



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**SUCCESSION CAUSE NO 1 OF 2017**  
**IN THE MATTER OF THE ESTATE OF SAUL NYARERU (DECEASED)**  
**ANGELINE MORAA NYARERU.....1<sup>ST</sup> PETITIONER**  
**ESTHER GACHOKI NYARERU.....2<sup>ND</sup> PETITIONER**  
**VERSUS**  
**ESTHER MORAA MOINDI.....1<sup>ST</sup> OBJECTOR**  
**DAVID NYAKUNDI MWEMBI.....2<sup>ND</sup> OBJECTOR**

**RULING**

1. The applicant herein filed Summons on 28<sup>th</sup> November 2019 seeking the following reliefs;

1. That an order be made prohibiting any sale, transfer, leasing, changing, sub-dividing (sic), wasting or in any other manner affecting the registrar of parcel Title Number Matatu Settlement Scheme/602.
2. That Esther Gachoki Nyareru and Ageline Nyareru Moraa be Ordered to account for the two (2) acres off (sic) land purchased by the late John Nyakundi Mwembi the Husband and Father to the Objectors respectively.
3. That the two (2) acres of Land sold to the late John Nyakundi Mwembi was and is part of Land parcel Matutu Settlement Scheme/602 and has not been factored during distribution of the Estate.
4. That the Grant for letters of Administration made to Esther Gachokki Nyareru and Angeline Nyareru Moraa on 27<sup>th</sup> September, 2019 be revoked until this application is heard and determined.

2. The objectors contend that the late John Nyakundi Mwembi initially bought 4 acres from the deceased family. Later, Emily Nyareru sold another 2 acres to the late John Nyakundi Mwembi. It was averred that it was not disclosed to the court that 2 more acres had been sold to the late John Nyakundi Mwembi and therefore the grant issued by the court should be revoked. They advanced that the petitioners have called for the estate to be surveyed and distributed as per the grant herein and thus the objectors stand to lose their entitlement to the 2 acres of land purchased by the late John Nyakundi Mwembi.

3. The Petitioner's in response to the application filed a Notice of Preliminary Objection raising the following grounds;

1. That the estate of the deceased is a stranger to the allegations of the Objectors in regards to the two (2) acres of land claimed.
2. That the alleged transaction happened after the death of the deceased Saul Nyareru Bosire.
3. That the transaction alleged offends **Section 82(b) proviso (ii) of the Law of Succession Act** which provides that; "No immovable property shall be sold before confirmation of Grant".
4. That if the allegations by the Applicants are true it amount to the Objectors intermeddling in the estate of the deceased.
5. That therefore the Application is defective, misplaced, and bad in law, frivolous and an abuse of the Court process as the

Objectors lack the requisite locus standi.

4. The objector David Nyakundi Mwebe filed a replying affidavit in response to the preliminary objection. He deposed that although his family was apportioned 4 acres from Land parcel Matutu Settlement Scheme/ 602 forming part of the deceased estate, Emily Nyareru sold them 2 more acres which proceeds were used to pay school fees for her children. He averred that provisions of **section 82(b) proviso (ii) of the Law of Succession Act** have not been offended and that he had not intermeddled with the deceased's estate in any way.

5. At the hearing of the application, Mr. Bosire for the petitioners submitted that the objectors have no *locus standi* in the matter and that no land can be disposed of before grant is confirmed. They sought the objectors' application to be dismissed with costs.

6. In this case it is not in dispute that John Nyakundi Mwembi bought 4 acres from the deceased and in that regard, his interest was considered and the 4 acres he purchased apportioned to him under the confirmed grant issued by this court on 27<sup>th</sup> September 2019.

7. The only issue before this court whether the objectors are entitled to an additional 2 acres of the deceased land forming part of Land parcel Matutu Settlement Scheme/602. The objectors claim that the 2 acres were sold to John Nyakundi Mwembi after the death of the deceased by Emily Nyareru.

8. The first preliminary issue that this court must consider is whether the objectors have the locus to make the application. The objectors in this case have made the application on behalf of John Nyakundi Mwembi who is now deceased. The applicants are yet obtained letters of administration necessary to clothe them with the *locus standi* to institute a claim against the estate. In **Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR** the court stated:

“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.”

9. Even if I were to consider the application on its merits, I find that there was no evidence presented by the objectors to support their claim. **Section 107 (1) of the Evidence Act** provides that:

“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.”

Further, **section 108** provides thus:

“The burden of proof in a suit or proceeding lies on that person who will fail if no evidence at all were given on either side.”

10. The objectors have not produced any evidence of the purported sale and it is not clear when the 2 acres were sold and what consideration was paid by John Nyakundi Mwembi. While it is not disputed that Emily Nyareru had earlier been appointed as an administrator it is not clear at what point the land was sold, either before her appointment as an administrator or after the appointment.

11. In **Virginia Mwari Thurania v Purity Nkirote Thurania [2017] eKLR**, the court observed that;

“The said sale agreement is null and void for violating section 82 (b) (ii) of the Law of Succession Act, as the said Julia Thurania had not obtained letters Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representatives and constitutes the estate of the deceased person. It is only the legal representatives of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of written law or order of the court. In this case, there is not a will and so the principle of relation back does not apply. Under section 80 (2) Law of Succession Act, Cap160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Therefore until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity.”

12. The objectors' case is purely speculative as no concrete evidence has been tabled before the court in support of their assertions.

13. In the end, I find that the application lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT KISII THIS 30<sup>TH</sup> DAY OF JULY, 2021**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Mr. Nyareru for the 1<sup>st</sup> Administrator and H/b for Mr. Ouma Carlos**

**Mr. Begi Absent**

**Mr. Orwasa Court Assistant,**