



**John Nyamari Mogaka t/a Ouru Hyper Stores v Mogaka & 2 others (Petition
24 of 2016) [2023] KEELC 19879 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
PETITION 24 OF 2016
M SILA, J
SEPTEMBER 19, 2023**

BETWEEN

JOHN NYAMARI MOGAKA T/A OURU HYPER STORES PETITIONER

AND

CHARLES MATUNDURA MOGAKA 1ST RESPONDENT

JOSEPHAT NYACHOTI T/A MINMAX AUCTIONEERS 2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, KISII/GUCHA 3RD RESPONDENT

RULING

(Application to strike out petition; petitioner claiming to be a beneficiary of the suit land as son of the deceased; petitioner claiming that the 1st respondent unlawfully transferred the suit land to himself after the demise of their father and inter alia seeking orders for the cancellation of the title of the 1st respondent; petitioner contending that registration of the land in name of the 1st respondent violated his constitutional rights; objection raised that applicant lacks locus standi as he is not administrator of the estate of the deceased and that there is already an appointed legal representative; petitioner contending that the suit is a constitutional petition hence rule on locus standi cannot be applied strictly; court of opinion that there is no valid constitutional petition as this is a suit seeking to restore the land of a deceased person; such suit can only be commenced by the legal representative of the deceased; petitioner thus lacks locus standi as he is not the legal representative of the deceased; application allowed and petition struck out)

1. The application before me is undated but filed on 22 March 2023 by the 1st respondent to this petition. The applicant seeks orders to have the petition struck out on the basis that the petitioner lacks locus standi. The application is opposed by the petitioner.
2. To put matters into perspective, the petitioner, John Nyamari Mogaka trading as Ouru Hyper Stores, filed this petition on 13 July 2016. In the petition, he averred that he is a son and legitimate beneficiary



of the estate of Joseph Mogaka Nyang'au (the deceased) who died on 20 June 2014. He pleaded that the land parcel Kisii Municipality/Block III/142 (the suit land) was registered in the sole name of the deceased at the time of his death. He pleaded that on 11 August 2014, the 1st respondent appeared before the District Land Officer, Central Kisii, and allegedly obtained a letter of consent to transfer the suit land, during which period the 1st respondent purported that the deceased was also present. It is contended that the 1st respondent fraudulently executed a transfer instrument purporting that it was executed by the deceased and transferred the suit land to his name on 12 August 2014. It is pleaded that on 23 November 2015, the 2nd respondent, a firm of auctioneers, filed a miscellaneous application, being Kisii CMCC Miscellaneous Application No. 127 of 2015, seeking orders of security to distrain the petitioner for rent arrears and eviction. It is said that he also filed another miscellaneous application, being Kisii CMCC Miscellaneous Application No. 37 of 2016, seeking breaking-in orders to proceed with distress for rent arrears. The petitioner avers that the 1st respondent is aware that no succession proceedings have been undertaken in respect of the estate of their deceased father. He contends that the registration of the suit land in favour of the 1st respondent was fraudulent. In the petition, the petitioner seeks the following orders (paraphrased for brevity):-

- a. Declaration that the petitioner is entitled to protection under *the Constitution* and to be paid damages.
 - b. Declaration that the 1st respondent had no right to transfer the suit land and cancellation of the transfer and registration of the title.
 - c. Declaration that the 3rd respondent (Land Registrar) failed to properly discharge his powers and abused his office in contravention of the provisions of Article 21 (1) of *the Constitution*, 2010.
 - d. An order of permanent injunction to restrain the 1st and 2nd respondents from taking possession or interfering with the occupation of the petitioner of the suit land.
 - e. Costs of the petition.
3. On 10 August 2016, the suit against the 2nd respondent (the auctioneer) was withdrawn.
 4. The applicant (as 1st respondent) opposed the petition through a replying affidavit sworn by Eunice Bosire, who holds his power of attorney as the 1st respondent resides in the United States of America. In it, she deposed inter alia that the petitioner has not been appointed as the legal administrator of the estate of the deceased. She deposed that subsequent to the demise of the deceased, the family met and appointed Zablon Nyamari Mogaka alias Zablon Mogambi Mogaka, to petition for a grant of letters of administration in respect of the estate of the deceased. It was averred that the said Zablon filed Kisii High Court Succession Cause No. 73 of 2015 and was issued with a grant of representation which is now awaiting confirmation. It is further averred that since the petitioner is not the legal representative of the estate of the deceased, he is devoid of locus standi to mount any complaint on behalf of the estate of the deceased. On the transfer of the suit property, it was deposed that the deceased had executed the transfer instruments to the applicant during his lifetime, an issue that was also deliberated by the family. It was averred that as proprietor, the applicant is entitled to demand rent from the petitioner.
 5. In this application, the issue of locus standi of the petitioner has yet again be raised. It is the contention of the applicant that the petitioner lacks locus standi for he is not the administrator of the estate of the deceased, and thus this petition needs to be struck out. The supporting affidavit is yet again sworn by



- Eunice Bosire. She has deposed that Zablon Nyamari Mogaka is the appointed administrator of the estate of the deceased and she has annexed a certificate of confirmation of grant dated 19 February 2019.
6. The petitioner filed a replying affidavit to oppose the motion. He has deposed inter alia that he filed the suit as a beneficiary of the estate of their deceased father; that he has been in occupation of the suit land and running his business there long before the demise of his late father; that while in occupation, it came to his knowledge that the applicant had unlawfully procured transfer of the suit land to his name; that he subsequently filed this petition to safeguard his interest as beneficiary and the person lawfully in occupation of the premises located on the suit land; that in the petition he has raised serious issues relating to infringement of his right to property and fair administrative action as protected by Articles 40 and 47 of *the Constitution*; that when it comes to constitutional issues every person has locus standi so long as it relates to infringement of a constitutional right; that he has filed summons of revocation of grant in Kisii High Court Succession Cause No. 73 of 2015 which application he annexed; that in his said application he has asked the High Court to amend the grant to include the suit land so that it can be subjected to distribution as part of the estate of the deceased; that the summons for revocation is pending determination; that he should be allowed to air his constitutional grievance within this petition; that he stands to suffer greatly by not being given a chance to be heard; that the administrator of his father's estate is not keen to protect the estate of his late father and has relinquished his duties letting the estate be subjected to waste; that as a result of abandoning his duties, some properties of the deceased, specifically the land parcels Central Kitutu/Daraja Mbili/1342 and 2343 are scheduled to be auctioned; that the application is only brought in bad faith.
 7. Both Mr. Wafula, learned counsel for the applicant, and Mr. Mainga, learned counsel for the petitioner, filed submissions in respect of the application. I have taken note of the submissions filed before arriving at my decision.
 8. The sole issue that the applicant raises is that the petitioner has no locus standi to file this petition since he is not the administrator of the estate of the deceased. The response of the petitioner is that he has raised constitutional issues, and owing to that, he has the locus to present this petition to protect his right to property and to fair administrative action.
 9. . In this petition, the petitioner does assert rights to occupy the suit property on the basis that he is a son of the deceased and a beneficiary of the estate of the deceased. The main prayer in the petition is to have the title of the applicant cancelled so that the suit land can revert back to the estate of the deceased and be distributed in the usual manner. I do not see any constitutional matter that is in issue here. In fact and in essence, this is a suit seeking to restore land back to the estate of the deceased but disguised as a constitutional petition.
 10. The person who is entitled to file suit on behalf of the estate of a deceased person so as to have property restored to the estate of a deceased is the legal representative of the deceased. This is apparent from a reading of Section 79 and 82 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Section 79 provides that :

79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.



11. From the above, it will be seen that the property of a deceased vests in the personal representative and not in any other person.

12. In so far as suits are concerned, Section 82 (a) provides as follows :-

S. 82 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 arising out of his death for his personal representative;

13. All causes of action which survive the deceased are only enforceable by the personal representative and not anybody else. Indeed, this has been the holding in numerous decisions including the case of Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo & Another, Court of Appeal, Civil Appeal No. 31 of 1987 where the Court of Appeal stated as follows :-

But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the *Law of Succession Act* provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq). But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception.

14. The principle that only an administrator can sue on behalf of the estate of a deceased person was reinforced by the Court of Appeal in the case of Trouistik Union International & Another vs Jane Mbeyu & Another, Court of Appeal at Nairobi, Civil Appeal No.145 of 1990. The respondents were wives to the deceased who died from injuries arising from a road traffic accident. They filed suit for compensation under both the *Law Reform Act* and the *Fatal Accidents Act*. The respondents did not have letters of administration in respect of the estate of the deceased but the High Court made an award for damages under both statutes. On appeal, the Court of Appeal faulted and set aside the award made under the *Law Reform Act*, for reason that for the respondents to claim damages in respect of the estate of the deceased, they needed to have first obtained letters of administration to represent the estate.

15. The issue is also illustrated in the decision of Republic vs Attorney General ex parte John Mugo & Another, High Court at Embu, Judicial Review No. 51 of 2011 (2013) eKLR. The ex parte applicant filed an application for leave to commence judicial review proceedings to quash the decision of the Minister, delegated to the District Commissioner, in an adjudication dispute. He filed the claim as the representative of his deceased brother. An objection was raised inter alia that the ex parte applicant did not have locus standi for want of letters of administration. The court pronounced itself as follows:-

As was held in the case of TROUSTIK UNION INTERNATIONAL & ANOTHER (Supra), the estate of a deceased person is vested in the legal representative.



And a legal representative is a person who has been issued with letters of grant. This is provided for under Section 82(a) of the Law of Succession Act. Its true that under the Land Adjudication Act any one can appear to represent a dead person. But the Court which deals with estates of deceased persons operates under the Law of Succession Act which gives specific direction on how such matters should be handled. The Applicant cannot fail to follow this procedure and hide under Article 22(1) & (2) of the Constitution. The applicant herein has a specific claim which is the estate of his deceased brother.

It can not therefore be anyone having a claim on this estate who can file a claim. The Law of Succession is clear that it must be the legal representative. The applicant has not shown that he is the legal representative. He therefore lacks the locus standi specific to this estate of his deceased brother.

16. The result was that the application was dismissed.
17. Mr. Mainga in his submissions, relied on the ruling of Odunga J (as he then was) in the case of Re Estate of Benson Maingi Mulwa (deceased) (ruling of 15 June 2021) (2021) eKLR. Unfortunately, Mr. Mainga did not enclose the full decision but only an excerpt of it which should not be encouraged. Any counsel wishing to rely on a court decision needs to annex the whole of the decision for the court ought not to be troubled to go on a mission to look for authorities relied upon by counsel. Be that as it may, I have gone the extra mile to find the full decision and I have read it. What was filed was an application within a succession cause vide which the applicant, a son to the deceased, and who had earlier been appointed as administrator but the grant revoked, sought two substantive orders, the first being an order to preserve the estate of the deceased pending hearing of the application and confirmation of the grant, and the second an order to declare sales of land to the 5th – 9th respondents as illegal. While assessing the application, the court made the following statement :-
 41. In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is property entitled to protect his or her interest in the estate.
18. It is the above statement which Mr. Mainga has put emphasis on as supporting his client's position. My assessment of the above statement is that it was made obiter considering the special circumstances of the case. The applicant had been the erstwhile administrator of the estate of the deceased and no other grant had been made. The matter was also subject to supervision by the court handling the succession matter, and having revoked the grant, there was probably no other way that the matter could be addressed. In fact, ultimately, the court did not make any substantive orders on the application, only issuing an order to stop any further alienation of the estate of the deceased and referring the matter to mediation.
19. I am not persuaded that the above dictum gives a blanket authority to any person to file suit on behalf of the estate of a deceased person without first obtaining a grant of representation. If it is the argument of the petitioner that the applicant has failed to act as administrator to protect the estate of the deceased, or has refused to reclaim properties that ought to belong to the estate of the deceased, the redress is not to file such a suit, but either seek a special grant to file suit on behalf of the estate of the deceased, or file an application for revocation of the grant, so that he (petitioner) can be allowed to act as administrator in place of the existing administrator/s. In fact, it does appear that the petitioner has a pending application for revocation of grant which he exhibited in his replying affidavit, and in that application he is seeking



orders to have a fresh grant issued in his name, for purposes of administering the suit land and to have the name of the applicant cancelled as proprietor of the suit land. He wants, within that application, to have the suit land declared part of the estate of the deceased so as to be included in the confirmed grant and be subjected to distribution.

20. . Even assuming that this petition was merited, it is engaging in an abuse of the court process by pursuing two different proceedings in different courts at the same time, seeking more or less the same orders.
21. For the above reasons, I am persuaded that this application is merited. As I have mentioned, this is a suit whose intention is for the benefit of the estate of a deceased person, and the filing of it as a petition is only aimed at camouflaging it as something else, which it is not. I proceed to allow this application and strike out this petition. Given the relationship of the parties, I will make no orders as to costs.
22. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 19TH DAY OF SEPTEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

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