



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ndungu & another v Mwaura (Environment & Land Case
E025 of 2024) [2024] KEELC 7216 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E025 OF 2024**

JG KEMEI, J

OCTOBER 31, 2024

BETWEEN

JOHN KIMANI NDUNGU 1ST PLAINTIFF

JAMES MWAURA WACHANGA 2ND PLAINTIFF

AND

GEOFFREY KIMANI MWAURA DEFENDANT

RULING

1. The subject of this Ruling relates to the Defendant’s Notice of Preliminary Objection dated 17/5/2024 premised on grounds THAT;
 - a. The Plaintiffs herein have no locus standi to sue for and on behalf of the estate of NDUNGU KIMANI WACHAGA.
 - b. The Plaintiffs did not obtain a full Grant before filing the suit but only obtained a limited Grant which does not entitle them to bring an action with respect of the deceased property.
 - c. Consequently, the entire suit is defective and a non-starter should be struck out with costs.
2. The 1st Plaintiff John Kimani Ndung’u opposed the Preliminary Objection vide his Replying Affidavit sworn on 27/5/2024 on his own behalf and that of the 2nd Plaintiff. He deponed that the Plaintiffs lodged the instant suit in their capacity as administrators ad litem of the estate of their late father Ndung’u Kimani Wachaga who died on 8/8/2019 and copy of the ad litem Grant issued In Kikuyu SPMC Succession Cause No. 56 of 2020 is attached as ‘JKO1’. That the gist of their claim stems from various Court pronouncements touching on the suit property which was held in trust by their late father’s elder brother prior to his demise. That therefore they are claiming beneficial interests in the suit property which was held in trust by the Defendant’s late father, Wachaga Kimani Wachaga. That the Defendant fraudulently and by way of concealment of material facts obtained a Grant for his late



father's estate without indicating that the suit property was family inheritance to be shared equally between the families of the late Wachaga Kimani Wachaga and the late Ndungu Kimani Wachaga. A copy of the confirmed Grant issued to the Defendant on 22/10/2022 in Nairobi Succession Cause No. E285 of 2021 is annexed as 'JKO2'.

3. Directions to canvass the Preliminary Objection by way of submissions were taken in 22/5/2024.
4. Supporting the objection, the Defendant through the firm of Gatitu Mwangi & Co. Advocates filed submissions dated 24/6/2024. A singular issue was drawn for determination whether the Plaintiffs have locus to institute this suit on behalf of the estate of Ndungu Kimani Wachaga.
5. Answering the issue in the negative, it was submitted that legal proceedings on behalf of the estate of a deceased person can only be commenced by persons holding requisite Grant of letters of administration. That the Plaintiffs lodged this suit vide a Plaint dated 12/2/2024 on behalf of the estate of Ndungu Kimani Wachaga based on a Limited Grant Ad Colligenda bona issued on 28/2/2020. That the purpose of the said Grant is limited to collection and preservation of the estate of the deceased person. That such a Grant cannot be used to institute a suit and thus the Plaintiffs lack locus standi. Reliance was placed on the case of Elijah Nderitu Gachaga Vs. Francis Gakuu Gachaga & 2 Others [2019] eKLR.
6. In rebuttal the firm of Karoki Mwangi & Co. Advocates filed submissions dated 3/6/2024 on behalf of the Plaintiffs. Four issues were drawn for determination; whether the Plaintiffs have locus standi to sue; whether an ad litem or limited Grant empowers the administrator to file a suit/collect and preserve; whether the suit is a non-starter and defective and whether the Defendant involved the Plaintiffs in the petition and distribution of their ancestral land.
7. Expounding on the first and second issues in the affirmative, the Plaintiffs highlighted the parameters of a Preliminary Objection as established in the case of Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA 696. It was further posited that locus standi signifies the right to be heard and in this instance the Plaintiffs possess an ad litem Grant to sue herein. That Section 82 of the Law of Succession Act outlines the powers of administrators which include to enforce by suit all causes of action which survive the deceased.
8. The main issue for determination is whether the Preliminary Objection is merited.
9. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit. See Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696.
10. The Preliminary Objection assails the Plaintiffs' capacity to in the instant case without obtaining requisite letters of administration for their deceased father. According to the Defendant the Plaintiffs' Grant is limited to collection and preservation of estate only and not for filing a suit. The issue of locus standi no doubt goes to the root of a capacity to have audience in Court. Without it, just like jurisdiction of the Court, a party cannot take any further steps in filing or defending a suit.
11. In this case the Plaintiffs obtained a Limited Grant Ad Colligenda Bona on the 28/2/2020 expressed as thus;

“LIMITED GRANT OF LETTERS OF ADMINISTRATION AD LITEM



In the matter of the Estate of NDUNGU KIMANI WACHAGA (DECEASED)

BE IT KNOWN that on the 28TH FEBRUARY, 2020 Letters of Administration ad Colligenda bona of all the Estate of NDUNGU KIMANI WACHAGA (deceased) late of NAIROBI who died domiciled in KENYA on the 8TH AUGUST, 2019 at KENYATTA NATIONAL HOSPITAL which by law devolves to and vests in his personal representative, but limited to the purposes only for COLLECTING AND PRESERVING THE ESTATE OF THE DECEASED and until further representation, were Granted by this Court to JOHN KIMANI NDUNGU and JAMES MWAURA WACHAGA NDUNGU of P.O. Box 110-00902 KIKUYU he/she having undertaken faithfully to administer such estate according to law (limited as aforesaid) and to render a just and true account thereof whenever required by law so to do.

ISSUED by the Senior Principal Magistrate's Court through the registry at Kikuyu this 28TH FEBRUARY, 2020.”

12. Locus standi is defined 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 letters of administration in cases of intestate succession”

13. The Court finds that the issue of locus standi is a pure point of law and the next issue for the Court to determine is whether the Objection is merited.

14. So critical is the issue of locus that absent it the suit filed without standing remains fatal and a nullity ab initio. This was the holding in the case of *Julian Adoyo Ongunga Vs. Francis Kiberenge Abano CA No.119 of 2015*, where the Court stated;

“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.”

15. From the reading of the Grant it is clear that it is limited to collecting and preserving the estate of the deceased. There is nothing to suggest that filing of the instant suit was contemplated by the Grant. The Plaintiffs therefore have not been clothed with locus to file and maintain suit.

16. This Court has had the occasion to determine a similar matter in ELC 4 OF 2019 – *Elijah Nderitu Gachaga Vs. Francis Gakuu Gachanga & 2 Others* where the Court expressed itself as follows;

“I have looked at the wording of the Grant in issue and I find that it does not include filing of suit as the Plaintiff has done in this case. Clearly, the said Grant, in addition to being inappropriate, had also not been tailored to include institution and maintenance of a suit, at least going by its contents and wording. Similarly, there is no evidence that the Grant was ever rectified in order to give locus to the Plaintiff.



It is the finding of the Court that the Plaintiff having filed suit on the basis of a Grant ad colligenda is not clothed with locus to file suit. The Court finds that the cause of action is incontestably wrong noting that locus is an issue that goes to the root of the case and that all proceedings here are a nullity since the Plaintiff did not have locus standi to file the suit. I can do no better than to cite Denning, L.J. in *Macfoy Vs. United Africa Co. Ltd.* [1961] 3 ALL ER 1169 at 1172 who stated that;

“If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.”

In other words the issue of locus is not a technicality but it goes to the root of the case.”

17. For the reasons above I find that the objection has succeeded as a pure point of law and consequently the suit herein be and is hereby struck out.
18. Costs shall be in favour of the Defendant.
19. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER, 2024.

J G KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

Karoki for 1st and 2nd Plaintiffs

Njoroge for the Defendant

Court Assistant – Phyllis

