

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. E127 OF 2025

WILLIAM OUKO
OGOLA.....APPELLANT

VERSUS

FLORENCE MURUNGA.....1ST
RESPONDENT

ELISHA OKEA OGOLA.....2ND
RESPONDENT

RULING

Before this court for determination is the Respondent’s Preliminary Objection dated 3rd November 2025, taken in response to the Appellant’s appeal arising from the ruling and order of the Chief Magistrate’s court at Migori delivered on 17th September 2025 in Migori CMCC Succession cause No. 14 of 1994

The impugned ruling revoked and annulled the Grant of Letters of Administration previously issued and confirmed jointly in favour of the Appellant, Mr. William Ouko, and his co-administrator, Mr. George Ogola Sigera

Aggrieved by that decision, the Appellant lodged the instant appeal singularly. He subsequently filed an application dated 23rd October 2025 seeking conservatory orders pending appeal. The application was expressed under the Civil Procedure Act and Rules, notwithstanding the existence of specific provisions governing interlocutory relief in succession causes under Section 47 of the Law of succession Act and Rules 41, 49, 63 and 73 of the Probate and Administration Rules.

Upon service of the appeal and application, the Respondent filed the current Preliminary Objection challenging:

- a. The locus standi of the Appellant to lodge the appeal and prosecute related applications without the participation of his co-administrator and
- b. That the appeal and application constitute an abuse of the court process having been filed under the wrong procedural framework.

On 4th November 2025, this court directed that the Preliminary Objection be canvassed by written submissions. Both parties complied

The Estate in issue is that of the late Daniel Ogola Sigera. Following his demise, the late Elisha Okea. He distributed part of the estate and died before completing distribution.

Thereafter, the Appellant and his brother, George Loch Mboya Ogolla, petitioned for a fresh grant. On 15th September 2021, a Grant was issue and later confirmed jointly in their names.

The Respondent subsequently applied for revocation of that joint Grant. By the ruling dated 11th September 2025, the trial court revoked the entire Grant, finding that the administrators had distributed property not belonging to the estate and had concealed the existence of Migori High Court Succession Cause No. 95 of 2015, which had distributed part of the same property.

The Respondent subsequently applied for revocation of that joint Grant. By the ruling dated 17th September 2025, the trial court revoked the entire Grant, finding that the administrators had distributed property not belonging to the estate and had concealed the existence of Migori High Court Succession Cause No. 95 of 2015, which had distributed part of the same property.

It is not in dispute that the Grant revoked was a joint grant issued to two administrators; the present appeal is filed only by one of them; there exists no order removing or serving the co-administrator from administration; and the co-administrator is not a party to this appeal.

The preliminary objection raises one central question:

- a. Whether the Respondent's Preliminary Objection meet Mukisa Biscuit threshold and whether the Appellant had locus standi to lodge the appeal singularly.
- b. Whether the objection raises pure points of law based on uncontested facts
- c. Whether a joint administrator can, in law lodge an appeal alone;
- d. Whether invocation of the wrong procedural provisions amounts to a proper Preliminary Objection

A proper Preliminary Objection must satisfy the test in ***Mukisa Biscuit Manufacturing Company versus West End Distributors (1969) EA 696***, where law JA stated:

“A Preliminary Objection consists of a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.”

Sir Charles Newbold in the same case clarified that a Preliminary Objection:

“.....must not be blurred with factual issues calling for proof or discretion.”

A question of locus standi is a classical jurisdiction issue appropriate for a Preliminary Objection

In ***owners of Motor Vessel “Lilain S” versus Caltex Oil (Kenya) Limited*** it was held:

- 1. “A question of jurisdiction ought to be raised at the earliest opportunity and the court *seized of the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.***
- 2. *A question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It was immaterial whether the evidence was scanty or limited. Scanty or limited facts constituted the evidence before the court. A party who failed to question the jurisdiction of a court may not be heard to raise the issue after the matter was heard and determined. There were no grounds as to why a question of jurisdiction could not be raised during the proceedings. As soon as that was done, the court should hear and dispose of that issue without further ado”***

Similarly, in *Rajesh Pranjivan Chudasama versus Sailesh Pranjivan Chudasama* [2014] eKLR the court held:

“In our view issues of locus standi and jurisdiction are critical preliminary issues which ought to have been settled before dwelling into other substantive issues”.

Regarding joint administrators Section 82(a) of the Law of Succession Act provides that Personal Representatives act subject to limitations in

their grant, while Section 81 underscores the principle of joint action, save where the grant is severed by death or court order.

On whether the Preliminary Objection raises a pure point of law, the fact that the Grant was issued jointly is not contested. The fact that the appeal was filed by only one administrator is equally not in dispute. No affidavit evidence is required to ascertain these facts. Accordingly, the issue whether one joint administrator may singularly lodge an appeal is a pure point of law. It therefore satisfies the Mukisa Biscuit threshold. This limb of the objection is properly raised and the same is upheld by the court.

On whether a joint administrator can lodge an appeal alone, a Grant issued to two or more persons vests the estate jointly in them. They must act collectively, unless the grant is severed by death or by an order of court. The record shows no such severance. Both administrators were parties before the trial court, and the impugned ruling affected them jointly. A singular appeal by one administrator effectively purports to represent the estate without lawful authority, contrary to Sections 79 - 83 of the Law of Succession Act. This court agrees with the Respondent that the administrators are, in law “like conjoined twins” in exercise of powers under a joint grant. The Appellant argued that he also appeals as a beneficiary. However, the ruling appeal from was directed at the administrators in their representative capacity, not in their capacity as beneficiaries. A beneficiary dissatisfied with distribution has remedies, but cannot camouflage a defective representative appeal. Thus, the Appellant lacked capacity/locus standi to singularly lodge this appeal. This limb of the Preliminary Objection equally succeeds

On whether the wrong procedural framework renders the matter an abuse of process, the Respondent faults the Appellant for invoking the

Civil Procedure Act rather than the specific provisions of the Law of Succession Act. While the application indeed cites the incorrect procedural framework, courts in succession matters have repeatedly held that the use of the wrong provisions is a curable defect and it does not by itself render proceedings incompetent, and it calls for judicial discretion under Article 159(2)(d)

Whether the wrong procedure amounts to abuse of process is not a pure point of law and would require the court to consider context, prejudice and intent – matters which fall outside the scope of a Preliminary Objection

In ***Oraro versus Mbaja [2005] eKLR J. B. Ojwang J*** (as he then was) held:

“From my analysis of submissions and of case law herein, I have to state clearly that the Applicant’s Notice of Preliminary Objection to Representation” dated 6th October and filed on 7th October 2004 cannot pass muster as a procedurally-designed Preliminary Objection. As already noted, it is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute. As preliminary objection, therefore, I find and determine that the “notice of Preliminary Objection to Representation” must be dismissed

It is so be recalled, however, that the learned counsel for the Applicant did retreat into some fall-back position in which he presented his client’s gravaman as a fundamental issue of proper conduct of

litigation dependent on the court's discretion exercised by virtue of Section 3A of the Civil Procedure Act (Cap 21). The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised. If a matter comes before the court dressed as a "Preliminary Objection", it will not come to co-exist with such factual scenarios as may lead the court to exercise its discretion by virtue of Section 3A of the Civil procedure Act.

More importantly, it has to be appreciated that the court's discretion exercised by virtue of Section 3A aforesaid is always for the purpose of upholding the law and so far as possible; and this would require preserving the claims of parties so that they may be heard and determined according to law. By contrast, the Applicant's plea is that the Respondent's pleadings be terminated in limine. There is no consistency between such a prayer, which belongs to the normal practice attending preliminary objections (matters of law), on the one hand, and the case for ensuring fair trial which the Applicant has also argued, on the hand"

This limb of the Preliminary Objection therefore fails.

Having carefully considered the Respondent's Preliminary Objection, the pleadings and the submissions of the parties, the court makes the following orders:

- a. The Preliminary objection on the issue of locus standi is merited and is hereby upheld. The Appellant, being one of two joint administrators, lacked capacity to lodge the instant appeal without the participation of his co-administrator.
- b. The limb alleging abuse of process on account of wrong procedural provisions is hereby declined

- c. Consequently, the appeal dated 13th day of October 2025 and the Notice of Motion dated 23rd October 2025 are hereby struck out
- d. Costs of the Preliminary Objection and the struck-out proceedings shall be borne by the Appellant

Dated, signed and delivered at Migori this 12th day of February 2026

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ANNE ONG'INJO
JUDGE