



**Kihanya & 4 others v Gichuri & another (Civil Appeal
15 of 2019) [2024] KECA 852 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KECA 852 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 15 OF 2019
S OLE KANTAI, F TUIYOTT & JM MATIVO, JJA
JULY 12, 2024**

BETWEEN

**JOSEPH KURIA KIHANYA 1ST APPELLANT
DOMINIC MBURU KIHANYA 2ND APPELLANT
BENSON KIHANYAN NDUNGU 3RD APPELLANT
PAUL NGANGA KIHANYA 4TH APPELLANT
JAMES KAMAU KIHANYA 5TH APPELLANT**

AND

**VERONICA NGATHA GICHURI 1ST RESPONDENT
JOHN NG'ANG'A GICHURI 2ND RESPONDENT**

(An appeal from the judgement and decree of the Environment and Land Court of Kenya, Nairobi (Okong'o, J.) dated 17th November, 2017 in ELC No. 814 of 2000)

JUDGMENT

1. The appellants, Joseph Kuria Kihanya, Dominic Mburu Kihanya, Benson Kihanyan Ndungu, Paul Nganga Kihanya, James Kamau Kihanya have appealed against the judgment of the Environment & Land Court (ELC) rendered on 17th November 2017 by Okong'o, J. in Nairobi ELC No. 814 of 2000, Veronica Ngatha Gichuri & Another vs Joseph Kuria Kihanya & 4 Others. A summary of the dispute that triggered the said case culminating in the judgment the subject of this appeal is necessary so as to properly contextualize the issues urged in this appeal.
2. Briefly, John Ng'ang'a Gichuri and Veronica Ngatha Gichuri (the respondents herein) instituted the said suit against the appellants by a plaint filed in the ELC on 17th March 2000 which was subsequently amended on 13th June 2000 and 23rd November 2000. They averred that the appellants herein are sons



of the late Gichuhi Mwaniki (deceased) who died in 1966, and that the deceased was also their father. They also averred that in 1958, during the land consolidation, the deceased sub-divided his parcels of land amongst his three surviving wives and their children as follows:-

- a. Nyandarua/Gatamaiyu/241 measuring 7.7 acres was given to Ngendo Gichuhi for herself and her children, namely Nganga Gichuri and Muigai Gichuri.
 - b. Nyandarua/Gatimaiyu/242 measuring 4.8 acres was given to Keru Gichuri and her children Francis Nganga Gichuri, Simeon Kinuthia Gichuri and Muigai Gichuri.
 - c. Nyandarua/Gatamaiyu/243 measuring 4.6 Ha. was given to Mugure Gichuri and her children Joel Nganga and John Kihanya Gichuri
3. It was the respondents' case that the deceased had 4 wives, and that the 4th wife Njeri Gichuri was their mother, that she died in 1955 when they were minors, and she had been given LR No. Gatamaiyu/Nyandarua/244 measuring 9 acres by the deceased to be shared among them in equal shares. Their complaint was that the 3rd appellant who was then working at the lands office fraudulently misrepresented to the Land Registrar, Kiambu lands office, that Kihanya Gichuri was also known as Gichuri Mwaniki, and he caused the said title to be changed in his name. They claimed that the aforesaid land was fraudulently sub-divided and transferred as follows:
- a. Gatamaiyo/Nyandarua/1769 to Joseph Kuria Kihanya,
 - b. Gatamaiyu/Nyandarua/1770 to Dominic Mburu Kihanya,
 - c. Gatamiyo/Nyandarua/1771 to Benson Kihanya Ndungu,
 - d. Gatamiyo/Nyandarua/1772 to Paul Nganga Kihanya,
 - e. Gatamiyo/Nyandarua/1773 to James Kamau Kihanya,
 - f. Gatamiyo/Nyandarua/1774 to Agnes Mugure Kihanya
4. They averred that they were not aware of the said change and the transfer of the said land to the appellants until 11th February 1997. Accordingly, they prayed for, inter alia, the cancellation of the above titles on grounds that transfers were effected fraudulently and for an order that a succession suit be filed to determine the beneficiaries of Gatamiyo/Nyandarua/244.
5. In their defence dated 30th October 2000, the appellants maintained that the respondents are not the legitimate beneficiaries of the deceased's estate and as such they were not entitled to inherit the said land. They maintained that they were the legitimate sons and grandchildren of the deceased, therefore, they were entitled to inherit the suit property. Further, the respondents' suit disclosed no cause of action against them and in any event, the suit is time barred.
6. During the trial, the respondents' case stood on the testimony of PW1 Simon Gichuri, the respondents' step brother and PW2, the 1st respondent in this appeal. The 1st, 2nd and 3rd appellants testified on behalf of the appellants.
7. In the impugned judgment dated 17th November 2017, Okong'o J. determined the 7 issues which were framed by the parties as follows: (a) whether or not the plaintiffs are daughter and son respectively of the deceased and consequently beneficiaries of the deceased's estate; (b) whether the plaintiffs are the sole and rightful beneficiaries of Gitamaiyu/Nyanduma/244 which is part of the deceased's estate; (c) whether or not Kihanya Gichuri and Gichuri Mwaniki is one and the same person; (e) whether or not Kihanya Mwaniki alias Gichuri Mwaniki had the capacity to solely take over and/or deal with Land Parcel No. Gitamaiyu/Nyanduma/244 without taking out letters of administration in respect of



the estate of Gichuri Mwaniki; (f) whether the properties comprised in the estate of Gichuri Mwaniki could have legally changed hands without a succession cause having been instituted; (g) whether the subdivision of Land Parcel No. Gitamaiyu/ Nyanduma/ 244 was illegal and should be cancelled; and, (h) who are the rightful beneficiaries of land parcel No. Gitamaiyu/ Nyanduma/ 244.

8. After evaluating the above issues, the learned judge held that the respondents had established that the suit property was acquired by Kihanya illegally and fraudulently and that Kihanya had no title in the suit property on the basis of which he could sub-divide the same and transfer portions thereof to the appellants. Further, the only lawful way Kihanya could have acquired the suit property was through a petition for grant of letters of administration in respect of the estate of Mwaniki. Judgment was therefore entered for the respondents against the appellants on the following terms:
 - a. I declare that the transfer and registration of Land Parcel Numbers: Gitamaiyu/ Nyanduma/1769, 1770, 1771, 1772, 1773 and 1774 in the names of the 1st, 2nd, 3rd, 4th, 5th and 6th defendants respectively was illegal and tainted with fraud.
 - b. The titles for Land Parcel Numbers: Gitamaiyu/Nyanduma/ 1769, 1770, 1771, 1772, 1773 and 1774 in the names of the 1st, 2nd, 3rd, 4th, 5th and 6th defendants respectively are cancelled and the land comprised in the said titles shall revert to the original Land Parcel Number Gitamaiyu/ Nyanduma/ 244.
 - c. I declare that the registration of Land Parcel Numbers: Gitamaiyu/Nyanduma/244 in the name of Kihanya Gichuri was illegal and fraudulent.
 - d. The registration of Land Parcel Number Gitamaiyu/ Nyanduma/244 in the name of Kihanya Gichuri is cancelled and the property shall revert to the name of Gichuri Mwaniki.
 - e. The status quo prevailing as of the date hereof as relates to possession, occupation and use of Land Parcel Number Gitamaiyu/Nyanduma/244 by all the parties to this suit shall be maintained, pending the filing, hearing and determination of a petition for full grant of letters of administration in respect of the estate Gichuri Mwaniki or for a period of two (2) years from the date hereof whichever comes earlier.
 - f. In view of the relationship between the parties and the nature of the dispute that was before the court each party shall bear its own costs of the suit.
9. Aggrieved by the judgment, the appellants filed this appeal seeking to set aside the judgment and decree of the ELC dated 17th November 2017. In their memorandum of appeal dated 8th January 2019, the appellants have raised 8 grounds of appeal contending that the learned judge erred in law and/or in fact in:
 - (a) entertaining a suit that was time barred; (b) making a finding on beneficiaries of an estate which matter ought to have been a preserve of the succession court; (c) arriving at a finding that was incongruent with his finding that he did not have jurisdiction to determine beneficiaries and distribution of estate of the deceased persons; (d) entertaining and adjudicating on a matter that was brought by parties who had no locus standi to bring the suit; (e) entertaining a claim for land brought by parties who had no registrable interest in the land in view of his finding that he had no jurisdiction to determine whether they were beneficiaries; (f) dealing with the property of a deceased person without jurisdiction and making adverse orders therein; (g) finding that there was a cause of action against the appellants whilst making a finding that the matter belonged to the succession court; and, (h) alienating land that had been transferred to the appellant without any legal or factual underpinning in view of the above.



10. The appeal was disposed of by way of written submissions. The appellants' submissions are dated 28th September 2020 while the respondents' submissions are dated 3rd October 2023.
11. Mr. Gitonga learned counsel for the appellants stated that the issues arising in respect of the grounds of appeal are cross cutting, therefore, he opted to urge them together. Counsel noted that the suit property was transferred in year 1972 and faulted the learned judge for failing to re-evaluate the evidence on record and section 7 of the Limitations of Actions Act. Counsel contended that instead the learned judge totally ignored the evidence and reached a finding that is incongruent with evidence presented before him. He also submitted that the learned judge had no jurisdiction to determine beneficiaries and distribution of the deceased's estate.
12. Mr. Gitonga contended that the respondents had not taken out letters of administration that would entitle them to sue as legal beneficiaries to the estate or on their own behalf. Therefore, the learned judge erred in law in entertaining a claim for land by parties who had no registrable interest in the land and contended that the learned judge had held that he lacked jurisdiction to determine the question whether the respondents were beneficiaries of the deceased's estate. In support of his submissions, counsel cited *Frederick Wachira Ndegwa (Substituting Ndegwa Wachira (Deceased) v Richarda Wanjiku Ndanjeru & Another [1997] eKLR* in support of the holding that a personal action dies with the person.
13. The respondents did not attend the virtual hearing. However, they filed written submissions dated 3rd October 2023. On the issue of limitation of actions, they submitted that the appellant did not raise the said issue before the trial court. Therefore, it cannot be introduced at this appellate stage. Further, introducing new matters at this stage renders this appeal mischievous and an abuse of the court process. Nevertheless, the respondents maintained that in actions relating to recovery of land, limitation does not lie between the time of the death and issuance of the grant of letters of administration.
14. In response to the allegations that the learned judge had dealt with property of a deceased person without jurisdiction and making adverse orders, the respondents submitted that the judge found that the suit property had been fraudulently transferred by causing a change of name in the record of the land registry. Consequently, the learned judge acted within his jurisdiction by declaring that the suit property belonged to the deceased and should be reverted to the deceased.
15. Our mandate as a first appellate court is provided under Rule 31 (1) (a) of the Court of Appeal Rules, 2022, which is a retrial of the dispute. A similar provision was contained in Rule 29 (1) of the Court of Appeal Rules, 2010, which were the applicable rules when this appeal was filed on 21st October 2019. We are required to reconsider the evidence on record and arrive at our own independent conclusions. However, unlike the trial court, we must bear in mind that we do not have the benefit of seeing and hearing the witnesses testify. (See *Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123*).
16. Upon considering the respective parties' submissions, the record of appeal and the law we find that the following three issues fall for determination: -
 - a. Whether the respondents' suit was time barred;
 - b. Whether the respondents had the locus standi to institute the suit;
 - c. Whether the learned judge had the jurisdiction to make findings on beneficiaries of the estate of Gichuki Mwaniki
17. There is no dispute that the deceased died intestate on 1st June 1966 while the suit property was registered in his name, therefore, the suit property formed part of his estate. Also, there is no dispute



that on 4th July 1972, Kihanya, a son to the deceased caused the suit property to be registered in the name Kihanya Gichuri. This was done by “correcting” the name in the register of titles from Gichuri Mwaniki to Kihanya Gichuri, after the Land Registrar was notified that the said names referred to one and the same person, that is, the deceased.

18. Having reviewed the appellant’s grounds of appeal, we find that grounds 1,2,3,4, and 6 raise issues of law which touch on the jurisdiction of the trial court and can be entertained at this appellate stage. Indeed, this position was appreciated by this Court in *Kenya Port Authority v Modern Holding (EA) Ltd* [2017] eKLR in which it stated that: -

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

19. It is settled law that an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection should be raised at the earliest opportunity. The failure to raise the issue locus standi before the trial court is not fatal nor is there a bar to the said issue being raised at this stage. Accordingly, we will first address the issue whether the respondents had the capacity to institute the impugned suit. If the answer to the said issue is in the affirmative, we will proceed to determine the other issues raised but if the answer is in the negative, then the instant appeal will be disposed on that ground alone.
20. Responding to the appellants’ argument that the respondents had no locus locus standi to institute the suit against them, the respondents maintained that the appellants are mischievously brewing new issues which they had not raised in the trial court.

The Black’s Law Dictionary, 9th Edition (page 1026) defines

locus standi as “the right to bring an action or to be heard in a given forum”. This Court in *Alfred Njau and Others v City Council of Nairobi* [1982] KAR 229 held that:-

“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”.

21. Locus standi is so cardinal in civil proceedings. This is because without locus standi, a party lacks the right to institute and/or maintain the suit even where a valid cause of action subsists. It can be equated to a court acting without jurisdiction. In *Amlers Precedents of Pleadings LexisNexis LTC Harms et al* 2018 on page 248 the following is said:

“The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person’s interest in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules.

22. The general rule is that it is for the party instituting proceedings to allege and prove his/her locus standi, and the onus of establishing it, rests on that party. It must accordingly appear ex facie from the pleading filed that the parties have the necessary legal standing. Locus standi in iudicio concerns the sufficiency and directness of a litigant’s interest in proceedings which warrants his or her title to prosecute the claim



asserted, and should be one of the first things to establish in a litigation matter. As stated earlier the property in question belongs to a deceased person. Therefore, it was a prerequisite for the respondents to obtain a grant of letters of administration before instituting the said suit which involved properties registered in the deceased's name.

23. Section 2 of the *Civil Procedure Act* has defines a 'legal representative' as:

A person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

24. Section 82 of the *Law of Succession Act* gives the personal representatives of a deceased person's estate the power 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 of his personal representative". It is evident from the above provision that one can only institute or enforce a suit on behalf of the estate of a deceased person once they have been appointed personal representatives to the estate. Such appointment under the Succession Act can only be by way of obtaining a full grant or a grant limited for purposes of instituting or defending a suit, which would in this case be ad-litem. Decided cases are in agreement that where a suit is filed relating to a deceased's estate without a grant of representation, the proceedings are null and void for want of locus standi. (See *Virginia Edith Wamboi v Joash Ochieng Ougo & Another* [1982-88] 1 KAR and *Teouistik Union International & Another vs Jane Mbeyu & Another*, Civil Appeal No. 145 of 1990). It follows that for a party to have locus standi to institute

or defend a case for and on behalf of a deceased person, he or she must first obtain a grant of letters of administration empowering him or her to administer the deceased's estate or limited for the purpose of filing or defending the suit.

25. It is common ground that a succession cause was never filed in relation to the estate of the deceased and that the respondents herein instituted a suit against the appellants vide plaint filed on 17th March 2000 which was subsequently amended on 13th June 2000 and 23rd November 2000. It is also a fact that the respondents took out a limited grant of letters of Administration Ad Litem vide High Court Probate and Administration Cause No. 274 of 2007 and they were issued with a limited grant of letters of Administration Ad Litem on 29th March 2007 which was rectified on 10th December 2007, 7 years after filing the suit against the appellants which culminated in this appeal. In *Otieno vs Ougo & Another* [1986 -1989] EALR 468, this Court stated: -

"... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception." (Emphasis added).

26. In *Macfoy vs United Africa Co. Ltd* [1961] 3 ALL ER 1169, the court held that if an act was void then in law it was a nullity and incurably bad; null and void, that one cannot put something on nothing and expect it to stay there since it will collapse.

27. As we have demonstrated, for the respondents to legally institute the suit on behalf of the estate of the deceased, they needed to have sought and obtained a grant of letters of administration to enable them to bring the suit on behalf of the deceased's estate. They did not and consequently, they lacked the capacity to institute the suit before the ELC. They had no locus standi to file the suit. A suit instituted by a person without the legal capacity is a nullity ab initio and is unsustainable. It is noteworthy that the limited grant of letters of Administration Ad Litem obtained on 29th March 2007, is inconsequential since it was not capable of curing a suit that was a nullity ab initio. For avoidance of doubt, the limited



grant of letters of Administration Ad Litem obtained on 29th March 2007, 7 years after filing the suit is inconsequential and of no effect, and, it was not capable of curing a suit that was a nullity ab initio. On this ground alone, this appeal succeeds.

28. It is also a fact that letters of administration intestate have never been taken out by any of deceased's dependants, but that notwithstanding, a purported "correction" of the deceased's name in the Lands and Registry was effected. Kihanya Gichuri who is now deceased was registered in the place of the deceased's on the assertion that he was one and the same person as the deceased. It is this change of name that the learned judge held was effected fraudulently. The question is whether the appellants should be allowed to benefit for the said registration. In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri*, - Civil Appeal No. 6, 26 & 27 of 2011, this Court held,

"This Court is a Court of law and a Court of equity; equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property".

29. In our view, there are critical issues which require proper adjudication and which we could not have delved into owing to our finding on locus standi. Accordingly, we find that the interests of justice will be served by the following order which we hereby issue:

a. The appellants' appeal be and is hereby allowed.

The respondent's suit before the ELC being ELC No. 814 of 2000 is hereby struck out for want of locus standi to institute the proceedings.

c. For the interests of justice and in order to have the dispute determined on merits, the respondents are hereby granted leave to institute fresh proceedings before the ELC.

d. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

S. ole KANTAI

JUDGE OF APPEAL

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F. TUIYOTT

JUDGE OF APPEAL

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J. MATIVO

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

