



**Edward v Mwakidudu & 3 others (Environment & Land Case  
25 of 2021) [2023] KEELC 6 (KLR) (10 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 6 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 25 OF 2021  
MAO ODENY, J  
JANUARY 10, 2023**

**BETWEEN**

**MBURA EDWARD ..... PLAINTIFF**

**AND**

**SHARIFF NDOLE MWAKIDUDU ..... 1<sup>ST</sup> DEFENDANT**

**LUWALI NDOLE MWAKIDUDU ..... 2<sup>ND</sup> DEFENDANT**

**KAZUNGU NDOLE MWAKIDUDU ..... 3<sup>RD</sup> DEFENDANT**

**PHILIP TUNGU MBURA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Preliminary Objection dated January 20, 2022 by the 4<sup>th</sup> Respondent seeking the striking out of this suit on the grounds that:
  - a) That the Applicant’s entire suit is fatally defective, null and *void ab initio* and the same ought to be struck out in that the Applicant lacks *locus standi* to bring this suit on his own behalf and/or that of the interested party/4<sup>th</sup> Respondent herein.
  - b) That the Applicant’s entire suit is fatally defective, null and *void ab initio* and the same ought to be struck out in that the suit is *sub judice* as there are matters before the High court of Kenya at Malindi touching on the parcel of land which include Succession cause No 48 of 2015 Malindi In The Matter of The Estate of Ndole Mwakidudu Deceased that Public Trustee Cause No 32 of 2019 Malindi In The Matter of The Estate of Ndole Mwakidudu Deceased



and as such this Honourable Court has no jurisdiction to entertain the instant suit.

2. Counsel agreed to canvas the Preliminary Objection by way of written submissions which were duly filed.

#### **4th Respondent's Submissions**

3. Counsel for the 4<sup>th</sup> Respondent submitted that the Applicant came into occupation of the suit land Gede/Dabaso/138 by virtue of him being the 4<sup>th</sup> Respondent's son. That the Applicant averred to be one of the sons of the late Gladys Kabibi Mbura, and hence filed this suit as a beneficiary of the estate of the deceased.
4. Counsel further submitted that the Applicant has not obtained any grant of letters of administration of the estate of the deceased mother hence has no locus standi to file this suit.
5. According to counsel the cause of action relied upon by the Applicant against the Respondents was with regards to an agreement for sale between the 4<sup>th</sup> Respondent and the other three Respondents in their capacity as the beneficiaries of one Ndole Mwakidudu, the registered owner of the suit property.
6. Further that the same cause of action is the subject matter involving the same parties in Succession Cause No 48 of 2015 Malindi In The Matter of The Estate of Ndole Mwakidudu Deceased and PT Cause No 32 of 2019 Malindi In The Matter of The Estate of Ndole Mwakidudu Deceased, thus making the present suit sub judice under Section 6 of the *Civil Procedure Act*.
7. Counsel urged the court to uphold the Preliminary Objection and strike out the suit with costs.

#### **Applicant/respondent's Submissions**

8. The Applicant/Respondent acting in person, submitted that the issues raised by the 4<sup>th</sup> Respondent require this Court to evaluate the evidence and that the matter cannot be determined by a Preliminary Objection. The Applicant cited numerous provisions and precedent to define a legal representative, the doctrine of sub judice and the jurisdiction of this court, which I have all considered.

#### **Analysis And Determination**

9. The issues for determination are whether the Preliminary Objection on whether the Applicant has locus standi to file this suit and whether this suit is sub judice.
10. A party can raise a Preliminary Objection on points of law at any time before judgment. The issue must be purely on points of law if argued on the assumption that all the facts pleaded by the other side are correct may dispose of the suit as was held in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.
11. Similarly, in the case of *Oraro v Mbaja* (2005) eKLR, the Court held that: -  

“As already remarked, 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.”
12. The issues raised in this Preliminary Objection are that the Applicant has no locus standi to bring this suit and that the same is sub judice which are pure points of law.



13. In the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court Civil Case No 464 of 2000, the Court held that: -

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and others v City Council of Nairobi (1982) KAR 229, the Court also held that;-

“the term *locus standi* means a right to appear in Court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings”.

14. Locus standi is the right to appear and be heard in Court or other processes and it follows that a party with no locus standi cannot be heard even when he/she has a good case. A party must have the capacity to file a case in a representative capacity to stand in the shoes a deceased person. If you do not apply and obtain letters of administration, then you do not have the locus to sue on behalf of the estate.

15. Looking at the affidavit in support of the Originating Summons, it is clear from paragraph 1 thereon that the Applicant filed the suit in his capacity as one of the beneficiaries of his deceased mother. There is nothing to show that the Applicant had obtained any grant and/or appointed as a legal representative of the deceased prior to filing this suit. This disqualifies the Applicant as a person who has capacity to sue.

16. In the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR the Court of Appeal, sitting in Mombasa held that; -

“...a litigant is clothed with *locus standi* upon obtaining a limited or full letters of administration in cases of intestate succession...”

17. In the circumstances, I find merit in the objection on locus standi and I need not delve into the issue whether this suit is *sub judice* and the Preliminary Objection on the first ground on locus standi has succeeded since for the aforementioned reason alone, the suit cannot stand.

18. In any event, the issue of sub judice as raised, and having perused the cases referred to which are succession cases would require further interrogation of facts which might not fit within the purview of Preliminary Objections

19. Consequently, the Preliminary Objection dated January 20, 2022 is hereby upheld and the suit is hereby struck out with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 10<sup>TH</sup> DAY OF JANUARY, 2023.**

.....

**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**

