



**Gicovi v Masinde (Sued as the Administrator of the Estate of Nelson Gatimu Kamaitha) & 5 others
(Environment & Land Case 15 of 2023) [2024] KEELC 5974 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 5974 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 15 OF 2023**

**A KANIARU, J
APRIL 24, 2024**

BETWEEN

ONESMUS MWANIKI GICOVI PLAINTIFF

AND

**PERSIAH MUTHONI MASINDE (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF NELSON GATIMU KAMAITHA) 1ST DEFENDANT**

MARY WAMBOGO GATIMU 2ND DEFENDANT

ROSELINE NJURA GATUMU 3RD DEFENDANT

CHARLES KARIUKI GATUMU 4TH DEFENDANT

ROGERS JOHNNIE KAMAITHA MUREITHI 5TH DEFENDANT

DAUDI NDATHA GITAU 6TH DEFENDANT

RULING

1. What is before me for determination is a Preliminary objection dated 12.07.2023 and filed on 13.07.2023. The objection has been brought by the 1st, 2nd, 3rd, 4th and 6th defendants on the following grounds:
 1. The plaintiff lacks the necessary locus to institute the instant suit as he has not obtained a grant of representation to the estate of Nelson Gatimu Kamaitha (deceased).
 2. The plaintiff's suit as filed is therefore incompetent and should be struck out with costs to the 1st, 2nd, 3rd, 4th and 6th defendants.
2. The Preliminary Objection was disposed of by way of written submissions. The plaintiff filed his submissions on 17.01.2024 whereas the 1st, 2nd, 3rd, 4th and 6th defendant's submissions were filed on 06.11.2023.



3. The 1st, 2nd, 3rd, 4th and 6th defendants gave brief facts of the case. They then submitted that their preliminary objection meets the required threshold as was laid down in the case *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* 1969 EA 696. That their preliminary objection is based on a point of law since without legal capacity, a party has no basis of filing or defending a suit and such a suit is in law incompetent, null and void.
4. That Section 82 (a) of the *Law of Succession Act* (Cap 160 Laws of Kenya) lists the powers of a personal representative to include “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 personal representative.” That it is clear from the plaint, the plaintiff’s statement and those of his witnesses, and other supporting documents, that the plaintiff’s suit is in respect of the estate of the deceased Nelson Gatimu Kamaitha which comprises land parcels no. Ngandori/Kirigi/355 and Gaturi/Weru/199.
5. That the 1st, 2nd, 3rd, 4th and 6th defendants are not the registered owners of the suit land parcels. They are beneficiaries as decreed by the court in Embu High Court Succession cause no. 13 of 2019. That a party filing a suit in respect of a property comprising the estate of a deceased person must obtain a limited grant or full grant to acquire legal capacity or locus standi. That a party without locus standi in a civil suit lacks the right to institute and/or maintain a suit even where a valid cause of action subsists. That the impact of a party in a suit without locus can be equated to that of a court acting without jurisdiction.
6. Further that the issue of locus standi becomes a serious one where the matter involves the estate of a deceased person where there are several other beneficiaries as is the case herein. They ask that the suit be struck out for these reasons. The cases of *Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 others* (2021) Eklr and *Isaya Masira Momanyi v Daniel Omwoyo* (2017) Eklr both cited in the case of *Edama & 2 others v Edema & 5 others* (2022) were relied on Eklr to support their submissions.
7. The plaintiff on the other hand submitted that the court in the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil case no. 464 of 2000 observed as follows on locus standi:

“Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a court of law.”

And in the case of *Alfred Njau and Others v City Council of Nairobi* (1982) KAR 229 the court 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 to be heard in such and such proceedings.”

8. It was submitted further, that the plaintiff has filed the present suit seeking for a declaration that land parcels no. Ngandori/Kirigi/355 and Gaturi/Weru/199 were held and registered in the name of Nelson Gatimu Kamaitha (deceased) in trust for himself, as the plaintiff and his siblings. That the plaintiff has not instituted the present suit on behalf of the estate of Nelson Gatimu Kamaitha, hence he was not required to obtain a grant of representation to the said estate. That in as much as the suit lands were registered in the name of Nelson Gatimu Kamaitha, the registration was not absolute as, according to the plaintiff, the Anduandiri clan bequeathed the said parcels of land to the deceased so as to cater for his family and that of the plaintiff.



9. That the 1st defendant has been sued in her capacity as the personal representative of the estate of Nelson Gatimu Kamaitha (deceased) as the subject property is still registered in the name of Nelson Gatimu Kamaitha. That the plaintiff has the locus standi to move this court for the reliefs sought which will require a full trial. The case of D.T Dobie Company (Kenya) Ltd v Joseph Muchina & Anor (1980) where it was held that “a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it” was cited and quoted for necessary effect.
10. I have considered the Preliminary Objection and the rival submissions. The issue for determination is whether the Preliminary Objection has merit.
11. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, as follows:

“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 effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a “pure point 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.

12. The brief facts of the case are that Nelson Gatimu Kamaitha is said to be the plaintiff’s paternal uncle. He is said to have been the guardian to the plaintiff and his siblings as he had taken them in as his own children after their father passed away. It is also said the clan bequeathed Nelson Gatimu land parcel Ngandori/Kirigi/355 after land demarcation so as cater for his own family and for the plaintiff’s family. That the plaintiff’s mother was still alive at that time but because women could customarily not hold land, the whole share of the suit land, which was 15 acres, was registered in favour of Nelson Gatimu to hold in trust for himself and the plaintiff’s family. That the clan also bequeathed land parcel Gaturi/Weru/199 to the plaintiff’s father and his brother but the land was also registered in favour of Nelson Gatimu as he was the eldest brother to hold in trust for his three brothers.
13. It is said that Nelson died before subdividing the suit parcels of land and transferring a portion to the plaintiff’s family. The plaintiff filed this suit on his own behalf and that of his siblings seeking a declaration that land parcels no. Ngandori/Kirigi/355 and Gaturi/Weru/199 were held and registered in the name of Nelson Gatimu Kamaitha to hold in trust for himself, his brothers and the plaintiff’s family and for their share to be transferred to the plaintiff to hold in trust for his siblings.
14. The defendants have raised an objection on the ground that the plaintiff has not obtained a grant of representation to the Estate of Nelson Gatimu Kamaitha and that therefore he lacks the locus standi to bring this suit. Locus standi has been defined as “the right or capacity to bring an action or to appear in a court” and its nature being one capable of disposing a suit, it can be said to be a point of law that can be urged in a preliminary manner. The defendants are of the view that the plaintiff ought to have obtained a grant of representation to the estate of Nelson Gatimu Kamaitha before bringing this suit and therefore because he failed to do so, he lacks the capacity to sustain the suit. They also say that the suit as filed is incompetent for that same reason and urge that the same be struck out with costs.



15. I agree with the plaintiff to the extent that according to the pleadings on record, he has instituted the suit on his behalf and that of his siblings. The suit is not on behalf of Nelson Gatimu. The estate of Nelson Gatimu has a legal representative – Persia Muthoni Masinde – who is the 1st defendant herein. There’s no law that requires a party to obtain a grant of representation on behalf of the person they are suing before they can sue them. That is unheard of. The law requires that the legal representative be sued and in this case Persia Muthoni is sued. The court therefore finds that the defendant’s ground of objection as raised in their preliminary objection has no merit. The plaintiff’s suit as presented is competently before the court.
16. Consequently, the preliminary objection dated 12.07.2023 lacks merit and the same is dismissed with costs to the plaintiff.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH APRIL, 2024.

In the presence of Ms Mwinja for 1st, 2nd, 3rd, 4th and 6th defendant, Ms Kimata for plaintiff. Oganda for Juma for 5th defendant.

Court Assistant - Leadys

A. KIANIARU

JUDGE, ELC - EMBU

24.4.2024

