



REPUBLIC OF KENYA



**In re Estate of Esther Wambui Wahiti (Deceased) (Succession Cause
456 of 1983) [2024] KEHC 4626 (KLR) (Family) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 456 OF 1983
MA ODERO, J
MAY 6, 2024**

RULING

1. Before this court for determination is the Notice of Preliminary Objection dated 28th February, 2023 filed by Robert Wahiti Nganga the Administrator/Respondent in this matter
2. The Objector/Appellant Douglas Wanjohi Kungu (acting on his own behalf and on behalf of Mihango 25 Neighbours Self Help Group) opposed the Preliminary Objection through their Replying Affidavit dated 14th March, 2023.
3. The matter was canvassed by way of written submissions. The Administrator filed the written submissions dated 5th April, 2023 whilst the Objectors relied upon their written submissions dated 24th April, 2023.

Background

4. This Successions Cause relates to the estate of the late Esther Wambui Wahiti (hereinafter ‘the Deceased’) who died intestate on 6th December, 1982.
5. The Deceased was said to have been survived by the following persons.
 - i. Wahiti Nganga - Husband.
 - ii. John Nganga Wahiti - Son
 - iii. Wanjiru Robert Nganga - Daughter
 - iv. Margaret Kabura Karaya - Daughter
 - v. Rosemary Wanjiku Wahiti - Daughter
6. The estate of the Deceased was said to comprise the following assets
 - i. House Number B7 – 3(a) New Pumwani Estate.



- ii. Plot No. Githunguri/Kiama/T-280
7. Following the demise of the Deceased a Grant of letters of Administration Intestate was on 27th September, 1983 issued to her son Robert Wahiti Nganga. That Grant was later amended on 13th June 2017 and was confirmed on 29th October, 2013.
 8. The Objectors in this matter then filed a summons for Revocation of Grant dated 23rd April, 2019. They alleged that in the confirmed Grant the property known as Njiru/Githunguri/6845/187 was wrongfully included as one of the assets of the Deceased to be distributed to the heirs. That the said parcel of land had been bequeathed by the Deceased to her daughter Rosemary Wanjiru Wahiti before she died.
 9. That in turn the said Rosemary Wanjiru Wahiti sold the said Githunguri land to one George Mwaura Mbugua. That when Rosemary Wanjiru died the land was transmitted to the said George Mwaura.
 10. The Objectors further claim that George Mwaura then sold the Githunguri land to Muhango 25 Neighbours Self Help Group vide a Sale Agreement dated 8th September, 2016.
 11. The Objectors allege that the Grant issued to the Administrator was fraudulently obtained as the Administrator illegally substituted himself for Wahiti Nganga who had passed away in 1991 before the Grant was confirmed. That following the death of Wahiti Nganga no summons was filed to substitute a new Administrator for the estate of the deceased Esther Wambui Wahiti. That the Grant was fraudulently rectified.
 12. The Objectors claims that he and the other members of the Mihango 25 Neighbours Self Help Group are the true and genuine owners of LR Njiru/Githunguri/187 measuring 1.473 acres which parcel of land was sold to them prior to the death of the Deceased by George Mwaura Mbugua, who had lawfully acquired said parcel of land from the Deceased.
 13. The Administrator Robert Wahiti Nganga filed a Replying Affidavit dated 11th April, 2022 opposing the summons for revocation of Grant.
 14. The Administrator also filed this Notice of Preliminary Objection which is premised upon the following grounds;-
 - i. That the Summons for Revocation Application dated 23/04/2019 is incurably defective for want of proper form and not being premised on proper legal principles and/or provisions.
 - ii. That the Objector/Applicant has no legal basis nor locus-standi to seek the Orders sought.
 - iii. That unmarked and unattested annexures offends Rule 9 and 10 Rules [under section 6 Oaths and Statutory Declarations Rules] of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya”
 15. The Objectors as stated earlier opposed the Preliminary Objection through their Replying Affidavit dated 14th March, 2023.

Analysis And Determination

16. I have carefully considered the Preliminary Objection as well as the written submissions filed by both parties.



17. The definition of what constitutes a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Company Ltd -vs-west End Distributors Ltd* [1969] E.A in which the court stated as follows.

“ 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 the suit. Examples are an objection to the jurisdiction of the court, or a place of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A Preliminary Objection is in the nature of what is 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.”

18. In *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Limited & 3 Others* [2015] eKLR, the Supreme Court of Kenya stated that

“ a Preliminary Objection may only be raised on a “pure question of law”

19. 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”

20. Therefore in order for a Preliminary Objection to succeed, the following tests must be satisfied;-

- i. The Preliminary Objection should raise a pure point of law.
- ii. The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
- iii. The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- iv. A valid Preliminary Objection ought if successful dispose of the entire suit.

21. Therefore a genuine and proper Preliminary Objection can only raise pure points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.

22. The Administrator has basically raised two grounds for objecting to the Summons for revocation of Grant.

1. That the said summons is incurably defective as the same contains unattested annexures contrary to Rules 9 and 10 of the *Oaths and Statutory Declarations Act* Cap 15, Laws of Kenya.

23. I have perused the annexure to the summons and I note that they are properly attested. In any event want of form would not in my view render the entire application incurably defective. Article 159 (2) (d) of *the Constitution* of Kenya 2010 provides that

“(a) Justice shall be administered without undue regard to procedural technicalities”

24. I therefore dismiss this limb of the Preliminary Objection.



Locus Standi

25. The Administrators submit that the Objectors not being beneficiaries to the estate of the Deceased have no locus to file the Summons for revocation of Grant.
26. Locus standi is a latin term which literally means ‘place of standing.’ It refers to the right of an individual and/or party to appear in a particular case.
27. It is trite law that pleadings filed by a person who has no Locus Standi are void ab initio. In [*Ibrahim - vs- Hassan & Charles Kimenyi Macharia*](#) [2009] eKLR it was stated 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, it means that party cannot be heard despite whether or not he has a case worth listening to. 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 regarding locus standi are critical preliminary issues which must be dealt with and settled before delving into other substantive issues. [Own emphasis]
28. This court is sitting as a Probate Court with the mandate to supervise and oversee the distribution of the estate to the genuine heirs. In [*Re Estate Of GKK \(Deceased\)*](#) [2017] eKLR the court observed that

“The primary functions of a Probate Court is distribution of the estate of a dead person”
29. In a Succession Cause therefore the persons who have *locus standi* are the beneficiaries/heirs of the estate and any dependants of the Deceased.
30. The Objectors are not relatives of the Deceased nor do they claim to be. The Objectors claim to be purchasers of the Githunguri land. As such they object to the inclusion of this asset as part of the estate available for distribution. I find that the objectors therefore do not have *locus standi* in this succession cause.
31. The objectors claim a legal proprietary interest in the parcel of land known as Njiru/Githunguri/6845/187. As stated earlier this is a dispute pitting the Administrator of the Estate against third parties who claim to be bonafide purchasers of estate assets. Matters relating to the ownership, use and occupation of land have now under Article 162 of [*the Constitution*](#) of Kenya 2010 been mandated to be determined by a specialized court being the Environment and Land Court (‘ELC’).
32. Section 13 of the [*Environment and Land Court Act*](#) provides for the jurisdiction of that court as follows:-
 13. Jurisdiction of the Court
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of [*the Constitution*](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment under the land.
 - (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 in land; and
- (e) any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]

33. Therefore, the correct and proper forum before which the Applicants ought to ventilate claim of the Estate to the suit land is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of ‘ownership’ of the suit land.

34. In *RE Estate Of Stone Kathubi Muinde (Deceased)* (2016) eKLR Hon. Justice William Musyoka held that:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit property brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that the court can give effect to it”. [own emphasis]

35. Therefore the Objectors are not left without any remedy. They are at liberty to approach the ELC to prosecute their claim to the suit land. If and when the objectors obtain judgment in their favour from the ELC then they are at liberty to present that decree before this Probate Court for implementation.

36. For the above reason I find that this court lacks jurisdiction to determine the question of ownership of the suit land. That is a matter for the ELC to determine.

37. Section 47 of the *Law of Succession Act* provides as follows:-

“The High Court have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

Likewise the *Probate and Administration Rules* provides that:-

“73. Nothing in these *Rules* shall limit or otherwise affect the Inherent power of the court to make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court.”

38. In order not to prejudice the objector’s claim I direct that the status quo regarding Njiru/ Githunguri/6845/187 be maintained for a period of forty (40) days to enable the Objectors file suit and seek relevant orders in the ELC.



Conclusion

39. Finally I find merit in the Notice of Preliminary Objection dated 28th February, 2023 and I make the following orders;
- i. The Summons for revocation of Grant dated 23rd April, 2019 is hereby struck out.
 - ii. The Objectors are at liberty to pursue their claim in the ELC.
 - iii. The status quo with respect to the property known as Njiru/Githunguri/6845/187 is to be maintained for the next forty (40) days.
 - v. If no suit is filed in the ELC within forty (40) days then the status quo orders will lapse with no further reference to the objectors.
 - (vi) Each party to meet their own costs.

DATED IN NYERI THIS 6TH DAY OF MAY, 2024.

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MAUREEN A. ODERO

JUDGE

