



**Kinuthia v Kinuthia & another (Environment and Land Miscellaneous Application 181 of 2016) [2025] KEELC 1194 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1194 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 181 OF 2016  
OA ANGOTE, J  
MARCH 13, 2025  
(FORMALLY MISC APPLICATION NO. 60 OF 1988)**

**BETWEEN**

**KAROMO KINUTHIA ..... APPLICANT**

**AND**

**GRACE NYAMBURA KINUTHIA ..... 1<sup>ST</sup> RESPONDENT**

**RUTH NJOKI KINUTHIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide the Motion dated 3<sup>rd</sup> May, 2023 brought pursuant to the provisions of Sections 1B and 3A of the [Civil Procedure Act](#) and Order 17 Rule 2 (1), 3 and Order 51 Rule 1 of the Civil Procedure Rules, the Respondents/Applicants seek the following reliefs:
  - i. That the Order/Directions issued by this Honourable Court on the 22<sup>nd</sup> February, 2023 allowing the Applicant's Application dated the 23<sup>rd</sup> February, 2021 be set aside.
  - ii. That the Directions given by the Court on the 6<sup>th</sup> October, 2022 be reinstated.
  - iii. That the costs of this Application be provided for.
2. The application is premised on the grounds on the face thereof and supported by the Affidavit of Odhiambo Christine Emily, an Advocate of the High Court of Kenya working in the firm of Mbutia Kinyanjui & Co Advocates of an even date, who deponed that on 22<sup>nd</sup> February, 2023, she logged into court and was ready to proceed with the matter but her call dropped; that she attempted to log back into the meeting but her Microsoft Teams Application failed to open in good time and that by the time she gained access to court, their matter had been called out.



3. The Respondents'/Applicants' counsel deponed that on the same day, she went to the Applicant's counsel's offices to find out what had transpired and was informed that the court had allowed the Applicant's Motion dated 23<sup>rd</sup> February, 2021 and that counsel equally promised to serve them with a hearing date for the Motion dated 1<sup>st</sup> February, 1989
4. According to Ms Odhiambo, the orders aforesaid were as a result of the Applicant's counsel misleading the court by stating that their Motion had not been responded to yet they had filed a Replying Affidavit dated the 3<sup>rd</sup> October, 2022 and physically effected service on counsel on 6<sup>th</sup> October, 2022 and that together with the Motion, they had filed a Notice of Preliminary Objection of an even date.
5. She noted that on 6<sup>th</sup> October, 2022, the court directed that they dispense with the Preliminary Objection and parties file submissions on the same; that they duly filed submissions dated 15<sup>th</sup> November, 2022 and effected service on the Applicant's counsel on 21<sup>st</sup> February, 2023 and that when the matter came up on 20<sup>th</sup> March, 2023, she informed the court of the true position necessitating the filing of the present Motion. It was her disposition that the Motion has been made in good faith and without unreasonable delay.
6. In response to the Motion, the Applicant/Respondent filed a Replying Affidavit on 10<sup>th</sup> November, 2023. He deponed that whereas the Respondents filed a response to his Motion of 23<sup>rd</sup> February, 2021, the same did not expressly oppose or address the dispute and that they also filed a Preliminary Objection which apart from reiterating the averments in the Replying Affidavit did not challenge the Motion and merely informed the court of the death of the Respondents.
7. He deponed that nonetheless, counsel for the Respondents have no locus standi in the matter; that by their Notice of Appointment filed on 13<sup>th</sup> February, 2019, the aforesaid firm alleges to have been appointed by the Respondents yet it informs the court that the Respondents passed on the 19<sup>th</sup> December 1998 and 30<sup>th</sup> June, 2001 respectively and that counsel further revealed to this court that the 1<sup>st</sup> Respondent is survived by a daughter in law Ms Lilian Wanjiku Gacheru.
8. Mr. Kinuthia noted that the deceased can only be represented by their legal representatives and there being none, the firm is not properly on record and any actions taken by them including all the pleadings filed have no legal force or consequences; that in any event, on 6<sup>th</sup> October, 2022, the court directed that the Respondents file their Replying Affidavit and the parties file submissions after which a ruling would be delivered on 22<sup>nd</sup> February, 2023.
9. According to the Applicant, he filed and served submissions dated 31<sup>st</sup> March, 2022 upon the Respondents on 1<sup>st</sup> April, 2022; that thereafter, the Respondents filed and served him with a Replying Affidavit on 6<sup>th</sup> October, 2022, a Notice of Preliminary Objection on 11<sup>th</sup> November, 2022 and submissions on 21<sup>st</sup> February, 2023
10. The Applicant deponed that rather than file submissions to their Motion, the Respondents only filed submissions to their Preliminary Objection in the absence of any orders to that effect and further served them with these submissions late; that this delay in serving them with the submissions was in bad faith and that ultimately, the Respondents were not denied an opportunity to be heard and the Motion should be dismissed.
11. The Applicant similarly filed a Preliminary Objection on 11<sup>th</sup> June, 2024 premised on the facts that:
  - i. The Law firm of M/S Mbutia Kinyanjui & Company Advocates appearing in the above suit on behalf of the Respondents has no locus standi, its alleged clients having died on the



19<sup>th</sup> December, 1998 and 30<sup>th</sup> June, 2001 respectively and there being no legal representative appointed by this Honourable Court to represent the said Respondents.

- ii. In the premises, all the representations, verbal or documentary made and or filed in this Honourable Court on behalf of the Respondents are null and void ab initio.
12. The Respondents, through counsel Emily Odhiambo, filed a Further Affidavit sworn on 11<sup>th</sup> March, 2024. She deponed that contrary to the Applicant's deposition, the Motion of 23<sup>rd</sup> February, 2021 was opposed; that the assertions that they have no locus standi is an afterthought because the firm was instructed to come on record by a daughter in law of the late Grace Nyambura which information was brought to the attention of the court together with supporting evidence and that at no point has the Applicant raised any objection.
  13. Counsel urged that in deponing that their Replying Affidavit and Notice of Preliminary Objection did not oppose the Motion, the Applicant has rendered himself a judge in his own cause; that while they indeed served their submissions on the Preliminary Objection late, the ideal option for the Applicant would have been to inform the court and seek more time and that the Preliminary Objection was to be canvassed first and other previous directions were vacated.
  14. Both parties filed written submissions and authorities which I have considered.

### **Analysis and Determination**

15. Having considered the Motion, Preliminary Objection, responses and submissions, the following are the issues that arise for determination:
  - i. Whether the firm of Mbuthia Kinyanjui & Co Advocates has the requisite locus in these proceedings?
  - ii. Whether the court should set aside the proceedings of 22<sup>nd</sup> February, 2023 and reinstate the directions issued on the 6<sup>th</sup> October, 2022?
16. Locus standi is defined in Black's Law Dictionary, 9<sup>th</sup> Edition (page 1026) as:

“the right to bring an action or to be heard in a given forum”.
17. Speaking to the same, the court in the case of Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229, noted:

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
18. It is trite that locus is essential in proceedings. Speaking to this, the Court of Appeal in *Kihanya & others v Gichuri & another (Civil Appeal 15 of 2019)* [2024] KECA 852 (KLR) (12 July 2024) (Judgment) stated:

“Locus standi is so cardinal in civil proceedings. This is because without locus standi, a party lacks the right to institute and/or maintain the suit even where a valid cause of action subsists. It can be equated to a court acting without jurisdiction. In Amlers Precedents of Pleadings LexisNexis LTC Harms et al 2018 on page 248 the following is said:

The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in the litigation to be accepted



as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules.

The general rule is that it is for the party instituting proceedings to allege and prove his/her locus standi, and the onus of establishing it, rests on that party. It must accordingly appear ex facie from the pleading filed that the parties have the necessary legal standing. Locus standi in iudicio concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted, and should be one of the first things to establish in a litigation matter.”

19. The Applicant contends that the firm on record for the Respondents does not have the requisite locus as the Respondents, being deceased, have yet to be substituted and consequently the notice of appointment by the Advocates as well as all their representation in the matter constitutes a nullity.
20. On her part, counsel for the Respondents state that she had earlier on informed the court of the status of representation, to wit, they were appointed by the 1<sup>st</sup> Respondent's daughter in law to defend the suit.
21. It is not disputed that the Respondents herein have died. The 1<sup>st</sup> Respondent having passed on the 19<sup>th</sup> December, 1998 and the 2<sup>nd</sup> Respondent on the 30<sup>th</sup> June, 2001. It is trite that suits and actions must be prosecuted by and against living parties. To institute, prosecute or defend an action in respect of a deceased person, a litigant is clothed with locus upon obtaining a limited or a full grant of letters of administration. In the case of *Otieno vs Ougo & Another* (1986-1989)EALR 468, the Court of Appeal 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....To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus means he cannot be heard, even on whether or not he has a case worth listening to.... ”

22. Similarly, the Court of Appeal in the case of *Geeta Bharat Shah & Others – v- Jomar Said Mwatayari & Another* [2009]eKLR noted:

“It is clear that a suit against a deceased is a nullity as the deceased person cannot defend a suit or participate in any legal proceedings. He can only do so through a legal representative who is mandated to act on behalf of the estate of the deceased in accordance with Section 82 of the *Law of Succession Act*.”

23. Considering the record, the court notes that the firm of Mbuthia Kinyanjui & Co Advocates came on record in this matter vide a Notice of Appointment dated 12<sup>th</sup> February, 2019. The notice aforesaid indicates that the Respondents have appointed the aforesaid firm to come on record for them. This cannot be true because at the time of issuance of instructions, the Respondents were deceased.
24. Counsel has indicated that they were given instructions by Ms Lilian Wanjiku Gacheru, a daughter in law of the 1<sup>st</sup> Respondent. Even if this was the position, there is no evidence to show that Ms Wanjiku took out and obtained letters of administration in respect of the Estate of either of the Respondents. This means that Ms Wanjiku had no capacity to issue any instructions with respect to the Estate of the deceased.
25. Ultimately, the court concurs with the Applicant. The firm of Mbuthia Kinyanjui & Co Advocates cannot purport to represent the Respondents in the circumstances. They can also not be heard to



say that the Applicant conceded to their irregular representation. It follows that all representation by counsel constitutes a nullity.

26. As aforesaid, there is no proper representation of the Respondents and all actions by the firm of Mbuthia Kinyanjui & Co Advocates in this respect constitute a nullity. This includes the present Motion which is consequently moot.

27. Nonetheless, this situation raises another critical issue, whether there is a live matter before this court upon which it can exercise its jurisdiction. It is trite that the court must always satisfy itself of its jurisdiction to handle a matter, and can embark upon such a determination suo moto. [See John K. Malembi v Trufosa Cheredi Mudembei & 2 others [2019] eKLR.]

28. Indeed, that jurisdiction is central in judicial proceedings, is a well settled principle of law. A court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself on this as follows:

“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...”

29. The Respondents herein are deceased and no legal representation has been made to their respective Estates. This factual position has been admitted by the Applicant. This brings into fore the provisions of Order 24 of the Civil Procedure Rules. It provides as follows:

“4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.”

30. The provisions of Order 24 of the Civil Procedure Rules are to the effect that, upon the death of a defendant, the court may only proceed with the suit if a legal representative of the deceased defendant is formally substituted as a party. If no such application is made within one year, the suit abates as against the deceased defendant.

31. This application, in which the Applicant sought for leave to file an appeal out of time, was filed in 1989. The 1<sup>st</sup> Respondent died on 19<sup>th</sup> December, 1998 whereas the 2<sup>nd</sup> Respondent died on 30<sup>th</sup> June, 2001. Upon their deaths, the Applicant had one year respectively to substitute them.

32. If the Applicant had any difficulties in this regard, the law prescribes measures. Indeed, it is noted from the record that the Applicant had begun citation proceedings. It is unclear what became of them.



33. Nonetheless, having failed to substitute the Respondents within the statutorily prescribed timelines, the suit as against them abated in December, 1999 and June 2001 respectively.
34. The court emphasizes that the abatement of a suit is not a declaration made by the court, but rather, a legal consequence that occurs automatically due to the lapse of time. Once the statutory period prescribed under Order 24, Rule 4(3) of the Civil Procedure Rules expires without an application for substitution being made, the suit abates by operation of law.
35. As expressed by the Court of Appeal in the case of Said Sweilem Gheithan Saanum -v- Commissioner Of Lands & 5 Others [2015] eKLR :
- “ the effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff.”
36. Similarly, the Court of Appeal in Rebecca Mijide Mungole & Another -v- Kenya Power & Lighting Company Ltd & 2 Others 2017 eKLR noted:
- “ It is the effluxion of time that causes the suit to abate.”
37. In the end, the court makes the following final determination:
- i. The firm of Mbuthia Kinyanjui & Co Advocates have no locus to represent the Respondents and all their pleadings and representations on behalf of the Respondents are void *ab initio*. Resultantly, the present motion is struck out.
  - ii. This suit is marked as having abated.
  - iii. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

**O. A. Angote**

**Judge**

In the presence of;

Mr. Nabutete for Applicant

Ms. Kinyanjui for Respondents

Court assistant - Tracy

