

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
FAMILY DIVISION
CIVIL APPEAL NO. E001 OF 2024

HENRY NJOROGE KIGUMO -----
1ST APPELLANT

MARTHA NJERI KIGUMO -----
2ND APPELLANT

-VERSUS-

DAMARIS WAITHERA KIGUMO -----
RESPONDENT

***(Being an Appeal from the Ruling delivered by the
Honourable Yvonne Inyama (PM) on 29th February 2024
in Naivasha CM Succession Cause No. 58 of 2017)***

JUDGMENT

Background

1. The Appellants herein, who hail from the deceased's second household, were the Petitioners/Respondents before the trial court. **David Gachunga Kigumo**, a son of the deceased from the first household, filed an Application dated 14th September 2020 seeking the Revocation of Grant but later sought to withdraw the said application through a Notice of Withdrawal of Suit dated 23rd November 2022 pursuant to Order 24 Rule 1 of the Civil Procedure Rules.

2. The deceased's first widow, **Damaris Waithera Kigumo**, however filed an application dated 14th April 2023 seeking leave to amend the Summons for Revocation of Grant by substituting herself as the Applicant in the place of the said David Gachunga Kigumo, and to be joined in the proceedings on behalf of the first household. The Applicant deponed that the original Applicant no longer wished to prosecute the matter on behalf of the first household who had nominated her to take up that role as the deceased's widow.
3. The Appellants opposed the Application through a Preliminary Objection dated 19th June 2023, contending that substitution was unavailable as the original Applicant was not deceased. The Appellants stated that the Intended Applicant lacked locus standi and that the court lacked jurisdiction on account of res judicata.
4. In a Ruling delivered on 29th February 2024, the trial court found the Preliminary Objection partially merited, holding that the Intended Applicant had not satisfied the requirements of Order 1 Rule 10 of the Civil Procedure Rules for substitution. Nevertheless, the court found that she had an interest in the estate as a widow and granted leave for amendment to add her as a second Applicant.
5. Aggrieved by the said decision, the Appellants lodged the present Appeal vide a Memorandum of Appeal dated 28th March 2024, seeking to set aside the Ruling, strike out the Application dated 14th April 2023, uphold the Preliminary Objection. The Appellants also seek to be awarded costs.

6. The Appeal was canvassed by way of written submissions, which this Court has considered.

Issue for Determination

7. Although the appeal raises fifteen (15) grounds of appeal, several grounds are wholly disconnected from the impugned Ruling and refer to evidentiary matters that never arose in the Application and the impugned ruling. Be that as it may, this Court is guided by its duty as a first appellate court as articulated in **Kenya Ports Authority vs. Kusthon (Kenya) Limited (2000) 2 EA 212**, wherein the Court of Appeal held: -

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

8. I find that the main issue for determination is whether the Appeal is merited.

Analysis and Determination

9. As a preliminary matter, the Court notes that the parties were improperly described on appeal by inclusion of a

party who was yet to be formally substituted at the trial court. I however find that this is a matter of form that can be cured by Article 159 of the Constitution.

10. The parameters of a preliminary objection were defined in ***Mukhisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696*** 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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

11. The Appellants’ principal contention was that the Intended Applicant lacked locus standi. The concept of locus standi was explained in ***Alfred Njau and Others vs. City Council of Nairobi [1982] KAR 229*** in the following terms:

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

12. It was not disputed that the Intended Applicant is the deceased’s first widow. As such, she has a direct and

sufficient interest in the estate and therefore has the requisite locus standi. I find that the contention to the contrary is without merit.

13. A careful reading of the trial court's Ruling reveals that it did not find that the Intended Applicant lacked locus standi, but rather that substitution under Order 1 Rule 10 had not been demonstrated. With respect, I find that amendment of parties is not confined to instances of misjoinder but equally applies where circumstances demand reconstitution of parties to facilitate effective adjudication.

14. The original Applicant filed a Notice of Withdrawal dated 23rd November 2022. The record shows that the matter had already been set down for hearing. Order 25 of the Civil Procedure Rules provides as follows: -

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing... discontinue his suit...”

15. Order 25 Rule 2 stipulates as follows:

“Where a suit has been set down for hearing it may be discontinued... upon the filing of a written consent signed by all the parties... or with leave of the court...”

16. I note that the Notice of Withdrawal was neither adopted by the court nor sanctioned by consent or leave. This means that the suit remained extant, and the Intended Applicant was therefore entitled to seek substitution.

17. In determining whether amendment ought to be allowed, the Court is guided by the decision in ***Joseph Ochieng & 2 Others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991***, where the Court of Appeal held:

“The ratio that emerges... is that powers of the court to allow amendment is to determine the true, substantive merits of the case... however late, the amendment sought to be made should be allowed if made in good faith... provided costs can compensate the other side...”

18. My finding is that the Intended Applicant demonstrated good faith, a clear legal interest, and the necessity of safeguarding the interests of the first household. I therefore find that requiring her to institute a fresh application would amount to unnecessary procedural formalism, offend the principle of expeditious disposal of cases, and risk multiplicity of proceedings.

19. It is therefore my view that the trial court erred in declining substitution while simultaneously adding the Intended Applicant as a second Applicant. Once the original Applicant unequivocally indicated unwillingness to proceed, there was no legal basis for retaining him in the proceedings.

20. The ground on jurisdiction was unsupported by either facts or law and is accordingly dismissed.

Disposition

21. For the reasons that I have stated in this judgment, I find that the Appeal is partially merited and make the following final orders: -

- a) ***The Ruling delivered on 29th February 2024 is hereby set aside.***
- b) ***The Preliminary Objection dated 19th June 2023 is dismissed.***
- c) ***Damaris Waithera Kigumo is hereby substituted in place of David Gachunga Kigumo and granted leave to file an Amended Application for Revocation of Grant as the main Applicant.***
- d) ***Since this matter involves members of the same family, each party shall bear his/her own costs of the Appeal.***

22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 5TH DAY OF MARCH, 2026.

**HON. W. A. OKWANY
JUDGE
05/03/2026**

**FOR APPELLANT NJOGU
FOR RESPONDENT SPENCER FOR NJAGI
COURT ASSISTANT Karani**

ORIGINAL