



**Kariro v Kariuki & another (Civil Appeal E302 of 2022)
[2024] KEHC 8266 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8266 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E302 OF 2022**

RC RUTTO, J

JULY 5, 2024

IN THE MATTER OF PAUL KABUE..... DECEASED

BETWEEN

JAMES KARIUKI KARIRO APPELLANT

AND

DANIEL GICHUHI KARIUKI 1ST RESPONDENT

JAMES NDIRANGU KARIUKI 2ND RESPONDENT

(Being an appeal from the Judgment of Hon V Asiyo made on the 24th October 2022 in the Senior Principal Magistrate Court Succession Cause No 13 of 2018)

JUDGMENT

1. This is an appeal against the decision of the trial court in Githunguri Succession Cause No 13 of 2018. In this matter the trial court invoked section 71 of the [Law of Succession Act](#) and confirmed the grant made on 8th October 2018.
2. In confirming the grant, the trial court found that the protestor had not annexed a copy of a grant or limited grant on behalf of the estate of Joseph Korio Kariuki and proceeded to hold that the protestor lacked the necessary locus standi to swear the affidavit of protest. Further, the trial court held that the protestor was challenging the ownership of land parcel Githunguri/Kimathi/706 and he ought to have filed the case in the Environment and Land Court Division so that his case could be determined on its merits.
3. Aggrieved by that decision, the appellant filed this appeal seeking to set aside the decision of the trial court on the basis of the following grounds;



- a. The trial magistrate erred in law and in fact by failing to consider, and dismissing the contents of the replying affidavit dated 8th June 2022 together with its annexures.
 - b. The trial magistrate erred in law and in fact by failing to consider the elders decision in Civil Case No 741 of 1978 where the deceased was only given one acre of land parcel Githunguri/Kimathi/706 while the appellant father got the remaining 2 acres.
 - c. The trial magistrate erred in law and in fact in finding that the appellant required a copy of grant or limited to show that he is the personal representative of Paul Kariuki Kabue (Deceased)
 - d. The trial magistrate erred in law and in fact by finding that the appellant lacked the locus standi to swear the affidavit of protest.
 - e. The trial magistrate erred in law and in fact in finding that the land parcel Githunguri/Kimathi/706 which the appellant father had 2 shares be shared equally amongst the estate of Paul Kariuki Kabue(Deceased) who had only one share.
 - f. The trial magistrate erred in law and in fact by failing to consider the evidence in form of exhibit provided by the appellant in the trial court; and
 - g. The trial magistrate erred in law and in fact by selectively applying evidence and relying on the respondents' malicious evidence hence arriving at an erroneous decision.
4. In support of this appeal the appellant filed submissions dated 29th May 2024. As at the date of writing this judgment, it is noted that the respondent had not filed their submissions despite repeated mentions. Therefore, I will be guided by the record of appeal before the court in writing this decision.

Appellant submissions

5. The appellant set out three issues for determination namely;
 - a. Whether the appellant has locus standi to file the objection.
 - b. Whether the appellant's father is entitled to 2.1 acres of Githunguri/Kimathi/706.
 - c. Who bears the cost of this appeal?
6. On the issue of locus standi, the appellant urges this court to find that he has locus standi, and he relies on the case of Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party (2019) eKLR which held that locus standi is basically the right to appear to be heard in court or other proceedings.
7. It is his submission that he is not a stranger to the proceedings as his relationship with the deceased is apparent on the face of the record by being a son of Joseph Komo Korio who is a son of the deceased.
8. He makes reference to the case of In Re Estate of Hellen Wangari Wathiai(Deceased) 2021 eKLR which held that the grandchildren get into the shoes of their deceased parents and take the parents' share in the estate of the grandparents. Further he relies on the case of In Re Estate of Erick Kibet Bomett (2021)eKLR.
9. The appellant urges the court to find that the respondents have not tendered any evidence before the court to rebut the relationship between him and the deceased.
10. It is his submission that it will be a travesty of justice for the court to drive him from the seat of justice for failure to take out letters in the estate of Joseph Korio Kariuki who is clearly a son of the deceased and the rightful owner of Githunguri/Kimathi/706. He urges the court to rely on the provisions of



Article 159(d) of *the Constitution* which provides that justice shall be administered without undue regard to procedural technicalities

11. As to whether the appellants father is entitled to 2.1 acres of Githunguri/Kimathi/706, the appellant submitted that; the portion of land Githunguri/Kimathi/706 belongs to Joseph Korio Kariuki, the appellants father, that his father Joseph Korio Kariuki took over possession of the land Githunguri/Kimathi/552. Thereafter, the land was subdivided into Githunguri/Kimathi/706 and Githunguri/Kimathi/707. It was his submission that his father continued being in possession of Githunguri/Kimathi/706, and neither did the respondents nor their father Kariuki Kabue erect a house or even tilled the land for the past 60years yet they claim that the land belonged to Kariuki Kabue.
12. Further that despite the appellant's father being in possession of the land Githunguri/Kimathi/706 for more than 60 years, his father Kariuki Kabue never instituted any suit against him seeking for vacant possession of the land. According to him, it was actually the appellant's father who sued Kariuki Kabue seeking for transfer of Githunguri/Kimathi/706 land back to him.
13. He submits that the respondents did not seek possession of the land after the death of Kariuki Kabue in 1983 from Joseph Korio Kariuki who died in 2002. That the respondents had an ample time to evict the said Joseph Korio Kariuki however, they did not as they were aware that the land belongs to Joseph Korio Kariuki.
14. He urged court to take note of the elders' award that held that Kariuki Kabue indicated that he could not have tilled the land or otherwise as he knew the land was not his. Further he could not give a clear answer as to why the land was registered in the name of Joseph Korio Kariuki and not Kabue Kariuki. He urges the court to find that customary trust is recognized in law under section 28(b) of the land Registered Act No. 3 of 2012
15. On the issue of costs, the appellant urges the court to find that costs follow the event, that they have proved their case on a balance of probability. The appellant relies on the case of Nancy Cheron Koros & Another v Presbyterian Foundation and Another (2014) eKLR

Analysis and determination

16. The issue for determination arising before this court is whether the trial court erred in confirming the grant made on 8th October 2018.
17. Notably the confirmation of the grant was granted on the basis of two issues; firstly, that the trial court established that the appellant had no locus standi to file affidavit of protest because as a protestor he did not produce a copy of a grant or limited grant on behalf of the estate of Joseph Korio Kariuki(deceased). The court went further to state that the only way a person could replace a dead beneficiary is by adducing a copy of grant or limited grant to prove that the person is the personal representative of the deceased.
18. In the case of *Legal Advice Centre t/a Kituo Cha Sheria v Attorney General (Advisory Opinion Reference E001 of 2023)* [2024] KESC 15 (KLR) (12 April 2024) (Ruling) the Supreme Court gave the following guidance with regard to the determination of locus standi:
 - “ 4. That question raised in regard to locus standi of a party goes directly to the issue of whether the Court has jurisdiction to hear this matter. It is therefore imperative that this Court should settle this question at the onset before moving forward with the hearing of the reference itself.”



It thus follows that the issue whether the trial court erred in finding that the objector had no locus standi falls for determination first.

19. In the case of Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR the Court of Appeal when dealing with the issue of locus standi in relation to an estate of deceased person held as follows;

“Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

In this matter therefore the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on. In coming to this finding this Court is alive to the truism that the matter is quite an old one and involves the loss of a loved one in a family.

20. Further in the In re Estate of Hellen Wangari Wathiai (Deceased) [2021] eKLR the court observed that ;
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] EALR468, 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.”

21. In this instance, the applicants now the respondents moved the court seeking to have the Grant of Letters of Administration issued to Daniel Gichuhi Karuiki and James Ndirangu Kariuki confirmed since six months had lapsed from when the grant was issued.
22. The application was supported by an affidavit sworn by the administrators in which they stated that; six months had passed since the grant was issued; the beneficiaries had agreed on the distribution of the assets; the list of the beneficiaries /survivors was provided; James Kariuki Kabue had been appointed as the legal representative of David Kabue Kariuki (a son of the deceased who was also deceased).
23. In response to this application James Kariuki Kario swore an affidavit of protest dated 4th May 2022 stating that; he is a beneficiary of the estate of Joseph Korio Kariuki(deceased), who was his biological father. That Paul Kariuki Kabue (deceased) whom the confirmation of grant was being made was his grandfather by virtue of being a biological father to his father.
24. While the appellant, outrightly admits that he is the beneficiary of his father’s estate (the estate of Joseph Korio Kariuki), he failed to provide the Grant of Letters of administration either limited or full. As guided by the quoted authorities, the locus standi over the estate of a deceased person is only acquired upon issuance of letters of administration. It is only then that a person acquires the legal capacity to represent a deceased person in court. In the absence of that, one is just a stranger, an unknown person.
25. The objector urges this court to invoke the provisions of Article 159 of *the Constitution* and find that justice shall be administered without undue regard to procedural technicalities. This court makes



reference to the case of Raila Odinga vs. the Independent Electoral and Boundaries Commission and 3 Others [2013] ECLR where the Supreme Court guided that the essence of this provision is that courts should not pay undue regard to procedural technicalities at the expense of substantive justice. The provision was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts. Consequently, the question of locus standi is not a procedural technicality but rather goes to the jurisdiction of the court. In this case, the appellant, in the absence of letters of administration had no capacity to appear before the court.

26. Consequently, drawing guidance from the case of Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eCLR cited above, I am of the considered view that the objector did not have the requisite locus standi to institute, the objection proceedings before the trial court. I therefore do not find any reason to disturb the finding by the trial court.
27. Secondly, the appellant appealed against the finding by the trial court, that the protestor was challenging the ownership of land parcel Githunguri/Kimathi 706. It should be noted that in sum the appellant submitted that his father was the initial owner of Githunguri/Kimathi/7078 before the property was divided into 2 portions Githunguri/Kimathi/706 and Githunguri/Kimathi/707. That due to a case involving his father in High Court Civil Suit No 1286 of 1965 his father transferred the land to his grandfather by way of a gift until the case was heard and determined as he thought he would be found guilty and convicted.
28. In response to the objection, the respondents herein stated that; the deceased was employed as a manager and would send money to their brother Joseph Korio Kariuki (the father of the protestor) to deliver it to the owner of the land as payment for the purchase price. Unfortunately, the land was registered in the late brother's name. Later in 1966 their father discovered that their brother Joseph Korio Kariuki was secretly planning to sell the land to one Mbugua Wathungu. This led to the land being transferred back to their father.
29. Issues of ownership of land are dealt with by the Environment and Land Court. In the Nyeri Court of Appeal case of, *Diasproperty Limited & 5 others v Githae & 10 others (Civil Appeal E155 & E157 of 2023)* (Consolidated) [2024] KECA 318 (KLR) (22 March 2024) (Judgment) the court while discussing the interplay between the jurisdiction of the Environment and Land Court and that of the High Court under the *Law of Succession Act* (Cap. 160) observed as follows;

Under Article 165(5)(b) of *the Constitution*, the High Court shall not have any jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court. Under Article 162(2) of *the Constitution* and section 13 of the *Environment and Land Court Act*, 2012, all matters relating to land, its ownership, use, tenure, boundaries, and so on, are reserved for the Environment and Land Court.

It is notable that under Rule 43(1) of the Probate and Administration Rules, made under the *Law of Succession Act*, where, in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, or there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate court. It is when such a determination is made that the succession court can confirm the grant, bearing in mind the determination. Of course, with *the Constitution* and the *Environment and Land Court Act*, such a dispute has to be referred to the Environment and Land Court for resolution.



30. A reading of the facts as presented by the parties show that the protestor was contesting the confirmation of the grant on the basis of contention on the ownership of land. The protestor is seeking this court to determine whether the land belongs to his late father. This position was confirmed by the trial court when it held that if indeed the protestor was challenging the ownership of land parcel Githunguri/Kimathi/706 then he ought to have filed the case before the Environment and Court Division so that if case has merited the Land Registrar can be ordered to cancel the title.
31. Having established that the protestor did not have the requisite locus standi to institute the objection proceedings before the trial court and having found no err by the trial court, I find that this appeal lacks merit and is hereby dismissed with costs.
32. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 5TH DAY OF JULY 2024

For Appellants: Ms. Ndichu H/B for Mr. Mburu Machua

For Respondent: Sharon Njoki H/B for Mr. Gatumuta

Court Assistant: Peter Wabwire

