



**Republic v Mbeere South Sub County Deputy Commissioner & 2 others;
Ileri (Interested Party); Murage (Exparte) (Judicial Review Miscellaneous
Application 6 of 2019) [2022] KEELC 4737 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 4737 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 6 OF 2019**

**A KANIARU, J
JUNE 30, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**MBEERE SOUTH SUB COUNTY DEPUTY COMMISSIONER 1ST
RESPONDENT**

**CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL
PLANNING 2ND RESPONDENT**

THE HONORABLE ATTORNEY GENERAL 3RD RESPONDENT

AND

FELISIO NGARI IRERI INTERESTED PARTY

AND

BENARD KABATA MURAGE EXPARTE

RULING

1. This ruling is on a preliminary objection dated 18/6/2021 and filed on 21/6/2022. It is a three-pronged objection filed by the respondents – Mbeere South Subcounty Commissioner, Cabinet Secretary, Ministry of Lands And Physical Planning and The Honourable Attorney General– faulting the suit on the following legal postulates:
 1. That the applicant has no locus standi to institute this suit as per section 82 as read with section 3 of the [Law of Succession Act](#).



2. That the application herein as drawn and served contravenes Order 53 Rule 1 and 3 of the [Civil Procedure Rules](#), 2010.
 3. That the application contravenes the provisions of section 13 of the [Government Proceedings Act](#) (cap 40) Laws of Kenya and Order 5 Rule 9 of the [Civil Procedure Rule](#).
2. This matter was instituted by the e-xparte applicant – Bernard Kabata Murage– pursuant to leave granted on 26/8/2019. The e-xparte applicant is contesting the award of Land parcel No. 1168, Kirima Adjudication Section to the interested party – Felesio Ngari Ireri- on 24/4/2019. It is clear that he is dissatisfied with the manner in which the proceedings leading to that award were conducted. He is also questioning the legality of the proceedings.
 3. The preliminary objection was canvassed by way of written submissions. The respondents submissions were filed on 20/4/2022. The submissions focus on only one limb of the objection namely: That the applicant has no locus standi to institute the suit as per section 82 as read with section 3 of the [Law of Succession Act](#).
 4. Since the prosecution of the objection is through submissions, it is proper to treat the other two limbs as abandoned as the respondents, who are the ones raising the objection, have given them a wide berth in their submissions. The respondents submissions first focus on the meaning and purport of both a preliminary objection and locus standi. In this regard, the cases of [Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd](#) [1969] EA 696 and [Capeto Cairo Logistics Limited vs The Government of Makueni County](#) ELC No. 73 of 2017, Makueni, have been cited. These two cases are about a preliminary objection and the point made is that a preliminary objection should be a point of law actually pleaded or inferred from pleadings and which has the potential to dispose of the entire suit or matter if raised preliminarily.
 5. For *Locus standi*, the court was referred to the meaning found in Blacks Law Dictionary and the case of [Law Society of Kenya vs Commissioner of Lands & others](#): HCC No. 464 of 2000, Nakuru. It is clear from these two sources that it means a right of appearance and/or hearing before a court of justice or a legislative body.
 6. The point was then made that the e-xparte Applicant filed this matter without the requisite grant from a competent court. This is said to run afoul of sections 82 (a) as read with section (3) of the Succession Act (cap 160). To drive the point home, the cases of [TRoustik Union International & Another vs Alice Mbeyu & another](#): CA No 145 of 1990, [Teresia Wairimu Kirima v Father Romeo & another](#) [2013] eKLR, [Pedee Builders Ltd v Petronila Ojiambo Odori](#) CA No 170 of 1992, and [Jonathan Orengo Obiayo v Moses Ondiegi Okoth](#); CA No 146 of 1990, were all cited.
 7. The court was ultimately told that the e-xparte applicant lacks capacity to bring the suit. The suit was said to be incompetent and therefore one that should be struck out.
 8. The e-xparte applicant’s submissions were filed on 24/2/2022. The submissions address all the three (3) limbs of the objection but since the respondents only focused on one limb, I do not deem it necessary to highlight the aspects of the Exparte Applicant’s submissions that focus on the limbs deemed to be abandoned by the respondents. The only relevant portion therefore is the one that focuses on the issue of Locus standi. On this, the Exparte applicant pointed out that he obtained a grant ad litem for “the purpose only for filing suit and until further representation”
 9. It was noted that the respondents were of the view that the e-xparte Applicant should have obtained a full grant before filing the suit. The e-xparte applicant disagreed with this view and proffered the case



of *Priscilla Njeri Wamiti & 2 others vs Shiku John Company Ltd* [2017] eKLR to reinforce his position. To the ex-parte applicant, a grant ad Litem is sufficient to enable a party to file a suit in court.

10. Ultimately, the court was told to dismiss the objection for the reason that it is unmeritous.
11. I have considered the objection and the rival submissions filed by both learned counsel on record. What is a preliminary objection was spelt out clearly in the *Locus classicus* case of *Mukisa Biscuit Co Ltd v West End Distributors Ltd* [1969] EA 696. In the case, it was observed thus:

Per law JA:

“So far as I am aware, a preliminary objection consists of a pure 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. Examples are an objection to the jurisdiction of the court, 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.

Per Sir Charles Newbold P:

“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 can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

12. The position expressed in *Mukisa's case (supra)* has been expressed in substantially the same terms in later cases (see for instance *Muiruri v Kimemia* [2002] 2 KLR 677 and *Sirma v Kiprono* [2005] 1 KLR 197).
13. What the respondent has raised is no doubt based on pure points of law. The clear provisions of law said to be violated are all well stated. But the requirement that a preliminary objection be based on pure points of law is only one test. There is a second test which is equally important namely: That it should be based on admitted, correct and/or uncontested facts. This is where the objection before me seems to have a problem. It is not based on correct, uncontested or admitted facts. The respondent's objection is based on an averment that the Exparte Applicants does not have a full grant to enable him to pursue the matter in court. The exparte applicant has denied this and asserted that he has a grant ad Litem which is sufficient for him to file the matter in court. Given that both sides are not agreed on the issue, this is something the court requires to ascertain. On this score therefore, the preliminary objection before me does not strictly qualify to be one.
14. I now turn to the issue of requirement of a grant. A grant ad Litem is normally granted to enable institution or prosecution of a suit where a full grant has not yet been issued. It is sometimes called a grant for special purposes. Where and if granted, it becomes enough to vest *Locus standi* to a party to prosecute or institute a suit. The very meaning of its name seems to suggest its adequacy for purposes of litigation. *Ad Litem* is Latin for “during the Litigation”. A person who gets the grant becomes an administrator ad Litem, also referred to as “Adminstrator ad prosequendum” in some jurisdictions, which essentially means “administrator during prosecution”. It is therefore a grant that is purpose-specific and the purpose itself is litigation.
15. In my humble view, it would be wrong in law to hold the view that a grant ad *Litem* is not sufficient to institute and prosecute a suit. If one were to say that its purpose is limited to filing of the suit only, one would be running away from the obvious fact that no one files a suit intending it to rest at that stage. Every suit is filed with a view to prosecute it. A litigant who comes to court may even intend



to seek some interim remedies or reliefs before the final remedies or reliefs sought in the main suit itself are considered. Such interim or temporary remedies are often sought in applications filed under a certificate of urgency. If one were to hold the position that a grant ad Litem only allows filing, wouldn't one be saying that such urgent applications should not be considered? Yet when one starts urging the applications before court, that exercise itself is prosecution. That is why it is important to appreciate the practical difficulties that would be placed in the way of a litigant who comes to the seat of justice to seek urgent relief after obtaining a grant ad Litem.

16. I think on this issue, our judicial techniques should be broad, adaptive to practical realities, and not narrowly grammatical, technical, or lexicographically shallow. The needs of a litigant who has acquired locus require to be given the necessary attention by a court of law. The court can only give the necessary attention if the matter is prosecuted before it.
17. It requires appreciation also that a grant ad Litem can also be given to defend a suit. Defence of a suit is also part of prosecution. If one were to hold that such defence should await the issuance of a full grant, wouldn't one be forestalling the case of a plaintiff who may not have power to force a defendant to get a full grant? Wouldn't that also be playing into the hands of the defendant who, in any case, would be too much willing to ensure that the plaintiff's case stalls? When you consider all this, it becomes obvious that it would be wrong to limit the purpose of a grant ad Litem to filing of cases only.
18. It is not correct in law to hold that a person requires a full grant in order to institute a suit. A grant ad Litem is enough. It is shown well that the exparte applicant obtained this kind of grant before coming to court. As far as the issue of Locus standi is concerned, no one can legally or competently fault the e-xparte applicant. It is clear to me that at least on this aspect of the objection, the respondents are laboring under a serious misapprehension of law. Their objection is also based on falsehood. There is a grant duly issued by a competent court enabling the e-xparte applicant to file this suit
19. The upshot, having analyzed as herein done, is that the objection is found to be unmeritorious. The same is hereby dismissed with costs to the e-xparte-applicant.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF JUNE, 2022.

In the presence of 2nd Interested party, Kariuki for Andande for 1st Respondent and Ms. Kimata for Exparte Applicant

Court Assistant: Leadys

A.K. KANIARU

JUDGE

