



**In re Estate of the Late Charles Mutinda Ngeene (Deceased) (Succession Cause E017 of 2022) [2024] KEHC 2344 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2344 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE E017 OF 2022**

**FR OLEL, J**

**MARCH 6, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE CHARLES  
MUTINDA NGEENE (DECEASED)**

**BETWEEN**

**ESTHER MWELU ..... APPLICANT**

**AND**

**ALICE KELI MUTINDA ..... 1<sup>ST</sup> RESPONDENT**

**COLLINS NGEENE MUTINDA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. By a notice of motion application dated 21<sup>st</sup> June 2023 and brought under Section 76 of the [Law of Succession](#), Cap 160 & Probate and Administration Rules, the applicant sought order inter alia that:
  1. That interim orders do issue that the distribution of the Estate to the beneficiaries listed herein be hereby suspended pending the hearing and determination of this application.
  2. That interim orders do issue that the distribution of the Estate to the beneficiaries listed herein be hereby suspended pending the hearing and determination of this petition.
  3. That the grant of confirmation issued in High Court Succession cause no 17 of 2022 on the Estate of the late Charles Ngeene on 28<sup>th</sup> March 2023 be revoked.
  4. That the cost of this application be borne by the Respondents.



## **B. The Pleadings**

2. The application is supported by the grounds on the face of the said application and the supporting affidavit dated 21<sup>st</sup> June 2023 sworn by the applicant Esther Mweu wherein she depones that the process of the making of the grant was unlawful and irregular as one Eric Mweu Mutinda ( deceased) , who was a son of the late Charles Mutinda Ngeene, and his estate had been deliberately/completely left out and the interest of his estate not considered under this process. The effect of the same was that the beneficiaries of the said Erick Mweu Mutina (Deceased) had been disinheriting occasioning grave injustice. The confirmation of grant was thus obtained by material concealment of facts to the court and misrepresentation and therefore the court had a basis upon which it could intervene to readdress the injustice caused.
3. It is finally deposed that it is in the interest of justice that the orders sought are granted as prayed and that the distribution of the estate of the late Charles Mutinda Ngeene be suspended.

## **C. Notice of preliminary objection**

4. In response to this application, the Respondents did file a notice of preliminary objection dated 29<sup>th</sup> June 2023, which raised the following ground of law;
  - a. That the Application under certificate of urgency dated 21<sup>st</sup> June 2023 is misconceived, bad in law and is an abuse of the process of this Honourable court.
  - b. That the Application filed under certificate of urgency and dated 21<sup>st</sup> June 2023 is bad in law since the Applicant lacks the locus standi to move court for orders sought therein and therefore incurably defective and ought to be dismissed with cost.
  - c. That the Applicant has no right or interest in the Estate of the Deceased herein.
  - d. That the Applicant is not a dependent under the provisions of section 29 of the Law of Succession Act, Cap 160.

## **D. Submissions**

5. The court directed parties to file written submissions on the preliminary objection.

### **i. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent Submission made in support of the Preliminary Objection.**

6. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's filed their submissions dated 10<sup>th</sup> July 2023, wherein they did submit that the applicant did not have locus to move the court for the orders sought as Eric Mweu Mutinda (deceased) was not a beneficiary nor a dependent to the estate of the late Charles Mutinda Ngeene. Further the late Charles Mutinda Ngeene died on 28<sup>th</sup> January 2022, while it was also a fact that the late Eric Mweu Mutinda died on 23<sup>rd</sup> May 2022. The late Eric Mweu thus did not survive the late Charles Mutinda Ngeene and by the documents filed it was disputed as to whether he was a biological son of the late Charles Mutinda Ngeene and/or a beneficiary/dependent of his Estate.
7. Reference was made to section 29 of the Law of Succession Act, Cap 160 laws of Kenya on who a dependent was and that the wording of the said section envisages that children must be alive at the time of administering the estate. Reliance was made to the case of in Re Estate of the Late M'ithigai Muchangi (deceased)[2020] eKLR on the meaning of dependency as defined under section 29 of the Law of succession Act, Cap 160.



8. The application as filed was therefore bad in law, a waste of Court's time and an utter abuse of court process. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's did pray that the said application be dismissed with costs.

**ii. The Applicant's submissions in response to the Preliminary objection.**

9. The Applicant filed her submissions in response to the preliminary objection dated 14<sup>th</sup> July, 2023. She did submit that the issues raised for determination were whether the preliminary objection had merit and whether she has locus standi to bring forth her objection. Reliance was placed in the case of *Aviation & Allied workers union Kenya v Kenya Airways Limited & 3others* [2017] eKLR & the citation of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited* (1969) to buttress the point that that a preliminary objection should be raised on pure question of law.
10. It is submitted that no prejudice would be suffered by the respondents if the applicant was granted an opportunity to litigate her application and that the delicate nature of succession matters must not be lost to this court. The court therefore ought to give due regard to Article 159(2) of the *Constitution* of Kenya especially in succession matters. On the issue of whether the applicant has locus standi to bring forth the suit, reliance was made to the case of *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya and another* [2016] and *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* (2014). It is submitted that the applicant sought and was granted limited grant of letters ad litem for the purposes of filing and prosecuting the suit thereby extinguishing any unfounded assertion that the applicant lacks locus standi to move the court on behalf of estate of Eric Mweu (deceased). Reliance was further made to the case of; *Re Estate of Hellen Wangari Wathiai (deceased)*[2021] eKLR, to buttress this point.
11. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's had failed to file a replying affidavit to traverse the applicant's assertions and since there was a complete clash of facts, there would be need for evidence to be led before an informed conclusion could be made. Since the facts made in the pleadings were contested, it could then not be said that the preliminary objection was based on a point of law and the court had no option but to reject the same.
12. The applicant herein had satisfied the definition of an interested party thus qualifies the locus standi test and should have her applications determined on merit. The applicant therefore urged the court to dismiss the said objection.

**D. Analysis and Determination**

13. I have carefully considered the Application, the issues raised in the Preliminary objection, and both set of written submissions filed by the respective parties. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same were set out in the case of *Mukisa Biscuits Manufacturing Ltd – v- West End Distributors* (1969) EA 696 , Where at page 700 Law JA stated 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.



In the same case, at page 701, 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”.

14. Therefore, a proper Preliminary Objection may only be raised on a pure point of law. In *Re Estate of Joseph Mutiso Kithome* it was held that the issue of locus standi is a pure point of law that can be properly raised in a Succession Cause.

15. The main objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is that the Applicant has no locus standi in this matter. *Locus Standi* is a Latin term, which literally means ‘place of standing’ and refers to the right of a particular party to bring an action a suit. *Blacks Law Dictionary* 10<sup>th</sup> Edition at Paragraph 1084 defines the term ‘Locus Standi’ as follows:-

“The right to bring an action or to be heard in a given forum.”

16. It is trite law that pleadings filed in court by persons with no locus standi are void ab initio and the court would have no jurisdiction in such actions. In *Ibrahim V Hassan & Charles Kimenyi Macharia*, [2019] eKLR the Court observed as follows:-

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues”.

17. The position in law as regards “locus standi” in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* [1986-1989] EALR 468, the Court rendered itself thus:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

18. Also in the Case of *Rajesh Pranjivan Chaudasama v Sailesh Pranjivan Chaudasama* (2014) eKLR, the court did address itself on the issue of Locus Standi and did hold that;

“.....But in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of letters of administration in the case of intestate succession.”



19. Section 76 of the law of succession Act, Cap 160 also provided that;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion....”

20. What this section implies is that applications for revocation of grant is not limited to only beneficiaries but to interested parties as well. In Ibrahim v Hassan & Charles Kimenyi Macabria, Interested Party (*supra*), the learned Judge did hold that under section 76 of the law of succession Act, Cap 160 any interested party in the Estate of the deceased may bring an application predicated under the said section and/or Rule 2 as read with Rule 17(1) of the Probate and Administration Rules which provides that;

“Any person who has not applied to the estate of a deceased and wishes to object to the making of a grant which has already been applied for by another person may do so.”

21. The applicant herein did apply for letters of administration ad litem on behalf of the estate of the late Eric Mweu in Machakos Probate and Administration Ad Litem Cause No E033 of 2023, and the same was issued on 7<sup>th</sup> June 2023. She therefore no doubt has the locus standi to pursue this matter and the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s contention to the contrary hold no weight.

22. All other issues raised in the preliminary objection, would require the court to look into the facts as pleaded and make a determination as to whether the said Eric Mweu (deceased) was a son, dependent and/or beneficiary of the late Charles Mutinda Ngeene and/or whether the applicant qualifies as a dependent of the estate. Those are issues of fact, which are contested and will have to be determined at trial and cannot form a basis of a preliminary objection on a point of law.

### **E. Disposition**

23. In the upshot is the preliminary objection dated 29<sup>th</sup> June 2023 lacks Merit and the same is dismissed with costs to the Objector/Applicant.

24. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6<sup>TH</sup> DAY OF MARCH, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 6<sup>th</sup> day of March, 2024.

In the presence of;

Mr. Sawe for Appellant

No appearance for Respondent

Sam Court Assistant

