



**Salat v Attorney General (Constitutional Petition 14 of 2019)  
[2024] KEHC 11328 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CONSTITUTIONAL PETITION 14 OF 2019  
JN ONYIEGO, J  
SEPTEMBER 25, 2024**

**IN THE MATTER OF ARTICLES 23,26,28 AND 29 OF THE CONSTITUTION**

**BETWEEN**

**MOHAMED ABDI SALAT ..... PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

1. The petitioners through the firm of Arthur Ingutya & Co. Advocates instituted this suit by way of a petition dated 06.05.2019 seeking for the court to grant the following prayers:
  - i. A declaration that the right of the deceased under article 26 of the constitution was infringed.
  - ii. A declaration that the deceased was denied his rights under articles 28 and 29 of the constitution.
  - iii. A declaration that the deceased was denied his rights under article 49 of the constitution.
  - iv. An order that the government do pay general damages for the unlawful killing of the deceased and as such damages be paid to his estate and beneficiaries thereof.
2. The petition is supported by the annexed affidavits of various deponents sworn on 06.05.2019 deposing inter alia that; on June 24, 2018, Mohamed Musa Elmi, Hassan Bashar Salat and Hussein Ibrahim Salat witnessed the arrest of Abdi Jimale Elmi while the other deponents stumbled upon the decomposing bodies of Abdi Jimale Elmi and Adan Dabar Abdi. That the arrest was effected by a team of Kenya Security Forces who were on an operation in Aus Mudule area. It was stated that the said Abdi Jimale Elmi was not seen alive again as they stumbled upon his decomposing body along Kotulo Bojigaras road.



3. Via a replying affidavit sworn by Loyford Kibaara, the County Commissioner Wajir County sworn on 23.12.2019, the respondent deponed that on 17.06.2018 along Kotulo – Bojigras road, a team of five administration police officers from Kotulo AP Camp heading toward Bojigras encountered a land mine set up by the Al Shabaab militia which exploded thus killing all of them. That all the rifles and ammunition in the officer's possession were extensively damaged in the process.
4. He further stated that on 25.06.2018, about thirty youths suspected to be Al Shabaab militia attacked Konton, Kotulo and Kholof Habar area within Wajir East sub county. That it was reported that the militia picked Adan Dabar Abdi, Abdi Jimale, Yusuf Ibrahim and Hussein Abdi Maalim.
5. It was his averment that there was no evidence that the aforesaid attacks were carried out by the Kenyan security forces as alleged by the petitioner. He further deposed that, the petitioner did not comply with the mandatory provisions of the succession Act before filing the suit herein. That this court ought to dismiss the suit as the same is incompetent.
6. In his quest to have this suit struck out, the respondent filed a preliminary objection dated 14.06.2024 citing the following grounds:
  - i. That by virtue of section 82 of the Laws of Succession Act, Cap 160 of the Laws of Kenya, one can only institute or enforce a suit on behalf of the estate of a deceased person once they have been appointed personal representatives to such estate.
  - ii. That the petitioner need to file proper letters of administration and grant ad litem to move the court, which in this case, the petitioners have not presented and as such, they lack locus standi.
7. The preliminary objection was canvassed by way of written submissions.
8. The respondent in his submissions dated 17.07.2024 contended that it is trite that only a person issued with a grant of letters of administration has capacity to represent the estate of the deceased person. That in the instant case, the petitioner having not presented the same, the suit was thus rendered incompetent as he lacked locus.
9. It was also urged that the supporting affidavits annexed herein provided scanty information especially on the issues and facts and therefore not supporting the allegations presented herein. That a comparison between the information contained in the affidavit of one Lyford Kibara and the pleadings by the petitioner, clearly indicate that the affidavit by Mr. Kibaara looked more probable than the allegations by the petitioner. In conclusion, this court was urged to dismiss the suit and award costs to the respondents as the suit was incompetent.
10. The petitioner on the other hand opposed the preliminary objection arguing that the only issue for determination is whether in the given circumstances of the case, the petitioner is clothed with the requisite standing to move this court. It was urged that in the case of Otolo Margaret Kanini & 16 others v the Attorney General, & 4 others [202] eKLR, the court dealt with a similar issue where it was determined that in petitions seeking declaratory orders, declarations that the rights and fundamental freedoms of the deceased were violated a petition can be filed and if an order for compensation is made, the court can direct payment to be made to the estate of the deceased. That the court went further to state that in such a case, a petition may be instituted without the necessity of a grant of letters of administration.
11. It was urged that the same reasoning in the above case applied to the case herein and therefore, this court was urged to adopt the same and find that the preliminary objection herein is in want of merit.



12. I have carefully read and considered the preliminary objection by the respondent and the written submissions by both parties. The only issue for determination is whether the preliminary objection is merited.
13. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is a classic case where the issue of what constitutes a preliminary objection was discussed:

“---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”.
14. An objection as to whether the petitioner had the requisite standing to move this court has been raised for the reason that the petitioner ought to have taken out letters of administration for purposes of instituting this suit.
15. A reading of articles 22 and 258 of the [constitution](#) in my view, act as the anchor provisions on locus standi. Article 22 provides the right of every person to institute proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
16. Article 258 makes provision for every person to institute proceedings that his rights have or the [constitution](#) has been contravened or is threatened with contravention. In reference to the foregoing, it follows that in both instances, such proceedings may be instituted by the aggrieved party on his own interest, by a person acting on behalf of another person, on behalf of a class of people, in public interest or by an association acting on behalf of its member or members. [ See The Court of Appeal in Mombasa Civil Appeal No. 75 of 2016, [Juletabi African Adventure Limited & another v Christopher Michael Lockley](#) [2017] eKLR and [Alfred Njau & 5 others v City Council of Nairobi](#) [1983] eKLR].
17. This Court has carefully assessed the requirement of locus-standi through the lenses of Articles 22 and 258 of the [constitution](#) and the [constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as ‘the Mutunga Rules’) and finds that any person has liberty to move a court more so under the circumstances enunciated in the provisions already mentioned.
18. In the instant case, a new dimension has been introduced in relation to the subject of locus standi. The same seeks to interrogate whether the allegations of violation of rights and fundamental freedoms can be successfully asserted by a dependant of a deceased person without the dependant first obtaining requisite letters of administration on behalf of the estate of the said deceased person. The foregoing notwithstanding, it is not lost to this court that letters of administration are, therefore, granted to persons who in one way or the other have interests in the affairs of a deceased person who died intestate or without a will. [ See [Vikash Kamal Kumar Devishi Shah v Abdalaman & 3 Others](#) (2021) eKLR].
19. The petitioner has argued that he is seeking to enforce the rights of the deceased who allegedly was arrested by the team of Kenya Security Forces and killed. Therefore, to that end, the remedies of declarations and compensation are limited to the deceased’s rights and his estate or his kin. In essence, it has been argued that the Petition is brought for and on behalf of the deceased person or his estate.
20. A careful look at the reliefs sought, indicates that the suit herein is not brought in the individual capacity of the petitioner. In such a scenario, my view therefore would be that one does not need to have letters of administration to realize such declarations upon proof.



21. Noting the nature of the suit before this court, the same is in relation to allegations that the state played a role either directly or indirectly in the disappearance hence the demise of the deceased. It is not lost to this court that the constitution places upon the state an obligation to protect all citizens from violent acts which could lead to their rights being violated. In the case of Charles Murigu Muriithi & 2 Others, v attorney General [2015] eKLR, the court was of the view that:

“it is therefore our finding that the State through its security agencies, including the Police, has a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in the constitution, including the right to security of the person and to property, would be freely and fully enjoyed by persons within its jurisdiction”.

22. The court proceeded to state that:

“The State’s duty to protect those rights would only be activated if it is demonstrated that the police or other State agencies had prior information that a section of the members of the public in a certain area, or specific individuals, were in danger of being subjected to acts of violence against their person or property and that the police, negligently or deliberately, failed to act on such information leading to a violation of the rights protected under the constitution”.

23. In the recent decision in petition No. 104 of 2019 consolidated with petitions 353 of 2022 and 209,210,211,212,213,214,215 of 2021 Nairobi high court between Legal Advice Centre T/A kituo Cha Sheria and 84 petitioners v the Cabinet Secretary ministry of Education and 7 others, the court awarded compensation to the estates of the deceased children who died at Garissa university during the terrorists attack.

24. In the above case, the court was faced with a similar situation where some of the deceased’s estates did not provide letters of administration in respect of the deceased students. The court dismissed the claim arguing that constitutional petitions are special in nature and do not follow strictly ordinary civil suit’s requirements such as the succession Act or the limitation of actions Act.

25. Based on the above case law, I am persuaded to hold that constitutional petitions are not bound by ordinary civil procedure procedural technicalities. The petitioner does not of necessity need to be a holder of a grant to seek for constitutional declaratory orders. He can however not directly benefit from any compensation made in respect of the deceased. In that case the estate of the deceased will lay claim of the compensation or award.

26. For the above reasons stated, the preliminary objection herein is dismissed. Costs shall be in the cause. Petition to proceed to full hearing by way of viva voce evidence.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**J. N. ONYIEGO**

**JUDGE**

