



In re Estate of Malakwen Kipsugut (Deceased) (Succession Cause 207 of 2013) [2025] KEHC 14074 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 207 OF 2013
E OMINDE, J
OCTOBER 9, 2025**

IN THE MATTER OF THE ESTATE OF THE LATE MALAKWEN KIPSUGUT -DECEASED

BETWEEN

JOSEPH KIPKOSGEI CHESANAI APPLICANT

AND

KITUR MALAKWEN 1ST RESPONDENT

HENRY MALAKWEN SUGUT 2ND RESPONDENT

RULING

1. The Interested Party Applicant herein filed a Summons for Amendment and Review of Grant dated 27th February 2025 which was brought under a Certificate of Urgency. The same is stated to be filed under Rule 49, 59 and 73 of the Probate and Administration Rules as Read with Section 47, 48, 50A, 83(d)(e) and 97 of the [law of Succession Act](#) Chapter 160. The Application is premised on the facts deposed in the Supporting Affidavit Sworn by the said Interested Party on 27th February 2025. In a nutshell, he contends that he purchased a quarter acre portion of land from the deceased the Late Malakwen Kipsugut but his interest was not considered in the distribution of the deceased Estate. He therefore seeks to have the applicants' share of ¼ acre of Uasin Gishu/ILLULA/70 be hived out of the shares allocated to the beneficiaries.
2. The Respondents filed a Notice of Preliminary Objection against the Summons for Amendment or Review of Grant on the following grounds;
 1. That the relief sought by the applicant relates to a sale of land in the year 1998 and any claim in respect of the agreement is a matter that falls within the jurisdiction of the Environment and Land Court and not the High Court in accordance with article 162 (2) (b) of [the Constitution](#) of Kenya, 2010 as read with section 13 of the [Environment and Land Court Act](#), 2011.



2. That the application cannot apply to amend the grant as not only does he lack standing but the jurisdiction to even amend the grant or rectify it is a limited one to be exercised within the scope of section 74 of the Law of the Succession Act, Cap. 160 and which cannot be invoked to deal with the applicant's claim to be included in the estate pursuant to a sale.
3. That the court has no jurisdiction to review as the applicant's request is not covered within the scope of Section 80 of the *Civil Procedure Act*, Cap. 21 as read with order 45 of the Civil Procedure Rules, 2010.
4. That the applicant has not entered appearance to the cause as required by rule 60 of the Probate and Administration Rules, 1980 thus the application is a nullity.

Respondents' Submissions

3. On jurisdiction, learned counsel for the respondent submitted that the crux of the applicant's application arises from a sale of land in the year 1998. The applicant's claim over the sale agreement ought to be made in the Environment and Land Court and not the High Court in tandem with Article 162 (2) (b) of *the Constitution* of Kenya, 2010. He invited the court to be guided by the authority in Re. Estate of the Late Barasa Kanenje Many - deceased [2020] KEHC1 (KLR).
4. On the scope of jurisdiction on rectification of grant or amendment, counsel urged that the applicant is seeking to have his interest as a purchaser of land included in the grant and submitted that the court is bereft of jurisdiction to grant such a relief based on the jurisdiction to rectify. He cited Section 74 of the Succession Act and urged that the said provision has been the subject of judicial pronouncement as to its scope in a legion of authorities amongst them being Re. Estate of Hasalon Mwangi Kahero - deceased (2013) eKLR. He reproduced the same and stated that the applicant's request is in the nature of a declaration on the validity of the sale as between the deceased and himself.
5. Further, that such a matter cannot be handled under the scope of the jurisdiction to review in Section 80 of *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010. Counsel submitted that the applicant's claim ought to be ventilated in a suit as opposed to an application for review. He cited the case of in Re, Estate of the late Stone Kathuli Muinde - deceased (2016) eKLR in this regard.
6. On failure to enter appearance, counsel submitted that the applicant was required by Rule 60 of the Probate and Administration Rules, 1980 to enter an appearance in this cause before filing the application. He urged the court to find that the application is a nullity being guided by the authority in Re, Estate of the Late Jafred Bwisa Sitati - deceased (2009) eKLR. He prayed that the objection be upheld, and the application be struck out with costs.

Interested party's submissions

7. Learned counsel for the interested party submitted that he court has jurisdiction to entertain the interested party's application. That the interested party is one of the liabilities of the estate of the deceased with ¼ acre of land according to the land sale agreement dated 8th July 1998 with the deceased contrary to the allegations that the same falls under article 162(2)(b) and under section 13 of the *Environment and Land Court Act*. He urged that the deceased sold ¼ acre of the land to the interested party and the administrators have locked them out from the administration and distribution of the estate.
8. Counsel urged that the application is brought under the law cited in the application dated 27th February 2025 and not under section 74 of the *Law of Succession Act*. Further, that the application is not an



application for review under the provisions of section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules.

9. On failure to enter appearance, counsel urged that the interested party relies on the provisions of article 159(2) (d) of [the Constitution](#) and further, urged that this court has jurisdiction to determine the application under Rule 49 and 59 of the Probate and Administration Rules and; Sections 47, 48, 50A, 83(d) (e) and 97 of the [Law of Succession Act](#). He urged that the Preliminary Objection has failed to meet the threshold set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Limited* (1969) EA 696.

Analysis & Determination

10. In considering the issues raised in the Preliminary Objection as herein summarised, as well as the submissions filed, it is my considered opinion that the main issue for determination is whether the applicants' claim as a purchaser of a portion of the estate can be determined by way of a rectification or a review of a certificate of confirmation of grant by this court as he as sought or whether his claim lies with the Environment and Land Court and further whether the applicant's failure to enter appearance which is not denied, is fatal to applicant's Application
11. The court in taking into consideration the submissions by both parties on the scope of jurisdiction on rectification of grant or amendment, suffice it to say that having considered the provisions of the law under which the Summons by the applicant is expressed to be brought as therein cited, I would agree with the submissions of Counsel for the applicant that that the Respondent's submissions on the provisions of Section 74 of the [Law of Succession Act](#) are not relevant to these proceedings. The same applies to the Respondent's submissions on the jurisdiction to review under the provisions of Section 80 of the [Civil Procedure act](#) CAP 21 and order 45 of the Civil Procedure Rules
12. The above said, the law pertaining to Preliminary Objections is well captured by the parties themselves in their submissions as laid out the famous case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd* (1969) EA 696, the Court of Appeal for Eastern Africa, stated (Law JA) in part that

"So far as I'm aware, a Preliminary Objection consists of 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 of 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."
13. In consideration of the fact that the applicant herein is seeking that the court finds that he purchased a quarter acre portion of land from the deceased the Late Malakwen Kipsugut and further that because his interest was not considered in the distribution of the deceased Estate, the court orders that his share of a ¼ acre of UASIN GISHU/ILLULA/70 be hived out of the shares allocated to the beneficiaries, then it is apparent that the applicant is seeking that his entitlement to the land be recognised and he be given title to the said land once hived of the shares allocated to the beneficiaries.
14. The above being his cause of action, then it is my very well considered opinion that Article 165(2) of [the Constitution](#) that sets out the jurisdiction of the Courts of Equal Status to the High Court becomes relevant and it provides as hereunder;
System of courts.
162.



- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3)

15. The issue of jurisdiction is a point of law that is to be determined preliminarily. In light of my conclusion herein, I am satisfied with the objection that since the Applicant's cause of action as against the Administrators of the Estate of the deceased is that he purchased land from the deceased for value and which consideration he paid in full but his beneficial interest was not recognised at the time of the distribution of the Estate then the court that is closed with the jurisdiction to hear this claim and if satisfied that he has sufficiently proved his case order that he be issue with title to a ¼ portion of the deceased Estate is the Environment and Land Court and not this Court.
16. Further to the above, I am also satisfied that the failure to enter appearance as provided under Rule 60 of the Probate and Administration Rules which is couched in mandatory is fatal to the applicant's case. Further, such failure to comply cannot be construed to be a technicality that is curable under Article 159(2)(d) of *the Constitution*. This because before a party can be heard by any court the party must have the requisite locus standi which is demonstrated by filing the requisite notice to appear. This requirement cannot by any stretch of the imagination to be construed to be a technicality. It goes to the very core of every matter before the court. In this regard I fully associate myself with the decision of Muchemi J in Re. Estate of the Late Jafred Bwisa Sitati-deceased (2009) eKLR
17. For the reasons given, it is my finding that the Preliminary Objection raised has merit with regard to the twin issues of jurisdiction and failure to enter appearance and the same is upheld. In this regard, the applicant's Summons dated 27th February 2025 is struck out in its entirety with costs to the petitioners/ respondents

READ DATED AND SIGNED AT ELDORET ON 9TH OCTOBER 2025

E. OMINDE

JUDGE

