



**Patel (Suing as the Executor of the Estate of Natverbhai Prabhudas  
Vallabhai Patel) v Patel & 3 others (Environment & Land Case  
721 of 2017) [2023] KEELC 16116 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16116 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 721 OF 2017**

**JA MOGENI, J**

**FEBRUARY 28, 2023**

**BETWEEN**

**SHIPLAN PATEL (SUING AS THE EXECUTOR OF THE ESTATE OF  
NATVERBHAI PRABHUDAS VALLABHAI PATEL) ..... PLAINTIFF**

**AND**

**DEVIKA SHAILESHKUMAR PATEL ..... 1<sup>ST</sup> DEFENDANT**

**NATAVERBHAI PATEL ..... 2<sup>ND</sup> DEFENDANT**

**SHANIL VIRAJ PATEL ..... 3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the Defendant's Notice of motion dated the 7/12/2022 where it seeks to have the court to stay the suit in the alternative to strike out the entire suit. The application is brought under Order 2 Rule 15 (1) (c), Order 2 Rule 15 1 d and Order 7 Rule 6 *Civil Procedure Rules*, Section 1A, 1B, 3 and 63 (e) of the *Civil Procedure Act*, Articles 25 (c) a 47, 48 ,50, (1) 159 (2) and the doctrine of *audi alteram partem* and all other enabling provisions of the law.
2. The Applicant has enumerated the orders sought as follows:
  1. Spent
  2. That pending inter partes hearing and determination, of this application this Honorable Court be pleased to stay further hearing of this suit before Honorable Lady Justice Jacqueline Mogeni or any other Court.



3. That pending the hearing and determination of this suit this Honorable Court be pleased to issue summons to the partner in charge of the transaction relating to the suit property from the Firm of Deton Hamilton Harrison and Matthews for cross-examination and/or interrogation as to breach or abuse of fiducial relationship between the firm of Hamilton Harrison and Matthews and the 1<sup>st</sup> Defendant herein.
  4. That this Honorable Court be pleased to strike out this suit in its entirety on account of the Plaintiff/Respondent lack of locus standi ab initio to institute this suit on behalf of the estate of Nataverbhai Prabhudas Vallabhai Patel here in Kenya
  5. That in furtherance to order number 4 above, this Honorable Court be pleased to award costs to this application and the suit to the 1<sup>st</sup> to 3<sup>rd</sup> Defendant/Applicants.
  6. That this Honorable Court be pleased to grant any other order that it may deem just to grant in the circumstances.
3. The application is supported by the grounds therein and the sworn affidavit of Devika Shaileshkumar Patel sworn on 6/12/2022.
  4. The application was opposed by the Plaintiff/Respondent's through his Replying Affidavit dated the 7/12/2022 sworn by Shilpan Patel who avers that he is the executor of the estate of the late Nataverbhai Prabhudas Vallabhai Patel. Wherein pursuant to the directions of the court on 08/02/2023 the Application was disposed of by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the Notice of Motion including the respective parties' submissions there are only two issues for determination. The first is whether the plaintiff has *locus standi* to institute this suit and the second is whether this applicant is entitled to the drastic orders of striking out of the suit.
6. Order 2 Rules 15(1) (b) (c) and (d) under which the application has been brought provide as follows:

“ 15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) .....; or
- (b) ..... or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

7. Striking out of a pleading is a very drastic remedy. The applicant must justify the striking out orders he seeks. In this court's view the applicant has mainly premised his application on the ground that the plaintiff lacks locus standi as the will which gave him power was prepared in India. The 1<sup>st</sup> Defendant's contends that the Plaintiff does not have locus to institute this suit to represent the estate of the late Nataverbhai Prabhudas Vallabhai Patel who was owner of suit property. The reason being that the Will



that grants the Plaintiff/Respondent power was drawn in India and is therefore alien to Kenya by dint of Article 2 (5 &6) of *the Constitution* as read with Article 1 and 2 of the Convention of the Conflicts of Laws Relating to the Form of Testamentary Disposition.

8. The Plaintiff has submitted that he has locus standi as Grant of Probate for the Succession Cause Application No. 3097 of 2014 was issued on 24/03/2015 and the certificate of confirmation of the grant was issued on 22/02/2016 which he produced as part of the exhibits in his bundle of documents in the main suit. Which he avers that the grant has not been revoked nor set aside and therefore he is still the executor.
9. From a perusal of the Plaint, I note the Plaintiff at paragraph 8 therein has indicated that he is the executor of the estate of Nataverbhai Prabhudas Vallabhai Patel who was the owner of land parcel number LR15005/5. He has also filed a Copy of the Grant of Probate dated 22/02/2016 which confirms that he is the Executor of the will and does therefore have locus standi to bring an action concerning the suit property.
10. Further that the 1<sup>st</sup> to 3<sup>rd</sup> defendants had filed a similar application on 3/07/2018 where it sought to have the firm of advocates, Hamilton, Harrison and Matthews (HHM) disqualified a ruling was delivered dismissing the application by Justice Komingoi a copy of which is attached at pages 37 to 43. That therefore the current suit is a decoy clothed in the fashion of fiducial relationship alleged by the 1<sup>st</sup> defendant between HHM and the 1<sup>st</sup> defendant.
11. The Plaintiff avers that the issue of purchase price was an issue raised during trial of the main suit and the matter is waiting judgment on 21/03/2023. Further that since the defences of the 1<sup>st</sup> to 3<sup>rd</sup> defendants were struck out the issue of purchase price of the suit property having come from the deceased is now unchallenged.
12. *Locus standi* is defined by the Black's Law Dictionary, 9<sup>th</sup> Edition as; "The right to bring an action or to be heard in a given forum."
13. The court in the case of *Alfred Njau & others v City Council of Nairobi* (1982) KAR 229, defined *locus standi* thus; "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 proceedings."
14. It is trite that the lack of the requisite capacity to bring a suit goes to the root of the case, and without locus standi, the suit cannot stand. This was aptly expressed by the court in the case of *Priscilla Jesang Koech v Rebecca Koech & 3 others* [2018] eKLR as follows: "*Locus standi* is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of *BV Law society of Kenya v Commissioner of Lands & others*, Nakuru High Court, Civil Case No 464 of 2000. It was held that: If a party has no locus standi, then the said party cannot bring a suit to court. The issue of *locus standi* goes to the root of any suit and the said issue of *locus standi* is a point of law which is capable of disposing of a matter preliminarily."
15. The 1<sup>st</sup> Defendant has pleaded that the Plaintiff has no *Locus Standi* or capacity to institute this suit. That due to the lack of the said capacity, the suit is incompetent and should be struck out. 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”.

16. It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no *locus standi*, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Plaintiff cannot be heard and that point alone may dispose of the suit. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu High Court Civil Case No.22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.

17. Having now considered the objections raised by the 1<sup>st</sup> Defendant, the Court finds that lack of *locus standi* can dispose of the matter preliminarily without having to resort to ascertaining of facts. However, where in the instant suit the main suit has already been heard and actually a judgment is awaited on 21/03/2023. I am curious to understand why the issue of locus standi is being raised at this late stage in the hearing. The defendants ought to have raised this matter before the main suit was heard and concluded.
18. This notwithstanding, I have examined the principles of the locus standi against the pleadings of the 1<sup>st</sup> defendant and note that the Plaintiff being an executor in the Will of the late Nataverbhai Prabhudas Vallabhai Patel does seem to have *locus standi* to institute the main suit. I am persuaded to make this finding when I consider what the Court of Appeal said in the case of [\*Martha Ndiro Odera \(suing as the administrator and personal representative of the estate of Willy Patrick Ochieng Ndiro \(Deceased\) v Come Cons Africa Limited\*](#) (2015) eKLR the Court of Appeal, differently constituted and sitting at Nairobi upheld that a party had the requisite locus standi to institute a suit in a matter where the grant of letters of administration ad colligenda bona was for 'the collection of the assets of the estate of the deceased including the filing of suit to claim the deceased's properties.
19. The plaintiff in the main suit has filed suit to claim the deceased's property the matter has been deliberated and heard and now awaits delivery of judgment. Generally, the administrator or executor of the estate is the only person authorized to initiate or defend an action on behalf of the probate estate. This general rule follows the logic that one must be conferred legal standing, or authority to act, before litigation can be taken on behalf of an estate
20. Finally, the defendant/applicant's has applied that since the Plaintiff/Respondent lacks locus standi and the suit should be struck out, while the plaintiff/respondent argument is that the confirmation of grant has not been revoked and he has locus.



21. From the pleadings of the defendant he has referred the court to Article 2 sub-article 5 and 6 of *the Constitution* which state that the general rules of international law shall form part of the Law of Kenya and any treaty ratified by Kenya shall form part of the laws of Kenya under *the Constitution* of Kenya.
22. Article 1 of the Convention on Conflict of Laws Relating to the Form of Testamentary Dispositions refers to the validity of testamentary disposition if they comply with internal law. The Article reads as follows:

Article 1

A testamentary disposition shall be valid as regards form if its form complies with the internal law:

- a. of the place where the testator made it, or
- b. of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
- c. of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
- d. of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
- e. so far as immovables are concerned, of the place where they are situated.

For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system.

The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.

23. On the other hand, Article 2 of the same convention speaks to the revocation of testamentary disposition it provides as follows:

Article 2

Article 1 shall apply to testamentary dispositions revoking an earlier testamentary disposition.

The revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under Article 1, the testamentary disposition that has been revoked was valid.

24. The applicant herein appears to have forgotten that the will he seeks to revoke was already confirmed through Grant of Probate and a Certificate of Confirmation. Further the Articles quoted from *the Constitution* confirm that Kenya being a signatory to the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions indeed makes it plausible that the Will is applicable in Kenya and the Executor is indeed an Executor as per the Laws of Kenya. While rejecting the applicant's apparent attempts at hoisting himself by his own bootstraps, this court finds that the ground is not helpful to the applicant even though it forms some part of the evidence that has been adduced at the hearing of the main suit.



25. The court in the case of *Alumark Investments Limited v Tom Otieno Anyango & 4 Others* [2018] eKLR reiterated the position set out long ago in the case of *D.T. Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR 1 and stated as follows:

“ 13. It is settled law that the court’s power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. This was the finding in the case of *D.T. Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR 1 at p. 9 where it was stated as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

26. I am of the view that that it is quite unsafe in the circumstances of the instant application to grant the orders of striking out suit as sought. This is not such a plain and obvious case that invitingly winks at this court for a striking out order. Colossal damage may be occasioned to the claimants at an intricate stage where the case has been heard and now a judgment date is reserved. Striking out this suit at this point will mean that the evidence heard was all in vain. Now that the parties had their day in court this court would rather the reserved judgment is delivered since the parties had their day in court and they addressed all the issues including the issues being raised in this application.

27. In conclusion therefore, the present application dated 7/12/2022 lacks merit and it is hereby dismissed with costs being in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MOGENI J**

**JUDGE**

Judgment read in virtual court in the presence of:

Mr. Mwihuri for Plaintiff/Respondent

Mr Kamau for the 4<sup>th</sup> Respondent

No appearance for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants

**MOGENI J**

**JUDGE**

