



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION NO. 384 OF 2002

IN THE MATTER OF THE ESTATE OF NURU KINOTI ALI ALIAS NOORU NURU ALI (DECEASED)

HASSAN NURU..... PETITIONER

VERSUS

ZAINABU MWARI.....1ST INTERESTED PARTY/RESPONDENT

JACOB KINOTI NURU.....2ND INTERESTED PARTY/ RESPONDENT

SALIMA NURU.....3RD INTERESTED PARTY/RESPONDENT

IDRIS NURU4TH INTERESTED PARTY/RESPONDENT

ABDI NURU.....5TH INTERESTED PARTY/RESPONDENT

YASMIN KENDI NURU.....6TH INTERESTED PARTY/RESPONDENT

MAGIRI RINKANYA1ST CAVEATOR/APPLICANT

ELIAS GITARI MAGIRI.....2ND CAVEATOR/ APPLICANT

JAMES KARANI MAGIRI3RD CAVEATOR/ APPLICANT

RULING

1. The petitioners filed a notice of preliminary objection in which they sought to have the applicants summons dated 1st April 2019 dismissed on the following grounds;

- a. The applicants lack locus as they are strangers to the estate of both Nuru Kinoti and Mariam Nuru respectively
- b. That the court lacks jurisdiction to hear and determine a land dispute
- c. That the applicants lack requisite locus to file the current cause on behalf of Mariam Nuru without a grant ad litem.
- d. That the applicants lack requisite locus to file summons or any application whatsoever in the current cause of the estate of Nuru Kinoti without grant ad litem.

2. The respondents filed written submissions in respect to the preliminary objection. They argued that the preliminary objection filed is misguided and a gross misrepresentation of the law. The objection is premised on facts and not on points of law as their application was for review and as such was filed properly under the law of succession. This court on 7th August 2018 observed that LR NO. ABOGETA/U-KITHANGARI/859 had been subdivided after it had been transferred to Mariam Nuru. The said Mariam Nuru is now deceased and that any claims were to be filed in her estate. The court however did order that the sub divisions of LR NO ABOGETA/U-KITHANGARI/859 be canceled. If this court dismisses the summons the applicants will have no recourse as it was an order from this court that cancelled the sub-divisions. Additionally HCCC No. 203 of 2001 MAGIRI RINKANYA vs MARIAM NURU & NURU HASSAN MURITHI found that the applicants have a legal claim to 3 acres from ABOGETA/U-KITHANGARI/859 and that decision has never been appealed.

3. Having considered the preliminary objection, the issues for determination are;

a. Whether the preliminary objection has met the legal threshold?

b. Whether the applicants have locus?

4. A preliminary objection has been defined by the courts in a number of cases, the celebrated one being **MUKISA BISCUITS MANUFACTURING CO LTD VS WESTEND DISTRIBUTION LTD [1969] E.A. 696** where the courts defined it as

“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 submission 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 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”

5. The supreme court of Kenya held in **Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] eKLR**

“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.”

6. It is the petitioner’s argument that the applicants lack locus in this matter as they are strangers to the estate of Nuru Kinoti and Mariam Nuru. On the other hand the applicants argue that this court made an order cancelling sub division that they owned and if the summons are dismissed they will have no recourse.

7. 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 review sits orders.

8. With respect to succession proceedings, the need to give a hearing to a person who has an interest in the suit is recognized, for instance, under section 76 of the Law of Succession Act, which gives locus to “any interested party” to move the court for revocation or annulment of grant. Similarly, Rule 60 of the Probate and Administration Rules provides as follows:

“Every interested person (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the Registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the applicant may with leave of the court file an affidavit in reply.”

9. Consequently, I find that the applicant has locus to be heard by this court as their application pertains an order made by this court. Therefore, I find that the Preliminary Objection lacks merit and is hereby dismissed.

HON A. ONG’INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 18TH DAY OF JULY 2019.

In the presence of :

C/A: Kinoti

Mr Ashaba Advocate holding brief for Mutuma J for Petitioner.

Mr Mureithi for Applicant

Order

Application dated 1.4.2019 by Mr Mutegi’s client to be heard on 17.10.2019

HON A. ONG’INJO

JUDGE