



Balleth v Khamis & 3 others (Legal Representatives of Omar Khamis Baleth) (Civil Appeal E180 of 2023) [2025] KEHC 4499 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E180 OF 2023
M THANDE, J
MARCH 28, 2025**

BETWEEN

SALIM KHAMIS SAID BALLETH APPELLANT

AND

SHAIMA OMAR KHAMIS 1ST RESPONDENT

ASMA HAMZA 2ND RESPONDENT

AL-LEITH OMAR KHAMIS 3RD RESPONDENT

RUMAISA OMAR KHAMIS 4TH RESPONDENT

LEGAL REPRESENTATIVES OF OMAR KHAMIS BALETH

(An Appeal from the ruling of Hon. James Ong'ondo delivered on 21.11.23 in Malindi CM Succession Cause No. 71 of 2017)

JUDGMENT

1. The Appeal herein arises from a ruling delivered in Malindi CM Succession Cause No. 71 of 2017 on 21.11.23. The proceedings in the court below relate to the estate of Khamis Said Balleth (the deceased) who died on 1.3.93. A grant of letters of administration (the Grant) was issued to Omar Khamis Said Balleth (Omar) on 3.7.18 and confirmed on 7.6.21.
2. The Appellant filed an application dated 17.5.23 in the court below, seeking injunctive orders against the Respondents restraining them from selling, transferring, distributing and or otherwise dealing or interfering with the deceased's property known as Plot No. 1978 (Original Number 1935/7) Malindi, Plot Number 1979 (Original Number 1935/8) Malindi, Plot Number 2141 (Original Number 424/53) and Portion 72 Ganda, Malindi pending the hearing and determination of the application and of the summons for revocation of grant he had filed.



3. The Respondents opposed the application via a preliminary objection dated 28.5.25. The objection is that the application is incompetent null and void under the principle of jus accrescendi given that Plots No. 1978, 1979 and 2141 were not available for distribution upon the death of one of the joint tenants. This objection was reiterated in a replying affidavit sworn on even date by the 1st Respondent.
4. In the impugned ruling, the trial Magistrate found that Plots 1978 and 1979 did not form part of the estate of the deceased and dismissed the application in so far as they relate to the 2 properties.
5. Being aggrieved by the ruling, the Appellant preferred the Appeal herein raising the following grounds:
 1. That the Learned Magistrate should have dismissed the Preliminary Objection, as the Objections tasked the court to deliberate on matters outside the scope of the Application, that is “Revocation of fraudulently obtained Grant”, and not Matters of Succession and distribution which are more appropriately under the Jurisdiction of the Kadhi’s Court since the deceased died professing the Islamic Faith.
 2. That the Preliminary Objection does not in fact challenge the legal sufficiency of the application to revoke/nullify a grant, but delved into matters of succession which are not within the Jurisdiction of the Court since the deceased professed the Islamic Faith where matters of succession are resolved by the Kadhi’s Court as enshrined in *the Constitution*.
 3. That the Opposing counsel willfully or ignorantly bundled four (4) properties and claimed they are not up for Distribution based on the principle of Jus accrescendi, when in fact only two of the four are jointly owned, the other two are solely and exclusively owned by KAHMIS SAID BALLETH.
 4. That the Fraudulently obtained Grant does not list the entire inventory of the Deceased’s properties, for this reason decisions on what is and is not up for distribution is premature and attempts to put the cart before the horse.
 5. That the Preliminary Objection on which the ruling was premised did not challenge the legal sufficiency of the opposing party’s claim for revocation of a clearly fraudulently obtained Grant, nor challenge the jurisdiction of the court to nullify/revoke the said Grant, as Preliminary Objections are required to do by law. And since this Preliminary Objection did not aim at challenging the court’s authority to hear the case, nor asserted that the opposing party’s application for Grant Revocation is legally deficient in some way, it has no legality whatsoever.
 6. That it be noted that the matter of whether the Principle of Survivorship is actually applicable since BOTH the joint owners are deceased and currently there is no “Survivor” and no action was taken to change the status of the Titles at any time, such deliberations of succession are also to be handled according to Islamic Law at the Kadhi’s Court.
6. The Appellant prayed that the impugned ruling be set aside to allow for the revocation of the fraudulently obtained grant, after which matters of succession and distribution be referred to the Kadhi’s Court for appropriate resolution. He also sought that the costs of the Appeal be borne by the Respondents.
7. Parties filed their written submissions which I have duly considered.
8. As I consider the matter herein, it is necessary to consider whether the trial court had the requisite jurisdiction to entertain the application before it. The Appellant’s complaint in his application in the trial court is that Omar who died on 8.10.21 obtained the Grant fraudulently by failing to disclose that the deceased was survived by beneficiaries other than himself. The Appellant further alleged that



they had been informed that his father's properties now belonged to his brother Omar and that the Respondents who are Omar's wife and children were planning to sell the same. He therefore moved to court to protect the estate of the deceased.

9. In the application, the Appellant described the Respondents as the legal representatives of Omar. The 1st Respondent however stated in her replying affidavit that she had not filed for a grant of representation in respect of Omar's estate nor in respect of the estate of her father in law, the deceased herein. With this averment, it is clear that the Respondents had no locus standi to be sued or appear in court.
10. It is trite law that a party without locus standi can neither sue nor be sued. Locus standi is defined in Black's Law Dictionary, 9th Edition (page 1026) as:

The right to bring an action or to be heard in a given forum.

11. In the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, the Court of Appeal had this to say about locus standi:

Locus standi is defined in Black's Law Dictionary, 9th Edition at page 1026 as-

"The right to bring an action or to be heard in a given forum".

This Court in *Alfred Njau & 5 others vs. City Council of Nairobi* [1983] eKLR put it in the following terms:-

"The term locus standi means a right to appear in Court and, conversely, as is stated in *Jowitt's Dictionary of English Law*, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

12. The Respondents are not the personal or legal representatives of the estate of Omar. As such, they were non-suited to the Applicant's claim for want of locus standi to be sued.
13. Just as a party with no locus standi may not appear or be heard in any proceedings, a court lacks jurisdiction to hear or give audience to such a party. In so saying, I am guided by the decision in *Legal Advice Centre t/a Kituo Cha Sheria v Attorney General (Advisory Opinion Reference E001 of 2023)* [2024] KESC 15 (KLR) (12 April 2024) (Ruling) where the Supreme court stated:

That question raised in regard to locus standi of a party goes directly to the issue of whether the Court has jurisdiction to hear this matter. It is therefore imperative that this Court should settle this question at the onset before moving forward with the hearing of the reference itself.

14. As indicated, the Appellant sued the Respondents in their capacity as legal representatives of Omar and with respect to the estate of the deceased. In light of the averments by the 1st Respondent that she is not the legal representative of the estate Omar or of the deceased, the trial court ought to have found that it lacked jurisdiction to entertain the application before it, filed against persons without locus standi.
15. The question as to whether the succession of the estate of the deceased should be referred to the Kadhi's Court for appropriate resolution can only be dealt with at the hearing of the summons for revocation of grant pending before the court below.



16. In the end and for the reasons stated herein the Appeal is allowed and the ruling of 21.11.23 is set aside with the result that the Application dated 17.5.23 for injunction in the court below is struck out for want of jurisdiction. No order as to costs.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 28TH DAY OF MARCH 2025

M. THANDE

JUDGE

