



**Ndua (Suing as Beneficiary of the Estate of David Ndua Thuo) v Waithera & 3 others
(Environment & Land Case E075 of 2024) [2025] KEELC 700 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E075 OF 2024
JM ONYANGO, J
FEBRUARY 12, 2025**

BETWEEN

**GODFREY ALFRED HINGA NDUU PLAINTIFF
SUING AS BENEFICIARY OF THE ESTATE OF DAVID NDUU THUO**

AND

**VIRGINIA WAITHERA 1ST DEFENDANT
WAMIKEY ESTATE LIMITED 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD DEFENDANT
THE LAND REGISTRAR KIAMBU 4TH DEFENDANT**

RULING

1. What is before me for determination are 2 Preliminary Objections dated 24.5.24 and 9.7.24 filed in response to the Plaintiff's application dated 17.5.2024 seeking orders that he be allowed to institute this suit as a beneficial owner of the 2nd Defendant/Respondent and for an injunction restraining the 1st defendant from passing any resolution or making any decision relating to the disposition or transaction of any land owned by the Wamikey Estate Limited.
2. In the Preliminary objection dated 24.5.24 the 1st and 2nd Defendants have raised the following points:
 - i. That the suit herein is incompetent, bad in law and incurably defective in that pursuant to the provisions of the Civil Procedure Rules 2010 and the *Law of Succession Act* 160, of the laws of Kenya, this court lacks the mandate and jurisdiction to determine questions arising from the deceased's estate.



- ii. That the suit herein, in form and substance offends the mandatory provisions of the Civil Procedure Act and Rules 2010 and the Law of Succession Act Cap 160 of the Laws of Kenya hence the same is untenable and liable to striking out.
 - iii. That the issues for determination in this suit are in respect of representation, administration and distribution of part of the estate of David Ndua Thuo (Deceased) which is pending determination by the High Court vide Kiambu High Court Succession Cause No. E093 of 2021 whereby proof of will is pending to set out the beneficiaries and mode of distribution of the shares of the deceased in the 2nd Defendant/ Respondent.
 - iv. The Plaintiff's suit through the back door is seeking to determine that the Plaintiff/Applicant as a beneficiary of the Deceased's estate which ousts the jurisdiction of this Honourable Court.
 - v. That this Honourable Court has no jurisdiction to hear and determine the suit herein as currently framed and instituted.
 - vi. That in the whole the Applicant herein is a vexatious and frivolous litigant and the proceedings herein are an abuse of the court process and the application should be struck out; In this court alone there is pending the following matters:
 1. High Court Succession Cause E093 /21- the Estate of the David Ndua Thuo – Kiambu;
 2. High Court Succession Cause E263/21 the Estate of the David Ndua Thuo;
 3. Chief Magistrate Misc. Application No. E125 of 2021;
 4. Chief Magistrate Misc. Application No. E080 of 2021;
 5. Chief Magistrate Case No. 249 of 2021
3. The Preliminary Objection dated 9.7.24 raises the following point:
- That the Plaintiff lacks the locus standi to file this suit in light of section 82(a) of the Law of Succession Act which provides as follows:
- “Personal representatives shall, subject only to any limitation imposed by their grant have the following powers:
- 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.”
4. Pursuant to the court's directions, the Preliminary Objection was canvassed by way of written submissions.

1st and 2nd Defendants' Submissions

5. In his submissions dated 13th January 2025 learned counsel for the 1st and 2nd Defendants/ Respondents submitted on two main issue; whether the court has jurisdiction to hear and determine this matter and whether this Honourable court has locus standi.
6. Counsel relied on the case of The Owners of Motor Vessel Lillian “S” v Caltex Oil Kenya Ltd (1989) KLR 1 where the court held that jurisdiction is everything and without it, a court cannot make one more step. It was his submission that the Plaintiff's suit raises issues that touch on the administration, representation and distribution of the estate of the late David Ndua Thuo (Deceased) and section



47 of the *Law of Succession Act* vests exclusive jurisdiction over such matters in the High Court or Magistrate's court with jurisdiction in succession matters. He added that Rule 41(1) of the Probate and Administration Rules provides that it is the Probate Court's mandate to determine who the beneficiaries of a deceased's estate are and to resolve any disputes regarding distribution of the estate.

7. It was counsel's further submission that this court's jurisdiction is ousted by the fact that the issues raised in the Plaintiff's suit are already the subject of determination in Kiambu H.C Succession Cause No. E093 of 2021 and Nbi H.C Succession Cause No. E2363 of 2021 which address the question the deceased's will. He argued that allowing this matter to proceed would result in duplicity of proceedings and it would create a potential for conflicting decisions thus undermining the orderly administration of justice. He relied on *In Re Estate of M'Ngarithi M'Miriti (Deceased)* (2017) eKLR and *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others* (1996) eKLR for the proposition that filing multiple suits over the same subject matter constitutes vexatious litigation and must be discouraged.
8. He submitted that the Applicant has filed various suits relating to the estate of the deceased including some in the Chief Magistrate's court thus contravening the doctrine of res sub judice under Section 6 of the *Civil Procedure Act*. He was of the view that the plaintiff's actions amount to forum-shopping which should not be entertained.
9. With regard to locus standi, counsel submitted that the question of whether the plaintiff is a beneficiary of the estate of the deceased falls within the exclusive jurisdiction of the probate court as was held in the case of *Trouistik Union International & Another v Jane Mbeyu & Another* (1993)eKLR. He added that the deceased died testate and the court had appointed an executor of his will who is vested with the responsibility of administering the estate of the deceased.

Plaintiff's Submissions

10. On his part, learned counsel for the Plaintiff submitted on whether the two preliminary Objections are merited. It was his submission that the Preliminary Objection dated 24.5.24 does not meet the threshold of a preliminary objection as it does not raise pure points of law. He relied on the case of *Odinga v Independent Electoral & Boundaries Commission & 3 Others* 2013 KESC 8 KLR and *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & infrastructure & 3 Others* (2021) KESC 39 (KLR) where the Supreme court refused to entertain preliminary points which did not raise pure points of law.
11. Counsel submitted that the 1st and 2nd Defendants were inviting the court to delve into the events transpiring in Kiambu High Court Succession Cause E093 of 2021 in which the subject matter is the suit property herein. He was of the view that this court cannot render itself of the said issues before hearing the parties. It was therefore his submission that the Preliminary objection is not merited.
12. With regard to the 3rd and 4th Defendant's Preliminary Objection, counsel submitted that the same was not merited as the Plaintiff has not instituted the suit on behalf of the estate of David Ndua Thuo Decased as contemplated by section 82 (a) of the *Law of Succession Act* and Order 31 Rule 1 of the Civil Procedure Rules. He contends the Plaintiff has sued on his own behalf in his capacity a beneficiary in order to protect his share and interest in the suit property owned by the 2nd defendant where the deceased held 98% shares. He relied on the case of *Nirmal Singh Dhanjal v Joginder Singh Dhanjal & 4 others* (2018) eKLR where the Court of Appeal held that the 1st Respondent did not need to take out a Limited Grant prior to moving the court to secure his interest as a beneficiary. He maintained the issue of the capacity in which the Plaintiff filed suit cannot be raised as a preliminary point.



Analysis and Determination

13. Having carefully considered the Preliminary Objections and the rival submissions filed by the parties herein, the following issues arise for determination:-
- i. Whether the court has jurisdiction to hear and determine this suit.
 - ii. Whether the plaintiff has the locus standi to institute this suit.
14. Before delving into the merits of the Preliminary Objections, it is important to determine whether the said Preliminary Objections meet the necessary threshold. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696 laid down the principle as to what constitutes a Preliminary Objection. In the said case Law, JA stated as follows: -
- “So far as I am aware, 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.”
15. As can be gleaned from the said authority, the question of jurisdiction is one of the issues that qualify to be taken up as a preliminary objection. One of the points raised by the 3rd and 4th Defendants is that this court lacks jurisdiction to hear and determine this matter as Plaintiff’s suit raises issues that touch on the administration and distribution of the estate of the late David Ndua Thuo (Deceased). The jurisdiction of this court is set out under Section 13 of the Land and Environment Court Act which provides as follows:
1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes”
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
16. A cursory glance at the Plaint shows that the Plaintiff is challenging the manner in which the 1st Defendant is dealing with part of the estate of David Ndua Thuo (Deceased) comprised in the properties owned by the 2nd Defendant. The Plaintiff’s rights in the suit property flow from the provisions of the *Law of Succession Act* as he states that he is a son of the deceased and therefore a beneficiary of his estate. The estate of David Ndua Thuo (Deceased) has not yet been distributed and the High Court is yet to determine issues concerning the deceased’s will, the identification of



beneficiaries and distribution of the estate. The dispute herein therefore falls within the jurisdiction of the High court pursuant to the provisions of section 47 of the Law of Succession Act. The said section provides as follows:

“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such order therein as may be expedient.

Provided that the High Court for purposes of this section may be represented by the Resident Magistrate appointed by the Chief Justice.

As was held in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR as follows:

“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and defendants.”

The same position was stated in *Re Estate of John Gakunga Njoroge (Deceased)* 2015 eKLR.

17. On the whether the Plaintiff has locus standi to bring this suit, it is clear that what clothes a party with the capacity to institute a case on behalf of the estate of the deceased is the Grant of letters of administration. See the cases of *Virginia Otieno v Joash Ougo and another* [1988] 1 KAR 1048 and *Trouistic Union International & Another v Jane Mbeyu and Another* (1993) eKLR. However, a beneficiary is not precluded from filing an application to safeguard his interests or challenge a Grant of Letters of Administration.

18. In the case of *Nirmal Singh Dhanjal v Joginder Singh Dhanjal* the Court of Appeal held as follows:

“It is apparent that in instituting the application, the 1st Respondent was acting in his capacity as an aggrieved dependant. As to whether his locus standi was dependent on his having a grant of letters of administration, section 76 of the Act is instructive. It provides in part that;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion”(emphasis added)

19. Further to this is rule 44 of the rules, which provides;

“Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate’s registry.” (emphasis added)



Consequently, under the aforesaid provisions, the summons for revocation of grant may be filed by any party who is interested in the estate. The 1st Respondent, having filed the application as an interested beneficiary was thus possessed of the locus standi to file the application.”

20. The court was of the view that a party who seeks to protect his interest in the estate of a deceased person is not legally bound to take out a limited grant prior to moving court to secure his interest as a beneficiary. However this case is distinguishable from the instant suit as the application was filed within the succession cause.
22. I am of the considered view that such an application can only be made within an existing succession case and not as a stand-alone suit. This is because it is the court seized with the succession case that has the mandate to deal with disputes arising between beneficiaries. In the instant case, the plaintiff chose to file a suit in this court instead of an application in the succession case without taking out a Limited Grant of Letters of Administration and he therefore lacks the locus standi.
23. In view of the foregoing, I find merit in the Preliminary Objections and I uphold them. Accordingly, the application and suit herein are struck out with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT THIKA THIS 12TH DAY OF FEBRUARY 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Mr Kingori for Akedi for the Plaintiff

Mr Kori for Mr Githui for the 1st and 2nd Defendants

Ms Nyawira for the 3rd and 4th Defendants

Court Assistant: Hinga

