



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nzola & another v Mutiso & another (Environment & Land Case  
E004 of 2022) [2022] KEELC 14877 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14877 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE E004 OF 2022**

**JM MUTUNGI, J  
NOVEMBER 17, 2022**

**BETWEEN**

**REUBEN MUNYAO NZOLA ..... 1<sup>ST</sup> PLAINTIFF**

**ROBERT MAINGI NZOLA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JEMIMAH KASIVA MUTISO ..... 1<sup>ST</sup> DEFENDANT**

**PATRICK GICOBI KARANI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff instituted the present vide a plaint dated February 9, 2022 seeking the following orders:-
  - a. Cancellation to title deeds of land parcel No. Kirinyaga/Gathigiriri/4781, 4782, 4783, 4784, 4785, 4786 and 4787.
  - b. That the land reverts back to the original owner David Nzolla Komu (deceased) under the original title No. Kirinyaga/Gathigiriri/67 as it was before the fraudulent transaction.
  - c. Costs of the suit.
2. The plaintiffs simultaneously with the plaint filed a notice of motion application dated February 9, 2022 where they sought orders of inhibition in respect of land parcels Kirinyaga/Gathigiriri/4781 – 4787 (sub-divisions from parcel 67) and an order of injunction restraining any dealings with the aforesaid parcel of land pending the hearing and determination of the suit. The application was premised on the grounds set out on the body of the application and the affidavit sworn in support by the applicants dated February 9, 2022. The applicants vide the affidavit averred that the suit land parcel Kirinyaga/Gathigiriri/67 belonged to their deceased father, David Komu Nzolla. They averred that their brother Simon Komu Nzolla (now deceased) cheated their father and got the suit land registered



- in his own name fraudulently. The applicants further averred that their father had before he died requested their brother to return the title which he never did.
3. The applicants stated that when they sought to do succession in regard to their late father's estate, they upon carrying out a search, discovered the 1<sup>st</sup> defendant had transferred the land to her name and had subdivided and sold a portion to the 2<sup>nd</sup> defendant without any reference to them. The applicants averred they reside on and have developed the portion of land that they occupy and are apprehensive the 1<sup>st</sup> respondent could sell the land and thereby disinherit them. The applicants thus pray for orders of inhibition and injunction.
  4. Upon the defendants filing the statement of defence and the preliminary objection, the applicants filed a supplementary affidavit on July 21, 2022 where they deponed that before their father died, he called a family meeting where their brother was asked to revert the title to the name of their father. They stated their father had 11 sons and only had the suit land and could therefore not only gift one son the land. They further averred the 1<sup>st</sup> defendant never consulted them when she did succession of her late husband's estate and they never knew their brother had not transferred the title as agreed.
  5. The defendants filed a statement of defence dated July 12, 2022. The defendants denied all the plaintiffs averments in the plaint. The 1<sup>st</sup> defendant averred that land parcel Kirinyaga/Gathigiriri/67 (the suit property) was gifted to her husband by his late father David Komu Nzola before he died. The 1<sup>st</sup> defendant further averred that following the death of her husband, land parcel Kirinyaga/Gathigiriri/67 was bequeathed to her in Kerugoya CM's Court Succession Cause No. 197 of 2010 and that the plaintiffs never raised any objection in the succession proceedings. The defendants further pleaded the plaintiffs suit was incompetent and lacked merit and gave notice that they would raise a preliminary objection to have the suit struck out for being time barred and on account of the plaintiffs lack of locus standi to institute the suit.
  6. Simultaneously with the statement of defence, the defendants filed a notice of preliminary objection to have the suit dismissed and struck on the following grounds:-
    1. The plaintiffs lack capacity (locus standi) to institute this suit as they have not taken out letters of administration ad litem in respect to the estate of their late DAVID NZOLLA KOMU (deceased).
    2. The suit is time barred having been brought outside the statutory limitation of 12 years in view of Section 7 of the Limitation of Actions Act Cap 22, since the alleged fraud was discovered sometime in the year 2003 (see paragraph 6 of the plaint).
    3. The plaintiffs' suit is incompetent, bad in law and an abuse of the court process and should be dismissed with costs to the defendants.
  7. The court on July 21, 2022 directed that the notice of motion application dated February 9, 2022 and the preliminary objection be heard together and that the same be canvassed by way of written submissions. Both the applicants and the respondents filed their respective submissions.
  8. The applicants in responding to the defendants/respondents preliminary objection on the ground that they lacked the *locus standi* to institute the suit, submitted that they could not have taken out letters of administration to represent their late father's estate since the title to the suit land had already been transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' names respectively. The applicants argued they could not have taken out letters of administration ad litem as the property was not in the name of their deceased father and the ownership of the land was in dispute. The applicants further submitted the facts in the matter were in dispute and therefore the preliminary objection was unsustainable. The applicants relied on



the case of *Vitin Properties Ltd Vs Singh Kailse & Another (1995) eKLR* where the Court of Appeal reiterating the principle established in the leading case on the subject of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696* stated as follows:-

' A preliminary objection 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.'

9. In the *Mukisa Biscuits* case (supra), Sir Charles Newbold, P. Stated thus:-

' 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 ...'

10. The defendants on their part in support of their assertion that the plaintiffs lacked the locus standi to institute the present suit submitted that to the extent that the plaintiffs in the suit are seeking to have the resultant titles arising from title number Kirinyaga/Gathigiriri/67 cancelled and the original title reverted to the name of their late father David Nzolla Komu (deceased), they have brought the suit on behalf of the deceased estate without the requisite authority to do so. The defendants contended as long as the suit was brought forward on behalf of the estate of the deceased, the plaintiffs needed to have taken out letters of administration more specifically a limited grant (ad litem grant) to clothe, them with authority to institute the suit on behalf of the deceased estate.

11. In the instant suit, the plaintiffs have clearly pleaded that land parcel Kirinyaga/Gathigiriri/67 was originally registered in the name of David Nzolla Kome (deceased) before it was, according to the plaintiffs, fraudulently transferred to the name of Simon Komu Nzolla (now also deceased). The wife of Simon Komu Nzolla (deceased) obtained grant of letters to his estate and caused the subdivision of the suit land into several portions and sold one such portion Kirinyaga/Gathigiriri/4781 to the 2<sup>nd</sup> defendant. The plaintiffs pray for the cancellation of the subtitles and for the land to be reverted to its original owner David Nzolla Komu (deceased). Without a doubt, the suit has to be seen as one brought on behalf of the estate of the deceased. In the event the plaintiffs were to be successful, the suit property would revert to the deceased and hence would be liable to succession proceedings.

12. It is trite law that only a duly appointed personal representative of a deceased person can act on behalf of a deceased person or can institute and/or sustain a suit on behalf of a deceased person's estate. Section 82(a) of the *Law of Succession Act* provides as follows:-

82. Powers of personal representatives-

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-

- a. To enforce by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate;
- b. ....
- c. ....
- d. ....
- e. ....



13. Where a person has died, only a legal personal representative can institute a suit on behalf of his estate and/or continue with a suit, where the cause of action survived the deceased death. Where a suit is commenced touching the estate of a deceased person without a legal personal representative for the deceased being appointed, such a suit would be incompetent as the person initiating the same, would have no legal capacity to bring the suit on behalf of the deceased estate. There are a myriad of cases where the courts have held that where suits filed relating to deceased estate, without a personal representative being appointed were null and void for want of *locus standi*. See Court of Appeal cases of [Virginia Edith Wamboi Vs Joash Ochieng Ougo & Another \(1982-88\) 1 KAR](#) and [Teouistik Union International & Another Vs Jane Mbeyu & Another, Civil Appeal No. 145 of 1990.](#)
14. Mrima J. in the case of [Julian Adoyo Ogunga & Another Vs Francis Kiberenge Bondera \(Suing as the Administrator of the Estate of Faniel Evans Amudavi, deceased\) \(2016\) eKLR](#) succinctly expressed himself as regards filing of a suit respecting a deceased estate without obtaining a grant. Inter-alia, the judge stated at paragraphs 28 and 29 of his judgment:-
- ' 28.....
- Further the issue of *locus standi* is cardinal in a civil matter since it turns through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matters involve the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.
- '29. In this matter therefore, the respondents lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the leg to stand on ....'
15. In the instant matter before me, it is a fact the plaintiffs have filed the suit on behalf of and for the benefit of the estate of their deceased father. As I have demonstrated, for the plaintiffs to legally institute the suit on behalf of the deceased estate, they needed to have sought and obtained an ad litem grant limited to enable them to bring the suit on behalf of the deceased estate. They did not and consequently, they lacked the capacity to institute the suit. They had no *locus standi* to file the suit. A suit instituted by a person without the legal capacity to do so is a nullity ab initio and is unsustainable. The defendants preliminary objection, that the plaintiffs had no locus standi to file the suit is meritorious and is sustainable.
16. Having upheld the defendants preliminary objection that the plaintiffs had no locus standi to file the suit, that is sufficient to dispose of the matter. There is no competent suit before the court and I need not consider the other limb of the preliminary objection that the suit was statute barred on account of section 7 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya. However, the plaintiffs as per the pleadings appear to have been laying claims to the suit land as beneficiaries of their deceased father's estate, meaning issues of trust could arise which in my view if established could defeat the plea of limitation.
17. Be it as it may be, having held that the plaintiffs lacked the requisite legal capacity to institute the suit, the suit is incompetent and a nullity. The plaintiffs notice of motion application dated February 9, 2022 which was argued together with the preliminary objection of necessity equally must fall by the



wayside. The application could not properly be founded on an incompetent suit that was a nullity ab-initio.

18. The net result is that I uphold the preliminary objection that the plaintiffs had no locus standi to institute the suit. The notice of motion application and the entire suit are hereby ordered struck out for being incompetent and null and void.
19. The court has noted that the suit involved close family members and in its discretion directs that each party shall bear their own costs of the application and the suit. Orders accordingly.

**Ruling Dated, Signed and Delivered at Kerugoya this 17<sup>th</sup> day of November, 2022.**

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**HON. J. M. MUTUNGI**

**ELC JUDGE**

