



REPUBLIC OF KENYA



KENYA LAW

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In re Estate of James Mugo alias James Mugo Njagi (Deceased) (Succession Cause 61 of 2001) [2025] KEHC 2341 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 61 OF 2001**

RM MWONGO, J

MARCH 5, 2025

**IN THE MATTER OF THE ESTATE OF JAMES
MUGO ALIAS JAMES MUGO NJAGI (DECEASED)**

BETWEEN

**RACHEL MURUGI MUGO 1ST APPLICANT
JAMES CHOMBA MUGO 2ND APPLICANT
ROSEMARY WANJIRU MUGO 3RD APPLICANT
EUNICE WAMBERE MUGO 4TH APPLICANT**

AND

**JOE KATHUNGU & CO. ADVOCATES 1ST RESPONDENT
EDWARD MURAGE MUGO 2ND RESPONDENT
JOEL KAVIU MUGO 3RD RESPONDENT
NJUE MUGO 4TH RESPONDENT
CATHERINE MURANGI MUGO 5TH RESPONDENT
SUSAN WAMBOGO MUGO 6TH RESPONDENT
MERCY WANGUI MUGO 7TH RESPONDENT
MARGARET W. MUGO 8TH RESPONDENT
AGNES W. MUGO 9TH RESPONDENT**



RULING

1. The respondents filed a preliminary objection dated 03rd July 2024 which is for determination herein. The grounds are that the applicants lack locus standi since they are not beneficiaries of the estate in terms of section 29 of the *Law of Succession Act*.
2. The preliminary objection is a response to the summons dated May 22, 2024 through which the applicants have sought the following orders:
 1. Spent;
 2. Spent;
 3. That the administrators of the estate of the deceased be directed to produce before the court a full and accurate inventory of the assets and liabilities of the deceased together with a full and accurate account of all the dealings therewith as at the date of the order of the court;
 4. That the administrators of the estate of the deceased be directed to produce to the court a full and accurate account of the completed administration of the estate at the date of the order of the court;
 5. That the 3rd respondent be substituted with the 2nd applicant as one of the administrators of the estate of the deceased in the certificate of confirmation of grant issued on 24th February 2005; and
 6. Costs of the application be provided for.
3. The preliminary objection was canvassed by way of oral submissions as directed by Court.

DIVISION - Respondents' (Objectors') Submissions

4. The respondent submitted that section 29 of the *Law of Succession Act* provides for the order of consanguinity and precedence of persons entitled to inherit from the estate of the deceased. None of the applicants is indicated among them. Counsel argued that the estate was not intestate and therefore the mode of distribution cannot be altered. In any event, all the dependants and/or beneficiaries according to the Will are still alive. He argued that the children of the administrator cannot substitute the role of their father while he is still alive and compos mentis.
5. The said administrator's mental or physical health has not been challenged by the applicant in a bid to establish grounds for his substitution as administrator. Additionally, he submitted that section 29 of the *Law of Succession Act* does not provide for daughters-in-law of the deceased unless they were being maintained by the deceased prior to his death. That onus would be on the other administrators and beneficiaries to nominate the 3rd respondent's replacement from amongst themselves, but there is no indication that this has been done.

Applicants' Submissions

6. Counsel for the applicants opposed to the preliminary objection stating that the objection raised does not fit into the four corners of the principles laid down in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 (Mukisa Biscuit case). The principles include that a preliminary objection ought not to be raised where matters of fact are in dispute; that it ought to be



raised only where the court can through its discretion grant the prayers sought. In this case, he argued that the preliminary objection raises several questions of fact, being:

1. Whether the deceased died testate. He argued that the deceased wrote a will but he did not sign it;
 2. Whether the applicants were beneficiaries of the estate of the deceased per section 29 of the [Law of Succession Act](#); and
 3. The capacity of the 3rd respondent to handle the estate of the deceased as an administrator. He argued that there is a power of attorney in place.
7. On this basis, Counsel asserted that the preliminary objection does not qualify. The respondents also relied on their written submissions in which they argued that they have locus standi to move the court. Counsel argued that section 66 (formerly section 79) of the [Law of Succession Act](#) gave discretion to the court to appoint an administrator and the appointment was not based on the order of consanguinity. He relied on the case of *In re Estate George Ragui Karanja (Deceased)* [2016] KEHC 6519 (KLR) where Musyoka, J held:

“The order of preference set out in section 66 of the [Law of Succession Act](#) is not binding to the court. It is discretionary. Section 66 refers to it as ‘a general guide.’ The court can appoint administrators without following the order of preference. Priority is given to surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in Part V of the Act, then the Public Trustee and creditors. The persons entitled in intestacy according to Part V, in their order of preference, include children (and grandchildren where their own parents are dead), parents, siblings, half-siblings and other relatives who are in the nearest degree of consanguinity up to and including the sixth degree.”

8. In rebuttal, counsel for the applicant stated that after the decision in *In re Estate George Ragui Karanja (Deceased)* (supra), the [Law of Succession Act](#) was amended in 2021. In that case, both administrators were dead and death certificates were attached. He faulted the respondents for relying on a repealed section of the law and urged the court to allow the preliminary objection. In the present case, the 3rd respondent, who is the administrator in question, is still alive and the issue has been deposed in the 1st applicant’s affidavit in support of the summons. Counsel referred to the same affidavit and stated that the 3rd respondent’s capacity is not in question. He stated that the applicants are not principal beneficiaries in the estate of the deceased.

Issues for Determination

9. The overarching issue for determination is whether the preliminary objection has merit. This objection raises the question of locus standi.
10. The respondents argued that the applicants lack locus standi to move the court since they are not beneficiaries in the estate of the deceased according to section 29 of the [Law of Succession Act](#).
11. It is trite that a preliminary objection raises a question of law as stated in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (supra) where the Court stated at page 700 paragraphs D-F the court stated:

“....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.”

12. Locus standi is defined in Black’s Law Dictionary, 9th Edition, page 1026 as “the right to bring an action or to be heard in a given forum”. In other words, it refers to the person who can rightfully bring an action before a court. In this case, the question before the court is whether the applicants have a right to file the summons and whether the court should hear and determine it.
13. In the case of *Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] KESC 6 (KLR) the Supreme Court was called upon to determine, inter alia, the issue of locus standi of the 1st respondent therein, given the nature of the institution. There, the applicant argued that the question of locus standi is so important that it directly informs the jurisdiction of a court. As such, the question takes determinative precedence. In the *Matemu* case Ndungu SCJ, held that the issue of locus standi has a close nexus to the right of access to justice.
14. Accordingly, it was posited that the issue of locus standi is, indeed, purely a question of law and it properly arises within the preliminary objection. Once the issue is determined, the course of the summons dated 22nd May 2024 will also be better defined.
15. According to her affidavit in support of the summons, the 1st applicant herein is a daughter-in-law of the deceased. She is the wife of the 3rd respondent who is one of the administrators of the estate of the deceased, and who is still alive. She deposed that on the strength of a power of attorney, the 2nd applicant should substitute the 3rd respondent as administrator of in the estate of the deceased. The 3rd and 4th applicants have given consent to this intended substitution. In the summons, there are also allegations of impropriety in administration of the estate of the deceased. However, those issues cannot be dealt with through this preliminary objection.
16. The respondents argued that none of the applicants had locus standi to bring the application since they are not proven dependants of the deceased in terms of section 29 of the *Law of Succession Act*. The applicants are the daughter-in-law and grandchildren of the deceased. Their only connection to the estate of the deceased is through the 3rd respondent who is a son of the deceased, their husband and a father, respectively.
17. The 3rd respondent was appointed as one of the administrators in the estate of the deceased through intestate succession proceedings. The applicants have contended that the deceased left a Will but it was not signed. They have also stated that the contents of the Will informed distribution of the estate as seen in the certificate of confirmation of grant issued on 31st March 2011.
18. This argument unnecessarily reopens a matter that is long settled. The deceased died intestate, not having left a valid Will. Thus, this argument by the applicants is baseless, and is in fact, a digression from the core question which is: what right do the applicants have to address the court through the summons?
19. Section 66 of the *Law of Succession Act* offers a guide as to who may be issued with a grant of representation. The court issued a grant of letters intestate to the administrators named in this matter and that is settled. The applicants cited Musyoka, J. in *In re Estate George Ragui Karanja (Deceased)* (supra). In that case, the administrators of the estate Grace Waithira Ragui and Edward Karanja Ragui, both died before completing their duties as administrators. Koigi wa Wamwere who was the executor of the will of Grace Waithira Ragui also sought to substitute her as administrator in the estate of the deceased in that case.



20. The court was tasked with determining a preliminary objection in which the issue of the standing of Koigi wa Wamwere' was raised. Musyoka, J. In that matter, the court considered the issues before him and determined them on the basis of death of an administrator who dies in office and what happens when the office of an administrator of an estate is left vacant on account of death.
21. Those facts are very different from the facts in the present case. The reasoning in that case does not directly apply to the present case since the administrator, whom the applicants are seeking to substitute, is still alive. This means that there is no legal basis for his substitution, whatsoever. The applicants have mentioned that there is a power of attorney in existence; donated by the 3rd respondent to the 2nd applicant his son.
22. The *Law of Succession Act* is silent on the situation where one of the administrators of the estate becomes incapacitated or donates power to another person. If the 3rd respondent was the only administrator in the estate, his incapacity to administer the estate would have been subject to section 76(d) or (e) of the Act or both. Here, there are 3 administrators, and all of them are still alive.
23. The law is clear on how to move forward in the event of the death of an administrator. Section 81 of the Act provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative. This is not the scenario in this case either.
24. While the applicants are immediate family members of the 3rd respondent, they have a distant right of being appointed as administrator(s) in the estate of the deceased herein under any circumstances, since the court has already exercised its discretion in that regard as guided by Section 66 of the *Law of Succession Act*. The applicants have not demonstrated their dependency upon the deceased. Even if the 3rd respondent were to unfortunately, cease being administrator in the estate of the deceased on account of death, the 2nd applicant, his son, cannot substitute him given the operation of Section 81 of the Act.

Conclusion and Disposition

25. In the circumstances, the 2nd, 3rd and 4th applicants may only benefit from the estate of the deceased, their grandfather, through their father, the 3rd respondent. Upon the death of the 3rd respondent, they may substitute their father as a beneficiary but not as administrator because Section 81 of the Act will have come into operation. The 1st applicant may also benefit as the wife of the 3rd respondent, her husband but not by being held as a direct beneficiary from the estate.
26. If it becomes necessary for a deceased administrator to be substituted, the applicants may substitute the 3rd respondent as administrator after his death through a petition for grant ad litem. However, none of them can take the 3rd respondent's place as administrator at this point in time for the reason that he is still alive.
27. The applicants may raise the issue of the power of attorney through an application under Rule 49 of the Probate and Administration Rules.
28. In the result I hold that the applicants indeed lack locus standi to institute the summons dated 22nd May 2024. The preliminary objection hereby succeeds and the summons dated May 22, 2024 is hereby struck out.
29. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 5TH DAY OF MARCH, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

Havi for Applicant

Ms. Muthoni Mboi holding brief for Guantai for Respondent

Francis Munyao - Court Assistant

