



REPUBLIC OF KENYA



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**Rugiri v Kinuthia & 3 others (Civil Appeal E420 of 2022)
[2024] KECA 1601 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1601 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E420 OF 2022
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA
NOVEMBER 8, 2024**

BETWEEN

JOSEPHAT GACHERU RUGIRI APPELLANT

AND

LOISE GACHIKU KINUTHIA 1ST RESPONDENT

THE LAND REGISTRAR KIAMBU 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

AMOS KIBATA GITHEKI 4TH RESPONDENT

(Being an appeal against the whole judgment and decree of the Environment and Land Court of Kenya at Thika (L. Mbugua, J.) dated 18th March, 2021 by (L. Gacheru, J.) in Thika ELC No. 856 of 2017 formerly ELC Civil Case No. 1363 of 2013)

JUDGMENT

1. A brief account of the facts which triggered this prolonged litigation is vital in order to suitably contextualize the issues pressed in this appeal. Luckily, this history is either uncontroverted or common ground. For example, it is undisputed that land parcel number LR. No. Kabete/Lower Kabete/43 was family land. The family members were Felix Kang'the alias Francis Felix Kang'ethe alias Kang'the Mbithi, John Kinuthia Mbithi and Margaret Njambi Mbithi, who are all deceased. It is common ground that adjacent to this parcel of land was land parcel number L.R. No. Kabete/Lower Kabete/47 measuring 3.8 acres which was registered in the name of John Kinuthia Mbithi on 3rd August, 1962. A title deed to that effect was issued on 6th June, 1968. It is this parcel of land that is the subject of this prolonged litigation
2. The dispute can be traced to a claim which was initiated by Margaret Njambi Mbithi at the Land Disputes Tribunal, seeking a share from L.R. No. Kabete/Lower Kabete/43 and L.R. No. Kabete/



Lower Kabete/47. After hearing the dispute, the tribunal's award was filed at the Kikuyu SRM Miscellaneous Application No. 17 of 1998. On 3rd December, 1998, the award was adopted as an order of the court as follows:

“That the elder's award filed in this Court on the 14th August, 1995 awarding Kabete/ Kabete/43 in the manner following:

- i. Francis Kangethe 1.7 acres
- ii. Edward Kinuthia 1.5 acres
- iii. Margaret Njambi Mbithi 1.00 acres

be and is hereby made a judgment of this Honourable court.

That individual allocations be based on where the homes are built.

That there be no order with regard to plot No. Kabete/Kabete/47 as the same was rightly purchased by the late Kangethe Mbithi with his own personal money”. (Emphasis added)

3. {}It is the last part of the above decree relating to Kabete/ Lower Kabete/47 which exacerbated the dispute. On 10th December, 1998, the title for the said parcel was registered in the name of Kangethe Mbithi. On 23rd July, 2001, Margaret Njambi Kangethe and Edward Mbithi Kangethe (deceased) obtained a grant of letters of administration in respect of the estate of Felix Kangethe in Succ. Cause No. 1449 of 2000. On the strength of the said grant, L.R. No. Kabete/Lower Kabete/47 was transferred into their names. This transfer is reflected as entry no. 8 of the green card. Thereafter, the said land was transferred to Edward Mbithi Kangethe (deceased) and a title was issued to him on 6th August, 2001. He sold the land to Amos Kibata Githeko (the 4th respondent) who subdivided the land into 3 parcels namely, Kabete/Lower Kabete/3162, 3163 and 3164. On 31st August, 2012, the titles for the said parcels were issued in his favour, and thereafter, he sold the three parcels to Josephat Gacheru Rugiri (the appellant) and the parcels were transferred to him on 24th February, 2017.
4. A dispute arose concerning the ownership of LR. Nos. {}Kabete/Lower Kabete 3162, 3163 and 3164 between the 4th respondent and Loise Gachiku Kinuthia (the 1st respondent). By a plaint dated 10th September, 2013, the 4th respondent filed Nairobi ELC Civil Case No. 1363 of 2013 against Loise Gachiku Kinuthia asserting that she was the registered proprietor of the said parcels of land, having purchased the same in year 2010 from Edward Mbithi Kangethe (Deceased). He sought the following orders:
 - a. A permanent injunction restraining the defendant from invading, trespassing, alienating or in any way howsoever interfering with the plaintiff's property(sic) known as land reference Number Kabete/L. Kabete/3162, Kabete/L. Kabete/3163 and Kabete/L. Kabete/3164.
 - b. An order compelling the defendant to give vacant possession of land reference numbers Kabete/L. Kabete/3162, Kabete/L. Kabete/3163 and Kabete L. Kabete/3164 to the plaintiff and in default eviction do issue.
 - c. Costs of this suit and interest thereon.
 - d. Any other or further relief as this court may deem fit.
5. The 1st respondent filed a statement of defence and counter-claim on 6th December, 2013 and added the Honourable Attorney General and the Land Registrar Kiambu into the suit as the 2nd and



3rd respondents respectively. Pursuant to a court ruling delivered on 6th November, 2018, the 1st respondent in the

{counter-claim filed an amended counter-claim that included Josphat Gacheru Rugiri (the appellant) as the 4th defendant. The 1st respondent pleaded that the 4th respondent was not a bona fide purchaser of L.R. No. Kabete/Lower Kabete/47 and the titles were obtained through fraud and misrepresentation as more specifically particularized in paragraph 18 of her statement of defence and counter-claim. In the counter-claim, the 1st respondent contended that she has been in peaceful occupation of L.R. No. Kabete/Lower Kabete/47 since 1968 as a beneficiary of her late husband, John Kinuthia Mbithi. Her prayers as set forth in the counter-claim are as follows:

- a. An order compelling the 3rd defendant in the counterclaim to cancel the registration and transfer of Kabete/Lower Kabete/47 in the 1st defendant in the counter claim favour (sic) and any subsequent sub- division.
 - b. An order directing the 3rd defendant to cancel the registration of entries of Kangethe Mbithi, whose entry was made on 10th December, 1999, the entry of Edward Mbithi Kangethe and Margaret Njambi Kangethe and the entry of Edward Mbithi Kangethe made on 7th August, 2001 on the title number Kabete/Lower Kabete/47.
 - c. An order directing the 3rd defendant to cancel the entry of Edward Mbithi Kangethe and all other subsequent entries by virtue of revocation of the grant in Succession Case No. 1449 of 2000 and the registration of the administrators appointed by the court in that cause.
 - d. An order directing 3rd defendant to cancel all entries of transfer that have been registered the suit premises(sic) title number Kabete/lower kabete/3162, Kabete/Lower Kabete/3163, Kabete/Lower Kabete/3164 transferring the same to Josphat Gacheru Rugiri.
 - e. A prohibitory order against any dealings relating to Kabete/Lower Kabete/47 and the subsequent subdivided tittles namely Kabete/Lower Kabete/3162, Kabete/Lower Kabete/3163 and Kabete/Lower Kabete/3164.
 - f. A declaration that the plaintiff in the counter claim is the rightful beneficiary and/or owner of title number Kabete/Lower Kabete/47.
 - g. {Costs of the suit and of the counter claim.
6. In his amended reply to defence and defence to the counter-claim filed in court on 16th July, 2020, the 4th respondent maintained that he conducted due diligence before buying L.R. no. Kabete/Lower Kabete/47. He contended that the decree issued in Kikuyu Miscellaneous Civil Application No. 17 of 1998 determined that the property was purchased by Kangethe Mbithi -deceased, that it formed part of his estate and was vested in his son, Edward Mbithi Kangethe (the deceased). He also contended that as at the time he bought it, all the restrictions on the land had been removed.
7. The Hon. Attorney General (on behalf of himself and the 3rd respondent) filed their defence dated 5th February, 2014 essentially denying the contents of the counter-claim.
8. The appellant filed his statement of defence on 22nd November, 2018 principally maintaining that he conducted due diligence {before buying the said parcels of land from the 4th respondent. He averred that it was a term of the sale agreement, inter alia, that the 4th respondent would grant him vacant possession of L.R. Nos. 3162,



3163 and 3164 but the latter did not comply, prompting him to file Milimani CMCC No. 6798 of 2016, Josephat Gacheru Rugiri vs. Amos Kibata Githeko and obtained an eviction order against the 4th respondent. He maintained that he learnt about the 1st respondent's claim to the land when the latter applied to be joined in Milimani Civil Suit No. 6798 of 2016 which gave rise to the appeal in Thika ELCA No. 856 of 2017. He denied the particulars of fraud set out in the 1st respondent's counter-claim and he sought for its dismissal.

9. Upon hearing the parties, the learned judge in the impugned judgment considered the following issues:

- (i) Whether the transfer of L.R. No. Kabete/Lower Kabete/47 from John Kinuthia Mbithi to Kangethe Mbithi and the subsequent transfer to Edward Mbithi Kangethe, then to the plaintiff and finally to 4th respondent were lawful;
- (ii) Whether the plaintiff and 4th respondent were innocent purchasers; and
- (iii) Whether the 1st respondent had capacity to sue and be sued.

10. Determining the first issue whether the transfer of the LR. No.

Kabete/Lower Kabete/47 from John Kinuthia Mbithi to Kangethe Mbithi and the subsequent transfer of the said land to Edward Mbithi Kangethe, then to appellant and finally to 4th respondent was lawful, Mbugua, J. held:

“116. What resonates from the laid out legal regime is that the indefeasibility of a title can be challenged. In the instant case, the decree in Kikuyu Case No. 17 of 1998 was unlawfully misrepresented and implemented to divest the rights and interests in the suit parcel no.47 from John Kinuthia to his brother Kang'ethe Mbithi both deceased. The subsequent title acquired by Edward Mbithi Kangethe (Deceased) and all other titles are therefore invalid as they are tainted with illegality. The same ought to be cancelled.”

11. Regarding the issue whether the appellant and 4th respondent were innocent purchasers, the learned Judge said:

129. The current suit is certainly not public land, but how do you buy a property with numerous restrictions in place where you cannot even step on the land due to the hostilities emanating from its occupants? How comes that plaintiff filed a suit to evict defendant in 2012 immediately he obtained the title to the land in the year 2012? And when it became apparent that defendant (Loise) was staying put, plaintiff sold the land to 4th defendant who was his own witness in the transaction of 12.8.2010, then the said 4th defendant sued the plaintiff.

130. It is not lost to this court that the transactions of the plaintiff (Amos Kibata) and 4th defendant including sale and transfer of the suit land as well as the filing of the case against each other was being done during the pendency of this suit. This is again

another pointer that the two litigants are not innocent.”

12. Concerning the issue whether the 1st respondent had capacity to sue and be sued, the learned judge had this to say:

133. It is not lost to this court that defendant (Loise) did take deliberate steps to pursue the issue of a grant in respect of her husband's estate. She acquired the grant on 14.6.1983 (see first item in her list dated 6.3.2019), though the same was apparently not confirmed and the property of her husband became the subject of numerous litigations in years to come.



134. Having established that plaintiff and 4th defendant acted in cahoot with each other in their transactions and having established that the root of the title as from the time it was registered in the name of Kangethe Mbithi, was tainted with illegality, then the logical conclusion to make is that the land should be in the hands of its beneficial owner who is the defendant in the main suit and a plaintiff in the counter claim (Loise).”
13. Aggrieved by the above judgment, the appellant lodged this appeal seeking to set it aside and substitute it with an order that the 1st respondent be evicted from L.R. No. Kabete/Lower/Kabete/47. In his memorandum of appeal, the appellant listed a whopping twenty-four grounds of appeal. The appellant’s counsel, Mr. Masore, rationalized the prolix grounds into four clusters as follows:
- a. Whether the learned judge erred in her conclusion that the decisions in Kikuyu SRM Miscellaneous Application No. 17 of 1998 and the allocation of Kabete /Lower/Kabete/47 in the matter of the estate of Francis Felix Kangethe (deceased) did not determine the ownership of Kabete/Lower/Kabete/47 (grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17 and 22);
 - b. Whether the learned judge erred in giving judgment for the 1st respondent who sued on the basis of being a beneficiary of her husband’s estate, when she did not have locus standi to do so for lack of grant of representation, (ground 20);
 - c. Whether the appellant was an innocent purchaser and that the court was obligated to protect the indefeasibility of his title (grounds 13, 14 and 15), and
 - d. Whether the 1st respondent did not prove her counterclaim, (grounds 23 and 24).
14. Mr. Masore faulted the trial judge for ignoring various aspects of evidence and submitted that Mary Njambi’s suit before the elders was a claim for both Kabete/Lower Kabete/43 and 47 as captured on the decree and not for only Kabete/Lower Kabete/43. The elders award was filed in court on 14th August, 1998 and adopted as an order of the court in SRM Miscellaneous Application No. 17 of 1998 on 3rd December, 1998 and no appeal was preferred against the elders’ award or against the Resident Magistrates’ Court’s decision, and that any appeal to the Provincial Appeals Tribunal, if any, was superfluous in light of the Resident Magistrates’ Court’s judgment.
15. Counsel faulted the learned judge’s holding that the finding on L.R. No. Kabete/Lower Kabete/47 by the elders was merely an obiter dictum when in fact the tribunal was hearing a determination on both L.R. No. Kabete/Lower Kabete/43 and 47 in respect of which evidence was adduced before the tribunal to the effect that the late Kangethe Mbithi purchased L.R. No. Kabete / Lower Kabete/47 with his own money. Further, counsel faulted the learned judge for holding that there was a letter from the tribunal seeking to correct the errors by substituting the name of Kangethe Mbithi with that of John Kinuthia when it is trite law that a court’s judgment cannot be set aside or reviewed by writing a letter to the court clarifying the judgment. It was his submission that it was necessary to apply for review under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.
16. Regarding the revocation of the grant issued in HC Succ. No. 199 of 2000 to Edward Mbithi Kangethe and Margaret Njambi Mbithi on 29th December, 2000 and confirmed on 23rd July, 2001, Mr. Masore



argued that the revocation was limited to removal of the names of the administrators to be replaced with a new administrator, which did not affect the shares and allocations. Consequently, the learned judge erred in granting orders which were inconsistent with orders issued by a court of concurrent jurisdiction in Nairobi HCSC No. 1499 of 2000.

17. {}Mr. Masore also submitted that the issue raised by the 1st respondent ought to have been raised in her counter-claim in Nairobi HC Succ. No. 1499 of 2000 which later became Kiambu HC Succ. No. 118 of 2016. Consequently, the learned judge acted contrary to the mandatory provisions of section 34 of the Civil Procedure Act which stipulates that all questions arising between parties to a suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. Consequently, the learned judge lacked the jurisdiction to entertain the 1st respondent's counter-claim.
18. Concerning the 1st respondent's locus standi, Mr. Masore contended that the 1st respondent had no locus standi to sue on behalf of her husband's estate without a grant of representation. He submitted that the 1st respondent's attempt to apply for grant of letters of administration in respect of her late husband's estate after she failed to show cause why her application should not be dismissed. Mr. Masore cited this Court's decision in *Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama* [2014] eKLR in support of the proposition that a suit filed prior to obtaining letters of administration in respect of a deceased's estate ought to be struck out.
19. {}Submitting on the question whether the appellant was an innocent purchaser, Mr. Masore contended that all the restrictions registered as a result of Kikuyu SRMCC No. 17 of 1998 or HCSC No. 1499 of 2000 were rightly removed and when the appellant was in the process of evicting the 4th respondent and/or his agents from the land, he was confronted by the 1st respondent who was claiming ownership of the same land. He maintained that in the circumstances of this case, any purchaser cannot be described as innocent. Lastly, Mr. Masore submitted that the 1st respondent never adduced evidence to support the alleged collusion with the 3rd respondent to fraudulently transfer the said parcels of land and cited this Court's decision in *Kinyanjui Kamau vs. George Kamau* [2015] eKLR in support of the proposition that allegations of fraud must be strictly pleaded and proved.
20. Mr. Gitonga, learned counsel for the 4th respondent, supported the appeal and urged this Court to allow it. He questioned the trial court's jurisdiction to determine succession related matters and argued that the court's jurisdiction was spent after it determined that the property belonged to the 1st respondent's late husband.

He maintained that in the absence of an appeal and/or application for review of the decree issued in Kikuyu SRMC Misc. Application No. 17 of 1998, the learned judge lacked jurisdiction to interfere and/or disturb the said decree.
21. {}As to whether the appellant and the 4th respondent had a good title, Mr. Gitonga maintained that the appellant purchased the land from the 4th respondent, who had purchased the same from the late Edward Mbithi Kangethe who was the son of Francis Felix Kangethe Mbithi and a beneficiary of his estate. He added that Edward Mbithi Kangethe obtained a grant of letters of administration intestate in Nairobi HCSC 1499 of 2000 which was subsequently confirmed on 23rd July 2001 and by the time the grant was revoked on 18th November 2003, the land had been transmitted to the late Edward Mbithi Kangethe and therefore the learned judge erred in holding that the revocation of the grant also cancelled the transmission of the land to the late Edward Mbithi Kangethe. Lastly, Mr. Gitonga submitted that



the land was transferred to the appellant in absence of any restriction in the green card and thus the appellant acquired a good title from the late Edward Mbithi Kangethe.

22. The 4th respondent opposed the appeal. Learned counsel Mr. F. N. Njanja combined grounds 1, 2, 3, 4, 5, 6, 7, 9 and 10 of the

{}memorandum of appeal and argued that the decree allowed the transfer of the land from John Kinuthia Mbithi (the 1st respondent's late husband) to Kangethe Mbithi, who was also deceased, and contended that there is no explanation why the property was transferred to a dead person, which was illegal and irregular. He submitted that the said transfer was effected through misrepresentation and fraud which this appeal seeks to sanctify.
23. Submitting on the arguments that the impugned judgment contradicted the court decisions in Kikuyu SRM CC No. 17 of 1998 and HC Succ. Cause No. 1499 of 2000 contrary to section 34 of the *Civil Procedure Act* (grounds 8, 16 & 22), Mr. Njanja contended that the decree in Miscellaneous Application No. 17 of 1998 formed the basis of the fraudulent transfer of the suit parcel by one Edward Mbithi Kangethe to his already deceased father. Consequently, the learned judge did not err when she found that the fraudulent transfer did not disturb the ownership rights of John Kinuthia Mbithi, nor did it divest his rights.
24. Submitting on the argument that the revoked grant in Nairobi HC Succ. No. 1499 of 2000 only affected the administrator not the distribution of the estate (grounds 11, 12 and 13). Mr Njanja dismissed the said argument as mischievous and asserted that the revocation affected both the grant and the purported

{}distribution of the land. He argued that notwithstanding the revocation, the said Edward Mbithi Kangethe purported to transfer the property to the 4th respondent, and it was that transfer which was subject to the proceedings before the ELC wherein the 4th respondent secretly sub-divided the land and transferred it to the appellant during the pendency of the said suit and various cautions and restrictions duly registered against the title by the 1st respondent. Counsel stressed that the appellant did not produce a court order authorizing the transfer, therefore, it was apparent that the appellant colluded with Edward Mbithi Kangethe to transfer the land.
25. Regarding the removal of the restrictions/inhibitions/caveats at the lands office, (grounds 14, 15, 17, 18, 19 & 21), Mr. Njanja contended that the appellant failed to produce a court order authorizing the removal. He maintained that the learned judge rightly concluded that the appellant and the 4th respondent did not demonstrate that they were bona fide purchasers from Edward Mbithi Kangethe and that the 4th respondent was part of a well-orchestrated fraudulent scheme to illegally transfer the land.
26. Submitting of the issue of locus standi, (ground 20), Mr. Njanja submitted that the 4th respondent was the one who sued the appellant in the ELC and the learned judge rightfully held that the

{}1st respondent had the locus standi to fight for her family property as a beneficial owner as well as the administrator of the estate of her late husband even though that grant had not been confirmed. Further, no evidence was adduced to show that the grant had been revoked. Counsel further submitted that under Article 22 of *the Constitution*, a person can sue on behalf of others. Counsel dismissed the accusation that the judgment went against the evidence and the law (grounds 23 and 24) as misplaced and maintained that the impugned judgment was sound and based on the evidence adduced.
27. This being a first appeal, it is our duty to analyze and re-assess the evidence on record and arrive at our own conclusions. (See *Selle vs. Associated Motor Boat Co.* [1968] EA 123). However, this Court will not lightly differ from the findings of fact of a trial judge who, unlike us, had the benefit of seeing and



hearing the witnesses, and we will only interfere if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in arriving at the findings. (See *Ephantus Mwangi vs. Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).

28. We have considered the evidence adduced before the trial court, the judgment, submissions by counsel and the cases and the law cited. It is noteworthy that the appellant was joined in the

proceedings by the 1st respondent vide the amended counter-claim dated 6th November 2018. We also note that the appellant has raised a jurisdictional issue questioning the 1st respondent's locus standi. The same issue was also raised before the Environment and Land Court and the learned trial judge had the following to say:

131. In paragraph 47 of defendant's counterclaim

(Loise) she seeks the following orders:

"A declaration that the plaintiff in the counterclaim is the rightful beneficiary and/or owner of the title number Kabete/Lower Kabete/47".

132. Thus defendant is claiming the suit land in a beneficial capacity and not as a legal representative of her deceased husband. In paragraph 31 of her counter claim, she states that she had peacefully occupied the suit land no. 47 since 1968. The plaintiff and 4th defendants had to file other suits to have her evicted which they successfully managed to do albeit temporarily in year 2016.

133. It is not lost to this court that defendant (Loise) did take deliberate steps to pursue the issue of a grant in respect of her husband's estate. She acquired the grant on 14.6.1983 (see first item in her list dated 6.3.2019), though the same was apparently not confirmed and the property of her husband became the subject of numerous litigation in years to come.

134. Having established that plaintiff and 4th defendant acted in cahoot with each other in their transactions and having established that the root of the title as from the time it was registered in the name of Kangethe Mbithi, was tainted with illegality, then the logical conclusion to make is that the land should be in the hands of its beneficial owner who is the defendant in the main suit and a plaintiff in the counter claim (Loise)."

15. There is no dispute that L.R. No. Kabete /Lower Kabete/47 was registered in the name of the 1st respondent's late husband, one John Kinuthia Mbithi since 1968. Pursuant to the Land Disputes Tribunal's award which was adopted as a judgment of the court on 3rd December 1998 and a decree issued thereof in Kikuyu SRM Miscellaneous Application No. 17 of 1998, the said land was registered in the name of Kangethe Mbithi on 10th December 1999. Thereafter, Margaret Njambi Kangethe and Edward Mbithi Kangethe (deceased) obtained a grant on 23rd July, 2001 in respect of the estate of Felix Kangethe in Succ. Cause No. 1449 of 2000. This paved way for the transfer of the land into their names as reflected in entry no. 8 of the green card. The land was then transferred to Edward Mbithi Kangethe (deceased), and a titled was issued to him on 6th August, 2001. Thereafter, he sold the land to the 4th respondent who subdivided it into 3 parcels namely, Kabete/Lower Kabete/3162, 3163 and 3164. He was issued with titles for the said parcels on 31st August, 2012. He then sold the three pieces to Josephat Gacheru Rugiri (the appellant), who obtained titles on 24th February, 2017.

17. As alluded to earlier, locus standi is a jurisdictional issue which is a point of law which can be entertained at this appellate stage.



This position was appreciated by this Court in *Kenya Port Authority vs. Modern Holding (EA) Ltd* [2017] eKLR thus:

{“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.”

17. Accordingly, we will first address the issue whether the 1st respondent had the capacity to institute the amended counter-claim which is the basis upon which the instant appeal was filed. 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.
18. Responding to the appellant’s argument that the 1st respondent had no locus standi to institute the suit against them, the 1st respondent maintained that it is the 4th respondent who dragged her to court, and that the appellant supported the 4th respondent’s suit. Additionally, the 1st respondent contended that as a beneficial owner she had the locus standi to fight for her family’s property and that no evidence was tendered to demonstrate that the grant issued to the 1st respondent had been revoked.
19. 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 vs. 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”.
20. Locus standi is cardinal in civil proceedings because without it, 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*, Lexis Nexis 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.”
21. Locus standi 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. As stated earlier in this judgment, the land in question belonged to a deceased person before it was transferred to his deceased brother. Therefore, it was a prerequisite for the 1st respondent to obtain a grant of letters of administration before instituting the suit and/or counter-claim, whose subject matter was land which was registered in her late husband’s name.
22. {Section 2 of the *Civil Procedure Act* 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.

23. Section 82 of the *Law of Succession Act* confers the personal representative 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 this 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 representative to the estate. Such appointment under the *Law of Succession Act* can only be by way of obtaining a full grant or a grant limited for purposes of instituting or defending a suit. We have gone through the record and we note that the 1st respondent did not attach a confirmed grant of letters of administration or a limited grant.
24. {}It is noteworthy that in her judgment, the learned judge held that as a beneficial owner to her late husband's land, the 1st respondent had the locus standi to fight for her family's property. We beg to differ. 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 vs. Joash Ochieng Ougo & Another* [1982-88] 1 KAR and *Trouistik Union International & Another vs. Jane Mbeyu & Another* Civil Appeal No. 145 of 1990). It follows, therefore, 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 a limited grant limited for the purpose of filing or defending the suit.
25. 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."
26. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 ALL ER 1169, the court held that if an act is void then in law it is 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 1st respondent to legally institute the suit on behalf of the estate of her deceased husband who was the registered proprietor of the land before it was transferred pursuant to the award of the Land Disputes Tribunal which was adopted as a judgment of the court on 3rd December 1998 and a decree was issued in *Kikuyu SRM Miscellaneous Application No. 17 of 1998*, she ought to have sought and obtained a confirmed grant of letters of administration or a limited grant to enable her to institute the counter-claim on behalf of the deceased's estate. Consequently, she lacked the locus standi to institute the counter- claim before the ELC. A suit instituted by a person without the legal capacity is nullity ab initio and is unsustainable. The ELC ought to have struck out the 1st respondent's claim, as we hereby do. On this ground alone, this appeal succeeds. See *Kihanya & 4 Others vs. Gichuri & Another* [2024] KECA 852 (KL).
28. It would be remiss for us not to mention that the learned judge in the impugned judgment stated that it was apparent that the decree in *Kikuyu SRMMCC No. 17 of 1998* was unlawfully mis- represented and implemented to divest the rights and interests in



L.R. No. Kabete/Lower Kabete/47 from John Kinuthia to his

brother, Kang'ethe Mbithi, both deceased, and, the subsequent title acquired by Edward Mbithi Kangethe (Deceased) and all other titles are therefore invalid as they are tainted with illegality. The question lingering in our minds is whether the appellant and the 4th respondent should be allowed to benefit from the said registration in light of the 1st respondent's counter-claim being defeated for want of locus standi. In *Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri* [2014] eKLR, 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 orders, which we hereby issue:
- a. The appellant's appeal be and is hereby allowed.
 - b. The respondent's amended counter-claim dated
 - c. For the interests of justice and in order to have the dispute determined on merits, the 1st respondent upon regularizing her locus standi is hereby granted leave to institute fresh proceedings before the ELC.
 - d. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

{D.K. MUSINGA, (P.)

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JUDGE OF APPEAL ALI – ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

