



Kimanzi & another v Director of Public Prosecutions & 7 others (Environment & Land Petition E002 of 2023) [2023] KEELC 20592 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION E002 OF 2023
LG KIMANI, J
OCTOBER 5, 2023**

BETWEEN

**KIMWELE KIMANZI 1ST PETITIONER
THE ESTATE OF KIMANZI MWATHE AND MWATHE
MUTWA 2ND PETITIONER**

AND

**DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT
LAND REGISTRAR KITUI COUNTY 3RD RESPONDENT
CHIEF MAGISTRATE 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT
CHARLES MUTUA NZAKYO 6TH RESPONDENT
GEORGE MWEMA SYENGO 7TH RESPONDENT
KILONZO KIMANZI 8TH RESPONDENT**

RULING

1. Before the court is a Notice of Preliminary Objection dated 3rd May 2023 by Counsel for the 6th, 7th & 8th Respondent objecting to the Petition on the following points:
 1. That the court lacks jurisdiction to entertain the Petition since there are succession proceedings ongoing over the suit parcels of land and which are correctly subject to administration over the estate of the deceased's. These are Succession Cause No.63 of 2013, Estate of Mwathe Mutwa



and Succession No.64 of 2013, Estate of Nzakyo Vuvi Mutwa. The Petitioner and the 6th -8th Respondents are parties to the succession matters.

2. The Petitioner lacks locus standi to institute this petition as he is neither an administrator of any of the deceased persons' estate.
 3. The 2nd Petitioner does not exist and is not known in law and no such estate of Kimanzi Mwathe exists.
 4. The Petition is res judicata as there was Succession No.64/2013 which concluded the administration process and confirmed the Grant and titles were issued out of this succession cause.
 5. The Petitioner having been and being a party to the succession proceedings is barred from instituting a fresh suit as it amounts to multiplicity and abuse of the court process.
2. The background to the Petition is land parcel number L.R Kyangwithya/Tungutu/10 registered in the name of the Petitioner's grandfather Mwathe Mutwa, later divided into portions LR Kyangwithya/Tungutu/2552 and Kyangwithya/Tungutu 2553 in favour of the 7th Respondent. The Petitioner avers that the 6th Respondent who is a cousin of the Petitioner, with intent to defraud registered interest in their grandfather's family land as a fictitious person in the name of Zakyo Mbuvi/Nzakyo Mbuvi. He stated that the 6th Respondent included the Petitioner's family land Kyangwithya/Tungutu/10 into the estate of his late father Nzakyo Vuvi under Succession Cause No. 64/2013 and transferred the land to the 7th Respondent who is purported to have purchased the land from the 6th Respondent. The Petitioner further states that the 8th Respondent who is the Petitioner's brother compromised the Petitioner's share of their father's estate to be relinquished to the 7th Respondent.
 3. The Petitioner filed the present petition and an application under Notice of Motion dated 13th March 2023 seeking stay of all ongoing proceedings before the subordinate court, that is CMC 907/2016 and CMC 922/2022, a restraining order against the 2nd, 6th and 7th Respondents from harassing, intimidating, evicting or interfering with the Petitioner's and family members' quiet use and possession of the suit property and from selling, disposing, transferring or in any way alienating the rights, interests and property in the suit land.
 4. The 7th Defendant filed a replying affidavit on 3/5/2023, on behalf of the 6th and 8th Respondents' to act on their behalf and stated that the Petitioner lacks locus standi to institute these proceedings since he is not the legal administrator of all the deceased relatives mentioned that is Kimanzi Mwathe, Mutwa and Mwathe Mutwa.
 5. He stated that the administrator of the estate of Mwathe Mutwa is the 6th Respondent, Charles Mutua Nzakyo and that the disputed lands were originally known as Kyangwithya/Tungutu/10, which was jointly owned by Mwathe Mutwa and Nzakyo Vuvi Mutwa. He claims that there have been separate succession proceedings for the deceased being succession cause no. 63 of 2013 for the estate of Mwathe Mutwa and Succession No. 64 of 2013 for the estate of Nzakyo Vuvi Mutwa and the 6th Respondent Charles Mutua Nzakyo is the administrator in both estates.
 6. The result of Succession 64/2013 was that Kyangwithya/Tungutu/10 was split into Kyangwithya/Tungutu/2552 and 2553 and that Succession 63/2013 for the estate of Mwathe Mutwa is still going on in court and the Petitioner is one of the beneficiaries. The Defendants state that there is a concluded matter in court which gave rise to Plot no. 2552 which makes the suit res judicata and that the court lacks jurisdiction to entertain the petition and that the filing of multiple suits while others are still pending is an abuse of the court process. The Respondent stated that the Petitioner herein had filed a



Chamber Summons application in Succession 64 of 2013 dated 15th February 2022 seeking to revoke the said grant.

The 6th - 8th Respondents' submissions on the Preliminary Objection

7. Counsel for the 6th, 7th and 8th Respondents' submitted that the court lacks jurisdiction to entertain this Petition since there are ongoing succession proceedings over the suit parcels of land in both Succession cases 63 and 64/2013 and in his view, this forms a multiplicity of suits and is an abuse of the court process since the Petitioner can raise all his issues in the succession cause to protest, object or apply for revocation.
8. Secondly, Counsel contends that the Petitioner lacks the Locus Standi to institute the Petition as he is neither an administrator of any of the deceased persons' estates and relied on the meaning of Locus Standi as defined in the cases of *Law Society of Kenya v Commissioner of Lands and others*, Nakuru High Court Civil Case No.464 of 2000 and *Alfred Njau & others v City Council of Nairobi* (1982)KRA 229. Since the land is under the estate of the deceased, Counsel for the 6th, 7th and 8th Respondents is of the opinion that all issues relating to interests of the deceased should be dealt by an authorized person with letters of administration and that the interests of any beneficiary should be addressed through a succession court. They relied on the cases of *Daniel Njuguna Mbugua-v- Peter Kiarie Njuguna & 2 others* and *Isaya Masira Momanyi-v Daniel Omwayo and Juliana Adoyo Ongunga v Francis Kiberenge Abanus* in Migori Civil Appeal No.119 of 2015.
9. Thirdly, Counsel for the 6th, 7th and 8th Respondents' submitted that the 2nd Petitioner does not exist is not known in law since an estate cannot sue without being represented by someone possessing the letters of administration which do not exist in this case.
10. The Counsel's final point is that the suit is res judicata since the suit land has been the subject of Succession 63 and 64 of 2013 between the same parties and the issues of the suit land had been dealt with and the grant confirmed.

Petitioner's submissions on the preliminary objection

11. Counsel for the Petitioner's submission is that this Court has the jurisdiction to try and determine the alleged issue of land fraud perpetuated by the 6th and 7th Respondents on the suit lands Kyangwithya/Tungutu/2552 and Kyangwithya/Tungutu/2553 herein and that the Petitioner has all the rights and locus standi as a direct descendant of Mwathe Mutwa. It is also their submission that this Court has the jurisdiction to make findings on how Zakayo Mbuvi and Charles Mutua Zakayo, who are fictitious to him, acquired interest and transferred the Petitioner's ancestral land to the 7th Defendant.
12. Further, counsel for the Petitioner submitted that the issues raised in the preliminary objection are issues of fact and not law and relied on the case of *Eunice Karimi Kibunja v Mwirigi Kibunja* CA 103 of 1996 as well as the case of *Abok James Odero v John P machira JA Keuwa* 2001 No.49/2001 and submit that it is therefore not a pure point of law.
13. It was also submitted that the Court has the jurisdiction to inquire into the discrepancies in the names of Nzakyo Vuvi Mutwa/Zakyo Mbuvi and Charles Mutua Zakayo/Charles Mutua Nzakyo as well as to the locus standi to challenge the inclusion of his ancestral land to the estate of the 6th Defendant's father (estate of Nzakyo Vuvi Mutwa).
14. Further, the Petitioner submits that the 6th and 7th Defendants are not heirs in the Estate of the Petitioner's grandfather and that this Honourable Court has unfettered powers to prevent the abuse



of the judicial process by them and that both his parents were buried in the suit land which has history as ancestral land.

15. The Petitioner is of the view that the efforts by the 3rd Respondent represented by the 7th Respondent to shut out the Petitioner and the subject of litigation as such must fail and relied on Sections 26(1) a,b, c and 27 1(a) of the [Land Registration Act](#) 2012 on challenging a fraudulently obtained title. The Petitioner's submission is that the preliminary objection does not meet the standard and urged the court to dismiss it with costs.

Analysis and Determination

16. The test of the true preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.

“So far as I'm aware, 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.”

17. The law requires that a Preliminary Objection be brought only on a point of law as Lady Justice Mary Kasango noted in [Kenya Breweries Limited & another v Keroche Breweries Limited](#) [2020] eKLR while quoting Mativo J in the case of:

“J.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR thus: Useful guidance can be obtained from the decision in *Omondi v. National Bank of Kenya Ltd & Others* where it was held that:- “The objection as to the legal competence of the Plaintiffs to sue.....and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections... - “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.”

The court went on to state that;

“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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...”

Ground 1

18. The first ground in the preliminary objection challenges the jurisdiction of this Court due to the ongoing succession proceedings in Succession Cause No.63 of 2013 over the Estate of Mwathe Mutwa and Succession No. 64 of 2013 concerning the Estate of Nzakyo Vuvi Mutwa as they relate to the suit parcels of land. The 6th -8th Respondents are parties to the succession matters while the 6th Defendant is



the Administrator of the estates subject matter of the two succession causes. The Defendants highlight that the Petitioner is not a personal representative of either of the estates.

19. The 6th-8th Respondent's contention is that the matter is a succession matter which falls outside of the jurisdiction of this court. Jurisdiction is everything and without it, the court cannot make one more step and therefore, lack of jurisdiction could very well render a suit struck out and as such, it is a point of law. In the words of the famous case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

20. The pleadings in this petition show that there are allegations by the Petitioner of fraud in the registration of the deceased Nzakyo Mbuvi as co-owner of the suit land and a claim that the entire land belonged to the deceased Mwathe Mutwa. Article 162(2)(b) confers the Environment and Land Court with the original jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land and the issues raised in the Plaint fall squarely within the purview of this court. Further, the *Environment & Land Court Act* Section 13(2) provides as follows:-

- "2. In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes –
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland; and
 - (e) any other dispute relating to environment and land."

21. The *Law of Succession Act* CAP 160 laws of Kenya defines itself as:

"An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto."

The definition of estate according to Section 3 of the *Law of Succession Act* as "the free property of a deceased person;"

22. The allegation of fraud in registration of title deed in this case, in my view raises a question of whether the land in dispute was the free property of the deceased Nzakyo Mbuvi. This would fall for determination under one of the grounds for challenge of registration of land under Section 26 of the *Land Registration Act*. The said section states that a certificate of title is to be held as conclusive evidence of proprietorship. It goes on to state that;



1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme
23. Section 101 of the *Land Registration Act* states clearly that the court with jurisdiction to hear matters arising out of the ELC Act and in the present case the dispute of whether the title held by Nzakyo Mbuvi over half of the land parcel Kyangwithya/Tunguti/10 is valid is the Environment and Land Court.
24. For the above reasons that court finds that the 1st ground of the preliminary objection raises allegations of fraud in registration of the deceased Nzakyo Mbuvi as co-owner of the suit land Kyangwithya/Tunguti/10 and that the real question in dispute is whether the portion of the suit land in dispute was the free property of the deceased Nzakyo Mbuvi or it was acquired through fraud. In the courts view the said issue falls within the jurisdiction of this court even though it is connected to a succession cause. The preliminary objection on the ground of the court’s jurisdiction has no merit and the same is dismissed. Nyamweya J in the case of *Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v. Caroline Wangui Kiguru*, Nairobi ELC suit No. (2013) eKLR noted that the jurisdiction of Environment and Land Court and the High Court on succession matters sometimes runs concurrently and stated that:

“While I therefore find no merit in the objection that this court has no jurisdiction, I appreciate that this is a matter where all the issues raised can only be effectively handled by the Family Division of the High Court.”

Ground 2

25. The 2nd ground in the preliminary objection is that the Petitioner lacks locus standi to institute this petition as he is neither an administrator of any of the deceased persons’ estate. The Petitioner filed this suit claiming that the suit land is his ancestral/family land owned by his grandfather, Mwathe Mutwa.
26. The Petitioner’s complaint is that the 6th Respondent with intent to defraud, registered interest in their grandfather’s family land a fictitious person in the name of Zakyo Mbuvi/Nzakyo Mbuvi. The Petitioner stated that the 6th Respondent included the family land Kyangwithya/Tungutu/10 into the estate of his (6th Respondent’s) late father Nzakyo Vuvi under Succession Cause No. 64/2013 and transferred the land to the 7th Respondent.
27. The certificate of official search dated 19th March 2014 for land parcel Kyangwithya/Tungutu/10 confirms that title deed was issued on 5th May 1977 and the registered owners are Mwathe Mutwa and Nzakyo Mbuvi as proprietors in common in equal shares.
28. It is an accepted fact that the Petitioner is not the personal representative of the estates of either Mwathe Mutwa or Nzakyo Mbuvi but the 6th Respondent Charles Mutua Nzakyo is the personal representative of the estate of the two deceased persons.



29. The *Law of Succession Act* Cap 160 Laws of Kenya Section 79 provides for vesting of the Property of deceased person in personal representative of his/her estate meaning that the properties of the two deceased persons were vested in the 6th Respondent Charles Mutua Nzakyo. The section states that:
- “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.”
30. Further, Section 82 provides for the powers of personal representatives to enforce the rights of a deceased person by way of a suit and states that:
- 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;
31. In the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that;-
- “Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a Court of Law.”
32. Further in the case of Alfred Njau and Others ..v.. City Council of Nairobi (1982) KAR 229, the Court also held that;-
- “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”
33. The Court of Appeal in the case of *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR held as follows:
- “To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the *Law of Succession Act*. That section confers that power on personal representatives and on them alone.”
34. Similarly, in the case of *Kipnetich Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones* [2021] e KLR the Court found that:
- “The issue on locus standi is a primary point of law almost similar to that of jurisdiction and since the Plaintiff/Respondent was not an administrator to the deceased’s estate herein, he lacked the capacity to sue on behalf of the deceased’s estate which renders the suit incompetent. Indeed, the Court of Appeal authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490 and in Trouistik Union International (supra) to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.”



35. From the foregoing authorities, the court agrees with the Respondents that if this were an ordinary suit the person that could rightfully pursue in court the claim advanced by the Petitioner that Nzakyo Mbuvi was fraudulently registered as a co-owner of the suit land and that the entire parcel of land was owned by Mwathe Mutwa could only be the said owner of the land Mwathe Mutwa or the personal representative of his estate. However, this is not an ordinary suit but a constitutional petition for enforcement of Constitutional rights as stated in the petition under the provisions of Chapter Four of the Constitution of Kenya 2010, Articles 19, 20, 21, 22, 23, 25 (a), 27(i), 28, 29(a), 40, 43 (I-a,b,e, 63 (1) (2) (4), 69, 70 Article 159 (2) (d).
36. On Enforcement of Bill of Rights Article 22 provides for locus standi and states that;
1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by
 - a. a person acting on behalf of another person who cannot act in their own name;
37. It is thus the court's view that the Petitioner has locus standi to institute the present petition claiming proprietary rights to land parcel number Kyangwithya/Tungutu/10 which was subdivided into land parcels Kyangwithya/Tungutu/ 2552 and Kyangwithya/Tungutu/2553.

Ground 3

38. The Respondents claim that the 2nd Petitioner does not exist and is not known in law and no such estate of Kimanzi Mwathe exists. The Court agrees that the suit by the 2nd Pwtitioner cannot stand since the said Petitioner is an estate of the deceased without a personal representative. This was also found to be the correct position of the law in the above cited authorities and in particular the case of Trouistik Union International & another v Jane Mbeyu & another (supra) which determined that the person who may agitate by suit any cause of action vested in him at the time of his death can only do so under section 82 (a) of the Law of Succession Act which confers that power on personal representatives and on them alone.
39. The court's view is that the 2nd Petitioner does not exist since the personal representatives of the estates mentioned are not included in the petition. This ground is thus found to have merit and the same is upheld.

Grounds 4 and 5

40. The 4th and 5th grounds of objection are that the Petition is res judicata as there was Succession No.64/2013 which concluded the administration process and confirmed the grant and titles were issued out of this succession cause and that the Petitioner, having been and being a party to the succession proceedings is barred from instituting a fresh suit as it amounts to multiplicity and abuse of the court process.
41. In applying the test of a preliminary objection, it should be able to be determined without going into matters of evidence and ascertainment of contradictory facts as was held by Angote J in Roman Mutuku Kisini & 2 others v Mary Mwikali Muasya & 3 others [2021] eKLR

“To determine whether this suit is res judicata or not, this court has to consider the proceedings that were before the Minister, and the decision of the Minister thereof. Those



proceedings could only be brought to the attention of this court by way of an Application and not a Preliminary Objection. Considering that a preliminary point only raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct, and in view of the fact that a preliminary point cannot succeed if any fact has to be ascertained or if what is sought is the exercise of judicial discretion, I decline to allow the two Preliminary Objections.”

42. In the present case it is the courts view that the proceedings that led to the confirmation of grant are not before this court to enable this court make a finding that the provisions of Section 7 of the Civil Procedure Act have been met. Consideration of such previous proceedings would in any event remove the matter from the purview of a preliminary objection in its true sense.

Final findings of the court:

43. The court finds that grounds 1,2, 4 and 5 of the preliminary objection have no merit and the same are dismissed.
44. Ground 3 of the preliminary objection has merit and the 2nd Petitioner’s name is hereby struck out as a party to the petition.
45. Each party to bear the cost of the Preliminary Objection.

DELIVERED, DATED AND SIGNED AT KITUI THIS 5TH DAY OF OCTOBER, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

J. Musyoki - Court Assistant

Ndiso for the Petitioner

Mwendwa for the 6th to 8th Respondents

