



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**PROBATE AND ADMINISTRATION NO. 42 OF 2002**

**SERAH MUTHEE MUNYAO.....DECEASED**

**AND**

**RUTH MUENI KITUNDU.....APPLICANT**

**R U L I N G**

Serah Muthee Munyao is the deceased in these proceedings. The applicant Ruth Mueni Kitundu has filed an application by way of chamber summons under Rule 24(1) of the Probate and Administration Rules. The application is against Mutinda Munyao, Joyce Ndungwa Munyao and Francis Manthi Masika requiring the three to bring to court the will of Serah Muthee Munyao for examination.

The respondents have put in a preliminary objection on the ground that the applicant has no relationship with the deceased and has no locus standi to make this application because she is not a beneficiary of the deceased neither is she the dependant or a child or wife of the deceased as defined in the law of succession Act Cap 160 Laws of Kenya.

In their oral submission in court Counsel for the objector stated that the applicant has no locus standi because she claims to be a wife and yet the Laws of Succession Act does not recognize woman to woman marriage.

The respondent who has opposed the preliminary objection submitted that the applicant has locus standi as the rules talk of any person who wants to make an application, that under rule 64 aspects of customary law have to be proved and if the applicant is shut out at this stage then she will not have another avenue where she can pursue her interests. That matters herein require evidence to be adduced and cannot be disposed off by way of a preliminary point of view.

I have heard both sides and in order for the preliminary objection to succeed it has to meet the test. The test is set out in the case of **Mukisa Biscuit Manufacturers versus West End Distributors Ltd. (1969) EA 696**. At page 701 paragraph AB. It is stated "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law that is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is being sought is the exercise of judicial discretion."

Applying the above principle to this preliminary objection it is clear that it cannot be upheld because the facts on which the applicants intends to rely on have to be ascertained namely:-

1. What interest she has in the said estate so as to give her locus standi.
2. Whether the basis of the locus standi she is putting forward is recognized by the law or not.

I therefore find that the preliminary objection advanced does not meet the standards set and so the same is dismissed with costs to the respondent.

Dated, read and delivered at Machakos this 7th day of March 2002

**R. NAMBUYE**

**JUDGE**