



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

HIGH COURT SUCCESSION CAUSE NO. 346 OF 2001

IN THE MATTER OF THE ESTATE OF LUISA MUTAVA KIOKO Alias LUISA MUTABA KIOKO (DECEASED)

JOEL MUTIE KIOKO.....1ST ADMINSTRATOR/RESPONDENT

BENEDICT MUTIA KIOKO.....2ND ADMINSTRATOR/RESPONDENT

AND

1. RUTH NDUNGE NTHENGE

2. MARGARET WANZA MUTUA

3. GRACE MWIKALI MUSYIMI

4. BEATRICE MUINDU NTHENGE

5. JOSEPHINE MUTIO NDONYE

6. SERAH MWELU NTHENGE

7. PRIMROSE NGII RURIGI

8. EVA MUENI WAMBUGU.....BENEFICIARIES

VERSUS

DAVID MUTISO NTHENGE.....OBJECTOR/APPLICANT

RULING

1. On 11th October, 2017, The Objector Herein Filed Summons For Revocation Of Grant Dated 10th October, 2017 Seeking The Following Orders:

2. According To The Objector, He Is The Only Son Of **Philip Nthenge Mukonyo** Who Is The Father Of All The Beneficiaries And The Grandfather Of The 8th Beneficiary. It Was Deposed That The Petition And The Consent Filed Alongside It Correctly Pointed Out That **Nthenge Mukonyo** Was The Sole Creditor Of The Estate To Whom The Petitioner Would Transfer Land Parcel No. Machakos Town Block II/319 (The Land) Based On The Fact That The Objector Identified The Deceased Herein And Linked The Deceased Herein With The Objector's Father For The Purposes Of The Said Land Transaction And Together With His Father, The Objector Commenced Construction On The Said Land.

3. However, Following The Death Of The Objector's Said Father On 11th July, 2002, The Petitioners In Cahoots With The Beneficiaries With The Aim Of Disinheriting The Said Objector's Father On 18th March, 2003, Falsified, Fabricated And Fraudulently Misled The Court By Seeking To Confirm The Grant And Introduced The Beneficiaries Herein As The Purchasers Of The Same Land That Had Been Bought By Said Nthenge Mukonyo. Subsequently The Said Beneficiaries Applied To Have The Grant Rectified And To Have Themselves Registered As The Joint Owners And Trustees Of The Said Land. According To The Objector, There Was No Evidence Of The Purported

Sale Exhibited By Either The Beneficiaries Or The Administrators. According To The Objector, The Beneficiaries Were Aware That There Were Ongoing Succession Proceedings In Respect Of The Estate Of **Nthenge Mukonyo** In Which Management Orders Were Made Regarding The Rental Accruing From The Building Constructed On The Suit Property Which Still Subsist But Did Not Disclose The Same.

4. The Objector Lamented That The Administrators Never Physically Attended Court To Explain Why Himself As The Sole Brother And Only Son Of Their Father Was Not Notified Of The Proceedings Herein And Why The Name Of **Nthenge Mukonyo** Was Removed And Excluded And Why The Only **Eva Mueni Wambugu** Was The Only Granddaughter Listed And Without Mentioning The Of Succession Cause No. 193 Of 2002 – Estate Of **Philip Nthenge Mukonyo** Which Has Never Been Determined. According To The Objector The Confirmed Grant Herein Is In Conflict With The Grant.

5. In The Replying Affidavit Sworn By **Joel Mutie Kioko** The 1st Administrator/ Respondent Herein, It Was Deposed That The Deponent Was A Brother/Co-Administrator To Their Mother's Estate Together With His Brother, **Benedict Mutia Kioko**, Who Passed Away On The 12th September, 2018. Upon The Death Of Their Mother, **Luisa Mutave Kioko**, They Filed Succession Cause Herein For The Sole Property Machakos Town Block II/319 Which According To Him, Their Deceased Mother Never Sold. However, The Said Property Was Sold By Them To One Late **Philip Nthenge Mukonyo** On 13/11/2001 And Same Was Reduced To Writing By Their Advocate J.A. Makau & Company Advocates.

6. According To The Deponent, They Did Not And Do Not Know **David Mutiso Nthenge** , The Objector Herein To Be Son Of The Purchaser And They Never Sold Any Property To Him Neither Did Their Late Mother Sell Any Property To Him. It Was Deposed That Their Late Mother Could Not Sell The Property In Issue Machakos Town Block II/319 As She Had Bought It By Herself And Never Had Any Interest To Sell It.

7. It Was Averred That **Philip Nthenge Mukonyo** Bought The Land For Kshs. 1.5M (One Million Five Hundred Thousand Only) Wherein He Paid Ksh. 750,000/= (Half) On The 13/11/2001 With Promise To Pay The Balance Once The Succession Of Their Late Mom (**Luisa Mutave Kioko**) Was Completed. The Late **Philip Nthenge Mukonyo** Started To Build On The Suit Plot Immediately He Paid The Said Deposit Of Kshs. 750,000/= (Seven Hundred Fifty Thousand Only) And Took Full Possession Solely By Myself And Solely Without **David Mutiso**. The Late **Philip Nthenge Mukonyo** However Informed Them That Should Anything Happen To Him As He Was An Old Man He Had Daughters Who Were Capable Of Paying The Balance Due Per The Agreement And They Could Change The Title Document To Their Names Once The Daughters Paid.

8. It Was Averred That **Philip Nthenge Mukonyo** Died Before He Could Fully Pay The Balance And Upon Approaching His Daughter, **Ruth Ndunge Nthenge**, The Said Daughter Informed The Deponent She Would Gather Her Sisters And Pay The Balance Without Mentioning **David Mutiso Nthenge**, The Objector, Anywhere. The Said Daughters Of The Said **Philip Nthenge Mukonyo** Directed The Deponent To **J.A Makau's Advocates** Office At Machakos Where The Earlier Agreement Had Been Done And They Met There And He Was Paid Together With His Late Brother The Full Balance Of Kshs. 750,000/= (Seven Hundred And Fifty Thousand). During The Transaction, He Never Saw Any Brother Of Theirs Nor Did They Mention Any Hence He Did Not Know The Objector And They Never Had Any Agreement Or Interaction With Him.

9. Upon The Said Payment, The Deponent And His Late Brother Agreed To Transfer The Property To The Respondents Herein That Is Daughters Of The Late **Philip Nthenge Mukonyo** And As Per The Confirmed Grant Marked. He Exhibited A Copy Of Bank Deposit Slips Of Kshs 250,000/= And Stated That The Balance Kshs 250,000/= Had Been Paid In Cash.

10. According To Him, The Property Should And Belongs To The Daughters Of **Philip Nthenge Mukonyo** And He Has No Claim From The Family As The Late **Philip Nthenge Mukonyo** Paid Me Kshs 750,000/= (Seven Hundred And Fifty Thousand Only) And His Daughters Paid The Full Balance Of Kshs. 750,000/= (Seven Hundred And Fifty Thousand Only) Hence The Objector Has No Share In The Estate Of His Late Mother As They Never Transacted With Him.

11. Since He Is Not Related To The Objector, He Averred That The Objector Cannot Be An Administrator To His Mother's Estate As He Does Not Know Him. It Was His View That If The Objector Has A Claim The Property He Could Have Been A Witness In The Sale Agreement, Paid The Purchase Price Balance, Participated In All The Transactions And He Would Have Known Him.

12. At The Hearing Of The Objection, The Objector, Testified As PW1 And Relied On His Witness Statement Filed Herein. According To The Said Statement, His Objection Relates To Land Title No. Machakos Town Block 11/318 Situated In Machakos Town Eastleigh Area ("The Plot") Next To Machakos Town Block 11/319("The Other Plot") Which His Father Had Bought Earlier And Had Constructed One Storey Building With Residential Units And Shops. According To Him, He Had A Stall In Machakos County Market While **Luisa Mutava Kioko** ("The Deceased Herein" And Or" **Luisa**") Also Had A Stall In The Market And She Knew Him. When **Luisa** Knew That It Was His Father Who Had Bought And Constructed On The Other Plot She Approached The Objector And Asked Him To Request His Father If He Was Willing To Buy Hers Also Which Was Adjacent. Unfortunately, **Luisa** Passed On Before She Could Effect Transfer Of The Plot To His Father And Upon Her Death His Father Approached Her Children And Took Them To One Of His Lawyers, **J. A Makau** To Do The Succession Cause Where He Was Noted As The Sole Creditor And Only Beneficiary Of The Estate In Which The Sole Property Was Indicated To Be The Plot And His Father Was Indicated As Having Had A Sale Agreement In His Favour.

13. Unfortunately, His Father Died Before The Completion Of The Succession Case Whilst The Construction Was Still Ongoing. Thereafter Due To The Long Fought Succession Case Of The Estate Of His Father, He Assumed That This Case Would Be Determined And Title Deed Issued In Favour Of His Father's Estate. To His Shock, He Learnt When The Case For His Father's Estate Was Being Heard That The Administrators And His Sister Had In Apparent Material Variation Of The Earlier Sworn Affidavits Stated That They Are The Ones Who Had Entered Into The Agreement To Buy The Plot With The Deceased Or With The Administrators Of Her Estate Upon Her Death Or They Completed The Payments And Took Over His Rights And Place As Purchasers. According To The Objector, That Claim Is Illogical And Contrary To The Entire Petition Papers As Drawn And Filed Upon His Father's Death And From His Own Knowledge And Information Being The Overseer And Supervisor Of His Father's Construction Who Introduced His Father To **Luisa**.

14. It Was His Averment That His Sisters Did Not Have Any Source Of Income Which Would Have Enabled Them To Buy And Build On The Plot As They Were All Earning Salaried Monies From Various Employers Which Were Very Low. Further By The Time His Father Bought And Started Construction On The Plot, The Plot Was No Longer Available To Sell To Any One As The Seller Who Is The Registered Owner Had Died After The Sale. According To Him, His Sisters Were Relatively Unknown In Machakos And Could Never Have Met The Deceased Herein And They Had Never Done Any Purchase Of Any Significant Plot Or Done Any Significant Construction Of A Similar Sized Building As They Lacked And Still Lack The Capital And Knowledge Required. He Reiterated That The Estate Of The Deceased Had Freely Acknowledged That His Father Was The Sole Purchaser And Creditor To The Estate From When Their Mother Died Up To When His Father Died And They Cannot Depart From That Truth Only Due To Death Of His Father.

15. In His Evidence In Court, He Stated That He Was Not Aware If The Plot Was Paid For By His Sisters. Referred To The Petition He Stated That It Indicated That There Was A Sale To His Father. However, The Grant Bears The Names Of His Sisters Hence He Could Not Understand Why His Name Was Missing Though He Was Not Aware Of That And He Did Not Consent To The Property Being Registered In Their Names As He Was Unaware Of These Proceedings. According To Him, Being Children Of The Same Father, They Ought To Have Had Equally Shares In The Said Property.

16. In Cross-Examination By **Mr Makau** For The Beneficiaries, He Stated That He Was The One Who Identified The Plot But Payment Was Made By His Father Though He Had No Sale Agreement And Was Not Present During The Transaction As The Same Was Done Before An Advocate. According To Him, He Was Informed By **Luisa's** 1st Son Whose Name He Could Not Recall That The Payment Was Completed By His Father. He Clarified That It Was The Said Son Who Knew About The Plot And The He Only Came In During The Construction And He Was Not Aware Of The Purchase Price. He Was Similarly Unaware Of The Date Of The Confirmation Or The Year That His Father Passed Away. He However Insisted That He Was Aware Of The Succession Cause In Respect Of His Father's Estate And As A Child Of His Father He Is Competent To Protect His Estate.

17. In Answer To The Questions Put To Him By **Mr Masika**, Learned Counsel For The Administrators, He Stated That He Was Not **Luisa's** Child And He Did Not Know Her Sons. He Was Similarly Unaware Of The Agreement Between His Father And **Luisa** And Did Not Know If The Plot Was Sold By **Luisa's** Children Since He Was Not Involved In The Transaction. He Admitted That He Had Not Gone To The Said Plot And Disclosed That He Was Not Involved In His Father's Estate But Had Been Informed That The Matter Was Being Handled Advocates Though He Was Aware That One John Had Been Authorised By The Court To Be The Administrator Of His Father's Estate. According To Him, He Was Only Involved In The Supplying Building Stones.

18. The Objector Called **John Nzuki Ngolanya**, OW1. According To His Statement, The Late **Philip Nthenge Mukonyo** Was A Personal Friend And He Was His Mechanic And He Visited Him In Kitale Accompanied By His Son, The Objector. Being The Same Age As **Philip**, He Was Also His Confidant. According To Him **Philip** Informed Him Of His Intention To Buy A Plot Which Was Adjacent To His Plot Machakos Town Block II/319 Which Was Already Constructed And Which Was Owned By The Deceased Herein. According To The Witness, He Informed The **Philip** That He Knew The Deceased Herein As A Business Woman In Machakos County And He Encouraged **Philip** To Buy The Said Plot.

19. In His Statement He Disclosed That One Day He Met **Philip** And The Deceased At His Building And **Philip** Told Him That They Had Reached An Agreement And Later On **Philip** Commenced Construction On The Said Plot Which Was Supervised By His Son, The Objector. In His Evidence, The Objector's Sisters Could Not Have Bought The Plot Since He Never Saw Them There. He Stated That The Deceased Never Complained That **Philip** Had Not Fulfilled His Obligations Under The Agreement And In His View, **Philip** Was An Honourable Man Who Bought Many Properties And Never Failed To Pay For Them.

20. Upon Being Cross-Examined By **Mr Mutua Makau** For The Beneficiaries, He Stated That He Could Not Recall When The Said **Philip** Passed Away But He Knew He Had 5 Children, 4 Daughters And 1 Son Though He Could Not Remember The Names Of The Daughters Since He Never Used To Visit Him At Home. He Admitted That **Luisa** Passed Away Before **Philip** And Though He Insisted That **Philip** Bought The Land From **Luisa**, He Admitted That He Was Not A Witness In The Transaction And Neither Saw The Agreement Nor Did **Philip** Tell Him The Purchase Price And How He Paid It.

21. In Answer To The Questions By **Mr Masika** For The Administrators, He Stated That On The Day He Met **Philip** They Were 4 People And The Information Of The Transaction Was Given To Him By **Philip** And After He Was Given His Money He Left. According To Him, **Luisa** Told Him That They Had Agreed. He Insisted That He Only Knew 4 Daughters Of **Philip** And Not The Others. He However Did Not Know **Luisa's** Husband Or Her Children.

22. **Joel Mutie Kioko**, Testified As PW1 On Behalf Of The Administrators. According To His Statement Which He Adopted, He Was The 1st Administrator Of The Estate Of The Deceased Herein Which They Were Administering With His Late Brother, **Benedict Mutia Kioko**, Who Passed Away On The 12/9/2018. He Disclosed That They Were The Only Children Of The Deceased, **Luisa Mutave Kioko**, And Their Mother Had The Only Property Machakos Town Block II/319 Which Is The Only Property Subject Of This Cause. Their Mother, The Deceased, Passed Away And Left Behind The Property In Issue In Her Names And Without Having Sold It To Anyone At Any Given Moment Or Time. However, The Property Was Sold By Them To One **Phillip Nthenge Mukonyo** On 13/11/2001 And The Same Was Reduced Into Writing Before **J A Makau** Advocate (As He Then Was) And They All Signed The Agreement.

23. According To Him, They Did Not And Do Not Know **David Mutiso Nthenge** The One Claiming To Be Son Of The Purchaser And Neither Themselves Nor Their Mother Sell Any Property To Him. According To Him, Their Mother Could Not Sell The Property In Issue Machakos Town Block II/319 As She Had Bought It By Herself And Never Had Any Interest To Sell It.

24. According To Him, **Philip Nthenge Mukonyo** Bought The Land For Kshs. 1.5M (One Million Five Hundred Thousand Only) Wherein He Paid Kshs. 750,000/= (Half) On The 13/11/2001 With Promise To Pay The Balance Once They Did Succession Of Their Late Mother And Upon Payment Of The Deposit, The Late **Philip Nthenge Mukonyo** Started To Build On The Suit Plot And Took Full Possession By Himself And Solely. However, By The Time Of The Said Transaction, **Philip Nthenge Mukonyo** Was Old In Age And Informed Them That Should Anything Happen To Him, He Had Daughters Who Were Capable Of Paying The Balance Due Per Agreement And They

Should Change The Title Document To Their Names Once The Daughters Made Payment. By The Time **Philip Nthenge Mukonyo** Died, He Had Not Fully Pay The Balance And They Looked For His Daughters Where They Had Been Shown And Found One **Ruth Nduge Nthenge** Who Assured Them That She Would Gather Her Sisters And Pay The Balance. There Was However No Mention Of The Objector Herein. The Said Daughters Then Directed Him To J.A Makau's Advocates Office At Machakos Where They Had Done Earlier Agreement And They Met There With Her Other 5 Sisters And They Were Paid The Full Balance Of Kshs. 750,000/= (Seven Hundred And Fifty Thousand). Upon The Full Balance Been Paid They Agreed To Transfer The Property To The Respondents Herein That Is Daughters Of The Late **Philip Nthenge Mukonyo** And As Per The Confirmed Grant. He Exhibited Copies Of The Sale Agreement, Bank Deposit Slips Of Kshs 250,000/= And Stated That The Balance Kshs 250,000/= Had Been Paid In Cash. According To Him, The Property Should And Belongs To The Daughters Of **Philip Nthenge Mukonyo** And I Had No Claim From The Family And Therefore **David Mutiso Nthenge** Has No Share In The Estate Of His Late Mother As They Never Transacted With Him And Do Not Even Know Him.

25. In Cross-Examination By Mr Odawa, Learned Counsel For The Objector, He Stated That By The Time They Entered Into The Agreement For Sale, Their Mother Was Dead. It Was His Evidence That He Was Staying In Mumbuni While His Mother Was Doing Business In Machakos. He Stated That He Knew The Buyer When He Was Doing Construction On Another Plot And He Was Called Nthenge Mukonyo To Whom He Sold The Plot Which Was Partly Developed By His Mother. According To Him, He Did Not Inform His Sisters About The Transaction As At That Time They Had No Share In The Property As Those Days Daughters Were Not Entitled To Inherit.

26. In His Evidence, He Did Not Know All The Daughters Of **Philip** But They Were Brought To The Advocate's Office And They Were Identified By Ruth Nthenge Who Also Introduced Him To The Advocate. In His Evidence, Ruth Did Not Add Him More Money But Only Paid The Balance Of Kshs 750,000/- And Did Not Disclose To Her Where She Got The Money From And He Did Not Ask Her. He Confirmed That They Signed The Transfer Forms To Nthenge But Later Agreed That The Property Be Registered In The Name Of Ruth And The Other Sisters. According To Him, Since The Money Was Deposited In The Account He Could Not Tell Who Did It And He Was Not Aware That Nthenge's Estate Had A Dispute As He Was Just Informed By **Philip's** Daughters That The Money Had Been Paid.

27. In His Evidence, **Philip** Informed Him That He Had No Son. It Was His Evidence That They Sorted Out The Issue With Their Sisters At Home Whom They Gave Kshs 25,000/- Each And Divided The Balance With His Brother.

Determination

28. I Have Considered The Application, The Affidavits Both In Support Of And In Opposition To The Application And The Submissions Filed.

29. The Objection Herein Is Based On The Allegation That The Objector's Father Entered Into A Sale Agreement With The Deceased Herein, **Luisa Mutave Kioko**, In Which The Deceased Agreed To Sell To The Objector's Father, One **Philip Nthenge Mukonyo**, Land Parcel No. Machakos Town Block II/319. However, The Said **Luisa Mutave Kioko** Passed Away Before Transferring The Said Parcel. After His Death **Philip Nthenge Mukonyo** Took The Deceased's Children To An Advocate Who In The Documents Filed In This Succession Cause Noted The Said **Philip Nthenge Mukonyo's** Interest In The Said Parcel Of Land. However, When Issuing The Grant And Confirming The Same, That Position Was Altered And The Said Land Was Instead Registered In The Names Of His Sisters, The Beneficiaries Herein, Leaving Him Out Of The Picture. According To The Objector, The Said Property Ought To Have Been Registered In The Names Of All The Children Of The Said **Philip Nthenge Mukonyo**.

30. The 1st Administrator, On The Other Hand Allege That He Does Not Know The Objector. According To Him, The Said Land Belonged To His Mother, **Luisa Mutave Kioko**, The Deceased Herein. After The Death Of The Deceased, He Together With His Late Brother, **Benedict Mutia Kioko**, Entered Into A Sale Agreement With The Said **Philip Nthenge Mukonyo**, In Which It Was Agreed That They Would Sell The Said Property To Him At The Sum Of Kshs 1.5 Million. Consequently, Half Of That Sum Was Paid As A Deposit While The Balance Awaited The Determination Of These Proceedings. However, The Said **Philip Nthenge Mukonyo** Who Was Well Advanced In Age Informed The Administrators That In The Event Of Him Passing Away They Should Substitute Him With His Daughters, The Beneficiaries Herein. Unfortunately, The Said **Philip Nthenge Mukonyo**, Passed Away And The Administrators Traced The Beneficiaries And An Agreement Was Entered Into Between Them And The Said Beneficiaries Who Paid The Balance Of The Purchased Price And The Interest Of **Philip Nthenge Mukonyo** In The Said Land Was Transferred To Them. According, To The 1st Administrator They Were Never Aware Of The Existence Of The Objector As He Was Never Disclosed By The Said **Philip Nthenge Mukonyo**.

31. From The Foregoing It Is Clear That The Objector Is Not A Beneficiary Of The Estate Of **Luisa Mutave Kioko**, The Deceased Herein. His Claim To The Suit Property Is Based On An Alleged Sale Agreement Between His Father Who Is Deceased And The Deceased Herein. He Is Therefore Making His Claim To The Suit Property As A Beneficiary Of The Estate Of His Late Father. There Is An Indication That The Proceedings In Respect Of The Estate Of His Father Are Still Ongoing And He Is Not An Administrator Of That Estate. For The Objector To Step Into The Shoes Of His Late Father And Properly Make A Claim To The Property Which Belongs To His Father, He Must Prove That He Is A Legal Representative Of His Father. The Term "Legal Representative" Is Defined In Section 2 Of The **Civil Procedure Act** As Meaning:

A Person Who In Law Represents The Estate Of A Deceased Person, And Where A Party Sues Or Is Sued In A Representative Character The Person On Whom The Estate Devolves On The Death Of The Party So Suing Or Sued.

32. According To **Byamugisha, J** In **Khalid Walusimbi Vs. Jamil Kaaya And Attorney General Kampala HCCS No. 526 Of 1989 [1993] I KALR 20:**

"In Order To Acquire A Representative Character Of Suing Or Being Sued, The Legal Representative Has To Be Either An Administrator Of The Estate, Executor Or Personal Representative As Defined Under The Succession Act. Section 3 Of The Succession Act (Cap 139) As Amended By Decree 22 Of 1972 Defines Personal Representative As "The Person Appointed By Law To Administer The Estate Or Any Part Thereof Of A Deceased Person."

33. In Trouistik Union International And Anor. Vs. Mrs. Jane Mbeyu And Anor [1993] KLR 230, The Court Of Appeal Extensively Addressed Itself On This Issue And Expressed Itself As Hereunder:

“The Common Law Is That “*Action Personalis Moritor Cum Persona*”, That Is, A Personal Action Dies With The Person. This Rule Was, However, To A Large Extent, Supplanted By The Law Reform Act, Which Act Keeps Alive, With Few Exceptions, Causes Of Action Which Vest In A Person Since Deceased. Accordingly, To Determine Who Is Empowered To Enforce That Chose In Action, For What Purposes, And When In Point Of Time, One Must Look At That Act And Allied Relevant Legislation. One Such Enactment Is The *Law Of Succession Act*, Cap 160. Section 2 Of That Act Provides In Mandatory Terms, That Unless Any Other Written Law Provides Otherwise, The Provisions Of The Act “Shall Constitute The Law In Kenya In Respect Of And Shall Have Universal Application To All Cases Of Intestate Or Testamentary Succession To The Estates Of Deceased Persons Dying After The Commencement Of The Act”. The Act Came Into Force On The 1st July, 1981 And The Person Whose Death Gave Rise To This Suit Died On 10th April 1984...To Determine Who May Agitate By Suit Any Cause Of Action Vested In Him At The Time Of His Death, One Must Turn To Section 82(A) Of The *Law Of Succession Act*, Which Confers That Power On Personal Representatives And On Them Alone. As To Who Are The Personal Representatives Within The Contemplation Of The Act, Section 3, The Interpretative Section Provides An All Inclusive Answer. It Says “Personal Representative Means Executor Or Administrator Of A Deceased Person”. It Is Common Ground That The Deceased In This Case Did Not Die Testate And Therefore, The Only Person Who Can Answer The Description Of A Personal Representative Is The Administrator Of The Estate Of The Deceased. The Next Inquiry Must Answer The Question, Who Is An Administrator Within The True Meaning And Intendment Of The Act? Section 3 Says “Administrator Means A Person To Whom Grant Of Letters Of Administration Has Been Made Under This Act” ...It Is Not In Doubt That The Two Respondents Who Invoked The Aid Of The Court To Agitate The Cause Of Action Which Survived The Deceased, Were Not Persons To “Whom A Grant Of Letters Of Administration Have Been Made Under The Act” I.E. The *Law Of Succession Act* And They Did Not Even Pretend To Be Such. The Only Capacity, In Which They Sought To Enforce The Deceased’s Chose In Action, Was As Dependants. At Common Law, Death By Itself Automatically Divests The Deceased Of His Chose In Action And The Reason For This Is Because In Law, The Dead Have No Rights. But No Legal Right Is Without An Owner So It Must Be Vested In A Person Or Entity...Our *Law Of Succession Act*, Cap 160, Did Not Provide For The Vesting Of An Intestate’s Property Between The Date Of Death And The Grant Of Letters In Any Entity. So The Suggestion That It Will Be Vested In The Courts Conforms With The Common Law Notions Of The Transmission Of An Intestate’s Right Or Estate. It Ought To Be Remembered That All These Temporary Custodians Of An Intestate’s Rights Are Bare Trustees Only. But As Soon As A Grant Is Obtained, The Right Or Estate Vests Automatically And By Force Of The Grant In The Administrator...We Find No Warrant For Chesoni, JA’s Statement That In Kenya An Intestate’s Property Is Transmissible By The Fact Of Death To His Personal Representatives Whom He Equates With His Next Of Kin. Neither Do We Find Any Authority In Law For His Somewhat Contradictory Statement That The Child’s Property Was, On His Death, Transmitted To And Not Vested In His Father. This Statement, With Respect, Shows Some Confusion Of Thought. If Death By Itself Transmitted The Estate To His Father, Why Did It Not Vest It In Him? If The Chose In Action Was Not Vested In Him And As It Was Not His Own Chose, Then What Standing Did He Have To Enforce It By Action? Clearly, He Would Not Have Done It Under The *Law Of Succession Act*, Cap 160, Or Even The *Indian Succession Act*...If Letters Of Administration Vest All Rights Of An Intestate In The Administrator At The Moment Of Death, What Right Would The Father Have Left To Agitate His Son’s Preserved Chose-In-Action If Some Other Person Than Himself, Were Granted Letters Of Administration? Personal Representatives, As Known In This Branch Of The Law, Are Persons Who Obtain Probate Or Letters Of Administration And Not Blood Relatives However Close. Had The Learned Judge In This Case Applied The Clear Provisions Of The *Law Of Succession Act*, He Would Have Been Obligated To Reach The Conclusion That The Deceased’s Chose In Action Cannot Properly Be Vested In Or Be Agitated In Court By Wives Qua Wives.”

34. I Agree With The Holding In The HCC Succ No. 36 Of 2017 – Khalid Abdi Frahim Vs. Asha Ibrahim Hast & Charles Macharia That:-

“The First Point For Determination Is Whether Or Not The Applicant Herein Lacks *Locus Standi* To Bring This Application As Alleged By The Counsel For The Interested Party In His Submissions. His Argument Is That The Applicant Is The Grandson Of The Deceased And Therefore He Is Not A Beneficiary To The Suit Property. My Understanding Of The Matter At Hand Is That The Applicant Herein Brought This Suit Before Court As A Beneficiary Of The Estate Of His Late Father Abdi Ibrahim Hassan. The Applicant’s Father (Name Aforementioned) Initially Brought An Action Challenging The Issuance Of The Grant In Question In Succession Cause No.2269 Of 1998, A Case Which Was Not Concluded To Date. It Was Further Argued That The Applicant Brought This Application On Behalf Of Abdi Ibrahim Hassan And Fatuma (Both Deceased) When There Is No Indication That He Was Appointed An Executor Under A Will Or Appointed By The Court As An Administrator *Ad Colligenda Bona* To Act On Behalf Of Them. *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] EALR 468*, 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.’”

35. It Therefore Follows That Without Evidence That The Objector Is A Legal Representative Of The Estate Of His Deceased Father, **Philip Nthenge Mukonyo**, He Cannot Purport To Lay A Claim To A Property Where His Interests Is Derived From The Interest Of His Said Father, Since He Is Not Staking The Said Claim In His Own Right But In His Capacity As A Beneficiary Of His Father’s Estate.

36. Apart From That The Objector’s Case Is That The Transfer Of The Suit Property To His Sisters Alone To His Exclusion Was Improper And As He Is Entitled To Share In The Same. If That Position Is Correct, Then It Would Mean That The Said Sisters Would Be Holding The Said Property In Trust For Themselves And For Himself As Well. The Administrators Of The Estate Of The Deceased Herein However,

Have Nothing To Do With The Issue Whether The Objector's Sisters Are Holding The Said Property In Trust For Him. Accordingly, These Are Not The Appropriate Proceedings For Him To Lay His Claim.

37. Consequently, I Find No Merit In This Summons Which I Hereby Dismiss But With No Order As To Costs As The Objector's Alleged Relationship With The Beneficiaries Herein Has Not Been Disputed By Them.

38. It Is So Ordered.

Ruling Read, Signed And Delivered In Open Court At Machakos This 23rd Day Of February, 2021.

G. V. ODUNGA

JUDGE

In The Presence Of:

Mr Masika For The Beneficiaries

CA Geoffrey