

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**MISCELLANEOUS CIVIL APPLICATION NO. 389 OF 2011**

**IN THE MATTER OF THE ESTATE OF M' NTHANG'A alias**

**MAITIMA NTHANGA - DECEASED**

**LUCIAH KAJIRA MAITIMA .....1<sup>ST</sup>**

**PETITIONER**

**JANEROSE GAKII ..... 2<sup>ND</sup>**

**PETITIONER**

**-VERSUS-**

**SUSAN MUKIRI KITHARA .....1<sup>ST</sup>**

**OBJECTOR**

**DORINE NAIROTE ..... 2<sup>ND</sup>**

**OBJECTOR**

**PURITY KINYA ..... 3<sup>RD</sup>**

**OBJECTOR**

**EVALYNE KARIUNGI THIORA ..... 4<sup>TH</sup>**

**OBJECTOR**

**AND**

**MATEO MUTHUKU KIREA .....**

**APPLICANT**

**JAPHET MBAYA .....**

**BENEFICIARY**

**RULING**

1. The application coming up for determination of the summons dated 15<sup>th</sup> November 2024, by Mateo Muthuku Kirea and it seeks the following orders:

***a) That the honourable court be pleased to set aside the dismissal order made on 10/7/2017 by Justice A.C Mrima and reinstate the petition for hearing and determination on merit.***

***b) That upon reinstatement of the petition, this honourable court be pleased to appoint the applicant herein Mateo Muthuku Kirea as the sole administrator of the estate herein.***

***c) That the costs of this application be in the cause.***

2. The gist of the application is that the grant herein was revoked by the court and that before the said revocation, the

petitioners in the cause had made great strides to conclude it but died before doing so.

3. The applicant further states that the parties were unaware of the order revoking the grant, since no notice was issued to them. That the estate remains undistributed and thus the beneficiaries are yet to benefit from it. That it will be time consuming to commence the cause all over again.
4. One Japhet Mbaya, who described himself as a beneficiary filed a Notice of Preliminary Objection dated 10<sup>th</sup> January 2025. The objection is based on the following grounds:-

**a) The summons are frivolous and an abuse of court process as the grant of representation issued to LUCIAH KAJIRA MAITIMA and JENEROSE GAKII was revoked on 10<sup>th</sup> July 2017 during a Notice to Show Cause and the file duly marked as closed.**

**b) The summons are an abuse of court process as there no prayers for reinstatement of the revoked letters of administration in the summons dated 6<sup>th</sup> June 2024.**

**c) The summons are frivolous as they have been filed by a stranger to the estate who is neither a relative of the deceased nor a beneficiary as by law requisite.**

5. The objection was argued by way of written submissions.
6. For the said beneficiary it was submitted that the applicant is a stranger to the estate and has no capacity to make the application. Cited in support of this position was the decision of Musyoka J in Re **Estate of George Ragui Karanja (deceased) 2016 e KLR** and that of the Court of Appeal in **Florence Okot Nandwa vs John Atemba Kajwa Kisumu Civil Appeal No. 306 of 1998.**
7. It was further submitted that the only panacea available is for the applicant to file a fresh petition to administer the estate.
8. For the applicant, it was submitted that the objection does not specify the section of the law that has been contravened. Cited in support of this submission was R **-vs County Government of Kiambu and 3 Others, Gitutu ex-parte applicant (2024) KEELC 793 (KLR).**

9. It is further submitted that the objection raises matters of fact that would require an investigation by the court. That the objection is based on a misinterpretation of the law. That where the beneficiaries to an estate agree to give their written consent to a person who is not a beneficiary, then such a person can be appointed as administrator.
10. The applicant argues that he is not seeking a transfer of the grant to him as interpreted by the beneficiary. That once the petitioner dies, what becomes useless is the grant issued but the cause remains and the court reserves the right to issue a fresh grant to continue with the administration. That this is not an issue that can be settled through a Preliminary Objection as it would mean that the court delves into factual matters. Cited in support of this submission was the decision in **Kyule vs Gitari (2024) KEHC 5819 (KLR)**.
11. On whether the court has powers to reinstate the petition, the applicant cited the decision in **Re Estate of John Njoroge Kanyiri Succession Cause No. 121 of 2021 (2024) KEHC and Ivita vs Kyumbu (1984) KLR 441**.

12. The applicant urged the court to dismiss the Preliminary Objection.
13. The parameters of the Preliminary Objection were let out in the well known case of **Mukhisa Biscuits vs West End Distributors Ltd** as follows:

**“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....**

**A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of**

**law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

14. The same principles were reiterated in the authorities cited by the applicant including **Hassan Nyanje Charo vs Khatib Mwashetani and 3 Others (2014) eKLR.**
15. The objection by the beneficiary is that the applicant has no locus standi to make the application as he is not a beneficiary of the estate.
16. It is well settled law that a question of locus standi is a valid one to be raised through a Preliminary Objection. It determines whether the person who comes to court can continue with the case or is to be ejected from it. Locus standi was described in **Ibrahim vs Hassan and Charles Kaimenyi Macharia (2019 e KLR** as follows:

**“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in**

**certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.”**

17. The Law of Succession Act at section 66 sets out the order of preference to be given to persons who are to administer an estate which is intestate. It is provided as follows:

**Preference to be given to certain persons to administer where deceased died intestate. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall,**

**without prejudice to that discretion, accept as a general guide the following order of preference—**

**(a) surviving spouse or spouses, with or without association of other beneficiaries;**

**(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**

**(c) the Public Trustee; and**

**(d) creditors:**

**Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.**

18. I have looked at the application. Th applicant has not stated who he is and how he relates to the deceased or the estate as would bring him within the realm of section 66 of the Act. That non-disclosure appears to be deliberate, since the applicant did not file any further affidavit to address the issue.

19. A party is bound by its own pleading and the court does not need to go out and fish for matters that are not pleaded.
20. Even if there is an alleged consent filed the applicant needed to satisfy the court that he falls within the said section. Once that is done then it would be a matter of considering the order of priority.
21. I am thus in agreement that the applicant has not exhibited that he has the requisite locus standi.
22. The court further notes that the grant herein was issued to Lucia Kajira Maitima and Janerose Gakii. From a look at the application, it is not the two who are making the application for reinstatement of the grant that was revoked. It is a stranger to the matter.
23. In my view, the application ought to have been done by the administrators or any of them. In case one of them is deceased then under section 81 of the Act, the surviving administrator has powers to proceed to conclude the administration. If both are deceased, then a person who qualifies under section 66 of the Act can apply for the grant herein.

24. In the circumstances, I uphold the Preliminary Objection and strike out the application.

25. There shall be no orders as to costs.

**Dated, signed and delivered at Meru this 19<sup>th</sup> day of January 2026.**

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**H. M. NYAGA**

**JUDGE**