



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Case 54 of 2010**

**NATHANIEL O. KHISA .....PLAINTIFF/  
RESPONDENT**

**V**

**1. MARY KHISA NYANYI.....1ST  
DEFENDANT/APPLICANT**

**2. PETER MUDENYO OBANDA .....2ND  
DEFENDANT/APPLICANT**

**3. FRANSISCA MWIKALI NZOMO .....3RD  
DEFENDANT/APPLICANT**

**4. THE DISTRICT LAND REGISTRAR,  
BUNGOMA.....3RDDEFENDANT/APPLICANT**

**RULING**

The 2nd and 3rd defendant has sought to have the plaintiffs suit struck out because the plaintiff lacks the requisite locus standi to bring this suit. The main ground is that the letters of administration issued to the plaintiff vide Bungoma HC Misc. No. 115 of 2010 under section 67 (1) of the Succession Act do not empower the plaintiff to file suit on behalf of the deceased estate.

The plaintiff/respondent has opposed the application and in his replying affidavit states that the limited grant issued to him by the court gives him capacity to sue. He has annexed to his affidavit form 90 B which is part of the application for limited grant to demonstrate his point.

Both parties have filed their respective submissions.

The plaintiff in their submissions aver that the reason for the petition is brought out in the form however the grant issued is different from what was sought for. They referred to the court of appeal digest prepared by Justice Richard Kuloba of January 1997. I have read through the digest and quoted phrase in the submission but I am unable to understand it's relevance to aid the plaintiffs case. The plaintiff has also not indicated whose mistake it is when the order extracted is not what he prayed for in the petition and what steps he has undertaken to review/set aside the anomaly.

The 2nd & 3rd defendants have also submitted that the plaintiff has not indicated under what capacity he has come to court. And in the event he has filed the suit in a representative capacity, then the grant

produced does not empower the plaintiff to sue. They have cited the case of Morjaria vs. Abdallah Civil Appeal No. 1 [1982] KLR to support their prayers for striking out the plaint. In this case at holding No. 6 the court of Appeal stated thus,

***“The appointment of a person as an administrator ad colligenda bona in respect of the estate of deceased person cannot include the right to take the place of the deceased for the for the purposes of instituting an action or appeal, especially where there is specific provision for that purpose in paragraph 14 of the 5th schedule of the Law of Succession Act”.***

***A reading of paragraph 1 of the plaint is as follows 'the plaintiff is a male adult of sound mind. His address of service is care of Ms. Bulimo & Co. adv. Paragraph 5' the plaintiff has fully sought and has been granted leave (limited grant of letters of administration) ad litem to file this suit on behalf of his deceased father one Luka Khisa Nyanyi .....***”

The plaintiff thus does not introduce himself as the personal representative of his father in the descriptive paragraph but does so in paragraph 5. He avers that he was given orders ad litem which would have been appropriate. However, what is shown to the court and attached to this verifying affidavit is limited grant of letters ad colligenda bona under sec. 67 (1) of Cap 160 which does not empower him to sue. In his application to the petition he sought for orders limited to filing suit. There has been nothing demonstrated that plaintiff did move the court to get any appropriate order to give him power to file suit. The present application was filed on 16th November 2010. Over two years has passed and the plaintiff did not regularize the order issued by the court in succession cause No. 115 of 2010.

This court therefore is left no option but to agree with the defence that the plaintiff lacks capacity to commence the proceedings on behalf of his late father. The application dated 15th November 2010 is hereby allowed.

The suit is struck off with costs to the 2nd and 3rd defendants.

**RULING SIGNED, DELIVERED AND READ** in open court this 8th day of April 2013.

**A. OMOLLO  
JUDGE.**