



REPUBLIC OF KENYA



KENYA LAW
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**Murei v Maiyo & 8 others (Civil Appeal 13 of 2022)
[2025] KEELC 4046 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
CIVIL APPEAL 13 OF 2022
L WAITHAKA, J
MAY 8, 2025
(FORMERLY ELD E & LC NO. 40 OF 2021)**

BETWEEN

RUKIA KIMOI MUREI APPELLANT

AND

AUGUSTINE KIPKORIR MAIYO & 8 OTHERS & 8 OTHERS & 8 OTHERS & 8 OTHERS & 8 OTHERS RESPONDENT

(Being an Appeal from the Ruling of Hon. Caroline R. T. Ateya SRM, delivered on 20th September 2021 in Iten SPM ELCC No. 96 of 2020 (formerly ELCC No. 27 of 2020))

JUDGMENT

1. By a ruling delivered on 20th April 2021 in Iten SPMC ELC Case No.27 of 2020, the trial magistrate, Hon R.T Ateya SRM, dismissed the plaintiff/appellant's suit hereto on the ground that the plaintiff lacked locus standi to bring the suit on behalf of the estate of her deceased father, Kipseget Arap Kipsagit, as she did not obtain a grant of representation before filing the suit.
2. The learned trial magistrate made the impugned decision after the defendants/respondents filed a notice of preliminary objection dated 14th August 2020 seeking to dismiss the plaintiff/appellant's suit in limine on the ground that the suit is an affront to the provisions of Section 4(2) of *Limitation of Actions Act*, Cap 22 laws of Kenya; that the plaintiff had not invoked the right jurisdiction of the court under Section 48 of the *Law of Succession Act*, Cap 160 laws of Kenya to oversee the transmission of a deceased person to its alleged beneficiaries and that the plaintiffs lacked locus standi to bring the suit on behalf of the estate of a deceased person pursuant to the express provisions of the *Law of Succession Act*, Cap 160 Laws of Kenya.
3. The preliminary objection, was disposed off by way of written submissions.



4. In upholding the preliminary objection the learned trial magistrate inter alia held/observed:-

“the plaintiff in her plaint dated 28th May 2020 indicates that the suit land was registered in the name of Kipseget Arap Kipsagit who is her deceased father. The suit land was subdivided and new titles issued to the defendants herein. She is seeking a restoration of the original title Lelan/Kaptalamwa/15 which was registered in the name of her father, now deceased.

In the case of Joseph Oginga Onyoni & 2 others v Attorney General & 2 others (2016)eKLR cited with approval in the case of Troustic Union International & another vs. Mbeyu & another (1993) e KLR the court held that the estate of a deceased person is vested in the legal representative who has capacity to represent the estate....

In this matter, the plaintiff has not obtained any grant on behalf of the estate of the deceased. The suit property and the rights she seeks to enforce were in the name of her deceased father. Without a grant of representation, the plaintiff has no locus to sue on behalf of the estate of the deceased.

In the absence of the grant and having found that the plaintiff has no locus to bring the suit, the court has no option but to dismiss the suit....

This is not an error or omission that can be cured by way of amendment. The plaintiff needs to have a grant before she can sue.

I therefore find that the preliminary objection raised by the defendants has merit. The plaintiff has no locus standi to bring the suit on behalf of the estate of the deceased as she did not obtain a grant of representation. There's therefore no need to proceed to pronounce myself on the issue of time limitation. The suit filed by the plaintiff is hereby dismissed with costs to the defendants.

5. Aggrieved by the decision of the trial court, the plaintiff appealed to this court on 15 grounds that can be reduced to one broad ground namely that the learned trial magistrate erred by upholding the defendants' preliminary objection and dismissing her suit with costs to the defendants.

6. Pursuant to directions given on 9th November 2023 the appeal was disposed off by way of written submissions.

Appellant's Submissions

7. In her submissions, filed on 19th December 2023 the plaintiff/appellant submits that the learned trial magistrate erred by upholding the defendants/respondents notice of preliminary objection which they used as a shield against her claim/case in order to benefit from their fraudulent actions and by failing to find that she is entitled to be heard on her claim that the defendants/respondents hold the suit property in trust for her as a beneficiary of the estate of her deceased father.

8. At the time of writing this judgment, the defendants/respondents had not filed submissions or otherwise put, the submissions, if any, were not in the court file.

Analysis and determination

9. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or



unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.

10. As pointed out herein above, this appeal is premised on 15 grounds that can be reduced to one broad ground namely; the learned trial magistrate erred by upholding the defendants/respondents' preliminary objection and dismissing her suit with costs to the defendants/respondents.
11. I have reviewed the case urged before the trial court and from the pleadings, plaint filed in the case hereto, it is clear that the suit relates to the property known as Lelan/Kaptalamwa/15 which belonged to the estate of Kipseget Arap Kipsagit, deceased, before it was subdivided and the subdivisions therefrom namely Lelan/Kaptalamwa/734 to 744 were registered in the names of the defendants/respondents.
12. The plaintiff/appellant complained that there was misrepresentation and fraud in the subdivision and transfer of the suit property to the defendants/resp-ondents; that arising from the impugned subdivision and transfer of the suit property she suffered loss and damage in that she lost her share of the estate of her deceased father amounting to 20 acres.
13. In the suit, the plaintiff sought the following reliefs/orders:-
 - a. A declaration that the process that culminated in subdivision of the suit property and registration of the subdivisions in the names of the defendants/respondents was fraudulent, un-lawful, illegal, unprocedural, tainted with corruption and misrepresentation;
 - b. An order of rectification of the register and cancellation of the registration of the defendants as proprietors of the resulting parcels;
 - c. Surrender by the defendants of the parcels registered in the defendants names to the plaintiff.
14. In essence, the plaintiff's suit is based on her contention that the suit property belongs to the estate of her deceased father, which estate she is entitled to a share as a beneficiary. The plaintiff, inter alia, wants to be registered as the proprietor of the suit property after the titles issued to the defendants/respondents are cancelled.
15. As pointed out above, the plaintiff hinged her case on the parcel of land known as Lelan/Kaptalamwa/15 which belonged to the estate of her deceased father before it was subdivided and the subdivisions therefrom registered in the name of the defendants.
16. As was rightly observed by the learned trial magistrate, before the plaintiff can lawfully sue on behalf of the estate of her deceased father comprised in the parcel of land known as Lelan Kaptalamwa/15, she needed a grant of representation, which grant she did not obtain. In that regard, see the case of *Troustic Union International & another vs. Mbeyu & another* (1993) e KLR where the Court of Appeal overturned the decision in the Hintz case cited by the appellant in support of her case:- In that case, the Court of Appeal held/observed:-

“..The highest judicial authority which, by necessary implication repudiated the holding in the Hintz case is the oft cited *Otieno v Ougo* case decided in 1987. The question at issue in that appeal was the right of a Widow to bury her intestate husband when she obtained no letters of administration to his estate. The Court gave vent to an important principle of law of universal application with respect to the right of a party to fulfil the role of an



administrator of an intestate without obtaining letters of administration the court, *inter alia*, observed:

“The administrator is not entitled to bring an action as administrator before he has taken letters of administration if he does the action is incompetent at the date of its inception.”

It is significant that Nyarangi, J.A., who co-authored the Hint judgment and who presided over the Ougo appeal, subscribed to this statement of the law or at any rate, did not dissent from it. It was he who stated in the now famous Hintz case that:

“It seems to me, having regard to Section 2 of the *Law Reform Act* that a parent or next of kin or a personal representative can act as a representative of a deceased person and file an action for the benefit of a deceased estate without a grant of probate or letters of administration to the estate”.

The Hintz decision has stood for nine years, but its life was not undisturbed its authority as a judicial precedent has been seriously undermined by the many cases to which we have referred. Perhaps, it is not uncharitable to conclude that its nine-year life was undeserved and we should now give this decision, whose life is in the balance, its “coup de grace” and lay it safely to rest.

17. It is thus trite law that a grant of letters of administration is required in order to sue on behalf of the estate of a deceased person.
18. Having instituted the suit without compliance with the law, the plaintiff cannot be heard to complain that the learned trial magistrate erred when she dismissed her suit with costs to the defendants.
19. The suit having been filed *contrastatute*, it was not only bad in law but also fatally defective. The issue of want of capacity to sue on behalf of the estate of a deceased person is not a procedural technicality which could be cured by way of amendment of the suit.
20. The upshot of the foregoing is that the appeal has no merits. Consequently, I dismiss it with costs to the defendants/respondents.
21. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT ITEN THIS 8TH DAY OF MAY, 2024

L. N. WAITHAKA

JUDGE

Judgment delivered electronically in the presence of:

Mr Cheptarus for the appellant

No appearance for the respondents

Court Assistant – Jael Kerubo

