



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. E254 OF 2021

WANYIRI KIHORO.....APPLICANT

VS

DIRECTOR GENERAL DEPARTMENT OF IMMIGRATION.....RESPONDENT

AND

RE: ELC NO. 517 OF 2017

SURINDERPAL SINGH SYAN.....1ST PLAINTIFF

JARSMEER SINGY SYAN.....2ND PLAINTIFF

SANAT KUMAR SHANTILAL TRIVEDI.....3RD PLAINTIFF

AND

VANLATA SANATKUMAR TRIVEDIPROPOSED INTERESTED PARTY

RULING

On 24/7/2021 the applicant filed this instant suit seeking orders that the respondent release information, bio-data and other relevant immigrant information, which the department of Immigration could be holding about the 3rd plaintiff to be used in connection with Milimani Commercial Court Case No. 1468 of 2008 that was later transferred to Milimani Land and Environment Court as ELC Case No. 517 of 2017. The case has been ongoing for 13 years and has not been concluded.

Preliminary Objection

On 15/7/2021, the respondent filed a preliminary objection on the grounds that the applicant lacks *locus standi*, that the present application is in violation of Article 31 of the Constitution, that the information sought is exempt under Article 24 of the Constitution and that the application is a violation of the Access of Information Act, 2016. This ruling is in relation to the preliminary objection.

The applicant in a response dated 19/7/2021 opposed the objection on the basis that he filed this instant suit against the respondent seeking very limited information about the 3rd plaintiff as contained in a Kenyan ID Card or passport and the locus of the applicant is that his property interest have been seriously injured by those who have acted in the name of the 3rd plaintiff when they did not have his mandate or consent for over 13 years and continue to do so even now.

The applicant argued further that he is not interested in personal or private information which go beyond the Milimani ELC suit No. 517 of 2017 which was filed in May 2008.

Analysis and determination

The issues for determination are:-

a. Whether the applicant has *locus Standi*?

b. Whether the application is in violation of Article 31 of the Constitution?

c. Whether the information sought is exempt under Article 24 of the Constitution?

d. Whether the application is in violation of the Access to Information Act 2016?

A preliminary objection has been defined by the courts in a number of cases. In **Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd [1969] E.A.696** the courts defined a Preliminary Objection in the following terms:-

“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 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”

The Supreme Court of Kenya held in **Aviation & Alliedworkers Union Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR**,

“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.”

The respondents have submitted that they are not party to any of the other suits and the applicant is seeking the immigration status of a deceased litigant. This being a matter relating to the estate of the deceased person anyone who seeks to represent the estate must first obtain a limited grant of representation and therefore the applicant’s failure to do so means that he lacks *locus standi* to request the immigration status of the deceased. Reliance is placed on the case of **Hawa Shanko v Mohamed Uta Shanko [2018] eKLR** where it was held that

“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.”

It is undisputed that the applicant herein seeks the immigration status of the 3rd plaintiff. This court disagrees with the respondents argument that the applicant should have filed for a limited grant in order to have *locus standi* to file this suit. *Locus standi* is defined in **Black’s Law Dictionary, 9th Edition (page 1026)** as **“the right to bring an action or to be heard in a given forum”**.

In **Mumo Matemu vs Trusted Society of Human Rights Alliances & 5 Others (2014) eKLR**, the Court held that;

“It is proper to note that the evaluation of locus ought to be based upon the constitutional consideration of capacity (Articles 3, 22 and 258, the nature of the suit and the enforceability of the orders sought. These considerations inform the enforcement mechanisms and coherent clarity of the following inquiries. Who will the orders be enforced against? Who bears the costs of litigation if at all? Who represent the parties in court”

The applicant instituted this matter in his own capacity and not as a representative of the 3rd plaintiff’s estate. He is merely seeking information about the 3rd plaintiff that in his opinion is vital in pursuant of Milimani Law Courts ELC Case No. 517 of 2017. It is clear that the applicant has a case that is worth listening and has the necessary locus to bring the application seeking information. The information is required in an existing case and not this case. The deceased is one of the plaintiffs in the existing case. The information is not being sought from the deceased.

In the case of **Oraro vs- Mbaja (2005) KLR 141** Ojwang J stated as follows:-

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

The applicant is of the view that the information that he is requesting is minimal as it is restricted to the immigration status of the 3rd plaintiff. On the other hand the respondent is of the view that the application violates the 3rd plaintiff’s privacy and the Access to Information Act. The issues raised are not points of law as they deal with disputed facts. The court has to decide whether indeed there is any violation of the Law after hearing the applicant’s application.

The information being sought is alleged to be in possession of the respondent. Even if the 3rd plaintiff is deceased, the file which contains the information is available. The Preliminary Objection to the effect that the information requested relates to a deceased person cannot dispose the dispute once and for all. The respondent also contends that the application violates Article 31 of the Constitution. The

arguments either in support or against this contention ought to form the basis of the ruling after the court fully hear the parties. The contention that the rights of the deceased plaintiff shall be violated form part of the contested facts. According to the applicant, there shall be no violation to the right to privacy. The court would have to hear what information is required and assess to what extent would an order allowing the application violate the deceased's right to privacy.

I do find that the Preliminary Objection is based on contested facts which can only be determined by the court after hearing the parties. This include the respondent's position that the information is exempt under Article 24 of the Constitution and that there would be violation of the Access to Information Act.

Upon hearing all the parties, the court will evaluate the rival positions and reach a conclusion as to whether to call upon the respondent to provide the information or dismiss the application. The decision cannot be made on the basis of the preliminary objection.

The upshot is that the Preliminary Objection lacks merit and the same is hereby dismissed with no orders as to costs.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE