



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.48 OF 2010

IN THE MATTER OF THE ESTATE OF NYASYO MULILI NZALU(DECEASED)

SAMSON WAMBUA MULINGE.....OBJECTOR

AND

JACKSON KIVUNGYA NYASYO.....PETITIONER/RESPONDENT

RULING

1. The ruling relates to the objection dated 17.7.2018 by the Objector who opposed confirmation of grant in respect of parcel **No. Kalama/Muumandu/ 167** on the grounds that he and his family was occupying the same as a portion thereof belonged to his late father one John Mulinge Mulili.
2. In support of the application, the applicant vide affidavit deponed on even date averred that he was not included in the distribution schedule in respect of the suit land and sought that the portion of the suit land that he had been living and which belonged to his father be transferred to his family.
3. In reply to the application, Simon Kioko Nyasyo vide affidavit deponed on 30.7.2018 averred that the applicant was a great grandson to the deponent's grandfather. It was averred that the suit land was given by the deceased to the applicant's grandmother out of an act of goodwill and that the deponent had no problem with letting the applicant have the half acre and in this regard the objection ought to be dismissed. Vide replying affidavit deponed on 30.7.2018 the respondent averred that the suit land is not ancestral land having been purchased and that the estimated size of the portion that the objector is claiming is ½ acre. He averred that the claim of the objector does not belong to a succession cause and further that the objector could meet the cost of a surveyor who shall determine the size of the land occupied by him.
4. Vide affidavit in rejoinder deponed on 17.10.2018 the applicant reiterated that the suit land is ancestral land and that the portion he occupies is more than ½ acre.
5. Vide affidavit deponed on 1.11.2018 Dominic Nyasyo averred that the deceased left a will in respect of his properties.
6. On 21st November, 2018, the respondent and his co-petitioner filed a notice of preliminary objection in respect of the objector and averred that the objector had no locus standi to bring the objection as he had no letters of administration in respect of the estate of his deceased father. Vide affidavit in rejoinder deponed on 20.11.2018, the respondent averred that the deceased is not a father to the objector; that the objection ought to be dismissed and that a surveyor ought to be brought at the cost of the objector to demarcate the estimated ½ acre of the suit land that he occupies that was given to his grandmother.
7. The court directed that the application be canvassed vide written submissions. I have considered the submissions of the respondent dated 18.1.2019 and filed on 21.1.2019.
8. The applicant's submissions are not on record.
9. The issues to be determined are whether the objector has locus standi to bring the instant application and whether the court has jurisdiction to grant the orders sought in the protest.
10. The issue of locus standi is a pure point of law that can properly be raised as a preliminary objection. In determining such a point, the court is perfectly entitled to look at the pleadings and other relevant matter in its records (see **Mukisa Biscuit v. West End Distributors [1969] EA 696** and **Omondi v. National Bank of Kenya Ltd and others, [2001] 1 EA 177**). The term locus standi literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding. (See **Njau and others v. City Council of Nairobi [1976-1985] 1 EA 397 at 407**). To say that a

person has no locus standi means the person cannot be heard, even on whether or not he has a case worth listening to.

11. The primary duty of this court in the exercise of its jurisdiction as a probate court can be coined in what William Musyoka J, stated **In Re Estate of G K K (Deceased) [2017] eKLR** that:

“The primary function of a probate court is distribution of the estate of a dead person.”

12. A perusal of the pleadings indicates that the protestor has not been listed as a beneficiary of the estate of the deceased and his claim cannot be tried in a succession cause. Section 29 of the Law of Succession Act is to the effect that a brother of the deceased will only be considered a dependant if maintained by the deceased prior to his death and hence is entitled to the estate of the deceased. In the absence of evidence of maintenance, I am unable to find that the applicant is a beneficiary of the estate of the deceased.

13. As the applicant claims to be beneficially interested in the estate of the deceased, it suffices to cite Musyoka J **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

14. **Rule 41(3) and 42 (2) of the Probate and Administration Rules** empowers the court before confirmation of a grant to remove property which is in contest from the schedule of assets and have the same determined separately. If the contested property is found to be part of the estate of the deceased, the same is restored back to the schedule of assets of the deceased's estate available for distribution. This position was supported by the case of **In Re Estate of Francis Peter Njuguna [2016] EKLR**.

15. The Objector confirmed that he is not a son of the deceased and that he does not have a grant of letters of administration in respect of his late father so as to entitle him to lodge the claim. The only recourse for him is to lodge his claim of ownership before the Environment and Land Court where he is expected to sue the administrators. He should leave the administrators to proceed to administer the estate of their late father. However in order not to prejudice the objector, the parcel of land in question namely **Kalama/ Muumandu/167** will be set aside from the confirmation and a timeline given to the objector to file his claim with the appropriate court failing which the said property will be available for distribution among the beneficiaries.

16. In the result the Objector’s protest partly succeeds. The following orders are made:

a) The petitioners are allowed to proceed with the confirmation of grant upon filing an amended schedule of distribution excluding parcel number Kalama/ Muumandu/167 which will await the outcome of the Objector’s claim before the ELC.

b) The objector is given forty five (45) days within which to file his claim of ownership before the ELC failing which the said property will be made available for distribution among the beneficiaries.

c) Each party to bear their own costs.

It is so ordered.

Dated and delivered at **Machakos** this 5th day of **December, 2019**.

D. K. Kemei

Judge