



**Mwakivonje (On his Behalf and on Behalf of the Estate of Kassim Ali Nzimu, Salim Mwatenga, Jumaa Vwinyu and Mwamoyo Moyo – Deceased) v Mwakaonje (Environment & Land Case E013 of 2023) [2024] KEELC 3794 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3794 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E013 OF 2023**

**AE DENA, J**

**APRIL 26, 2024**

**BETWEEN**

**SAID MWAKIVONJE (ON HIS BEHALF AND ON BEHALF OF THE ESTATE OF KASSIM ALI NZIMU, SALIM MWATENGA, JUMAA VWINYU AND MWAMOYO MOYO – DECEASED) ..... PLAINTIFF**

**AND**

**RAMADHANI KAONJE MWAKAONJE ..... DEFENDANT**

**RULING**

1. The preliminary objection subject of this ruling is dated 3/10/2023 and the same seeks that the court strikes out the suit herein on the ground that;

SUBPARA \*\*a.

The Plaintiff has instituted this suit without authority as provided under paragraph 82[a] of the [Law of Succession Act](#) Cap 160 laws of Kenya.

2. The preliminary objection was dispensed by way of written submissions. The Defendant/Applicant's submissions were filed before court on 6/11/2023. On 18/01/24 Mr. Rono informed the court that Ms. Ogotti had intimated to him that she would not file submissions. The court has considered the submissions on record.
3. The preliminary objection herein posits the Plaintiff lacks capacity/locus standi to institute the suit before court. The main issue for determination therefore is whether the ground set out in the notice of preliminary objection is a point of law and if so whether the same is merited.



4. What constitutes a Preliminary Objection is set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, where it was held 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

5. In **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** the court elaborated the foregone legal position whereby Mwita J. stated that: -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

6. Also in the case of **Oraro v Mbaja [2005] 1 KLR 141** the court held as follows:

“...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 process 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....”

7. Having perused the grounds for the application and the pleadings I note that there are no issues of fact to be ascertained in proof of the grounds raised. All matters raised are premised on the law and I therefore find that the preliminary objection is properly before this court.

8. In the case of **Elijah Nderitu Gachaga v Francis Gakuu Gachaga & 2 others [2019] eKLR** the court in addressing the issue of locus standi had this to say; -

Black’s law dictionary defines locus standi as the right to bring an action or to be heard in a given forum. The forum includes a Court of law. In *Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR* the Court of Appeal held that;

“.....a litigant is clothed with locus standi upon obtaining a limited or full letter of administration in cases of intestate succession.....”



9. The Court of Appeal also rendered itself on the issue of locus standi in case of **Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730** where it was held that;

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone.”

10. Additionally in the case of **Julian Adoyo Ongunga & Another —Vs- Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased) eKLR** *Mrima J\_\_\_\_\_ described a party filing a suit without an Ad Litem as follows;*

“..Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain the suit even where a valid cause of action exists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is 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...”

11. Arising from the foregoing case law it is therefore a mandatory requirement of law that a litigant should have obtained a limited grant ad litem or Grant of letters of Administration Intestate before filing suit on behalf of the estate of a deceased. Also see **Elizabeth Ndulu Mathuva & 2 Others v Joseph Mbiu Muthiani & Another (2008) eKLR**.

12. The first port of call will be to review the Plaint filed by the Plaintiffs to appreciate the capacity under which these proceedings have been brought before this court. At paragraph 3 of the Plaint it is stated that **“The Plaintiff is the registered proprietor of title No. Kwale/Golini 1304 and registered together with 4 others, now deceased.”** It is averred that in the year 2010 the Defendants illegally buried his brother on the said parcel. Following the said acts of trespass the Plaintiff chaired a family meeting to safeguard his interest and the interest of the other deceased registered proprietors. The title of the suit further reads it has been filed by the Plaintiff on his own behalf and on behalf of the estate of the other deceased proprietors.

13. It is clear from the pleadings the suit has on one limb been filed on behalf of the estate of the other deceased proprietors. The Defendant has based his objection on the provisions of Section 82(a) of the Law of Succession Act which provides as follows;

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. 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 for his personal representative;

14. The import of the above provisions is that personal representatives can commence proceedings for actions accruing from a deceased estate. Firstly the representation is conferred by law and which is through a confirmed grant of letters of administration or limited grant ad item for purposes of commencing the proceedings. I have perused the proceedings and have not come across any limited grant ad litem which gives the Plaintiff the power to institute suit on behalf of the deceased persons herein as a legal representative of their estate. I have also not seen any letter of authority by the personal representatives of the deceased registered proprietors consenting to the present proceedings. I however



came across an order issued by the Kadhis court in Kwale Kadhi Succession No E151 of 2021, the same did not however indicate who the legal representative to the estate was even though the petitioner therein was one Mwarandu Juma Rangombe. In the present proceedings I have also not seen the authority from the said beneficiaries.

15. Guided by the provisions of the law and the case law cited herein, it is my finding that the Plaintiff lacks the legal capacity to institute this suit on behalf of the estate of the other deceased proprietors including their beneficiaries. I have noted the submissions by Mr. Rono learned counsel for the Defendant with regard to consent among other provisions of the Law of Succession Act. But for me the absence of a grant of letters of administration or limited grant ad litem alone renders the suit incompetent as regards the estate of the other registered proprietors who are deceased.
16. I have also noted from the Plaint as highlighted, the suit has been brought in two limbs, by the Plaintiff in his own interest as a registered owner and on behalf of the estate of the other 4 proprietors. Considering the above finding that the Plaintiff lacked capacity in respect of the estate of the other proprietors, what would be the fate of the Plaintiffs personal interest? The Defendant has invited the court to strike out the entire suit and that in any case it has been brought as a representative suit. It's the courts view that the entire suit cannot collapse on the basis of lack of letters of administration on the part of the estate of the rest of the proprietors. I say so because the Plaintiff is a registered proprietor who is affected by the alleged acts of the Defendant and is entitled to access justice as envisaged under article 48 of the Constitution of Kenya 2010. For me the Plaintiffs suit against the Defendant in his individual capacity as one of the registered proprietors of Kwale/Golini/1304 is properly before the court.
17. The upshot of the foregoing is that I am inclined to allow the preliminary objection albeit partly and make the following orders to dispense of the same;-

SUBPARA 1.

The proceedings as relates the estate of KASSIM ALI NZIMU, SALIM MWATENGA, JUMAA VWINYU and MWAMOYO MOYO are hereby struck out. The suit shall proceed in respect of the Plaintiff as against the defendant.

SUBPARA 2.

Costs shall be in the cause.

Orders accordingly.

Ruling Dated Signed and delivered this 26<sup>th</sup> day of April 2024.

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**A.E DENA**

**JUDGE**

In the presence of;

No appearance for the Plaintiff

No appearance for the Defendant

Mr. Daniel Disii – Court Assistant

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