



**In re Estate of Gideon Gilbert Ochiel (Deceased) (Miscellaneous Application E022 of 2022) [2023] KEHC 23486 (KLR) (Family) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23486 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E022 OF 2022  
MA ODERO, J  
OCTOBER 6, 2023  
IN THE MATTER OF THE ESTATE OF GIDEON GILBERT OCHIEL (DECEASED)**

**BETWEEN**

**Jael Awino Ochiel-Otieno ..... 1<sup>ST</sup> APPLICANT  
Lucille Ochiel ..... 2<sup>ND</sup> APPLICANT  
Caren Onyango Ochiel ..... 3<sup>RD</sup> APPLICANT**

**AND**

**Adam Samo Ochiel ..... 1<sup>ST</sup> RESPONDENT  
Rachael Amondi Ochiel ..... 2<sup>ND</sup> RESPONDENT  
Agnes Bess Muthoni ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**Gad Dev Wanga Ochiel ..... INTERESTED PARTY**

**RULING**

1. Before this Court for determination is the Notice of Preliminary Objection dated 25<sup>th</sup> July 2022 filed by the Interested Party Gad Dev Wanga Ochiel.
2. The Applicants Jael Awino Ochiel-otieno, Lucille Ochiel and Caren Onyango-ochiel all opposed the Preliminary Objection. The matter was canvassed by way of written submissions. The Interested Party filed the written submissions dated 23<sup>rd</sup> February 2023 whilst the Applicants relied upon their submissions dated 16<sup>th</sup> February, 2023.



## Background

3. This Succession Cause relates to the estate of the late Gideon Gilbert Ochiel (hereinafter ‘the Deceased’) who died intestate on 18<sup>th</sup> January 2017. A copy of the Burial Permit serial Number 0095290 appears as Annexure ‘JO1’ to the Affidavit dated 11<sup>th</sup> February 2022 sworn by the 1<sup>st</sup> Applicant.
4. The Applicants herein filed in the High Court the Chamber Summons dated 10<sup>th</sup> February 2022 seeking the following orders:-
  - “1. Spent.
  2. The Honourable Court be pleased to issue an order of inhibition restraining any dealings in the estate of the deceased until this cause is heard and determined.
  3. The Honourable Court be pleased to order status quo be maintained and order the Respondents to stop intermeddling with the estate until this cause is heard and determined or until further orders of the court.
  4. The Honourable Court be pleased to order the 1<sup>st</sup> Respondent to produce all the ownership documents (title deeds and lease certificates) that he is withholding to facilitate the commencement of a legal succession process.
  5. The costs of this application be in the cause.”
5. In response the Interested Party filed this Notice of Preliminary Objection which is premised on the following grounds:-
  - “1. The Chamber Summons application aforesaid is premised on non-existent law and/or the quoted law does not support the application.
  2. In addition, the applicants do not have *locus standi* to bring this application before court, having failed to comply with the provisions of rules 7 and/or 22 of the *Probate and Administration Rules*, 1980.
  3. The application is incompetent, misconceived, lacks merit and an abuse of the court process.
  4. Consequently, the application is null and void ab initio and should be struck out with costs to the Interested Party.”
6. To date no party has taken out letters of Administration in respect of the estate of the Deceased.
7. In their application the Applicants accuse the Respondents of intermeddling with the estate of the Deceased by leasing out the Matrimonial home being House No. 32/252/Golf Course Estate in Ngumo Estate Nairobi.
8. The Applicants pray that the 3<sup>rd</sup> Respondent be ordered to produce all ownership documents/certificates for properties owned by the Deceased so as to enable the Succession Cause to be commenced.
9. On their part the Respondents deny all the allegations of intermeddling. They assert that the matrimonial home was jointly owned by the Deceased and 3<sup>rd</sup> Applicant Caren Onyango Ochiel (the



- Deceased's wife) and that as such the said matrimonial home does not form part of the estate of the Deceased.
10. The Respondents further deny the allegation that they have leased out land in the village belonging to the Deceased.
  11. The Interested Party sought to be enjoined in these proceedings vide the Notice of Motion dated 24<sup>th</sup> June 2022. Hon. Justice Muchelule (as he then was) vide his ruling dated 25<sup>th</sup> July 2022 allowed that application. The Hon. Judge (as he then was) then gave directions on the filing of written submissions in respect of the application dated 10<sup>th</sup> February 2020.
  12. The Interested Party then filed this Notice of Preliminary Objection dated 25<sup>th</sup> July 2022 in which he submits that the Applicants have no '*locus standi*' to file this suit as none of them have been issued with any form of Letters of representation authorizing them to act for the estate of the Deceased.

### **Analysis and Determination**

13. I have carefully considered the Preliminary Objection raised by the Interested Party as well as the submissions filed by both parties.
14. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company LTD – v West End Distributors Ltd* [1969] EA where 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 plea of limitation or a submissions 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 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.”
15. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. 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.”
16. 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.
17. Therefore, a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.



18. By this Preliminary Objection the Respondent asserts that the Applicants have no *locus standi* in this matter and that therefore they cannot purport to be acting on behalf of estate of the Deceased.
19. ‘Locus standi’ is a Latin term which literally means “place of standing” and refers to the capacity of a party to participate in a suit. It is trite law that without requisite locus standi one cannot participate in a suit or action. Therefore, I am satisfied that this is a genuine preliminary point which has the potential to determine the entire matter.
20. The first objection raised by the Interested Party is that the application dated 10<sup>th</sup> February 2022 is premised on a non-existent law. It is true that the cited law being part IV rule 20, the *High Court (Practice and Procedure) Rules* does not exist however, does this render the application fatally defective? The answer is No article 159 (d) of the *Constitution* of Kenya 2010 exhorts courts to administer substantive justice without “undue regard to procedural technicalities.” An erroneous citation of Law is in my view a procedural technicality which does not render an application fatally defective.
21. The citing of a wrong provision of law is in my view a technicality and cannot be a ground to strike out the application. I therefore reject this limb of the Preliminary Objection.
22. The second ground of the Preliminary Objection is that the Applicants have no ‘*locus standi*’ to file this application.
23. ‘Locus Standi’ is a legal term which literally means ‘place of standing’ and refers to the right of a party to be involved in a particular suit. In *Black Law Dictionary* Tenth Edition the term ‘Locus Standi’ is defined as:-
- “The right to bring an action or to be heard in a given forum”.
24. In Succession matters *locus standi* is acquired by obtaining a Grant of letters of Administration. In the case of *Otieno v Ougo* [1986-1987] EALR it was stated that:-
- “An administrator is not entitled to bring any action as an administrator before he has taken out letters of administration. If he does the actions is incompetent as of the date of inception.” [own emphasis]
25. The Applicants herein have stated that they are bringing this suit on behalf of the estate of their late father Gideon Gilbert Ochiel
- In order to represent the estate of the Deceased the Applicants must have the requisite legal authority to represent the said estate.
26. In the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR the Court of Appeal stated that:-
- “A litigant is clothed with locus standi upon obtaining a limited or a full Grant of Letters of Administration cases of intestate Succession.”
27. The Applicants herein do not hold a Grant of representation to the estate of the Deceased. In order to file this matter the Applicants ought to have sought an obtained a ‘Special Grant’ which would enable them represent the estate. As matters stand they are ‘strangers’ to the estate. It is trite law that pleadings filed by Parties who have no ‘*locus standi*’ are ‘*void ab initio*’ and are for striking out.



28. I find that the Applicants have no legal capacity to represent the estate of the Deceased. Accordingly, I find merit in this Preliminary Objection. The application dated 10<sup>th</sup> February 2022 is therefore null and void and is hereby struck out. This being a family matter each side shall bear its own costs.

**DATED IN NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

