



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.460 OF 2014

IN THE MATTER OF THE ESTATE OF ALFRED MUTUNE MUNYAO (DECEASED)

PATRICK MUNYAO NDAVA.....APPLICANT

AND

AGNES MUTHEU MUTUNE

NDAVA MUTUNE MUNYAO

MICHAEL MUNYAO MUTUNE

MUNYWOKI MBUNZI.....RESPONDENTS

RULING

1. The ruling relates to the application dated 23.4.2018 by the applicant who sought injunction orders against the respondents in respect of land parcel **Mwala/Myanyani/494** pending the confirmation of the grant and the distribution.
2. In support of the application, the applicant vide affidavit deponed on even date averred that the respondents encroached on the subject land and yet they are strangers to the estate.
3. In reply to the application, Michael Munyao Mutune vide affidavit deponed on 31.1.2019 averred that the subject land is registered in the names of his deceased father and the applicant is not a beneficiary to the estate of the deceased hence is not entitled to the prayers sought in the application.
4. The court directed that the application be canvassed vide written submissions. The applicant's submissions are not on record.
5. Learned Counsel for the respondent submitted that the applicant is not a beneficiary for purposes of the Law of Succession Act and any actions on the suit land amounts to intermeddling. Reliance was placed on Section 45, 82 and 83 of the Law of Succession Act and the case of **Joel Oichoe Oisebe v Bilha Bosibori Oisebe (2014) eKLR**.
6. I am faced with what is an objection to the locus standi of the applicant.
7. 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.
8. 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.”

9. A perusal of the pleadings indicates that the applicant 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. Merely stating that the deceased was his brother is not enough for the applicant to lay claim to the estate of the deceased without any proof that he was being maintained by the deceased as a dependant.

10. 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.”

11. **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**.

12. Looking at the applicant’s pleadings there is no evidence to link him to the estate of the deceased or anything to prove that he was a dependant of the deceased. He has not explained his interest in the properties of the deceased and as such he should not prevent the respondents from administering the estate of the deceased. The chief’s introductory letter dated 29.4.2014 has listed the respondents as dependants of the deceased. The applicant is not indicated as a dependant and as such he had the burden of establishing the same. The applicant has not satisfied me that he is a dependant of the deceased. However should he have any claim to ownership of the properties of the deceased then he is at liberty to proceed to lodge it at the Environment and Land Court. Entertaining the applicant in the proceeding herein will serve no useful purpose other than to convolute the matter. The applicant has not satisfied this court that he merits the orders he is seeking as he lacks locus standi.

13. In the result it is my finding that the applicant’s application dated 23.4. 2018 lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this **4th** day of **December, 2019**.

D. K. Kemei

Judge