



Kavoo & another v Marera (Suing on behalf of Marera Family) (Environment and Land Appeal 7 of 2022) [2023] KEELC 18857 (KLR) (12 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 7 OF 2022**

**EK MAKORI, J
JULY 12, 2023**

BETWEEN

BONFACE KAVOO 1ST APPELLANT

JONA JOEL 2ND APPELLANT

AND

MICHEAL KASHIHIRI MARERA (SUING ON BEHALF OF MARERA FAMILY) RESPONDENT

(An appeal from the Ruling of the Honourable J. M Kituku delivered at Kilifi on 1st February 2022 in the Senior Principal Magistrate's Court in _____ ELC Case No E105 of 2021)

JUDGMENT

1. For determination before this Court is the Appellant's Appeal appealing the entire Ruling of Honourable J. M. Kituku delivered on 1st February 2022.
2. Aggrieved by the decision of the Court the Appellant filed its Memorandum of appeal raising grounds therein inter alia:
 - a. That the Learned Magistrate erred in law and fact in failing to find that the Respondent had no *locus standi* to institute the suit at the trial court on behalf of the Estate of Pius Mwarabu Marera (Deceased) whom he states that the deceased held the suit property in trust for the Marera Family.
 - b. That the Learned Magistrate erred in law and fact in failing to note and appreciate that the Respondent had in his suit and application before the trial court, expressly stated that he was instituting the said suit on behalf of the late Pius Mwarabu Marera (Deceased) who held the suit property in trust for the Marera Family.



- c. That the Learned Magistrate erred in law and fact, in finding that, the issue of establishing the *locus standi* of the Respondent has no merits.
 - d. That the Learned Magistrate erred in law and fact in holding that whether or not the property ought to be declared a customary trust was the issue up for determination in the Appellant's Preliminary objection as opposed to the issue of whether or not the Respondent had *locus standi* to institute the suit on behalf of the late Pius Mwarabu Marera
3. The Appellant in their Memorandum of Appeal seeks that the decision of Honourable J. M. Kituku delivered on 1st February 2022 be set aside in its entirety and substitute it with an order allowing the Appellants' preliminary objection and strike out the entire suit.
4. The Respondent herein instituted a suit vide a Complaint dated 15th September 2021 and filed on 24th September 2021 praying for judgment against the Appellants herein. The Plaintiff simultaneously filed an application under a certificate of urgency dated 15th September 2021 filed on 24th September 2021 which application was supported by an affidavit sworn by Michael Kashihiri Marera, and sought an order of temporary injunction be issued against the Appellant until the hearing and determination of the suit.
5. The Appellants herein filed its Preliminary Objection dated 6th October 2021 opposing the Respondent's suit because it argued that it was incompetent and fatally defective since the same had been instituted by a person who did not have the requisite legal capacity and/or letters of administration, the Appellant herein sought that the same to be dismissed with costs.
6. The Appellants in their Preliminary Objection stated that the Respondent lacked the legal capacity and/or *locus standi* to bring the suit at the Magistrates Court or make any application therein as he had not obtained Grant of Letters of Administration Intestate, grant of Probate and/or *grant ad litem* thereof to the Estate of Pius Mwarabu Marera (Deceased) whom he stated was his deceased father and was the lawful owner and the absolute proprietor of the suit property known as Plot Number 339 situated in Kikambala, Kilifi Measuring 2.5 Acres, whom he alleged held the suit property in trust for the Marera Family.
7. The Appellants further stated that the Respondent's entire suit was incompetent, fatally, and incurably defective for failing to comply with the mandatory provisions of the [Law of Succession Act](#) since the Respondent had not shown that he was the Legal Representative of the Estate of Pius Mwarabu Marera (deceased), hence the suit ought to have been struck out with cost to the Appellant.
8. Honourable J. M. Kituku delivered the Ruling on 1st February 2022 in which he dismissed the Preliminary Objection with costs, the Court found that the Preliminary Objection had no merits and that the Respondent did not require letters of administration to file the suit. This is what provoked the current appeal.
9. The court directed parties to file written submissions. The Appellant did file their submissions. The Respondents did not.
10. Looking at the material placed before me including the pleadings, proceedings, and the impugned Ruling by the Trial Court: issues for determination in the present appeal can be listed as follows:
 - i. Whether the Preliminary Objection as filed was properly raised in the Lower Court.



- ii. Whether the orders issued on 1st February 2022 ought to be set aside
 - iii. Who should bear the costs of this appeal?
11. The Appellant has quoted the leading case in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. The Eastern Africa Court of Appeal then stated the parameters to achieve when raising a Preliminary Objection as follows:
- “ A Preliminary Objection consists of a 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 or 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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
12. The submission by the Appellant in the Lower Court and here are correct on what amounts to a Preliminary Objection. The issue raised in the Lower Court was *locus standi* of the respondent to propagate a suit ostensibly on a property owned by a deceased person without letters of administration. The Appellant picks a quarrel with the findings by the Magistrate that he erred in holding that the issue of *locus standi* was an issue to be determined at trial. The Appellant quoted the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR the Court of Appeal opined that:
- “In our view issues of *locus standi* and jurisdiction are critical preliminary issues which ought to have been settled before dwelling into other substantive issues”
13. The Appellants averred that in his Plea, the Respondent stated that the suit property was a family/ ancestral land belonging to the Merera Family where he is a member and is entitled to ownership, possession, and all other benefits appurtenant thereto and that the suit property was being held in trust by the Respondent’s Deceased father one Pius Mwarabu Marera on behalf of the Marera Family. Under paragraph 3 of the Witness Statement (page 13, of the record of appeal) filed by the Respondent in the trial court:
- “That the suit property was being held in trust by his Deceased father Pius Mwarabu on behalf of the Marera family”
14. The Appellants further submitted that owing to the above, it is clear from his pleadings that the alleged suit property has always been the property of the deceased and it therefore forms part of his Estate. The Respondent’s interest in the suit property is that of a beneficiary and from a look at his pleadings, this position is evident.
15. The Appellants proceeded to state that in the present case, the Respondent herein instituted the suit knowing very well that he does not have the requisite legal capacity and/or letters of administration to bring a suit and more specifically on behalf of the property of the deceased. Section 45 (1) of the *Law of Succession Act* (Cap 160 Laws of Kenya) provides as follows:
- “Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”



16. The main objection raised by the Appellant herein is that the Respondent has no *locus standi* in this matter and the case of *Re Estate of Stephen Kimotho Karanja (Deceased)* [2022] eKLR the Court stated that:

“Locus standi is a Latin term, which literally means ‘place of standing’ and refers to the right of a particular party to bring an action or a suit.”

17. The Appellants contended that it is trite law from the foregoing that pleadings filed in court by persons with no *locus standi* are void ab initio and the court would have no jurisdiction in such actions. The court *In Re Estate of Stephen Kimotho Karanja (supra)* placed reliance on the case of *Ibrahim v Hassan & Charles Kimenyi Macharia*, [2019] eKLR the court observed as follows: -

“Locus standi is the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening to. The issue herein is whether the Applicant lacks the requisite *locus standi* to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards *locus standi* are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues”.

18. The Appellants further submitted that this position would have differed had the Respondent herein petitioned for grants as that is where he will be deriving his authority from, however, the Respondent is bringing a suit on behalf of the deceased without having obtained the said grants of letters of administration or grant of probate neither has the Respondent obtained grant ad litem from a court of competent jurisdiction to enable him to lodge the suit.

19. From the foregoing, the Appellants submitted that the issue of *locus standi*, being one based on a pure point of law as such must be determined in the preliminaries.

20. As stated the Respondent never filed any submissions in this appeal.

21. I agree with the Appellant that where a party sues on behalf of the estate of the deceased, one has to obtain letters of administration to be clothed with the necessary *locus standi* so to say. I have looked at the Ruling by the trial court on the issue raised in this appeal. After considering the submissions regarding the couching of the Plaintiff, particularly the way the Plaintiff/Respondent is described vis-a-vis the deceased, the Magistrate had this to state:

Did the Plaintiff require letters of administration to file this case? To me, the answer depends on whether the Plaintiff is suing on behalf of the estate of the deceased or not. That is to be gleaned from the Plaintiff in paragraphs 4 and 5. He claims the deceased held the property in trust of other family members.

Section 3 of the Law of Succession defines “intestate” as the free property of the deceased.

Clearly, if a person holds property in the trust of other family members, that is not property to dispose of at will and if he dies, that is not a freehold property and therefore not part of the estate

I find that Plaintiff did not require letters of administration to file the present suit, and I am totally in agreement with the Plaintiff’s submission on that issue.



22. The Trial Court quoted a passage from the case of *Michael Osundwa Sakwa v Chief Justice and the President of the Supreme Court & Anor.* [2016] eKLR while quoting the case of *Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission* Nairobi HCCP No. 1 of 2010 as follows:

“...In Kenya, the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population.”

23. The Magistrate proceeded on the premises that this was not a succession issue, the Plaintiff has couched the pleadings in such a manner that it could appear that the suit property was never part of the estate of the deceased for free distribution as defined under Section 3 of the Succession Act, but rather it was family land and anybody within the family had a right to own it. In such a scenario then, the Magistrate reasoned that it would be up to the Plaintiff/Respondent to prove that during a hearing.

24. The element of Customary Trust was brought into the picture that the deceased held the land in trust for the Marera family and upon his demise, the entire family had a right of ownership not necessarily via transmission. In Kenya, a customary trust is a legal arrangement that is rooted in Traditional African Customs and Practices. It is a form of trust that is recognized under Section 28 of the *Land Registration Act*, 2012:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a).....

(b)trusts including customary trusts;”

25. Customary Trusts are typically established for the benefit of family members or designated beneficiaries, in accordance with customary laws and practices. These trusts are often created to protect and preserve family or communal assets and ensure their proper distribution among heirs.

26. Customary trust was well explained by the Supreme Court in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR, as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan, or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan, or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.



5. The claim is directed against the registered proprietor who is a member of the family, clan, or group.”
27. The specific terms and conditions of a Customary Trust can vary depending on the customs and traditions of the particular community involved. The beneficiaries, who are often family members or members of a particular community, are entitled to benefit from the trust in accordance with customary norms and practices.
28. Courts have grappled with which Court is well suited to hear cases involving Customary Trust when a deceased is said to have been the Trustee whether it is the Family Court or the Land and Environment Court. *In Re Estate Of The Late Jonathan Kinyua Waititu - (Deceased)* [2017] eKLR, The court held that:

“I have also considered the second question which really is of *locus standi* or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father.

In my view, this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependents, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I, therefore, do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction to the court. This will only go to the question of costs.”



29. In the Court of Appeal cases of *Mutbuita v Mutbuita* [1982-88] 1 KAR 42 at 44 and *Njenga Chogera v Maria Wanjira Kimani & others* [2005] eKLR, it was held that:

“customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.” The Court of Appeal noted in the above cases that though the High Court has unlimited original jurisdiction in Criminal and Civil Matters, it does not have jurisdiction to deal with matters that fall under the ambit of the Environment and Land Court”

30. From the authorities cited, I then think that the Magistrate was right in having the matter go for full trial for the alleged Customary Trust to be established by the parties. The finding on the Trust will ultimately lead to the distribution of the estate.
31. Whether the orders issued on 1st February 2022 ought to be set aside. I do not think so based on the authorities that I have quoted on the Customary Trust Concept. The Respondent did not require the letters of administration to bring up the suit before the Magistrates Court.
32. The upshot is that the appeal lacks merit. It is hereby dismissed with no order as to costs since the Respondent never participated as can be shown from the record.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 12TH DAY OF JULY, 2023

E.K. MAKORI

JUDGE

In the Presence of:

M/s Amina for Appellant

Court Clerk: Happy

In the Absence of:-

Ms. Kiseu for the Respondents

