



Chepkurui v Miting & 5 others (Enviromental and Land Originating Summons 13 of 2021) [2024] KEELC 4035 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4035 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 13 OF 2021**

LA OMOLLO, J

MAY 16, 2024

**IN THE MATTER OF THE LAW OF SUCCESSION ACT (CAP 75) LAWS OF KENYA
IN THE MATTER OF THE ESTATE OF KITUR METO (DECEASED)**

AND

IN THE MATTER OF LAND PARCEL NO. KERICHO/KIPSONOI S.S 346

BETWEEN

VERA CHEPKURUI APPLICANT

AND

ELIZABETH CHEPNGENO MITING 1ST RESPONDENT

GRACE CHEPKURGAT MITING 2ND RESPONDENT

STEPHEN KIBET NGENO 3RD RESPONDENT

RICHARD KIMETO 4TH RESPONDENT

ANN CHERUIYOT 5TH RESPONDENT

THE CHIEF LAND REGISTRAR 6TH RESPONDENT

RULING

1. This ruling is in respect of the 4th Respondent’s Preliminary Objection dated 16th January, 2024 which is on the following grounds;

a. That the Applicant lacks the locus standi to bring and maintain the suit before this honorable court.



- b. That the originating summons herein offends the provisions of Section 7 of the *Civil Procedure Act* as the same is res judicata the matter having been heard and determined in Sotik Principal Magistrate's Court Civil Case No. 75 of 2018.
- c. That the originating summons is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.

Factual Background.

2. The Applicant commenced the present proceedings vide the Originating Summons dated 7th December, 2021 and filed on 21st January, 2022.
3. The Applicant seeks the determination of the following questions;
 - a. Whether the title in respect of LR No. Kericho/Kipsonoi S.S/346 belonging to the Kitur Meto (deceased) was still charged to the Settlement Fund Trustees at the time its proprietor died.
 - b. Whether the Respondents colluded and unlawfully and irregularly subdivided the title comprised in LR No. Kericho/Kipsonoi S.S/346 registered in the name of the deceased without undertaking succession proceedings and in absence of a certificate of confirmation of Grant of Letters of Administration.
 - c. Whether the Applicant and other beneficiaries of the estate of Kitur Meto (deceased) were denied their rightful share of the estate of their deceased father by reason of the irregular subdivision and transfer of LR No. Kericho/Kipsonoi S.S/346.
 - d. Whether the titles resultant from the subdivision and closure of LR No. Kericho/Kipsonoi S.S/346 namely LR No. Kericho/Kipsonoi/1711, 1712, 1749, 1750, 1751 and any other subsequent titles thereto should be declared null and void and be therefore cancelled.
 - e. Whether the title in respect of LR No. Kericho/Kipsonoi S.S/346 should be restored to the name of Kitur Meto (deceased) to pave way for succession proceedings.
 - f. Whether the Respondents should bear the costs of this suit.
4. In response to the Originating Summons, the 4th Respondent filed a Replying Affidavit sworn on 28th March, 2023.
5. The 6th Respondent filed Grounds of Opposition which is the subject of this ruling.
6. The matter came up on 31st January, 2024 and the court directed that the Preliminary Objection be canvassed by way of written submissions.
7. The matter was mentioned on 8th March, 2024 to confirm filing of submissions and on 9th April, 2024 it was reserved for ruling.

Applicant's Response to the 4th Respondent's Preliminary Objection

8. The Applicant filed a Replying Affidavit sworn on 22nd February, 2024 in response to the 4th Respondent's Preliminary Objection.
9. The Applicant deposes that the 4th Respondent's Preliminary Objection is based on a misapprehension of the law.



10. The Applicant also deposes that she is one of the daughters and a dependant of Kitur Arap Meto aka Kitur Meto (deceased) and therefore one of the beneficiaries of his estate.
11. The Applicant further deposes that she is advised by her advocates on record that since she is a beneficiary of the estate of the deceased, she has the locus standi to institute this suit.
12. It is her deposition that succession proceedings in respect of the estate of the late Kitur Meto are yet to be commenced. Regardless, she commenced a claim in Sotik PMCC 75 of 2018 where she sought for her rightful share of the land.
13. It is also her deposition that in the said matter, the court on 27th February, 2019 made an order that she together with her sister were to retain their mother's share of 7.5 acres.
14. It is further her deposition that she was constrained to abandon the said suit because she did not have the requisite locus to file it as she had not taken out grant of letters of administration.
15. The Applicant deposes that on 3rd August, 2021 the said suit was dismissed for want of prosecution.
16. The Applicant also deposes that she is advised by her advocates on record that for the doctrine of res judicata to apply, the matter must be between the same parties, over the same cause of action and be previously decided by a court of competent jurisdiction.
17. The Applicant further deposes that she is advised by her advocates on record that the elements of res judicata have been held to be conjunctive rather than disjunctive as they all must be met before a suit or issue is deemed res judicata on account of a former suit.
18. She contends that previous suit sought for among other orders, an order of restitution of family minutes dated 16th March, 2018 and a claim of 2 ½ acres of land parcel number Kericho/Kipsonoi S.S 1749 while the present suit raises the issue of whether the respondents colluded and unlawfully and irregularly subdivided land parcel No. Kericho/Kipsonoi S.S/346 registered in the name of the deceased without undertaking succession proceedings and in absence of a certificate of confirmation of Grant of Letters of Administration.
19. The Applicant deposes that she is advised by her advocates on record that where parties fail to attend court or take steps in prosecuting a case, the court cannot be said to have delved into the merits of the case.
20. The Applicant deposes that if the Preliminary Objection is upheld, it will be ejecting her and her legal claim into an abyss without the prospect of being retrieved.
21. She ends her deposition by stating that she is aware that the core duty of the court is to strive to sustain claims for purposes of being heard.

Issues for determination.

22. The 4th Respondent filed his submissions on 23rd February 2024 while the 6th Respondent filed its submissions on 6th March, 2024. The Applicant filed her submissions on 4th March, 2024.
23. The 4th Respondent identifies the following issues for determination;
 - a. Whether the Applicant herein lacks the requisite locus standi to institute this suit/claim.
 - b. Whether the Applicant's case offends the provisions of Section 7 of the *Civil Procedure Act* as the same is res judicata having been heard and determined in Sotik Principal Magistrate's Court Civil Case No. 75 of 2018.



24. On the first issue, the 4th Respondent relies on Section 82(1) of the Law of Succession of Act, the judicial decision of Alfred Njau and Others vs City Council of Nairobi [1982] KAR 229 and submits that the Applicant seeks to protect the interests of the estate of the late Kitur Arap Meto without obtaining any grant of letters of Administration Ad Litem.
25. The 4th Respondent submits that an estate of a deceased person can only be represented by a person duly authorized to do so. The 4th Respondents relies on Isaya Masira Momanyi vs Daniel Omwoyo & another [2017] eKLR, Narok Environment and Land Court ELC No. 31 of 2020 Nolparakwo Olotuno Kortom & another vs Mamura Oloyuno Kortom & another and Trouistic Union International & anor vs Mrs Alice Mbevu (citation not given) in support of his arguments.
26. With regard to the second issue, the 4th Respondent submits that the Applicant acknowledges that she previously instituted a suit in Sotik Law Courts which was heard and determined.
27. The 4th Respondent also submits that the Applicant has neither preferred an appeal nor applied for the setting aside of the said judgement.
28. The 4th Respondent relies on Section 7 of the *Civil Procedure Act* and submits that the main issue for determination in the present suit is the subdivision of land parcel No. Kericho/Kipsonoi S.S/346 to other resultant parcels including 1749 which the Applicant was claiming in Sotik Principal Magistrate's Court Case No. 75 of 2018 where a judgement was delivered and the matter concluded.
29. The 4th Respondent admits that there are new issues raised in the present suit that ought to have been raised in Sotik Principal Magistrate's Court Case No. 75 of 2018 such as the alleged fraudulent subdivision of the suit property.
30. The 4th Respondent relies on Henry Wanyama Khaemba vs Standard Chartered Bank of Kenya Limited Civil Case 560 of 2006, Independent Electoral and Boundaries Commission vs Maina Kiai and others Civil Appeal No. 105 of 2017, E.T vs Attorney General & another [2012]eKLR as was cited in Charity Njanja Mwaniki (suing on her behalf and 8 other siblings) v James Mwaniki Gaturu & another [2017] eKLR among other judicial authorities and seeks that his preliminary objection be allowed as prayed.
31. The 6th Respondent in its submissions identifies the following issues for determination;
 - a. Whether the Applicant lacks locus standi to institute the suit.
 - b. Whether the suit is res judicata.
32. On the first issue, the 6th Respondent relies on Section 82(a) of the *Law of Succession Act*, the judicial decisions of Alfred Njau vs City Council of Nairobi [1983] KLR, Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, (Deceased) [2016] eKLR and submits that the Applicant commenced the present proceedings to challenge the alleged illegal subdivision of land parcel No. Kericho/Kipsonoi S.S/346 that belongs to the estate of the late Kitur Meto.
33. The 6th Respondent also submits that the Applicant admits in her replying affidavit that she has not obtained grant of letters of administration which is why she had to abandon Sotik PMCC Case No. 75 of 2018.
34. It is the 6th Respondent's submissions that the Applicant commenced the present suit without letters of administration which makes this suit invalid and cannot therefore be cured by the Applicant later obtaining letters of administration.



35. The 6th Respondent relies on Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 Others [2021] eKLR and submits that since the Applicant lacks the requisite locus standi, the Originating Summons ought to be struck out.
36. On whether the suit is res judicata, the 6th Respondent relies on Section 7 of the Civil Procedure Act, the judicial decisions of Moses Mbatia v Joseph Wamburu Kihara [2021]eKLR, Siri Ram Kaura vs M.J.E Morgan CA 71/1960 (1961) E.A 462 as was cited in Richard Thairu Gachagua vs Naftali Ruthi Kinyua [2019] eKLR and submits that the 4th Respondent challenges the Applicant's claim on the ground that the issues raised in the present suit were heard and determined by a court of competent jurisdiction in Sotik PMCC Case No. 75 of 2018.
37. The 6th Respondent submits that even though the Applicant claims that the present suit raises new issues, it is clear that the Applicant has undertaken a cosmetic surgery of her pleadings and restructured the issues which still contravenes Section 7 of the Civil Procedure Act.
38. The 6th Respondent sought that the 4th Respondent's Preliminary Objection be allowed.
39. In her submission, the Applicant identifies the following issues for determination;
 - i. Whether the Applicant has locus to institute this suit.
 - ii. Whether the preliminary objection herein is premised on a pure point of law.
 - iii. Whether this suit is res judicata.
40. On the first issue, the Applicant relies on Section 29 of the Law of Succession Act, Order 37 Rule 1 of the Civil Procedure Rules, the judicial decision of Abdilahi Salim Badri vs Hemed Mohmaed Mbarak [2022]eKLR and submits that she commenced the present proceedings under Order 37 Rule 1 of the Civil Procedure Rules which does not necessarily require an applicant to have letters of administration to a deceased's estate in order to institute a suit.
41. With regard to the second issue, the Applicant relies on Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR and submits that the 4th Respondent's Preliminary Objection does not raise pure points of law as it calls for an examination of pleadings filed in the present matter vis a vis those filed in Sotik Principal Magistrates Court Civil Case No. 75 of 2018.
42. It is the Applicant's submissions that the issues raised by the 4th Respondent in his Preliminary Objection fall outside the ambit of what can be canvassed through a preliminary objection and she sought that the preliminary objection be dismissed with costs.
43. On the third issue, the Applicant relies on The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR and submits that the matter that was filed in Sotik was between the Applicant and her siblings over reinstatement of family minutes which is not the issue herein.

Analysis and determination.

44. I have considered the preliminary objection, the replying affidavit and the rival submissions filed by the parties herein.
45. In my view, the only issue that arises for determination is whether the preliminary objection dated 16th January, 2024 is merited.



46. The court in the judicial decision of *Ushago Diani Investment Limited v Abdulwahab (Environment & Land Case 12 of 2023)* [2023] KEELC 20213 (KLR) (27 September 2023) (Ruling) cited with approval *Oraro v Mbaja* [2005] eKLR 141 where the court held as follows on the nature of preliminary objections;

“A preliminary objection is now well identified 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 and 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 objection 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.”

47. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.

48. The first ground of the 4th Respondent’s preliminary objection is that the Applicant does not have locus standi to file the present suit.

49. The 4th Respondent argues that the Applicant commenced the present proceedings with the intention of defending the interests of the estate of the late Kitur Arap Meto without obtaining the necessary letters of administration.

50. The Applicant on the other hand argues that she has locus standi to commence the present proceedings as she is the daughter and heir of the deceased.

51. The Applicant also argues that the originating summons herein was brought under Order 37 Rule 1 of the Civil Procedure Rules which does not necessarily require her to have letters of administration.

52. My view is that the estate of a deceased person can only be represented in legal proceedings by a person duly authorized to do so. Only persons who have been issued with letters of administration have the capacity to represent the estate of a deceased person.

53. Section 82 of the *Law of Succession Act* 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;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best...”

54. As stated in the preceding paragraphs, the Applicant argues that she commenced the present proceedings under Order 37 Rule 1 of the Civil Procedure Rules and she therefore does not require Grant of Letters of Administration.



55. Order 37 Rule 1 of the Civil Procedure Rules provides as follows;

“The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- (f) the approval of a sale, purchase, compromise or other transaction;
- (g) the determination of any question arising directly out of the administration of the estate or trust.

56. The Applicant relies on *Abdilahi Salim Badri v Hemed Mohmaed Mbarak* [2022] eKLR where the court held that under Order 37 Rule 1 of the Civil Procedure Rules, any person named therein has a right to take out an originating summons as of right and therefore made an exception to the requirement of taking out letters of administration.

57. The court before making the aforesaid determination observed as follows;

“24. In an ideal case, it would be arguable and the Defendant/Applicant’s would be right here, that the Plaintiff/Respondent would have been incompetent for want of Locus standi to commence these proceedings by way of originating summons on behalf of the estate of the deceased. Thus, there would have need to discuss it ex debito jusficial Locus Standi. This is basically the right to appear or be heard in court of other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that the party cannot be heard, despite whether or not he has a case worth listening. However, from the facts well adduced herein the situation is completely to the contrary. In this case, it appears the matter of the Grant Letters of Administration and the distribution of the estate of the deceased based on the duly executed Probate Will was already accomplished and with filed Decree in the Khadi’s Court Mombasa in Succession cause Number 243 of 1997 (OS). It is not in doubt that the Plaintiff/Respondent is the beneficiary heir in Trust of some



the beneficiaries of the estate on the strength of the Will by the deceased. Accordingly, the Plaintiff/Respondent has the Locus Standi or capacity to institute the Originating Summons on behalf of the deceased and to preserve the estate. The submission by the Defendant/Applicant on its legal capacity on the suit land has to be dealt with on merit and that is only possible during a full trial.” (Emphasis Mine)

58. The circumstances in *Abdilahi Salim Badri v Hemed Mohmaed Mbarak* (supra) relied on by the Applicant are quite different from the circumstances in the present case and I wish to distinguish them.
59. In *Abdilahi Salim Badri v Hemed Mohmaed Mbarak* (supra) the grant of letters of administration with respect to the estate of the deceased had already been issued and the issue of distribution of the estate already accomplished. The Applicant in the said matter was also a beneficiary heir in trust of the said estate. It was on this basis that the court held that the applicant had the locus standi to institute the suit.
60. In the present case, the circumstances are quite different. The Applicant admits that no succession proceedings with respect to the estate of the late Kitur Meto have been commenced. There has been no distribution and the Applicant has no basis for claiming beneficial interest. That being the case, the Applicant herein did not have locus standi to commence the present proceedings.
61. The following persons, under provisions of order 37, may take out originating summons as of course:
 - a. Executors or administrators of a deceased person, or any of them.
 - b. The trustees under any deed or instrument, or any of them.
 - c. Any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid.
62. The Applicant only describes herself as a beneficiary of the Estate of the deceased. This beneficial interest has to be disclosed in order for a finding to be made that she need not take out letters of administration and/or can take out originating summons under Order 37 as of course. Is she an Administrator or Executor, Trustee, Creditor, Devisee, Heir, Legatee, Legal representative or Cestui que trust of the estate of late Kitur Meto?
63. In the judicial decision of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva* (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR the court held as follows;

“Further 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.

29. In this matter therefore the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal



capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on.” (Emphasis mine)

64. Having found that the Applicant did not have locus standi to commence the present proceedings, it shall not be necessary to address the question whether or not the present suit is res judicata.

Disposition.

65. The Applicant has not taken out letters of administration to the Estate of Kitur Meto (deceased). She does not have locus standi to file and maintain this suit on behalf of the estate of deceased.
66. Therefore, this suit is null and void and is hereby struck out with costs.
67. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 16TH DAY OF MAY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Koech for the Applicant.

No appearance for the 1st Respondent.

No appearance for the 2nd Respondent.

No appearance for the 3rd Respondent.

Mr. Kefa for the 4th Respondent.

No appearance for the 5th Respondent.

Mr. Ojwang for the 6th Respondent.

Court Assistant; Mr. Joseph Makori.

