



**Koech v Attorney General & 3 others (Environment & Land Case
64 of 2003) [2022] KEELC 2221 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 64 OF 2003**

MC OUNDO, J

JUNE 16, 2022

BETWEEN

TIGISEY KIPNGENO KOECH PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

DIRECTOR OF SURVEYS 2ND DEFENDANT

**EMMANUEL KIPKORIR KOECH & THOMAS KIPNGETICH LANGAT SUED
AS ADMINISTRATORS OF THE ESTATE OF KIMITEI ARAP CHUMO
(DECEASED 3RD DEFENDANT**

JEREMIAH KIPSANG LANGAT 4TH DEFENDANT

RULING

1. Coming before me for determination is a Notice of Preliminary Objection dated the 22nd November 2021 wherein the 3rd and 4th Defendants have intimated that the Plaintiff's suit herein is fatally and incurable defective for want of a legal Plaintiff, the Plaintiff herein having brought suit in his capacity as the administrator of the estate of John Melile Kaplelach without the prerequisite documentation. There was no response from the Plaintiff.
2. The application was disposed of by way of written submissions to which the 3rd and 4th Defendants submitted that the Plaintiff herein had no locus standi to bring suit and to maintain the pleadings legally for reasons that he had brought suit on behalf of the estate of John Melile Kaplelach (deceased). That it was trite law that the estate of a deceased person would only be represented in legal proceedings by a person who had been duly authorized by the courts to do so through the issuance of a Grant of Letters of Administration as per the provisions of Section 82 of the *Law of Succession Act*.



3. That vide the Grant issued on 6th December 2013 and confirmed on 24th November 2014, the administration of the estate of John Melile Kaplelach (deceased) was Granted to one Anna Cheruto Melile (see annexure ACM1 and ACM2) wherein the Plaintiff herein was a beneficiary and not an administrator.
4. That at paragraph 6 of the Plaint which was further amended in March 2019, the Plaintiff deponed as follows:

“The Plaintiff brings this proceedings in his capacity as the administrator of the estate of John Melile Kaplelach the allottee of plot No. G13 Gelegele settlement scheme/43.”
5. That there were in existence two Grants issued in Kericho High Court P & A No. 183 of 2002 and Kericho High Court P & A No. 93 of 2002(2010) amended, which brought into question the validity of the Grant and the legality of the appointed administrators.
6. That the Grant giving the Plaintiff, Tigisey Kipngeno Koech authority to sue had neither been confirmed nor finalized and therefore he could not sustain a suit on behalf of the estate of the deceased. That Rule 9 (3) (a) & (5) and 14 (5) of the *Probate and Administration Rules* prohibit the filing and issuance of more than two Grants of Letters of Administration to the same estate of a deceased person and therefore the only remedy available was for the subsequent administrator to file a fresh suit and not to amend a prior suit that had been filed by non-existent legal representative.
7. That the current Plaintiff had been issued with a Grant on 26th March 2003 which Grant was never confirmed. His mother had subsequently applied for other Grant which had been issued to her on 6th December 2013 thus rendering the previous Grant useless. The Plaintiff thus ceased to have locus standi on 6th December 2013.
8. That the only scenario where two Grants are allowed in law was where either party had instituted suit vide a Limited Grant of Letters of Administration Ad Litem pursuant to obtaining of a full Grant in which case a party with the full Grant would be allowed to substitute the party with the Limited Grant.
9. That the issue of locus standi went to the root of a matter and once the same was lacking, then the suit became automatically null and void ab initio. The applicant/Defendants sought for their Preliminary Objection to be allowed. to buttress their application, the Defendants relied on the decided cases in *Raila Amolo Odinga & Another vs IEBC & 2 Others* [2017] eKLR and *Julian Adoyo Ongunga & another vs Francis Kiberenge AbanoBondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR.

The Plaintiff’s submissions

10. The Plaintiff’s submissions in response to the Preliminary Objection, was that pursuant to filing their Application dated the 8th March 2021 seeking leave to join Anna Cheruto Melile to the pleadings, the 3rd and 4th Defendants filed the Preliminary Objection in opposition to the application.
11. That the Letters of Administration to the estate of John Melile Kaplelach had been granted to Anna Cheruto Melile way back on the 16th March 2003 and therefore when she realized that there was suit filed in court, she sought to be joined in the pleadings as an administrator of the estate of John Melile Kaplelach in place of Tigisey Kipngeno Koech.
12. That it was not good practice for litigants to use Preliminary Objections to throw out matters that should clearly be heard. That the court ought to invoke the overriding objectives to allow the substitution of the Plaintiff. The Plaintiff relied on the decided case in *Aggrey Swaka Waswa vs Patrick*



Omonge Khaemba: Tomas Meshak Omonge & 3 others (proposed Respondents) [2020] eKLR and Order 24(sic) to submit that where one party died and the cause of action survived or continued against the surviving party, the court would cause the legal representative of the deceased to be made a party by substitution and the matter need not abate. The Plaintiff sought for the Preliminary Objection to be dismissed costs.

Determination.

13. I have considered the Preliminary Objection herein and the submissions by Counsel for both parties as well as the authorities filed herein. It is not in dispute that the Plaintiff, Tigisey Kipngeno Koech filed suit on the 3rd September, 2003 vide a Plaint dated 27th August, 2003 as against the Hon Attorney General as a 1st Defendant and the Director of Surveys as a 2nd Defendant. At paragraph 4 of the said Plaint, the Plaintiff had presented himself as the administrator of the estate of the late John Melile Kaplelach an allottee of Plot No G.13 Gelegele Settlement Scheme.
14. Vide an order of the 20th June 2018, the Plaint was amended on the 27th July 2018 to join Emmanuel Kipkorir Koech and Thomas Kipngetch Langat as 3rd Defendants and Administrators of the estate of Kimitei arap Chumo. Another amendment was subsequently made to the Plaint in March of 2019 to bring on board the 4th Defendant. All this while, the Plaintiff had presented himself as an administrator of the estate of John Melile Kaplelach.
15. I note from the pleadings herein filed that a Grant of Letters of Administration to the estate of John Melile Kaplelach was issued to one Anna Cheruto Melile, Catherine Melile and the Plaintiff Tigisey Koech on the 26th March 2003 in the High Court sitting at Kericho in Succession Cause No.183 of 2002. I also note from the pleadings that on the 6th December 2010 Letters of Administration to the estate of John Melile Kaplelach were again issued to Anna Cheruto Melile only, by the High Court sitting at Kericho but this time in Succession Cause No. 93 of 2010 (the year has been interfered with using a black pen to read 2002) that thereafter a certificate of the Confirmation of Grant was issued to Anna Cheruto Melile on the 24th November 2014 vide Succession Cause No. 93 of 2010 (Again the year has been interfered with this time using white out)
16. Consequently the issue that arises for determination is whether the Plaintiff has the *locus Standi* to sue on behalf of the Estate of John Melile Kaplelach.
17. Before I analyze my finding, I wish to point out that pursuant to the service of the Notice of Preliminary Objection upon the Plaintiff, they chose not to file a response to the same but instead filed their submissions challenging the Preliminary Objection. The Supreme Court of Kenya in *Gideon Sitelu Konbellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR held as follows:

“A Replying Affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect.”
18. That said and done, I find that the Plaintiff’s written submissions of 25th April 2022 are of no effect without a Replying Affidavit.
19. It is on recorded that pursuant to the issuance of the Letters of Administration to Anna Cheruto Melile, by the High Court sitting at Kericho in Succession Cause No. 93 of 2010 on the 6th December 2010 followed by the confirmation of Grant on the 24th November 2014, the Letters of Administration



took effect from the date of such Grant as provided for by the provision of Section 80(2) of the Law of Succession Act.

20. In effect therefore, the Plaintiff herein ceased being the personal representative of the deceased by virtue of the provisions of Section 3 of the Law of Succession Act which defines a personal representative to include the executor or administrator, as the case may be, of a deceased person. The Plaintiff herein could therefore not move any court to propound the deceased's estate as he did not pose the locus standi.
21. In *Alfred Njau & Others v City Council of Nairobi* [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”
22. Applying the principles in *Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd.* (1969) EA 696 to wit that an objection must consist of a point of law which if argued as a Preliminary Objection is capable of disposing of the suit, the 3rd and 4th Respondents herein have argued that the Plaintiff herein cannot bring a suit against them because he does not have locus standi. Locus standi is a primary point of law almost similar to that of jurisdiction and is therefore within the first principle in the Mukisa Biscuit case. It is a point of law capable of disposing of a suit. Since the Plaintiff ceased being an administrator of the deceased's estate after Anna Cheruto Melile was granted the Letters of Administration which were subsequently confirmed, he lacked the capacity to sue on behalf of the deceased's estate which then rendered the pleadings filed by him and the suit incompetent.
23. Indeed the Court of Appeal authoritatively delivered itself on the issue of locus standi in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* (1982-99) 1 KAR, *Morjaria v Abdalla* [1984] KLR 490 and in *Troustik Union International & Another v Jane Mbeyu & Another* Civil Appeal No. 145 of 1990 to the effect that Locus standi being a primary point of law almost similar to that of jurisdiction, the lack of capacity to sue or be sued therefore rendered any the suit incompetent.
24. Since the issue of locus standi is a point of law which goes to the root of any suit whereby its absence renders a suit fatally defective, lack of it cannot therefore be termed as a mere technicality and the provisions of Article 159 (2) (d) of the Constitution cannot in such circumstance salvage the suit. For this reason, I strike out the suit. The Preliminary Objection dated the 22nd November 2021 succeeds with costs to the 3rd and 4th Defendants.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 16TH DAY OF JUNE 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

