



In re Estate of Elaine Diane Scarpelliini (Deceased) (Succession Cause E042 of 2024) [2024] KEHC 14152 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E042 OF 2024**

G MUTAI, J

NOVEMBER 6, 2024

IN THE MATTER OF THE ESTATE OF ELAINE DIANE SCARPELLINI (DECEASED)

BETWEEN

**MICHELE CARVEN SCARPELLINI 1ST PETITIONER
ELOISE CATERINA SCARPELLINI 2ND PETITIONER**

AND

**AGA KHAN HEALTH SERVICES KENYA LIMITED T/A AGA KHAN
UNIVERSITY HOSPITAL, NAIROB 1ST RESPONDENT**

**THE SOCIAL SERVICES LEAGUE T/AMP SHAH HOSPITAL 2ND
RESPONDENT**

**AVENUE HEALTHCARE LIMITED T/A AVENUE HEALTHCARE PARKLANDS
HOSPITAL 3RD RESPONDENT**

DR MARX M OKONJI 4TH RESPONDENT

DR NASIR BHANJI 5TH RESPONDENT

STANDARD CHARTERED BANK KENYA LIMITED 6TH RESPONDENT

ELAINE'A NOAH'S ARK LIMITED 7TH RESPONDENT

KENAFRIQUE ADMINISTRATION LIMITED 8TH RESPONDENT

MTC TRUST AND CORPORATE SERVICES LIMITED 9TH RESPONDENT

ANTONETTA SCHOLASTICA ALVES 10TH RESPONDENT



RULING

1. Elaine Diane Scarpellini (hereafter “the deceased”) herein died on 2nd November 2022. She was survived by Eloise Caterina Scarpellini, Michele Carven Scarpellini and Desiree Anna Scarpellini. The estate comprises of motor vehicles with registration Numbers KCJ 066T, KBQ 973P and KBL 264M, Land Reference Number 209/7474 Nairobi (I.R 24918) (now Nairobi /Block 2/210), together with all buildings and the accompanying household goods, jewellery, monies in the US dollar account no. 87005942850000, held at Standard Chartered Bank Kenya Limited, monies in Kenya Shillings Account No. 01005942850000, held at Standard Chartered Bank Kenya Limited; monies in Bank Vontobel AG, Zurich, Switzerland, Account Numbers 10034025.001, 10034025.001.002, 10034025.001.003, 10034025.001.004 and 99000.001.
2. Michele Carven Scarpellini and Eloise Caterina Scarpellini (hereafter together called “the petitioners”) filed a petition for letters of administration intestate together with a chamber summons application dated 9th June 2024. Vide the said summons they sought various orders against the respondents. As this ruling is not in regard to the merits of the said application I see no need to set out the prayers that were sought therein.
3. The application is premised on the grounds therein and the supporting affidavit of Michele Carven Scarpellini (hereafter “Michele”) sworn on 9th June 2024. Michele deposed that the deceased died without a valid will and that they were petitioning for letters of administration intestate in their capacity as the deceased’s children. He averred that their mother suffered from multiple sclerosis, which is a chronic autoimmune disease that impacts the central nervous system and leads to progressive cognitive decline, especially in memory and executive function, due to neurodegeneration, for a significant portion of her life. Michele deposed further that the medication she took daily affected her mental capacity and that her eyesight also deteriorated over the years, with her vision drastically diminishing in March 2022, affecting her psychologically. She was also on medication for depression, insomnia and pain for many years, which led to impaired cognitive function. Due to her deteriorating physical and mental condition, she was bound to and was only able to move around in a wheelchair. This resulted in her having a team of caregivers provided by Avenue Healthcare and a personal assistant named Antonetta Scholastic Alves, the 10th respondent, who was in charge of her affairs, including withdrawals from her accounts, payments for her upkeep and maintaining her treatment regimen.
4. Michele stated that it is because of the medical condition of the deceased before her demise that they are seeking the release of her medical treatment records and bank statements so that they can be able to prove fraud in the transactions surrounding her properties and her lack of mental capacity, as well as the circumstances surrounding her death.
5. In response, the 2nd respondent filed a notice of preliminary objection dated 3rd July 2024, seeking to have the application struck out on the ground that the petitioners are divested of the requisite locus standi to institute the present proceedings.
6. The 7th, 8th, and 9th respondents filed a Notice of Preliminary Objection on 28th June 2024, challenging the petition and the application on the grounds that this honourable court has no jurisdiction to entertain these proceedings as there is, to the petitioners’ knowledge, a written will, whose validity or otherwise can only be determined in proceedings seeking to prove the will; these proceedings are an abuse of this honourable court; this honourable court has no jurisdiction to grant relief sought in the application dated 9th June 2024, whether under the provisions cited, or at all; and that the petitioners



have no standing to seek the reliefs sought in the application dated 9th June, 2024, whether under the provisions cited or at all.

7. The 10th respondent also filed a notice of preliminary objection dated 3rd July 2024 seeking to have the application struck out because the petitioners could not institute these proceedings as the deceased died leaving a will, that the matter is improperly before this court, and that it offends Rules 3 and 7 of the Probate and Administration Rules.
8. The 1st respondent filed a replying affidavit sworn by Valentine Situma Achungo, the head of the Legal and Data Protection Office, on 11th July 2024. She stated that the 1st respondent, as a health care service provider, has regulations that govern how qualified medical practitioners attend to patients within its facility and define how admitting and clinical privileges are granted to such medical practitioners and their responsibilities.
9. She deposed that the petitioners, via a letter dated 18th March 2024, sought to have access to the deceased's medical records, which they couldn't allow as none of them was named as the next of kin of the deceased and also for lack of a court order. She stated that the release of the said information to the petitioners would have amounted to a breach of the provisions of the Data Protection Act and the Health Act of 2017. That the 1st respondent is willing to release the same if a court order is issued.
10. She confirmed that the deceased was attended to at the 1st respondent's facility by two practitioners, namely Dr Juzar Hooker and Dr Nasir Bhanji, who are both private doctors with admitting and clinical privileges at the 1st respondent's facility.
11. The 3rd respondent filed a replying affidavit to the application sworn by its Chief Medical Officer, Paul Makau, on 4th July 2024. He stated that the entire suit and the application were filed in the wrong court in terms of geographical jurisdiction as the matters complained of and the property forming the same are in Nairobi.
12. He further stated that the 3rd respondent's interaction with the deceased was limited to home-based care, which its homeware nurses provided. Mr Makau deposed that the 3rd respondent had never refused to provide the deceased's medical documents to the petitioners. Due to patient confidentiality, the same could not be provided without a court order. He thus stated that the 3rd Respondent was willing to provide the same if a court order was issued.
13. The 7th, 8th and 9th respondents also filed a replying affidavit sworn by Madabhushi Soundararajan on 28th June 2024. He reiterated the 7th, 8th and 9th respondents' position in the notice of preliminary objection and stated that the deceased incorporated ENAL on 3rd September 2021, where she was the majority shareholder. On 7th September 2021, she transferred all the property on Land Reference No.209/7474 to ENAL. She later transferred all her shares in ENAL to Kenafrique Administration Ltd, a nominee company of MTC, on 29th October 2019.
14. He averred that the deceased prepared a will dated 14th January 2022 in which she bequeathed all her shares in ENAL to MTC which were instead transferred to Kenafrique to administer ENAL. He referred to the deceased's letter dated 17th January 2022, expressing her wishes to have the property be sold and proceeds credited to ENAL's account for future distributions to the beneficiaries and that the beneficiaries are only entitled to the deceased's shares and the property. The 7th respondent cannot be treated as part of the deceased's estate as it is the registered proprietor of the property, which the deceased had already relinquished her rights and interests before her death. He also stated that a petition for proof of the will was filed at the High Court of Kenya, Nairobi and urged the Court to dismiss the application.



15. When the matter came up for hearing on 1st July 2024, Mr Amoko, counsel for the 7th, 8th and 9th respondents, notified the court of the respondents' preliminary objections on jurisdiction, stating that the same is based on the fact that the deceased was based in Nairobi and died in Nairobi. Thus, the matter should be before the Family Court in Nairobi as they have already instituted succession proceedings in Nairobi, to wit, P&A E354 of 2024. The property of the deceased is also in Nairobi. He stated that the matter should be transferred to Nairobi.
16. Mr Esmail, learned counsel for petitioners, on the other hand, submitted that there is no provision that the matter be filed in Nairobi and referred the court to rule 8(3) of the Probate & Administration Rules, submitting that a matter can be filed in any registry. Further a High Court Judge has countrywide jurisdiction.
17. He submitted that the petitioners were unaware of the other matter and urged the court not to transfer the matter.
18. Via letter dated 24th July 2024, the office of the Registrar, High Court, Milimani Law Courts, Nairobi, informed the Deputy Registrar of this Court that petitions for letters of administration of the estate of the deceased herein were filed in three different courts namely; Kwale P&A No. E001 of 2024, filed on 17th May 2024, which petition had not been gazetted, Milimani P&A No. E352 of 2024, filed on 7th May 2024, which had not also been gazetted, and Mombasa P&A No. E42 of 2024, filed on 19th June 2024, which was gazetted in Volume 105 of 2024 Notice No.8646.
19. The court directed parties to file written submissions with respect to the notices of preliminary objection. Subsequently, the petitioners, through their advocates Anjarwalla & Khanna LLP, filed written submissions dated 5th September 2024 and submitted on two issues for determination, namely, whether the petitioners have locus to institute the present proceedings; and whether this honourable court has jurisdiction to hear and determine the application before it.
20. Counsel submitted that the purpose of the application is to seek medical records so that the petitioners can validate the medical procedures and drugs that their mother was given over the several years of her suffering from multiple sclerosis. That same will assist the court in appreciating the petitioners' argument that their mother could not enter into any of the transactions she purported to have entered into. They are seeking the information as children of the deceased and beneficiaries of the estate, and they have a legitimate interest and constitutional right to the information. Thus, they have the locus standi to institute these proceedings and seek information regarding the affairs of their late mother.
21. On the second issue, counsel submitted the allegation that this court has no jurisdiction to entertain these proceedings and grant reliefs sought in the application because there is a written will whose validity can only be determined in proceedings seeking to prove the will is not provided for in law. The argument that they can only institute citation proceedings does not hold as it only applies where there is a valid will, while in this case, there is no valid will. They could not file any objection proceedings as they were not aware of any actions taken by MTC.
22. Counsel relied on Sections 47 and 54 of the *Law of Succession Act* as well as paragraph 16 of the 5th Schedule of the said Act and submitted that the court has wide discretion to issue a grant to any person notwithstanding that another person is entitled to grant by evaluating the circumstances of each case.
23. Counsel further submitted that the allegation that the matter is improperly before this court and offends Rules 3 and 7 of the Probate and Administration Rules is an issue of territorial jurisdiction and its petitioners' submissions that this court has jurisdiction under article 165 (3)(a) of *the Constitution*. Counsel relied on Rule 7(3) of the Probate & Administration Rules and submitted that it is proper for



- the petition and the application to be filed before this court. Further, it was urged that it was unclear how the petition and the application offend Rule 3 and Rule 7(3) of the Probate and Administration Rules, 1980.
24. On the issue that this court has no jurisdiction on the basis that Land Reference No.209/7474 does not form part of the deceased's estate and that it has no jurisdiction over matters relating to cautions, counsel relied on Section 47 of the *Law of Succession Act* and submitted that this court has jurisdiction to issue the orders sought.
 25. Further, the orders sought in the application relate to securing the medical and bank records of the deceased where palpable fraud has been alleged and to protecting the estate of the deceased, which falls squarely within the jurisdiction of this court. The issue in this matter is a succession dispute, not one of land, and thus, this court has the requisite jurisdiction.
 26. In conclusion, Mr Esmail urged the court to dismiss the preliminary objections with costs.
 27. The 2nd respondent, through its advocates Iseme Kamau & Maema Advocates, filed their written submissions on 7th August 2024 to the notice of preliminary objection dated 3rd July 2024. Counsel relied on Section 82(a) and submitted that one can only institute proceedings and seek reliefs on behalf of the estate of a deceased estate once they have obtained a full grant of representation or a limited grant ad litem. In this case, the petitioners do not have either of the grants, and their mere relationship with the deceased does not clothe them with the capacity to request medical records or institute these proceedings.
 28. In conclusion, counsel urged the court to dismiss the application.
 29. Through their advocates, ANL Law Advocates, The 7th, 8th, and 9th respondents filed written submissions dated 18th July 2024. The said counsels submitted on two issues, namely whether this court has jurisdiction and whether the petitioners cum applicants were clothed with requisite locus standi to institute these proceedings.
 30. On jurisdiction, the learned counsel for the 7th, 8th and 9th respondents, Mr Muchiri, submitted on two aspects: jurisdiction with respect to the probate and administration proceedings and jurisdiction over property claim. In respect of the first aspect, counsel submitted that once there is a written will, no one is entitled to institute intestate proceedings such as the one the petitioners have purported to. The petitioners' recourse is to file a citation pursuant to section 62 of the *Law of Succession Act*. The validity of a will can only be determined in proceedings that seek to prove a will which has already been instituted. Counsel submitted that as a result of the said proceedings, this court lacks jurisdiction.
 31. On the second aspect, counsel submitted that the deceased had already transferred her property to ENAL and her shares in ENAL to Kenafrigue as a nominee to MTC according to the will. The property is not part of the deceased's estate; thus, this court sitting as a Probate & Administration court does not have jurisdiction to determine disputes relating to land.
 32. On locus standi, counsel submitted that without letters of administration or a grant of probate, the petitioners lack locus standi to apply herein, either on their behalf or on behalf of the estate.
 33. In conclusion, the counsel urged the court to strike out the succession proceedings and the application herein with costs.
 34. I have considered the preliminary objections and the rival submissions therein. I must now determine whether the preliminary objections filed herein have merit and, if so, what orders should be issued.



35. To determine this matter, I must consider if there are before me proper notices of preliminary objections. The Court of Appeal for Eastern Africa in *Mukisa Biscuit Manufacturing Ltd vs West End Distributors Ltd* (1969) EA 696 observed that:-

“... 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.”

36. In the same case Sir Charles Newbold, P. stated:-

“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 the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

37. The 2nd, 7th, 8th, 9th and 10th respondents have raised objections to this court’s jurisdiction and the petitioners’ locus standi on the grounds that the deceased was based in and died in Nairobi and that she left a will and also on the ground that other proceedings to prove will have already been instituted in Milimani Law Courts. In their submissions, the respondents also urged that the petitioners had not obtained a full or limited grant to enable them to institute these proceedings or prosecute the application herein.

38. In the circumstances, as the jurisdiction of this Court to hear the matter is in issue, notices of preliminary objections have rightly been raised in this matter.

39. When an objection as to jurisdiction is raised, the court seized of the matter must hear it as a preliminary issue and determine it, for without jurisdiction, the court cannot take any further steps.

40. In the locus classicus case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA stated:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

41. Further, the Supreme Court, in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated,

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of



mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

42. Does this Court have jurisdiction, or should it down its tools now? In my view, the enquiry must begin with *the Constitution* of Kenya, 2010 and, in particular, Article 165 of *the Constitution* of Kenya, 2010, which provides that:-

1. There is established the High Court, which—
 - a. shall consist of the number of judges prescribed by an Act of Parliament; and
 - b. shall be organised and administered in the manner prescribed by an Act of Parliament.
2. There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
3. Subject to clause (5), the High Court shall have—
 - a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(emphasis added)

43. The Probate & Administration Court derives its jurisdiction from Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, which provide as follows:-

Section 47

“The High Court shall 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.”

Rule 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 justice or to prevent abuse of the process of the court.”

44. The proceedings herein relate to the estate of the deceased. It is not in dispute that at the time of her demise, the deceased lived in Kenya and that most of the subject assets of the estate were within the territory of the said state.
45. Since this court has unlimited original jurisdiction in civil matters, over the entire territory of the Republic of Kenya, except for those matters within the jurisdiction of the Environment and Land Court and the Employment and Labour Relations Court, it would appear to me that this Court has the necessary jurisdiction to hear this matter.
46. In my view, the limitation as to territorial jurisdiction in Rule 7 of the Probate and Administration Rules only applies to the Magistrates’ Courts. Having said so, the High Court must strive, out of prudence, as much as possible, to handle those matters within the county in which it is situated to prevent forum shopping and abuse of its processes.
47. Regarding the fact that some of the issues in dispute include land and shares in limited liability companies, over which this court is said not to have jurisdictions, it is my view the court must look at the predominant purpose of these proceedings. Ngugi, J (as he then was), while considering the competing jurisdiction of equal status courts, stated as follows in *Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another* (2016) EKLK: -
 - “ 23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-Dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
 24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”
48. In this matter, I do not doubt that the predominant purpose of these proceedings is the succession to the deceased's estate.
49. In the circumstances, I dismiss the objection as to territorial and subject matter jurisdiction.



50. Did the petitioners have locus standi to institute these succession proceedings or to apply for the orders sought? The issue of locus standi was discussed by the court in the case of Ibrahim vs Hassan & Charles Kimenyi Macharia (Interested Party) [2019] eKLR. In the said case the court 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, he means that party cannot be heard, despite whether or not he has a case worth listening. 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 as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.

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] EALR 468, 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.”

51. It is common ground that the petitioners do not have either a full or limited grant in respect of the estate of the deceased. That notwithstanding, they seek certain reliefs against the respondents on behalf of the estate. On the basis of the decision of the Court of Appeal in *Otieno v Ougo* [1986-1989] EALR 468, it is my view that they may not.
52. The main dispute on locus standi is that there is an existing will whose validity is subject to determination by the court. The Petitioners contend that the deceased did not leave a valid will and contest the validity of the wills supposedly written by their mother.
53. In my view, the question of whether the wills were valid or not could not be determined by the petitioners herein. The correct procedure would be for the petitioners to contest the validity of the same in probate proceedings commenced by the Executor and have the wills invalidated. If, on the other hand, Executors refused to file probate proceedings, the petitioners would then have had the option of commencing citation under Rule 23 of the Probate & Administration Rules, 1980, so that the executor named in the Will could be compelled to propound the same.
54. From their application, it is evident that the petitioners were aware of the impugned will and also of the deceased's previous wills and codicils.
55. In my view, when the probate proceedings were filed in Nairobi, the petition filed herein became untenable until the Probate Court in Nairobi invalidates the impugned will. The reason for this is that for as long as there exists a document that purports to be the last will and testament of the deceased, it cannot be said that she died intestate. The alleged intestacy of the deceased gives this court the jurisdiction to hear this matter as an intestate succession cause.
56. I therefore find and hold that although this Court has jurisdiction to hear the petition, the petitioners lack the standing to commence the same. In the circumstances, I strike out these succession proceedings and order that any challenge(s) regarding the will's validity, or for ancillary reliefs be made in the succession proceedings filed in the Probate and Administration Court, Nairobi.



57. The Court notes that although this is a family matter, the petitioners filed proceedings in this Court and at the Kwale High Court. Although the Kwale High Court proceedings were withdrawn, that fact was not disclosed in these proceedings. The non-disclosure of material facts is something that courts should strongly frown upon. This would appear to be an abuse of the process of court. In the circumstances, I award the 2nd, 7th, 8th, 9th and 10th respondents costs.

58. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Esmail, for the Petitioners;

Mr Matheka, for the 1st Respondent;

Mr Karuti, for the 2nd Respondent;

No appearance for the 3rd Respondent;

No appearance for the 4th Respondent;

No appearance for the 5th Respondent;

No appearance for the 6th Respondent;

Mr Muchiri, holding brief for Mr Amoko, for the 7th, 8th and 9th Respondents;

Ms Ngonde, for the 10th Respondents; and

Arthur – Court Assistant.

