



**Kigen (Suing in His Capacity as Personal Representative of Zarah
Chepngetich Tonui - Deceased) v Joseph & another (Environment & Land
Case E005 of 2023) [2024] KEELC 5477 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5477 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE E005 OF 2023

LA OMOLLO, J

JULY 25, 2024

THE MATTER OF THE ESTATE OF KIPSANG TONUI (DECEASED)

AND

IN THE MATTER OF LR NO. KERICHO/KOIWA/191

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT (CAP 170 LAWS OF KENYA)

BETWEEN

**GEOFFREY KIGEN (SUING IN HIS CAPACITY AS PERSONAL
REPRESENTATIVE OF ZARAH CHEPNGETICH TONUI -
DECEASED) APPLICANT**

AND

LANGAT JOSEPH 1ST RESPONDENT

**THE ATTORNEY GENERAL (SUED ON BEHALF OF THE CHIEF LAND
REGISTRAR) 2ND RESPONDENT**

RULING

Introduction.

1. This ruling is in respect of the 1st Respondent's Preliminary Objection dated 30th October, 2023. It is on the following grounds;
 - a. That the applicant's Application concerns the parcel registered as Kericho/Koiwa/191 which belongs to the deceased one Kipsang Tonui.



- b. That the Applicant has nonetheless instituted these proceedings without obtaining a limited grant of letters of administration ad litem of the deceased's estate as envisioned in Sections 81 and 82 of the Law of Succession Act.
- c. That the Applicant thus has no locus standi to bring the instant proceedings concerning the deceased's estate.
- d. That as a result, the Applicant's Originating Summons dated 2nd May, 2023 is bad in law, incompetent, fatally defective and has been brought in absolute disregard of the law and ought to be dismissed forthwith.

Factual Background.

2. The Applicant commenced the present proceedings vide the Originating Summons dated 2nd May, 2023 and filed on 19th May, 2023. The Applicant seeks the determination of the following questions;
 - a. Whether Kipsang Tonui (deceased) was the registered owner of 6.8 Hectares (17 acres) of land comprised in LR No. Kericho/Koiwa/191.
 - b. Whether on or about 27th December, 2013 upon the demise of the afore stated Kipsang Tonui, the 1st Respondent acted in collusion with the Land Registrar, Bomet and irregularly transferred the whole of the said land to the 1st Respondent without first taking out succession proceedings.
 - c. Whether the actions of the 1st and 2nd Respondents deprived the Applicant and other Defendants of Kipsang Tonui (deceased) of their rightful share of the estate of the deceased.
 - d. Whether the Applicant is entitled to a declaration that all that parcel of land known as LR No. Kericho/Koiwa/191 lawfully belongs to the estate of Kipsang Tonui (deceased).
 - e. Whether the register in respect of the said property comprised in LR No. Kericho/Koiwa/191 ought to be rectified so as to reflect the names of the original proprietor Kipsang Tonui (deceased) to pave way for succession proceedings.
 - f. Whether the Applicant is entitled to costs of this suit.
3. In response to the Originating Summons, the 1st Respondent filed a Replying Affidavit on 9th October, 2023.
4. The matter came up on 7th March, 2024 and the court directed that the Preliminary Objection be served upon the 2nd Respondent.
5. The matter was mentioned on 9th April, 2024, on which date it was confirmed that the 2nd Respondent had been served. The court directed that the preliminary objection be heard by way of written submissions.
6. On 15th May, 2024, parties confirmed having filed submissions and the matter was reserved for ruling.

Issues for Determination.

7. The 1st Respondent filed his submissions on 22nd April, 2024 while the Applicant filed his submissions on 2nd May, 2024. The 2nd Respondent did not file any submissions.
8. The 1st Respondent submits on the following issues;



- a. Whether the Applicant has locus standi.
 - b. Who should bear the costs of this preliminary objection?
9. The 1st Respondent relies on the judicial decisions of Peter Kaukau Asitua and 3 others vs Oleria Mahindu Makunga [2021] eKLR, Charity Wawira Nderi versus Wazir Auto Limited [2023] eKLR and submits that the Applicant failed to obtain letters of administration ad litem to enable him sue on behalf of the estate of the late Kipsang Tonui.
 10. It is the 1st Respondent's submissions that in the absence of a grant of letters of administration ad litem, the Originating Summons filed herein is incompetent and ought to be dismissed with costs.
 11. The 1st Respondent relies on Section 27(1) of the [Civil Procedure Act](#) and seeks that Originating Summons be struck out with costs.
 12. The Applicant in his submissions identifies the following issues for determination;
 - a. Whether the preliminary Objection herein is premised on a pure point of law.
 - b. Whether the Applicant has locus to institute the suit.
 13. With regard to the first issue, the Applicant relies on the judicial decisions of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, Daykio Plantations Limited v National Bank of Kenya Limited & 2 Others [2019] eKLR and concedes that since the preliminary objection raises an issue of locus standi, the same can be considered and be disposed of.
 14. With regard to the second issue, the Applicant submits that he has the locus to institute the present proceedings as he is the Legal Representative of the heir of the estate of the late Kipsang Tonui (deceased).
 15. The Applicant further submits that he is the legal representative of the estate of Zarah Chepngetich Tonui (deceased) who was the daughter of Kipsang Tonui (deceased) and therefore pursuant to the provisions of Section 29 of the [Law of Succession Act](#), he is a dependent of the deceased and thus entitled to inherit from his estate.
 16. The Applicant relies on 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 since the present proceedings are brought under Order 37 Rule 1 of the Civil Procedure Rules, he is not required to have letters of administration to the deceased's estate in order to institute the suit.
 17. The Applicant seeks that the preliminary objection be dismissed with costs.

Analysis and Determination.

18. I have considered the Preliminary Objection and the rival submissions.
19. In my view, the only issue that arises for determination is whether the Preliminary Objection dated 30th October, 2023 is merited.
20. 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.”

21. 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. A Preliminary Objection must stem from the proceedings and must not deal with or derive its foundation from disputed facts.
22. The 1st Respondent’s Preliminary Objection is on the ground that the Applicant does not have the locus standi to institute proceedings on behalf of the estate of the late Kipsang Tonui and as such the Originating Summons dated 2nd May, 2023 is fatally defective and ought to be dismissed.
23. The Applicant in response argues that he is the Legal Representative of the Estate of Zarah Chepngetich Tonui who was the daughter of Kipsang Tonui (deceased).
24. He also argues that since the late Zarah Chepngetich Tonui was an heir of Kipsang Tonui (deceased) he does not require letters of administration ad litem to commence the present proceedings.
25. The Applicant further argues that he has commenced the present proceedings under Order 31 Rule 1 of the Civil Procedure Rules and does not therefore require letters of administration to commence the proceedings on behalf of the estate of Kipsang Tonui (deceased).
26. 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.”

27. 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.

28. 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 justicial Locus Standi (sic). 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 of 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)

29. It is my view that the circumstances in *Abdilahi Salim Badri v Hemed Mohmaed Mbarak* (supra) which the Applicant relies on and the present proceedings are different and I will distinguish them as hereunder.

30. 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 distribution of the estate already accomplished. The Applicant in the said matter was also a beneficiary heir in trust of some of the beneficiaries of the said estate. It was on this basis that the court held that the Applicant in the said matter had the locus standi to institute the suit.

31. In the present case, the circumstances are different. The Applicant admits that he is the grandson of Kipsang Tonui (deceased) and argues that since he is the legal representative of the estate of Zarah Chepngetich Tonui (deceased) who was an heir of Kipsang Tonui (deceased), he is not required to get letters of administration with respect of the estate of Kipsang Tonui (deceased) in order to commence the present proceedings.



32. The estate of a deceased person can only be represented in legal proceedings by a person duly authorized to do so. Therefore, only persons who have been issued with letters of administration have the capacity to represent the estate of a deceased person.

33. 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...”

34. It is not disputed that succession proceedings with regard to the estate of the late Kipsang Tonui have not been commenced and neither has there been any distribution of the said estate. The Applicant cannot, therefore, purport to sue on behalf of the estate of Zarah Chepngetich Tonui (deceased) who he argues was heir to the estate of Kipsang Tonui.

35. Given the said circumstances, it is my view that the Applicant herein did not have locus standi to commence the present suit, it is null and void and cannot therefore be maintained by him.

36. In *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.”

Disposition.

37. I find that the Applicant did not have locus standi to commence the present proceedings on behalf of the estate of Kipsang Tonui (deceased).

38. Consequently, the preliminary objection is upheld. The suit commenced by the Applicant vide the Originating Summons dated 2nd May, 2023 is hereby struck out with costs to the 1st Respondent.

39. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 25TH DAY OF JULY, 2024.



L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Kipkorir for Koech for the Applicant.

No appearance for the 1st Respondent.

Mr. Ojwang for the 2nd Respondent.

Court Assistant; Mr. Joseph Makori.

