



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO.101 OF 2004

IN THE MATTER OF THE ESTATE OF JOSEPH MUTISO KITHOME (DECEASED)

SUMMONS FOR REVOCATION OF LETTERS OF ADMINISTRATION

BETWEEN

JAMES KARIUKI.....1ST OBJECTOR/APPLICANT

ISAAC MAGARA.....2ND OBJECTOR/APPLICANT

NICODEMUS KAMAU.....3RD OBJECTOR/APPLICANT

AND

GIDEON CYRUS MUTISO.....PETITIONER/RESPONDENT

RULING

1. The ruling relates to the preliminary objection that was filed on 26th April, 2018 to the objectors' summons dated 12th April, 2018 for revocation of grant that was confirmed on 9th March, 2012 where they claim purchasers' interest and possessors' interest in respect of the properties of the deceased.
2. Learned counsel F.M. Mulwa and Co. Advocates submitted that the application dated 12th April, 2018 lacks merit for want of jurisdiction and that the concerns of the applicant cannot be addressed by a probate court.
3. The court directed that the preliminary objection be canvassed vide written submissions. Learned counsel for the applicant vide submissions dated 6th May, 2019 addressed the substantive application and not the preliminary objection.
4. Learned counsel for the petitioner/ respondent submitted that the matters advanced by the objectors cannot be handled by the probate court but by the Environment and Land Court. Learned counsel also submitted that the objectors are not beneficiaries of the estate of the deceased and therefore lack locus standi to seek revocation of the grant and hence the summons for revocation dated 12th April, 2018 ought to be dismissed with costs to the petitioner/respondent.
5. I am faced with objections; that is to the jurisdiction of the court and to the locus standi of the objectors. The issue I have to determine is; what is the status of such purchaser in a succession cause? Is this matter in the requisite forum?
6. 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.
7. 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.”

8. A perusal of the pleadings by the objectors is that of purchasers and is based on a sale of land agreement with the deceased and a company called Regmars Company Limited. Doubtless, the agreement was done before the death of the deceased and before confirmation of the grant herein. The purchasers aver to have purchased from Regmars Company Limited what is now Mavoko Town Block 12/587 that is one of the assets of the deceased. The said purchasers have not been listed as beneficiaries of the estate and their claim cannot be tried in a succession cause. As the objectors claim 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.”

9. **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**.

10. The evidence on record indicates that the grant was already confirmed in respect of the deceased’s properties hence this court cannot separate the disputed property under **Rule 41(3) and 42 (2) of Probate and Administration Rules**.

11. The objector’s action may have been a legitimate quest for justice albeit filed in the wrong court. This I say so because the dispute relates to ownership of land. Matters relating to land have now been left to be dealt with by specialized courts vide Article 162 of the Constitution. Parliament thereafter enacted the Environment and Land Court Act and set out in details, the jurisdiction of the court. Section 13 of the Act outlines the jurisdiction of the court as follows:

13 Jurisdiction of the Court

1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and

e) any other dispute relating to environment and land.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court

5) Deleted by Act No. 12 of 2012

6) Deleted by Act No. 12 of 2012

7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

a) Interim or permanent preservation orders including injunctions;

b) prerogative orders;

c) award of damages;

d) compensation;

e) specific performance;

f) restitution; or

g) declaration; or

h) costs

12. The court vested with jurisdiction to address the concerns of the objectors is the environment and land court. The objectors are free to pursue an action for recovery of land to assert their rights if any to the subject land. They shall present evidence on ownership before the requisite court which shall make a determination. The grant herein has since been confirmed and the objectors not being beneficiaries cannot be allowed to come and muddy waters in the estate of the deceased. It is not possible at this stage to isolate any property to await a determination of the objectors claims in the relevant court. The objectors will have their day in the ELC where they will prove their claims against the administrators of the estate.

13. To this end, the preliminary objection dated 20.4.2018 succeeds and the objectors' summons dated 12th April, 2018 for revocation of grant is dismissed with no order as to costs. The interim orders issued on 16.4.2018 are hereby vacated.

It is so ordered.

Dated and delivered at Machakos this 3rd day of December, 2019.

D. K. Kemei

Judge