



**Benson v Kimani t/s GN Kimani & Associates Advocates
(Environmental and Land Originating Summons E005 of 2024)
[2024] KEELC 7347 (KLR) (Environment and Land) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2024
MC OUNDO, J
NOVEMBER 7, 2024**

BETWEEN

MARGARET WANJIRU BENSON APPLICANT

AND

**GEORGE N KIMANI T/S GN KIMANI & ASSOCIATES
ADVOCATES RESPONDENT**

RULING

1. Vide an Originating Summons dated 27th May, 2024 brought under the provisions of Order 37 Rule 11 & 14 and Order 52 Rule 4 (e) of the Civil Procedure Rules, the Applicant herein sought that The Respondent herein George N. Kimani Advocate be ordered to deliver up/and or release the following documents to the Surveyor M/s Gathome Associates Surveyors.
 - a. Original Mutations
 - b. Original Consent to Subdivide (LCB)
 - c. Original Title Deed Naivasha/Maraigushu Block 1/4438, and that the costs of the Application be provided for.
2. The application was supported by the applicants supporting affidavit wherein she had deponed that she was a beneficiary of the estate of the deceased Eunice Wangari Kigwa who was her mother, who had subdivided her parcels of land to her children during her lifetime. That she had surrendered some documents to the respondent for onward transmission to the surveyor M/s Gatome & Associates Surveyors to process the green card and title deeds for each of the parcels of land herein listed so as to transfer to her beneficiaries the respectful gifts and therefore there was no need for succession process.



3. In response to the Originating Summons, the Respondent filed his Preliminary Objection dated 12th June, 2024 and the Replying Affidavit of even date stating that the Applicant's application dated 27th May, 2024 was an abuse of the court process was grossly defective wherein the Applicant lacked legal capacity to institute the same by virtue of Section 54 of the Succession Law Act, Evidence Act 13(1) (sic) and entire provision of Advocates Act on confidentiality inter alia.
4. That the deceased died intestate and the rightful jurisdiction to institute any claim in respect to the estate of the deceased in so far as Naivasha/Maraigushu Block 1/4428 (remainder) land, was in the family Succession Court.
5. That the application was superfluous and overtaken by events since the original title deed for Naivasha/Maraigushu Block 1/4428 and original mutation form were subject to the deceased instruction.
6. In response, the Applicant opposed the Respondent's Preliminary Objection via her Grounds of Opposition dated 18th June, 2024 to the effect that the Application was misconceived, incompetent and bad in law and an abuse of the court process. That there was no estate of Eunice Wangari Kigwa (deceased), capable of being referred to succession to the effect that the deceased had distributed her estate, inter-vivos, and had instructed the Respondent to effect and complete the conveyance of the same when she was alive wherein the Respondent had in fact partly effected those instructions for which the import of the Applicant's application was to have him release the documents to the surveyor to complete the pending instruction. That there was no legal fee pending on the instructions of their mother and no document had been filed to the contrary.
7. The Preliminary Objection and the Grounds of Opposition were disposed of in the first instance by way of written submissions wherein in support of his Notice of Preliminary Objection and in opposition of the Applicant's Grounds of Opposition the Respondent hinged his reliance on the decided case of Pravinchandra Jamnadas Lakad v Estate of Lucas Oluoch Mumia and 3 others [2022] eKLR to submit that the law did not allow a person to file a suit in respect of a land or asset owned by a deceased person without taking out a Limited Grant/Letters of Administration.
8. That the Applicant herein was a daughter to the late Eunice Wangari Kigwa (Deceased) who had been the Respondent's client of many years and who had died while in the United States of America.
9. That in 2015 prior to her death, the deceased had instructed him to oversee the subdivision, registration of mutations and later, upon specific instructions and payments of requisite legal charges by the intended beneficiaries who were her children, effect transfer of the land parcels. That he had express instruction from the deceased Eunice Wangari Kigwa to act in the conveyance of the subject in exclusion of any other person including the Applicant or her agents. That her instructions were that the legal fees of the conveyance were to be paid by the individual beneficiary proportionate to the allocated share of land. That the Applicant herein did not pay the requisite conveyance charges thus no transfer of land parcel Nos. Naivasha/Maraigushu/Block 1/4481, 4482, 4483, 4484 and 4485 could happen.
10. That the intention of the deceased to give land to any of her children could not be a gift inter vivos since the same required the donor to provide means for putting the land under effective control of the donee. That further, the said gift had to be registered and instrument of conveyance executed which had not been the case herein.
11. Land parcel No. Naivasha/Maraigushu Block 1/4428 was registered in the name of Eunice Wangari Kigwa (Deceased) and that no ownership of the same had passed on to the Applicant. The Respondent thus lacked the locus standi to file the instant suit without legal capacity as she held no letters of a limited grant for that purpose.



12. That the deceased had died intestate in that regard and her estate was subject of Succession Cause process as no inter-vivos interests had been conveyed to the Applicant. That the Applicant's allegations had been wishful, misguided and lacking in legal validity.
13. That he had satisfied the instructions of the deceased's including submitting the original title deed for L.R Naivasha/Maraigushu Block 1/4428 and original mutation form to the District Surveyor Nakuru which documents had been received on 29th March, 2017.
14. It was his submission that contrary to the allegations by the Applicant herein, the role of Gatome and Associates surveyors had been to draft the mutation records which they did and handed over the documents to the deceased through the Respondent's firm for lodging at the land registry which lodging had been done. That in any case, a firm of surveyor could not prepare documents at a fee for a client, handover the same and later seek from the court that the same be returned to them together with the original mutations, original consent to subdivide and original title deed. That the said the firm of Gatome & Associates lacked any legal basis to seek to be given the documents sought herein. That further the Respondent had not received such instructions since the work of surveyors was not to register or oversee conveyance of interests to proposed beneficiary.
15. That the estate of Eunice Wangari Kigwa owed their office colossal amount of money in form of fees for the work done. That in any event, there were other beneficiaries to the deceased's estate hence it would be unprofessional and breach of Advocates practice rules to prejudice other third parties including the Applicant's siblings by handing over the conveyance instruments to the Applicant or her agents since that would be encroaching on the rights of others especially in light of the fact that the Applicant had termed her siblings as insane. He reiterated that the subject documents were in safe custody of the Land Registrar Naivasha and the Respondent's instructions to date was to protect the same until the entire transaction was over.
16. He thus sought that the Application dated 27th May, 2024 be dismissed and his Preliminary Objection upheld.
17. The Applicant's Submissions on the other hand had been that to the effect that her deceased mother had through a consent dated 24th March 2027 (sic) given a clear and express instruction the Respondent to convey the entire property being L.R No. Naivasha/Maraigushu Block 1/1428 until completion. That additionally, the deceased had given him all the instruments being the Original Mutation, Original title, signed instruction, consent and signed transfers to effect the said instruction. That the Respondent herein had not mentioned any single condition that the deceased was to fulfil for the transfer of gift to be effected. That the deceased having obtained consent and signed the transfers of the said property from her name to that of her children/beneficiaries including the Applicant herein wherein the Respondent had confirmed that he had complied with some instructions in relation to the children save for the Applicant and one Peter Nganga Benson on account of fee payment.
18. That it was thus baffling as to what succession proceedings were required to complete and effect transfers to some children but not others as alleged by the Respondent. That one would also wonder how some gifts passed to the intended beneficiaries while others had not for over 7 years despite the same being under one instruction.
19. The Applicant thus submitted that the Respondent's Preliminary Objection herein was unmerited the Applicant having sought to have the Respondent release documents to complete the remaining instructions for inter vivos. That the issue of pending fees and third-party interest represented by the Respondent against his client could not be a subject of succession proceedings as submitted by the



Respondents. Reliance was hinged in Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e-I in relation to gift inter vivo where it had been observed as follows; -

“Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell's Equity 29ED Page 122 paragraph 3)

...The donor is no longer the owner of the property conveyed in gift intervivos or mortis causa. It is essential to its validity that the donor has actually and irrevocably divested himself or herself of the property conveyed as a gift”

20. She thus submitted that property could not be given yet retained at the same time.
21. That whereas the only reason for failure to transfer the gift to the Applicant that had been the non-payment of some fees, the Respondent had not produced any invoice or bill of cost in court. The Applicant thus submitted that in the absence of any evidence of unpaid fees, there were no such pending fees.
22. That further, the Respondent's allegation that he had submitted the requested documents to the Lands office had not been supported by any record of evidence. That contrary to the allegation that the deceased had died intestate, she had left a will for the remainder of the estate which she had allocated to herself as per the distribution consent dated 24th March, 2017.
23. It was her submission that the Respondent was conflicted as to which interest he was protecting since despite being the appointed counsel to conveyance, he had acted for a third party on a purported sale of some of his client's properties as seen in a pending matter in Naivasha ELC 008 of 2021. That further, upon the demise of the deceased, the Respondent had purported to cite the Applicant herein to commence succession proceedings so that the land of deceased client could be transferred to a trespasser. She thus submitted that the Respondent posed great danger to the Deceased estate and the beneficiaries. Reliance was placed on the provisions of Rule 6 paragraph 96 of the Standards of Professional Practice and Ethical Conduct, 2016 to submit that the circumstances resulting from the grave actions of the Respondent had caused great pain and losses to the family of the deceased. The Applicant thus prayed that the Respondent ceases to hold any documents relating to the property herein as the same would be aiding the risks to the property including aiding the trespassers to deal with the Deceased's estate at the peril of the Applicant.
24. That the Applicant herein was one of the Deceased's children whose gift/share of the property herein had not been transferred by the Respondent and that the Respondent had not demonstrated why he had not completed the said transfers for the last 7 years or why the same should be referred to a Succession Court as prayed in the Respondent's Preliminary Objection or the affidavits thereof, while the deceased's wishes had been effected to her other children who had no letters of administration so to say.
25. It was thus her submission that the Preliminary Objection be dismissed with costs and that the documents as requested in the Application dated 27th May, 2024 herein be released to complete the transfers as had been intended.



Determination.

26. I have carefully and anxiously considered the Preliminary objection raised to the Applicant's application seeking that the Respondent herein releases the Original Mutations, Consent to Subdivide (LCB), and Title Deed to Naivasha/Maraigushu Block 1/4438, to the Surveyor M/s Gathome Associates Surveyors, wherein the Respondent's response on a Preliminary Objection was that she had no Locus standi to file the instant suit without legal capacity as she held no Letters of a Limited Grant for that purpose.
27. I have considered the submissions, the law applicable and the authorities herein cited wherein I find that the main issue for determination herein is whether indeed the Applicant herein had or had no locus to file the current application.
28. The Oxford English Dictionary defines "locus standi" as the right to bring action to court.
29. In the decided case in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR the court observed as follows:

... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."
30. The notorious case in Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696 held that a preliminary objection....

“.....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”.
31. It had not been disputed that the Applicant is beneficiary of the estate of the deceased Eunice Wangari Kigwa who in her lifetime had surrendered the above captioned documents to the Respondent for onward transmission to the surveyor M/s Gatome & Associates Surveyors so as to ensure that there was complete conveyance of Naivasha/Maraigushu Block 1/4438 upon her children. The Applicant now seeks that the Respondent be compelled to surrender the said documents as instructed.
32. In response the Respondent has craftily brought in the issue of locus standi to oust the Applicant's application while forgetting that in his own admission, he had complied with the instructions of the deceased upon each child meeting the cost. The question then arises as to what criteria the Respondent used to convey the deceased's estate to some of her children while leaving out others to the effect that when he was questioned, he raised the issue of locus standi as a diversion. I find this tactic as being dishonest selective and discriminatory.
33. I find that the issue of locus standi does not arise in the present circumstance. The Applicant is only seeking for documents to be handed over to the surveyor as per her mother's instructions given during her lifetime. I find that the Applicant has a right to bring action to court as she is not seeking the deceased's estate. I find that the reason as to why the Respondent has refused to hand over the documents as instructed cannot be handled as Preliminary Objections as it will require probing of



evidence, as it is already evident from the submissions by the parties herein, which is contrary to the limited scope of the jurisdiction on preliminary objection.

34. On this point alone, I dismiss the preliminary objection herein filed by the Respondent.

Cost shall be in cause.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 7TH DAY OF NOVEMBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

