid out in the supporting affidavits to the application for revocation of grant dated June 28, 2021 and notice of motion dated July 14, 2021. The applicant further contends that it will be premature to deal with the said issues at the preliminary stage without giving him a chance to prove them. As such, the applicant prays that the preliminary objection be dismissed with costs.
6. In opposition to the preliminary objection, the applicant has filed a replying affidavit dated 19th May 2022. The applicant avers that the suit premises has been distributed by the instant court which has jurisdiction to deal with succession matters and to entertain any application for revocation of grant pursuant to Section 76 of the *Law of Succession Act* thus the summons for revocation of grant dated 28th June 2021 is properly before the court.
7. The issues for determination are:
- (1) Whether the application raises a preliminary point of law.
 - (2) Whether the applicant has the locus standi to bring up the application.
 - (3) Whether this court has jurisdiction to entertain the application.
- Whether the application raises a preliminary point of law



8. A preliminary objection was defined in the case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 thus:-

.....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.

Sir Charles Newbold P. stated:-

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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

9. Similarly, the Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR 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.

10. Further in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR the court held that:-

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

11. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. In this matter the facts are contested. The applicant contends that he bought the suit land from the deceased. The respondents deny it. These facts have to be ascertained. It is therefore evident that the preliminary objection does not raise matters of law but of fact which can only be determined upon ventilation of the case. The application is thus not purely on a question of law.

Jurisdiction and locus standi -

12. The respondents contend that the court has no jurisdiction to entertain the application for revocation of grant as it offends the primary function of the probate court which is to distribute the estate. Further, the respondents argue that since the applicant is not a dependent or a beneficiary of the deceased he has no locus standi to invoke the powers of the court.
13. The locus classicus case on the question of jurisdiction is the celebrated case of Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited [1989] KLR 1 where the court held:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.



14. On the source of jurisdiction, it was held in the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others (2012) eKLR that:

A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

15. The jurisdiction of the probate court was stated in the case of the Estate of M'Muriangi M'Mngwika (Deceased) [2019] eKLR to be as follows:

The Law of Succession Act and the rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate identification of survivors and beneficiaries and distribution of the assets.

16. Section 76 of the Law of Succession Act provides as follows:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case

17. By dint of this section, an application for revocation can be made by “any interested party”. A question then arises as to the meaning of the words “any interested party” under that section.

18. The Black's Law Dictionary defines an interested party as “A party who has a recognizable stake in the matter.”

19. In Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR mativo J. held that:

“In law, standing or locus standi is the term for ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Standing exists from one of the following:-

- a). that the party is likely to suffer adverse effect,
- b). that the harm suffered is likely to affect others who might not be able to ask the court for relief,
- c). that the party is granted standing by the law.

20. In Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR the court heard that-

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.



21. The Court of Appeal in re Estate of Yusuf Kipkorir Chepkeitany (Deceased) [2021] eKLR, considered the meaning of the words “any interested party” in section 76 of the [Law of Succession Act](#) and held that:

(6) It is manifest therefore that the Respondents’ argument that an application for revocation can only be brought by a dependant of the deceased is unfounded. Indeed, it is now settled that the above provision is wide enough to include a purchaser. Thus, in *Musa Nyaribari Gekone & 2 others v Peter Miyienda & another* (2015) eKLR for instance, the Court of Appeal sitting in Kisumu held that:

“The expression “any interested party” as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of sections 66 and 39 of the [Law of Succession Act](#). Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an ‘interested party’ for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the [Law of Succession Act](#). There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the [Law of Succession Act](#) when he held that the 1st respondent has the locus standi to present the application for revocation of the grant. We agree with the learned Judge that the 1st respondent’s interest as a purchaser of the property of the deceased qualifies him as an ‘interested party’ with standing to challenge the grant.”

22. Section 76 of the [Law of Succession Act](#) therefore does not restrict the filing of an application for revocation to only the beneficiaries or dependants of the deceased. The application can be made by any person who has a right or expectancy in the estate. A purchaser from a deceased is one such person who has a right to the estate of the deceased. It has also to be noted that a purchaser is among the persons to whom a grant of letters of administration may be made under section 66 of the [Law of Succession Act](#). If a purchaser has such a right as being issued with a grant of letters of administration of the estate of a deceased person, he must have a corresponding right of applying for revocation of the same grant. I thereby find that the applicant herein has a locus standi to invoke the powers of this court under section 76 of the [Law of Succession Act](#). In the premises the court has jurisdiction to entertain the application. If the matter cannot be conveniently handled by the probate court the court will decide so upon hearing the parties on the application.

23. I find that the court has jurisdiction to hear and determine the application for revocation dated 28th June 2021. The preliminary objection dated 6th October 2021 lacks merit and is dismissed with costs.

SIGNED THIS 14TH SEPTEMBER 2022

J.N. NJAGI

JUDGE

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF OCTOBER, 2022.

By:

HON. JUSTICE M. MUYA



JUDGE

In the presence of:

Mrs. Wahome: for Applicant

.....for Respondents

Court Assistant: Kinyua

30 days R/A.

