



REPUBLIC OF KENYA



KENYA LAW
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Kinyua v Ireri (Civil Appeal 19 of 2024) [2025] KEHC 10685 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA**

CIVIL APPEAL 19 OF 2024

FN MUCHEMI, J

JULY 17, 2025

BETWEEN

NJERU PETER KINYUA APPELLANT

AND

AGATHA NJOKI IRERI RESPONDENT

RULING

Brief facts

1. Coming up for determination is the respondent's Notice of Preliminary Objection dated 27th March 2025 based on the grounds that the appeal is fatally defective and a nullity as it offends the provisions of Section 82(a) of the *Law of Succession Act* in that it is brought and filed in the name of the appellant who died on 15th October 2008. The respondent urges the court to strike out the appeal with costs.
2. Directions were issued that parties put in written submissions on the 2nd April 2025. The record shows that the respondent complied by filing submissions on 5th May 2025. The appellant on the other hand failed to comply in that regard.

The Respondent's Submissions

3. The respondent submits that the appellant passed away on 15th October 2008 as per the attached death certificate and as such no legal proceedings can be instituted in the name of a deceased person. The respondent submits that pursuant to Section 82(a) of the *Law of Succession Act* provides that the proper party to bring such proceedings is the personal representative of the deceased. To support her arguments, the respondent refers to the cases of Kenya Power & Lighting Company Limited vs Benzene Holdings Limited t/a Wyco Paints [2016] KECA 73 (KLR) and Enterprises & Another vs Langat & Another (Suing as the legal administrators of the Estate of the late Chepkwony Kiplangat Dennis) (Civil Appeal E955 of 2023) [2024] KEHC 6101 (KLR) and submits that the appeal is fatally defective.



The Law

Whether the preliminary objection is sustainable.

4. The case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....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.

5. Sir Charles Newbold P. stated:-

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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

6. Similarly the Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR held that:-

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.

7. Further in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

8. It is trite that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

9. The respondent argues that the appeal is fatally defective as it was purportedly filed by the appellant who died on 15th October 2008 thereby offending Section 82(a) of the [Law of Succession Act](#).

10. Section 82(a) of the [Law of Succession Act](#) provides:-

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

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.

11. From perusal of the record, the appellant died on 15th October 2008. Thus, a grant of representation ought to have been made in respect of his estate under the [Law of Succession Act](#) to lodge the instant appeal. On further perusal of the record, the trial court whilst delivering its ruling in the lower court in respect of the appellant's application dated 14th February 2023 found that the appellant's counsel and



family concealed the appellant's death in a bid to avoid judgment being executed against him. The trial court went further and stated that one could only represent the estate of the deceased person when a grant of representation has been made in respect of such deceased person under Section 82(a) of the *Law of Succession Act*. Despite being privy to the said information, the appellant's counsel still filed the present appeal.

12. It is therefore my considered view that the appellant filed the appeal knowing very well that it was fatally defective and a nullity under the law. In that regard, this appeal is hereby declared fatally defective and is hereby struck out.
13. Accordingly, the notice of preliminary objection dated 27th March 2025 has merit and is hereby allowed.
14. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIA THIS 17TH DAY OF JULY 2025.

JUDGE

F. MUCHEMI

