

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**PROBATE AND ADMINISTRATION CAUSE NO. 22 OF 2012**

**JOSEPH SAWE NANGO.....PETITIONER/1<sup>ST</sup> RESPONDENT**  
**PAUL BITOK KIPKOSGEI.....2<sup>ND</sup> RESPONDENT**  
**SAMUEL KIPKURGAT SAWE.....3<sup>RD</sup> RESPONDENT**

**VERSUS**

**RICHARD LAGAT.....1<sup>ST</sup> OBJECTOR/APPLICANT**  
**GRACE KORIR.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**RULING**

1. The brief background underlying the Preliminary Objection before this court is that the Objectors filed a Notice of Motion dated 20<sup>th</sup> March 2025 seeking Revocation of the Grant confirmed on 3<sup>rd</sup> December 2019 and an order of injunction pending the determination of the said application. The application is premised on the grounds that the applicants' husband had purchased portions of the estate from the administrators who proceeded to distribute the estate without making any provisions for the purchaser to wit; her deceased husband. By way of a Preliminary Objection to the Objectors/Applicants Application dated 20<sup>th</sup> March, 2025 the Petitioners, the Petitioners seek to have the application struck out on the following grounds;

- 1) That the Objectors/Applicants have no *Locus Standi* to bring the current Application.**
  
- 2) That as exhibited in Paragraph 7 of the Affidavit in support of the Application, the 1<sup>st</sup> Objector has brought this Application on behalf of her husband, who is deceased. No legal authority has**

**been produced to confer her the rights to institute this claim on behalf of the Estate of her late husband.**

- 3) That the objectors are neither beneficiaries nor dependants of the Deceased and have no legal claim to the estate.**
- 4) The 2<sup>nd</sup> Objector has not exhibited any authority granted to him by the 1<sup>st</sup> objector she alleges to represent authorizing her to file the application or to swear the Affidavit in support of the summons on his behalf hence the Application, and the Affidavit are defective.**
- 5) That this Honourable Court is deprived of jurisdiction to hear and determine the said Application.**

#### **Petitioners' submissions**

2. Learned counsel for the Petitioner submitted that the 2<sup>nd</sup> Objector has brought this Application on behalf of her husband, who is deceased. No legal authority has been produced to confer her the rights to institute this claim on behalf of the Estate of her late husband. No evidence has been brought to confirm that the 2<sup>nd</sup> Objector was truly married to Samuel Kipkorir Keter as claimed.
3. Counsel further submitted that the Objector has not exhibited any authority granted by the 2<sup>nd</sup> objector she alleges to represent authorizing her to file the application or to swear the Affidavit in support of the summons on his behalf hence the Application and the Affidavit are defective. That in addition to that the Objectors are neither beneficiaries nor dependants of the Deceased and have no legal claim to the estate hence have no right to institute the claim hence they lack *locus standi*.

4. Counsel urged that *locus standi* is a point of law that touches on jurisdiction of the Court and that it should be resolved at the earliest opportunity. He placed reliance on the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliances & 5 Others (2014) eKLR** in this regard. He further submitted that a preliminary Objection should be raised purely on a point of law or procedure and it cannot be sustained if any fact is contested and has to be ascertained placing reliance on the case of **Bashir Haji Abdullahi Vs Adan Mohammed Noor & 3 Others (2004) eKLR**.
5. He urged that the preliminary objection qualifies to be a preliminary objection as described in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**. Further, that because the Objectors have no Locus Standi or capacity to institute the Objection, the same is incompetent and should be struck out. He cited the case of **Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000** in this regard.
6. On the averment that the objectors aver that they bought the property sometime in the year 2015 and they annexed various sale agreements to that effect but the suit properties complained of were divided from the property known as KAPSARET/SIMAT BLOCK 2(SIMAT)/37 after completion of the succession process in the Estate of Jelimo Sawe, Counsel submitted that it is worthy to note that the said Jelimo Sawe died on 19<sup>th</sup> January, 2007 at Moi Teaching & Referral Hospital and it is therefore impossible that the Objectors bought the property during her lifetime and as such, they engaged in an illegality by purporting to deal with the property of the deceased before a full grant was issued in the Estate of Jelimo Sawe on 5<sup>th</sup> December 2019.

7. That it is trite law as under **Section 82 of the Law of Succession Act** that no immovable property of a deceased person shall not be sold before confirmation of grant. Counsel maintained that the Applicants are total strangers to the estate of the deceased and are only acting to disturb the peace of the beneficial owners of the estate of the deceased in the suit property after an open succession process was done and concluded. In addition to that they have never occupied the property forming the Estate of the deceased. He urged the court to allow the Preliminary Objection and dismiss the objection herein with costs.

### **1<sup>st</sup> & 2<sup>nd</sup> Objectors' Submissions**

8. Counsel laid down a brief background of the case and proceeded to submit on the issues for determination. On *locus standi*, Counsel submitted that the objectors herein have an equitable interests and a beneficial interest to the estate of the deceased and in the instance where one has equitable and beneficial interests, one does not need Letters of Administration as long as he or she can show that there is probability to suffer irreparable loss and damage and in this regard, they have the requisite *locus standi* in the instant application.

9. That the 2<sup>nd</sup> objector being the wife of the deceased, and having Special Limited Grant of letters of Administration Ad Colligenda Bona issued to her on 9<sup>th</sup> December 2021 at Eldoret law courts in estate of the late Samuel Kipkorir Keter (Deceased) Ad Colligenda Bona No. 282 of 2021 is sufficient as she was also witness during the purchase of the portion of estate in claim by her.

10. Counsel urged that the plight of women and widows must be protected and safeguarded and in this case, the petitioner is taking too much advantage on

the 2<sup>nd</sup> respondent since he is aware that in case where this court will bar her, then its privilege for them to take over back what they had already eaten and send her away. He urged that the persons who sold the estate and showed the objectors the site and made agreements before the area Chief, and Assistant chief are the administrators of the estate; the Petitioner and the 2<sup>nd</sup> Respondent selling his share as beneficiary of the estate. That they are barred by the principle of estoppel from turning back after the objectors acted in good faith believing there was no reason to disbelieve them.

11. Counsel submitted that the letters of administration was issued to the petitioner on 27<sup>th</sup> March 2013 and confirmed on 5<sup>th</sup> December 2019 and the parcel was sold to the objectors in 2015 in the presence of the estate administrator and other family members. Further, that the duties of an administrator and role in the estate of a deceased person is to distribute and when one is distributing it considers the equitable and beneficial Interest of the parties and the liabilities of the estate.

12. As in question of “de jure and de factor” (*sic*) the petitioner did not raise any complaint over the sale to objectors until the objectors herein raised the complaint of being left out in the succession cause, thus dragging the confirmation to delay from 2013 to 2019, a period of 6 years and therefore the delay and the actions of the administrator defeats the maxims of equity.

13. Counsel urged that in any event, delay defeats equity, and in this case, the succession cause took a very long time to be confirmed from 2012 /2013 to 2019. He urged that the conditions for consideration in this issue were settled in the celebrated case of **Giella vs Cassman Brown** and further, that the term Prime facie case was defined in **Mrao Ltd v First American Bank of Kenya & 2 Others**. Additionally, that the case of **Pius Kipchirchir Kogo -**

**Vs- Frank Kimeli Tenai (2018) eKLR** provides an explanation for what is meant by irreparable injury.

14. On jurisdiction, counsel urged that the issue is very clear and settled under **Article 165(3) of the Constitution** as the high court has unlimited original jurisdiction and in **Section 47 of the Law of Succession Act and Rule 72(2) and Rule 41(3) of the Probate and Administration rules**. That it is clear that pursuant to **Section 47 and Rule 72(2)** of the laws of succession, this court has jurisdiction to determine any application and any dispute under the act and to be satisfied as to the respective identities and shares of all persons entitled.

15. He cited the case of **Samuel Kamau Macharia vs KCB & 2 Others Civil App No. 2 of 2011**, and the case of **Owners of the Motor Vessels Lilian S vs Caltex Oil (Kenya) 1989** and urged that the allegation by the petitioner where he has referred to the objectors as strangers is false. Further, that in paragraph 14 of his Replying Affidavit, the 2<sup>nd</sup> respondent confirmed the objector's narration of the history of how the suit property herein being Kapseret/Simat Block 2 (Simat)/446 and 447 was obtained,

16. He submitted that it is very clear that the petitioner did not inform the 2<sup>nd</sup> respondent to attend court for Confirmation of the Grant on 5<sup>th</sup> December 2019 and therefore it is wise to state that denying the objectors herein is not something new. That the petitioner feared to inform the 2<sup>nd</sup> respondent since he knew he will pass the information to the objectors who are liabilities and beneficiaries to the estate.

17. Counsel further urged that the Applicants /objectors have lived in the suit property for over 10 years and have built permanent houses and they stand to lose a place they call home they have lived over a period of many years if the

Preliminary Objection stands and eventually causing unfairness on the side of the objectors as they are likely to be evicted vide the ELC case awaiting determination of this matter. That this will defeat **Articles 25,50 and 159 of the Constitution.**

**18.**Further, that the 1<sup>st</sup> Respondent concealed material facts from this Honourable Court in in the succession cause and allowing the preliminary objection will be tantamount to allowing him to defeat the objectors claim. He cited the cases of **Equity Bank Limited v Kimanthi (2023) KEHC 19237 (KLR)** and the case of **Abu Chiaba Mohammed v Mohammed Bwana Bakari & 2 Others (2005) eKLR** in this regard.

**19.**Counsel urged that the balance of probability in the present application tilts in favour of the Respondents and that the objectors herein have demonstrated that they have *locus standi* indeed on equitable interests and having prima facie case with evidence and proved that they will suffer irreparable damages if the Preliminary Objection herein is allowed. He urged the court to dismiss the preliminary objection in its entirety.

### **Determination**

**20.**Having considered the issues herein raised, it is my considered opinion that the two issues for determination are;

- i. Whether the preliminary objection meets the threshold for a Preliminary Objection**
- ii. Whether the same has merit on the issue of the *locus standi* of the Objectors**

21. In the case **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."**

22. Further, in **Oraro v. Mbaja [2005] 1 KLR 141**, the court stated thus on what ought to constitute a Preliminary Objection;

**"A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed."**

23. *Locus standi* is defined in Black's Law Dictionary, 9<sup>th</sup> Edition, page 1026 as

**"the right to bring an action or to be heard in a given forum".**

24. In **Ibrahim v Hassan & Charles Kimenyi Macharia [2019] eKLR** it was stated 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 to. 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 regarding locus standi are critical preliminary issues which must be dealt with and settled before developing into other substantive issues”**

25. On the point of objection that the objectors are neither beneficiaries nor dependants of the Deceased and have no legal claim to the estate, **Section 29 of the Law of Succession Act** defines who a dependant of a deceased estate is as follows;

**Meaning of dependant for the purposes of this Part, "dependant" means—**

**(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

**(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

**26. Section 66 of the Act** on the other hand provides as follows on who Letters of Grant of Administration of a deceased estate can issue;

**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:**

**27.** From the above provisions of the Succession Act, it is apparent that in matters of succession, there are many different capacities of dependants just

as there are many different capacities of beneficiaries. It follows therefore that dependency and beneficial interest are points of fact to be proven by way of evidence. This being the case the, this preliminary point of objection does qualify as a point of law and in this regard, this aspect of the objection is misconceived and lacks merit.

**28.**On the point of objection that the 2<sup>nd</sup> Objector has not exhibited any authority granted to him by the 1<sup>st</sup> objector she alleges to represent authorizing her to file the application or to swear the Affidavit in support of the summons on his behalf hence the Application, and the Affidavit are defective.

**29.**I have considered the objection and the affidavits filed in support thereof. From these pleadings, it is actually the 1<sup>st</sup> Objector and not the 2<sup>nd</sup> Objector who has made this averment and it is with respect to the grounds in support of the Objection.

**30.**The 2<sup>nd</sup> Objector has in fact sworn her own Affidavit dated 20<sup>th</sup> March 2025 in support of the Application. In this regard, I am unable to understand precisely what the objection is about. Further, the has not made any substantive submissions on this objection to assist the court to understand exactly what his point is. For this reason, I do not find merit in this aspect of the objection.

**31.**On the ground of objection is that the 1<sup>st</sup> Objector has brought this Application on behalf of her husband, who is deceased yet no legal authority has been produced to confer her the rights to institute this claim on behalf of the Estate of her late husband.

**32.**The issue of standing indeed is a preliminary prerequisite in law for any party wishing to institute legal proceedings of any nature and without this standing,

a party then has no audience in court. It qualifies therefore as a pure point of law that merits to be brought as a Preliminary Objection and in this regard, the same is merited.

**33.**On whether it is indeed correct that the Objector lacks standing for the reasons given, the court notes that the 1<sup>st</sup> Objector has annexed to her Objection a Special Limited Grant issued to her on 9<sup>th</sup> December 2021 in **Eldoret Chief Magistrate’s Court Ad Colligenda No. 282 of 2021.**

**34.**The same is limited to the purposes of the operation of her deceased husband **Mpesa and Mshwari Account Numbers 0721299812 and 0722634334 from Safaricom Company Ltd** for the dependant’s school fees, family subsistence and to have **Mpesa Statements** only. It does not grant the Objector the authority to represent the Estate of her deceased husband in any matter. The question then is whether this Special Limited Grant can be construed to confer upon the 1<sup>st</sup> Objector the requisite *locus standi*.

**35.**Section 82 (a) of the Law of Succession Act that provides that: -

**“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—**

**(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.**

**36.**Limited Grants are covered by **Section 54 of the Law of Succession Act** which provides as follows;

**A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.**

**37.** Rules 36 and 37 of the Probate and Administration Rules provide as follows;

**(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad Colligenda bona defuncti of the estate of the deceased.**

**(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.**

**38.** Ordinarily, as per the provisions above, a Grant Ad Colligenda Bona cannot be used to institute a suit on behalf of the estate of the deceased. This was discussed in **Elijah Nderitu Gachaga vs Francis Gakuu Gachaga & 2 Others (2019) eKLR** where the court held as follows;

**It is the finding of the Court that the Plaintiff, having filed suit on the basis of a grant ad Colligenda, is not clothed with locus to file suit. The Court finds that the cause of action is incontestably wrong noting that locus is an issue that goes to**

**the root of the case and that all proceedings here are a nullity since the Plaintiff did not have locus standi to file the suit. I can do no better than to cite Denning, L.J. in *Macfoy v United Africa Co. Ltd.* [1961] 3 ALL ER 1169 at 1172, who stated that: “If an act is void, it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.”**

**39.** However, there are exceptions to this rule. The Court of Appeal laid down the circumstances under which a Grant Ad Colligenda Bona can be considered as being capable of instituting a suit in *Morjaria v Abdalla* [1984] KECA 44 (KLR) where it held;

**We now turn to the other order which is purportedly made “ad Colligenda bona”. This form of grant was inappropriate in the present case. This is self-evident from rule 36 of the Probate and Administration Rules, to which Mr. Khanna drew our attention, and of which sub-rule (1) and (2) are in these terms:- The purpose of this form of grant is to collect the property of a deceased person where it is of a perishable or precarious nature, and where regular probate or administration cannot be granted at once- see Jowitt’s Law Dictionary, Volume 1 at page 45.....**

**However, we do not think that the appointment of a person “ad Colligenda bona” can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific**

provision .....designed for this purpose. The Latin verb “colligere” means to collect, bring together or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated, and not for purpose of representation in a suit or in an appeal.....Notwithstanding the foregoing, the grant of February 24 is specifically limited to “the purpose only” of representing the deceased, that is to say Ranchod, in the present appeal. In our judgment, therefore, it is those words which should be looked at for the purpose of determining this part of the application. In themselves, they constitute a valid grant pursuant to rule 14, and we are prepared to regard them as such.

40. This position was reiterated in **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)** [2016] eKLR where the court held;

The above is the prevailing general position in law. However, there are instances where such a Limited Grant of Letters of Administration Ad Colligenda Bona is tailored in a manner as to allow for the institution of an action or where the record expressly provides for such. In such cases, the focus will no doubt shift to the contents and wording of the grant or the record as opposed to the type of the grant.

41. Guided by the above statute and case law, it follows that a grant Ad Colligenda Bona can institute a suit only when it includes the words to institute a suit. The emphasis is then paid to the construction and content of the grant. In the instant case, the grant Ad Colligenda Bona that has been

relied upon by the Applicants is not so tailored and can therefore not be relied upon by the Objectors to accord them the requisite *locus standi* to institute the Objection proceedings. In this regard, I find merit on this aspect of the objection and the same is accordingly upheld. As a consequence, the objection proceedings are struck out for reasons that they are misconceived and bad in law.

**Read dated and Signed at ELDORET on 20<sup>th</sup> February 2026**

**E. OMINDE  
JUDGE**