



REPUBLIC OF KENYA



KENYA LAW
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**Onyango v Nyokun & another (Civil Appeal E008 of 2025)
[2026] KEHC 2987 (KLR) (26 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E008 OF 2025
OA SEWE, J
FEBRUARY 26, 2026**

BETWEEN

ROSEMARY ONYANGO APPELLANT

AND

EVELINE AUMA NYOKUN 1ST RESPONDENT

EVANCE OCHIENG LUSI 2ND RESPONDENT

RULING

1. The respondents filed an undated Notice of Preliminary Objection on the grounds that the appellant lacks the locus standi to institute the appeal, and therefore the appeal in a nullity ab initio. The Preliminary Objection was canvassed by way of written submissions, to which end the respondents relied on their written submissions dated 1st July 2024. They explained that the appellant is the daughter of Jane Agola Lusi who was the personal representative and administrator of the estate of the deceased, Lusi Kojo, having been issued with a grant of letters of administration in respect of the estate of the deceased.
2. The respondents further explained that they are the 2nd widow and son of the deceased, respectively; and that they were left out of the succession proceedings, prompting them to file Summons for Revocation of Grant on the ground of concealment of material facts. The said Grant was accordingly revoked on 16th January 2025, thereby precipitating the instant appeal.
3. In the premises, the respondents proposed a single issue for determination, namely, whether the appellant lacks the locus standi to institute this appeal. They referred to the case of Mukisa Biscuit Company V West End Distributors Ltd [1969] EA 696 and the decision of the Supreme court of Kenya in Aviation & Allied workers Unions Kenya V Kenya Airways Limited & 3 others [2015] eKLR as to what amounts to a proper preliminary objection. They also referred to the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR, for the proposition that the



issue of locus standi raises a point of law that touches on the jurisdiction of the court and it should be resolved at the earliest opportunity.

4. While conceding that the applicant participated in the proceedings before the subordinate court, the respondents asserted that she only did so with their consent and as a witness for the petitioner who at the time was ill and could not testify before the court. The respondents further stated that, although the petitioner subsequently died, no substitution was made in accordance with Order 24, Rule 3 of the Civil Procedure Rules. In the circumstances, the respondents submitted that the appellant herein is neither a legal representative of the estate of the deceased nor the estate of Jane Agola Lusi for purposes of Section 54 of the [Law of Succession Act](#); and therefore lacks the locus standi to file this appeal without leave of the subordinate court.
5. The respondents relied on *Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva* (Suing as the Administrator of the Estate of Fanuel Evans Amudavi Deceased) [2016] eKLR as cited with approval in *Migwi* (Suing on His Own and Also on Behalf of the Estate of Migwi Mariga - Deceased) v Ngunjiri & another [2024] eKLR. In that matter, the court held that:

“... the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

6. The respondents also relied on the decision of the Court of Appeal in *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR in which the issue of locus standi in succession causes was discussed. The Court held as follows:

“...the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.”

7. Further to the foregoing, the respondents cited Section 82 of the [Law of Succession Act](#), which provides that the powers of a personal representative include the power to enforce by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate. It was therefore their submission that without Grant of Letters of Administration Ad Litem or similar authority to file the appeal, the same is null and void for lack of locus standi.
8. It was also the submission of the respondents that leave of the lower court was a prerequisite. They relied on the decision of the Court of Appeal in *Attorney General v George Bala*, Nairobi Civil Appeal No. 223 of 2017, in which it was held that:

“...The right to appeal was a creature of statute and an appeal could be presented only;

- i. By a party in the suit if he was aggrieved by the Judgment, or
- ii. By a person who was not a party but who was aggrieved by the Judgment if he sought and got leave of the court to prefer an appeal against the judgment.”



21. The Appellant herein was not a party in the succession proceedings which gave rise to the impugned ruling Oyugis Succession 156/2022 neither did the Appellant if aggrieved by the impugned ruling seek or obtain the trial court's leave to appeal against the ruling.
9. Accordingly, the respondents urged the Court to uphold their Preliminary Objection, find that the appellant lacks the locus standi to institute or maintain the instant appeal and strike out the appeal with costs.
10. The appellant opposed the respondents' Preliminary Objection, contending that the same was prematurely raised before the filing of her Record of Appeal. She explained that she had not filed her Record of Appeal by that time because she had not been supplied with certified copies of the proceedings and decree of the subordinate court. On that account, she urged for the dismissal of the Preliminary Objection as it was merely intended to deny her the right of access to justice as envisaged by Articles 10, 25, 48 and 50 of *the Constitution* of Kenya 2010.
11. It was further the submission of the appellant that the Record of Appeal and the proceedings of the subordinate would eventually show that she is the sole beneficiary of the estate of the deceased person after the demise of her mother, Jane Agola Lusi. The appellant also contended that she was permitted by the learned magistrate with the consent of the respondents herein to participate in the proceedings of the subordinate court in place of her deceased mother and to challenge the respondents Summons for Revocation of the Grant as an interested party. In her submission as the only surviving beneficiary of the estate of the deceased person, she has the right to protect her beneficial legal and equitable interest in estate of her deceased father, including on appeal.
12. The appellant reiterated her contention that respondents herein are not entitled to inherit the estate of her deceased father because the deceased did not marry the 1st respondent, and therefore did not sire any of the 1st respondents alleged children as was purported by her before the subordinate court in Oyugis. In the premises, the appellant invoked Articles 10 and 40 of *the Constitution* as well as Section 47 of the *Law of Succession Act* and prayed that she be allowed to prosecute her appeal to its logical conclusion. She relied on *Mukisa Biscuit Company -Vs- West End Distributors Ltd* (supra) to buttress her submissions.
13. In the light of the submissions made by the parties, the only issue for determination is whether the appellant had the locus standi to file and maintain the appeal. However, considering that the parties sought to rely on the Record of Appeal and other factual aspects that require proof, the Court must first be satisfied that the respondents' Preliminary Objection was properly taken.
14. In *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors* (supra) it was pointed out that:
- “...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...”



15. Similarly, in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR the Supreme Court emphasized the point that: -

“...a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”

16. The written submissions filed herein show that the parties relied heavily on matters that comprise evidence and would require proof to enable the Court make a determination on which version to believe, seeing as the parties were not agreed on those factual details. For instance, the respondents contended that:

- (a) the appellant participated in the proceedings before the lower court as a witness for the petitioner who was unable to attend court at the time due to illness.
- (b) That upon the death of the petitioner, no steps were taken by the appellant to apply for substitution for purposes of Order 24 Rule 3 of the Civil Procedure Rules.
- (c) That leave of the subordinate court to file the instant appeal was not obtained.

17. These are certainly aspects that would put the Court to inquiry with a view of finding out the factual position. It is for this very reason that the appellant sought to rely on the proceedings and the pleadings filed before the lower court. On her part, the appellant also contended that she is the sole beneficiary of the estate of the deceased, after the death of her mother. Again this is not manifest as an agreed fact.

18. In the circumstances, it is my finding that the Preliminary Objection was wrongly taken for the simple reason that any preliminary point that is based on evidence cannot be a valid preliminary objection. In *Oraro v Mbaja* [2005] 1 KLR 141, Hon. Ojwang, J. (as he then was) held that:

“...A “preliminary objection” correctly understood, is now well defined as, and declared to be, 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 processes of evidence. Any assertion, which claims to be a preliminary objection, 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...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

19. In *Mukisa Biscuits Manufacturing case* Sir Charles Newbold, P. pointed out that:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

20. In the light of the foregoing, I find no merit in the respondents’ Preliminary Objection. The same is hereby dismissed with an order that the costs thereof be borne by the respondents.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 26TH DAY OF
FEBRUARY 2026

OLGA SEWE

JUDGE

