



Forino & another (Suing as the Administrators of the Estate of Giovanni Forino - Deceased) v Forino & 4 others (Civil Case 9 of 2019) [2024] KEHC 12221 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 9 OF 2019
SM GITHINJI, J
OCTOBER 9, 2024**

BETWEEN

**MICHELINA FORINO 1ST APPLICANT
SALVATORE FORINO 2ND APPLICANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF GIOVANNI FORINO
- DECEASED**

AND

**ALFONSO FORINO 1ST DEFENDANT
LAZARUS KIMANGA 2ND DEFENDANT
PARKER RANDALL-EAST AFRICA LIMITED 3RD DEFENDANT
REGISTRAR OF COMPANIES 4TH DEFENDANT
GI-FO LIMITED 5TH DEFENDANT**

RULING

1. For determination is the Notice of Motion dated 30th April 2024 brought pursuant to Order 2 Rule 15 (1) (b) (c) and (d) and (3) of the [Civil Procedure](#) 2010, Section 1A, 1B, 3A and 5 the [Civil Procedure Act](#) seeking the following orders;
 1. That this honourable court be pleased to strike out the Plaintiff's Suit.
 2. That the costs of the application be provided for.
2. The Application is founded on the grounds on its face and the supporting affidavit of Alfonso Forino the 1st Defendant/Applicant who deponed that vide the summons dated 21st June 2019, the Plaintiffs vide Malindi High Court P& A Cause No. 3 of 2019 sought the following orders;



1. That the Summons and Petition filed herewith be certified urgent and admitted for hearing *ex parte*.
 2. That letters of administration *ad colligenda bona defuncti* for the administration of the Estate of Giovanni Forino(deceased) do issue to the Applicants/Petitioners Michelina Forino and Salvatore Forino.
 3. That the grant of letters of administration *ad colligenda bona defuncti* do permit the Applicants/Petitioners to take over all litigation and legal processes initiated by the Deceased Giovanni Forino for the benefit of the deceased's estate.
 4. That the grant of letters of administration *ad colligenda bona defuncti* do permit the Applicants/Petitioners to engage the Registrar of Companies to enquire into the irregular share transfers in the company known as GIO-FO Limited for the benefit of the deceased's estate and were found necessary to cause rectification of the register of the Company at the Companies Registry.
 5. That costs be provided for out of the Estate of the deceased.
3. He stated that the grant of Letters of Administration *ad colligenda bona* of the estate of the deceased was issued to the Plaintiffs by Hon Justice Rueben Nyakundi on 26th June 2019. That the Plaintiffs filed this suit on 18th September 2019 as administrators' *ad colligenda bona defuncti* of the estate of the deceased and not in their personal capacities. He added that limited grant of letters of administration *ad colligenda bona defuncti* are for purposes of collecting and preservation of the estate and do not enable the representative of the estate to sue on behalf of the estate or defend a suit where the estate has been sued.
 4. It was stated that on 3rd June 2020, Hon. Justice Rueben Nyakundi in his ruling in the Succession cause directed Gioia Anna to apply for the grant of Letters of Administration in the estate of the deceased which orders have not been reviewed or appealed against and no letters of administration *ad litem* have been issued to the Plaintiffs by this honourable court or any other court in relation to the estate of the deceased.
 5. In response, the Plaintiffs filed a replying affidavit sworn by Michelina Forino the 1st Plaintiff. He stated that on 26th June 2019, letters of administration *ad colligenda* were issued to the Plaintiffs. That acting on the powers conferred to them by the said letters of administration *ad colligenda*, the Plaintiffs instituted this matter by way of originating summons seeking several orders including a preservation order restraining the Defendants from transferring the shares of the 5th Defendant. It was further stated that the 1st and 5th Defendants opposed the originating summons by way of a replying affidavit and a P.O, which P.O challenged the Plaintiffs' *locus standi*. It was additionally stated that the P.O was dismissed vide the ruling dated 27th May 2020 and letters of administration *ad colligenda bona* issued thus the instant Application is *Res Judicata*.

Analysis and Determination

6. The Application was disposed of by way of written submissions. I have carefully considered the detailed submissions by the parties as well as the authorities relied upon. Arising for determination are two issues;
 1. Whether the Plaintiffs have *locus standi* in this suit
 2. Whether the Application is *Res Judicata*



7. The term “Locus Standi” connotes the right of a party to bring an action. It seeks to determine whether a party is entitled in law to bring up an action or is properly before the court. There are many decisions on the subject from the Courts and to quote the decision in the case of *Michael Osudwa Sakwa v Chief Justice and President Supreme Court of Kenya & Another*. [2016] eKLR which referred to the matter of *Ms Priscilla Nyokabi Kanyua v Attorney General & I.E.B.C*, Nairobi H.C CP NO. 1/2010 it was stated that: -

“In Kenya the court has emphatically stated that what gives Locus Standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that it would not be more affected than any other member of the population.”

8. Such interest must be vested legal interest giving the party a right to enforce the claim by way of a lawsuit. It follows that for a party to have a locus standi he must have a vested interest in the subject matter before court. “Locus Standi” is point of law that touches on a party’s interest in the matter before the court. In the *Law Society of Kenya –v Commissioner of Land & Others*, Nakuru H.CCC No.464/2000 the court stated that, “Locus Standi’ signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in Court of Law.”

The gravamen of the instant Application is that the Plaintiffs lack the locus standi in relation to the estate of the deceased. That they have not acquired letters of administration ad litem to agitate any suit on behalf of the estate of the deceased. The Plaintiffs on the other hand aver that they are clothed with letters of administration ad colligenda bona and the title on the said letters is merely a procedural technicality. As it is, there is no dispute that letters of administration ad colligenda bona were issued by my brother Hon. Justice Nyakundi on 26th June 2019.

9. Section 67 (1) of the *Law of Succession Act* provides as follows;
- (1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.
 - (2) A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.
10. Rule 36 (1) of the *Probate and Administration Rules*, 1980 is instructive and it provides as follows:

“Grant ad colligenda bona under s. 67 of the Act (1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.”

12. In *Hawo Shanko v Mohamed UTA Shanko* [2018] eKLR the Court observed as follows:

“The issue as to whether a party can file a suit involving a deceased’s estate before obtaining a limited grant has been the subject of several Court cases. The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each



beneficiary is allowed to file a suit touching on a deceased's estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same.”

13. The Court of Appeal in Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR, addressed itself on the issue of locus standi in succession matters as follows:

“... But in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of Letters of Administration in cases of Intestate succession.”

14. In Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR the Court stated as follows as relates to the fate of succession claims filed by parties that lack locus standi:

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. 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.”

15. A cursory glance at the ruling by my brother Hon. Justice Nyakundi, he observed at page 31 that;

“on this issue there is an error on the face of the record when the court unmistakably admitted the O.S pursuant to a special Grant of Letters of Administration Ad Colligenda bona under Section 67 of the Act which does not allow the holder to easily cross the threshold of prosecuting or defending any suit touching on the estate of the deceased... indeed that a claim is to be empowered under Section 54 of the Act, notably a separate Grant of Letters of Administration Ad Litem for purposes of filing suit... in the instant case, it seems plain it affects the capacity to litigate or bring an action on behalf of the estate of the deceased, the claim intended to challenge the transfer of shares incorporating the 5th Respondent can be filed as derivative action by the legally appointed administrator to the estate of the deceased under Section 51 of the Law of Succession as read in conjunction with Section 66 of the Act.”

16. From the above citation, it is clear that the letters of administration ad colligenda bona defuncti were for the purposes of preservation of the estate of the deceased. Any suit or issues arising from the estate of the deceased can only be prosecuted or defended by the legal administrators of the estate as afore discussed in the authorities above. As a result, it is my finding that the Plaintiffs lack the *locus standi* to institute or prosecute the instant suit.

17. As regards the issue of res judicata, having determined the issue of *locus standi*, it is my view that it serves no purpose to determine the same.

18. In the end, I find that the Application is merited and the suit is hereby struck out. This being a succession matter and between families, each party shall bear its own costs.



RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF OCTOBER, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

- 1. Ms Lutto for the 2nd and 3rd Respondents
- 2. Mr Binyenya for the 1st and 5th Respondents

