



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**

**Civil Appeal 277 of 2004**

BETWEEN

**JUDITH GATHONI WILLIE ..... APPELLANT**

AND

**GEORGE KIHARA MUCHUKI ..... 1<sup>ST</sup> RESPONDENT**  
**CHARLES KIMITA MUCHUKI ..... 2<sup>ND</sup> RESPONDENT**  
**JOHN ALEX MUCHUKI ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from the Ruling and Order of the High Court of Kenya at Nakuru (Kimaru, J.) dated 20<sup>th</sup> September, 2004*

in

H.C.C.C. NO. 163 OF 2004 (OS)  
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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the superior court (Kimaru, J.) delivered at Nakuru on 20<sup>th</sup> September, 2004.

The appellant herein, **JUDITH GATHONI WILLIE**, filed an originating summons in the High Court of Kenya at Nakuru, under the provisions of **Sections 2, 45, 55 and 59** of the Law of Succession Act, **Rules 49, 59 and 73** of the Probate and Administration Rules, **Order XXXVI** Rules 1 and 2 of the Civil Procedure Rules and the enabling provisions of the law seeking orders that:-

- (a) ***The applicant herein be entitled to participate in the administration of the Estate of the (sic) Willie Mwangi Muchuki (deceased) as a duly recognized executor; administrator and/or trustee together with other executors, administrators and/or trustees of the same.***
- (b) ***George Kihara Muchuki, Charles Kimita Muchuki and Johan Alex Muchuki be restrained by themselves or through their agents, as individuals or as executors, administrators, trustees and personal representatives of the estate of the deceased, from disposing of the immovable and other properties comprising the estate of the deceased pending the hearing interpartes and pending the issuance of letters of grant of representation as confirmed and or from disposing of and/or dealing in the same in any manner inconsistent with the provisions of the will or the law.***
- (c) ***The same parties delineated in paragraph 3 above be and are hereby compelled to render accounts of the estate of the deceased.***

The respondents herein were served with the said application and duly entered appearance, and, through their advocate, filed a Notice of preliminary objection to the entire suit on the ground that the suit was *res judicata* in that the matter in issue had been heard and conclusively determined in Succession proceedings in respect of the estate of the late **Willie Mwangi Muchuki** in Nakuru High Court

When the suit came up for hearing before Kimaru, J., the respondents' counsel, Mr. Chuma Mburu argued the preliminary objection to the effect that the issues the appellant was purporting to raise in her application had already been dealt with in *Nakuru High Court Succession Cause No. 68 of 1992* in which the grant of letters of administration was confirmed on 21<sup>st</sup> October, 1994 and a certificate of confirmation of the grant issued. It was further argued, on behalf of the respondents, that the estate of the deceased had already been distributed to all the beneficiaries of the deceased, including the appellant herein. Finally, Mr. Chuma Mburu submitted before the superior court, that the appellant was seeking to reopen the issue of the administration of the estate of the deceased. He therefore asked the superior court to allow the preliminary objection and dismiss the suit.

Mr. Odhiambo, the learned counsel for the appellant, submitted that the issues in the appellant's application before the superior court were not res judicata since the orders the appellant was seeking were meant to restrain or prevent the respondents from interfering with the family property. It was further submitted, on behalf of the appellants, that the foundation of the suit was the last will of the late Willie Mwangi Muchuki made on 30<sup>th</sup> March, 1985. It was finally submitted by Mr. Odhiambo that the issue raised by the appellant in her application could not be determined by a preliminary objection.

The learned judge of the superior court considered the rival submissions before him and in the end came to the conclusion that the preliminary objection was properly raised and he eventually upheld the preliminary objection. In concluding his ruling the learned judge said:-

***“The legal point that will determine this suit, in my view, is whether the applicant had the capacity or locus standi to bring this suit. From the pleadings filed in Court, it is evident that the applicant is seeking to be made an administrator of the estate of the deceased in proceedings which are not succession proceedings. Secondly, she is seeking to restrain the Respondent from disposing off part of the deceased's estate, where in actual fact she does not have letters of administration to give her capacity to file such a suit. In Trouisik Union International & Anor vs. Mrs. Jane Mbeyu & Anor C.A. Civil Appeal No. 145 of 1990 (unreported) it was held by the Court of Appeal that where a party seeks to file a suit on behalf of the estate of a deceased person, he must, of necessity, obtain letters of administration. In the instant case, there is no indication that the applicant obtained letters of administration before filing this suit. The applicant did not therefore have locus standi or capacity to file this suit. For this reason and the reasons stated earlier in this ruling, the preliminary objection raised by the Respondents is hereby upheld. The applicant's suit is hereby struck out with costs to the respondent.*”**

***For the avoidance of doubt, the applicant is at liberty to raise the issues that she purported to raise in this suit in a proper forum, namely, in the Succession Cause where the letters of administration was issued in respect of the deceased estate.”***

It is the foregoing that provoked this appeal in which the appellant, through her advocates, set out the following five grounds of appeal:-

- “1. THAT the learned trial judge erred in law in striking out the applicant's originating summons in what would not have amounted to a preliminary objection.**
- 2. THAT the learned trial judge erred in law by venturing out of the pleadings to strike out the applicants originating summons for lack of locus standi.**
- 3. THAT the learned trial judge erred in law by upholding the preliminary objection and striking out the originating summons on locus standi while not directing his mind at all to the effect of the will of the deceased.**
- 4. THAT the learned trial judge misdirected himself by holding that the applicant's only remedy lay in applying for revocation or nullification of the grant issued to the administrators of the estate of the deceased under the provisions of the succession Act.**

5. ***THAT the learned trial judge further misdirected himself by holding that the applicant's remedy lay in making application as a dependant under the Law of Succession Act, and that the applicants Originating Summons was meant to circumvent the provisions of the Law of Succession Act as regards the issuance and annulment of grants."***

The appeal came up for hearing before us on 28<sup>th</sup> September, 2010, when Miss Caroline Ateya appeared for the appellant, while Mr. Chuma Mburu appeared for the respondents.

In her submissions, Miss Ateya argued the first ground of appeal on its own, combined grounds 2 and 3 which she argued together and finally argued grounds 4 and 5 together. On the first ground, Miss Ateya submitted that what the respondents raised in the superior court was not a preliminary objection because it raised not only a point of law but other points on matters of fact. She was therefore of the view that the preliminary objection ought to have been dismissed.

As regards grounds 2 and 3 of the appeal, Miss Ateya submitted that the issue of *locus standi* had not been raised by any of the parties in the superior court but introduced by the court itself.

On grounds 4 and 5 of the appeal, Miss Ateya submitted that the appellant was exercising her rights under **Order XXXVI** of the Civil Procedure Rules and in that case the suit should have proceeded on its merit. She therefore, asked us to allow the appeal and set aside the orders of the superior court so that the suit could proceed to trial.

To buttress her submissions, Miss Ateya relied on ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd*** [1969] E.A. 696, ***Shire v. Thabiti Finance Co. Ltd.*** [2002] 1 E.A. 279 and ***Vyas Industries v. Diocese of Meru*** (1976-1985) E.A. 596.

In opposing the appeal, Mr. Chuma Mburu submitted that the issue of *res judicata* was a point of law which had to be raised since the prayers the appellant was seeking had been raised and determined in the earlier suit. It was Mr. Mburu's submission that the preliminary objection raised had satisfied the test in ***Mukisa Biscuit*** case (supra). Finally, Mr. Mburu submitted that the appellant should have disclosed the fact that there was another succession cause. For these reasons, Mr. Mburu was of the view that the appeal lacked merit and he, therefore, asked us to dismiss it.

We have considered the rival submissions in this appeal as ably argued by Miss Ateya for the appellant and Mr. Chuma Mburu for the respondents. The ruling that is being challenged in this appeal has its origin in an application in the High Court in which the appellant herein sought certain orders which we have set out at the commencement of this judgment. From the record and the submissions by counsel appearing for the parties herein, it is now clear that there was ***Nakuru High Court Succession Cause No 68 of 1992*** involving the same estate of Willie Mwangi Muchuki and that letters of administration were confirmed on 21<sup>st</sup> October, 1994 and a certificate of confirmation issued. It has also transpired that the estate of the deceased Willie Mwangi Muchuki had already been distributed to all the beneficiaries of the deceased including the appellant.

Having considered the history of this matter, we are of the view that the learned judge was right when he stated as follows in the course of his ruling:-

***"The issue for determination by this Court is whether or not the suit filed herein by the applicant is Res Judicata. The other issue that emerged from the pleadings is whether the applicant had capacity or locus standi to file this suit against the Respondents herein. The final issue for determination is whether the Respondents properly raised the preliminary objection in this suit. I will begin with the last point. The law as regards what constitutes a proper preliminary point of law was restated in the oft-quoted case of *Mukisa Biscuit Manufacturing Co. Ltd. Versus West End Distributors Ltd.* [1968] E.A. 697 where it was held at page 700 E that:-***

***"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the 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.”*

**At page 701B**

*“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.”*

Since the issues being raised by the appellant in her originating summons had been raised or ought to have been raised in the earlier Succession Cause, we are of the view that the respondents were perfectly entitled to raise a preliminary objection to the appellant’s application in the superior court. It is to be noted that the learned judge in his ruling clearly stated that the appellant was at liberty to raise the issues she was raising in that application in the proper forum i.e. the Succession Cause in which the letters of administration had been issued in respect of the estate of the deceased, **Willie Mwangi Muchuki**. For that reason it cannot be said that the appellant had been driven away from the seat of justice. All she was told by the superior court was that she had to go to the proper forum where she would be allowed to ventilate her grievances.

In view of the foregoing, we find no merit in this appeal and we order that the same be and is hereby dismissed with costs to the respondents.

***Dated and delivered at Nakuru this 12<sup>th</sup> day of November, 2010.***

**E.O. O’KUBASU**

.....  
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**