



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Swakei Ole Lekinayia (Deceased) (Miscellaneous Civil Case E028 of 2024) [2025] KEHC 5937 (KLR) (13 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CIVIL CASE E028 OF 2024**

CM KARIUKI, J

MAY 13, 2025

**IN THE MATTER OF THE ESTATE OF THE LATE SWAKEI OLE LEKINAYIA
(DECEASED)**

BETWEEN

DENNIS LEMASHON KILEYIA PETITIONER

AND

SIMORE KILEYIA RESPONDENT

RULING

13/05/2025

1. The Applicant vide a notice of motion dated 16/12/2024, sought orders;
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to order the respondent to surrender the original identity card for the deceased to the registrar of births and deaths for purposes of processing the certificate of death for the deceased.
 - d. That the costs of this application be provided for and be borne by the respondent.
 - e. Any other that this court deems fit to issue.
2. The application is premised on sections 3A and 1B of the *Civil Procedure Act* and Order 40 and 51 of the Civil Procedure Rules, and article 159(2) (d) of *the Constitution*.
3. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Dennis Lemashon Kileyia on 16/12/2024.



The background.

4. In the entire life of the deceased, he had only one child, the applicant.
5. The deceased's property, i.e., Cismara/lemek/877, is currently in possession and use by the respondent unlawfully.
6. The applicant herein is the only beneficiary of the estate of the late Swakei Ole Lekinayia, and he is keen to protect and preserve it for succession purposes.
7. The applicant's attempts to protect and preserve the property from wastage and/or misuse by the respondent were thwarted and frustrated.

The response.

Notice of preliminary objection

8. The respondent opposed the application vide Notice of preliminary objection dated 14/01/2025.
9. The respondent contends that the objector's application is misconceived, bad in law, and is an abuse of the due process of this honourable court.
10. The respondent contends the applicant's cause and instant application are incompetent and fatally defective for failure to take out a grant of representation as required by Section 82 of the [Law of Succession Act](#).
11. The respondent contends that the objectors have no locus standi to bring this application and the application is therefore incurably defective and ought to be dismissed with costs.
12. The respondent contends that the application herein is misconceived and misplaced as the provisions set out hereunder have nothing to do with the law of succession and/or probate and administration rules.
13. The respondent contends that under section 29 of the [Law of Succession Act](#), the applicant, being a grandson to the estate of the deceased herein, is not entitled to inherit, and no direct nexus to the deceased has been established according to the consanguinity table.
14. The respondent contends that the plaintiff herein lacks the standing to lodge a claim of this nature against the defendant, and the same is premature.

The replying affidavit

15. The respondent also filed a replying affidavit sworn by Simore Kileyia on 06/02/2025.
16. The respondent averred that an application of this nature must be sanctioned by the court through the issuance of letters of administration ad litem, and in this instance, none has been sought.
17. The respondent contends that the applicant has lived in his household as a son since he was very young. He raised him, schooled him, and provided for him unconditionally. In fact, the documents, such as the identity card, have been obtained under his care.
18. The respondent averred that after joining college, the applicant drifted from his family and came up with ideas that he had been disinherited from his father's land.



19. The respondent contends that there is no proof that the applicant is the son of the late Swakei and the late Memusi. The applicant has not annexed either the birth certificate or any other document to connect him with the estate of Swakei, as he alleges.

Further affidavit

20. The applicant filed a further affidavit sworn by Dennis Lemashon Kileyia on 13/02/2025.
21. The applicant averred that the respondent is his cousin, as he is the son of his uncle Kiguana Ole Kileyia.
22. The applicant averred that the respondent's father is alive, and he is related to his late father because he is his blood brother.
23. The applicant averred that in the year 2018 having been informed by his uncle that the respondent is in possession of his late parents original identity cards, he approached and requested the respondent to hand over to him the said cards for application of birth certificate to enable him register for his Kenya certificate of secondary education (KCSE) as it was a requirement and mandatory for that registration.
24. The applicant averred that the respondent misadvised him to use his identity card and that of his wife, since he claimed that he had misplaced his late parents' original identity cards.
25. The applicant averred that later after the respondent used his late father's original identity card to fraudulently and illegally transfer his late father's property i.e. CIS-mara/lemek/877 into his name, he learnt that the respondent had been having the original identity card for his late parents and that he had lied to him.
26. The applicant averred that the birth certificate annexed to the respondent's replying affidavit is erroneous and invalid for purporting to give him parents who are not truly his lawful parents.
27. The applicant averred that succession is based mainly on blood relation(consanguinity) but not on an erroneously obtained certificate of birth or any erroneous document.
28. The applicant averred that his late mother was from the Kisemei Family and was a sister to Ngunya Ole Kisemei, among others.
29. The applicant averred that the respondent's blood brother is Ntankuya Kileyia, among other brothers and sisters of his, and their father is alive.
30. The applicant averred that upon the respondent being served with pleadings and court order in respect of this suit, he applied for and has been issued with the certificate of death for his late father without his knowledge and/or consent; and up to this point he has maliciously chosen not to disclose to this court.

Directions of the court.

31. Vide orders issued on 17/12/2024, this court ordered that as long as the suit property is registered in the name of the deceased, no one should dissipate or waste it in any manner.
32. The applications were canvassed by way of written submissions.

The Respondent's Submissions

33. The respondent submitted that the present suit is incompetent because there are no letters of ad litem, and the application offends the provisions of section 29 of LSA. The respondent relied on *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696, *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & others*, application no. 50 of 2014, [2015] eKLR, Kenya



Commercial Bank Limited V Stage Coach Management Ltd [2014] eKLR, Julian Adoyo Ongunga & Jared Odhiambo Abano V Francis Kiberenge Bondeva (Suing As The Administrator of the Estate Of Fanuel Evans Amudavi, Deceased)[2016] KEHC 4186, Juma (Suing As Legal Representative Of Ochier Owando(Deceased) V Hayer & Another (Environment & Land Case E010 of 2023) [2023] KEELC 20304 (KLR), and Joshua Werunga V Joyce Namunyak (2013) eKLR

The applicant's submissions.

34. The applicant submitted that the issue the applicant a grandson to the deceased is a factual point which needs to be determined at the hearing of the application hence disqualify the respondent's preliminary objection for failing to raise pure points of law and calls it to be dismissed by this court for not meeting the threshold. The applicant relied on Aviation & Allied Workers Union (k) v Kenya Airways Limited [2021] eKLR, and Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors [1969] E.A. 696.
35. The applicant submitted that the respondent made it difficult for the applicant to approach this court under probate and administration rules; the applicant was left with no other option other than to come to this court by the procedures under the *Civil Procedure Act*. The applicant relied on Kenya Power and Lighting Company Limited V Benzene Holding Limited T/A Wyco Paints [2016] eKLR, article 159(2)(d) of *the Constitution*, section 3A of the *Civil Procedure Act*, James Mangelin Musoo V Ezeetec Limited [2014] eKLR, Raila Odinga v IEBC & others [2013] eKLR, and Joshua Warunga v Namunyak [2013] eKLR.
36. The applicant submitted that the applicant having beneficial interests for the estate as his affidavits establish, he is properly with locus standi before this court not in his capacity as the representative of the estate but in his private capacity and as a potential and prospective representative/administrator of the estate to seek orders to unlock doors towards succession law and/or probate and administration rules which have been blocked by the respondent. The applicant relied on Law Society of Kenya v Commissioner of Lands & 2 others [2001] eKLR, Law Society of Kenya v Commissioner of Lands & 2 others [2001] eKLR, Elendu V Ekwoaba[1998] 12 NWLR (pt. 578) 320, Kapenguria High Court in Civil Appeal no. of 2016, SM V SC[2017] eKLR, succession cause no. 546 of 2014, and in re estate of late Kipkurer Chesire(Deceased)(Succession Cause 546 of 2014) [2023] KEHC 21643(KLR) (31 July 2023).

Analysis and Determination.

37. This court considered the application, the supporting affidavit, notice of preliminary objection, replying affidavit, further affidavit, and the respective submissions.

Issues

38. The main issue for determination: Whether the preliminary objection is merited.
39. Under Section 82 of the *Law of Succession Act*, the powers of a personal representative are spelt out. It provides:

“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 arise out of his death for his estate.



(b) to sell or otherwise turn into account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best”

40. Locus standi in Constitutional matters is not regulated by the Statute but *the Constitution* itself, and is very liberal in this regard. Under Article 22 (2) (a) of *the Constitution*, a person can file court proceedings on behalf another person who cannot act in their name, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed, or is threatened. This is equally reiterated by Rule 4 (2) (i) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which provides as follows:

In addition to a person acting in their own interest, court proceedings under subrule 1 may be instituted by-

i. a person acting on behalf of another person who cannot act in their own name’

41. As was held in the case of *Ototo Margret Kanini & 16 Others vs Attorney General (2022) eKLR* a application whose aim is to vindicate violation of rights of another does not relate to the administration of the estate of the deceased and cannot thus be subjected to the requirements of Section 82 (2) (a) of the *Law of Succession Act*. I find this ground of preliminary objection untenable and thus make the orders ;

i. The PO is dismissed accordingly.

ii. Costs shall be in the cause.

iii. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
13TH DAY OF MAY, 2025**

JUSTICE CHARLES KARIUKI

JUDGE

In the presence of:-

Court Assistant: Abel Odhiambo

