



**In re Estates of Winfred Mukami Tiras (Deceased) and Alice  
Kanini Thuguri (Deceased) (Succession Cause 49 & 50 of 2008  
(Consolidated)) [2024] KEHC 2467 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2467 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 49 & 50 OF 2008 (CONSOLIDATED)**

**G MUTAI, J**

**FEBRUARY 23, 2024**

**BETWEEN**

**ENID NJERI ..... APPLICANT**

**AND**

**ELIZABETH KAGENDO THUGURI ..... RESPONDENT**

**RULING**

1. The Succession Cause Nos. 49 of 2008 and 50 of 2009 relate to the estates of Winfred Mukami Tiras (deceased) (hereafter “Winfred”) and Alice Kanini Thuguri (deceased) (hereafter “Alice”), respectively. Winfred and Alice were the sisters of the Applicant, Enid Njeri and the Respondent, Elizabeth Kagendo Thuguri. I shall refer to them as Enid and Elizabeth, respectively, in this ruling. In both cases, Elizabeth petitioned for the grant of representation. Enid, on her part filed 2 Chamber Summons application dated 13<sup>th</sup> December 2020 seeking to have the grant issued to Elizabeth revoked, on the grounds, inter alia, that it was obtained fraudulently, by making a false statement and concealment of something material to the case.
2. The Respondent’s advocates raised preliminary objections dated 2<sup>nd</sup> October 2022 in each of the two matters. As the objections are similar, I shall consider them together and make one ruling.
3. The said Notices of Preliminary Objection seek to have Enid’s applications dismissed on the grounds that she has no *locus standi* to file the instant application pursuant to Section 39 of the *Law of Succession Act*. Further the application is time-barred as the interest of the Applicant (if any) has been extinguished by effluxion of time and that the application is a moot. Thus, any subsequent action/ recourse brought about by allowing the application is statute-barred under Sections 4(3), 20(1), and (2) and 21 of the *Limitation of Actions Act*, rendering the decision an academic exercise. It was also urged that the application is an abuse of the court process, vexatious, misconceived and devoid of any practical significance and ought to be dismissed in limine.



4. The preliminary objection was canvassed by way of written submissions.
5. The advocates for the Respondent, A.B Patel & Patel Advocates LLP filed written submissions dated 7<sup>th</sup> November 2023 in support of the Preliminary Objection.
6. On the issue of *locus standi* it was submitted that the deceased persons herein died intestate leaving no surviving children or spouse hence the applicability of Section 39(1) of [Law of Succession Act](#). However, they were survived by their mother Esther Muthoni Mhuri, the sole beneficiary pursuant to the Section 39, and the only person entitled to apply for letters of administration intestate. Counsel submitted that the applicant has no interest in the subject matter on her own and hence lacks *locus standi* to lodge the application. For that reason, she ought not to be heard by this honourable court. Counsel relied on the case of [Khelef Khalif El-Busaidy v Commissioner of Lands & 2 Others](#) [2002]eKLR and [Mumo Matemu v Trusted Society Of Human Rights Alliances & 5 Others](#) [2014]eKLR.
7. Counsel further relied on the case of In [Re Estate of the Late M'thigai Muchangi \(Deceased\)](#) [2020]eKLR and submitted that Enid had moved the court under erroneous legal provision as she ought to have sued as a legal representative of the estate of the late Esther Muthoni Mhuri.
8. On the second of issue of the application being time barred counsel submitted that the application is a moot application whose decision shall have no substantive effect to any party thus amounting to an abuse of court process. To support this position, Elizabeth's counsel relied on the case of [Republic v Kenya Maritime Authority & Another, ex parte Zamzam Shipping Limited](#) (2021) eKLR.
9. Counsel further submitted that Section 42 of the [Limitations of Actions Act](#) only exempts criminal proceedings and actions to recover possession of trust land thus this matter is not exempt, hence the application of section 4(3) and 20(1) and (2) of the said [Act](#). The grant of letters of administration intestate was issued on 11<sup>th</sup> August 2008, whereas the applicant's application was filed on 13<sup>th</sup> December 2020, 12 years later, thus the applicant is estopped by effluxion of time.
10. Counsel submitted that the beneficiary of the two estates passed away, and during her lifetime, the applicant never raised any objection to the administration of the two estates.
11. In conclusion, counsel submitted that the application is an abuse of court process, misguided and moot and ought to be dismissed with costs.
12. Through her advocates, MCM Advocates LLP, Enid filed her written submissions dated 10<sup>th</sup> November 2023.
13. Counsel relied on the case of [Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd](#) (1969) EA 696 and submitted that the issue of *locus standi* could only be determined after the other issues had been heard in a full trial.
14. Counsel relied on Section 76 of the [Law of Succession Act](#) and submitted that any interested person could file and or apply for revocation of a grant.
15. On the issue of the application being time-barred, counsel submitted that an application for revocation does not fall under the ambit of Sections 4, 20, and 21 of the Limitations of Actions Act.
16. Counsel submitted that the preliminary objection is unmerited and should be dismissed.
17. When the matter came for highlighting of the written submissions on 23<sup>rd</sup> January 2024, both parties reiterated the position in their respective submissions.



18. I have considered the preliminary objection and the rival submissions. Should the preliminary objection be upheld by this Court?

19. The Court of Appeal for Eastern Africa in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (supra)* observed that:-

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of 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 a contract giving rise to the suit to refer the dispute to arbitration”.

20. In the same case Sir Charles Newbold, P. stated:-

“a preliminary objection is in the nature of what used to be a demurrer. It 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

21. Elizabeth’s objection is in respect of Enid’s *locus standi* and whether, given the provisions of the *Limitation of Actions Act* Enid had the right to file the Chamber Summons application dated 13<sup>th</sup> December 2020. As I have already adverted to, the two applications seeks revocation of grant of letters of administration intestate issued to Elizabeth in respect of the two estates on 11<sup>th</sup> August 2008 and confirmed on 27<sup>th</sup> September 2010 and 4<sup>th</sup> October 2010 respectively.

22. The applicant has argued that the applicant has no *locus standi* to apply for revocation of the said grant for the reasons that the only beneficiary and person entitled to apply for grant of letters of administration of the two estates according to Section 39 of the *Law of Succession Act* was their mother Esther Muthoni Mburi, who authorised her to apply for the same on her behalf through a power of attorney. On the other hand, the applicant submitted that the *locus standi* issue can only be determined after all issues are heard in full trials. She also submitted that Section 76 of the Act allows any person to apply for revocation.

23. Section 39 of the *Law of Succession Act* provides:-

1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
  - a. father; or if dead
  - b. mother; or if dead
  - c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
  - d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none



- e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
  2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.
24. On *locus standi* the court in the case of *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR stated:-

“*locus standi* is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite *locus standi* to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards *locus standi* are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.

The position in law as regards *locus standi* in succession matters is well settled. A litigant is clothed with *locus standi* upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* [1986-1989] EALR 468, the Court rendered itself thus:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

25. It would appear to me that Enid applied for revocation of the two grants on the grounds that they were obtained fraudulently by the making of false statements and for concealment of material facts. She also made the application in her capacity as a sister to the two deceased persons herein and not on behalf of or in the interest of their mother, as alleged by Elizabeth.
26. Section 76 of the *Law of Succession Act* provides 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—
- a. that the proceedings to obtain the grant were defective in substance;
  - b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
  - c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
  - d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
    - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
    - ii. to proceed diligently with the administration of the estate; or
    - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or



- e. that the grant has become useless and inoperative through subsequent circumstances.
27. In my view, section 39 of the said Act lists the order to be applied when determining to whom the estate of a deceased person who has left no surviving spouse or children shall devolve. It does not state who may apply for revocation. Section 76 permits any interested party to do so. By virtue of being the sister of the deceased, Enid qualifies to be an interested party for the purposes of the said section. Therefore, it is my finding that pursuant to the provisions of Section 76 the applicant has the *locus standi* to apply for revocation of grant issued to Elizabeth. That being so the first ground of the preliminary objection must fail.
28. On the second ground the respondent's argument is that the applicant's is time statute barred pursuant to Section 4(3), 20(1) and (2) 21 of the *Limitation of Actions Act*.

Section 4(3)

“An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action”.

Section 20(1) and (2)

1. None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—
  - a. in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
  - b. to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.
2. Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:

Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.

Section 21

“Subject to section 20(1) of this Act, an action in respect of a claim to movable property of a deceased person, whether under a will or on intestacy, may not be brought after the end of twelve years from the date on which the cause of action accrued, and an action to recover arrears of interest in respect of a legacy, or damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due.

29. It is my view that Section 4(3) of the said Act is in respect of an action for accounts, while Section 20(1) and (2) makes provisions for actions concerning trust property and Section 21, on the other hand, relates to movable property of a deceased. The issue for determination in this case is revocation



of grant. That being the case, I find and hold that the cited provisions of the Limitation of Actions Act do not apply.

30. In my view, there is no time limitation on matters revocation of grants as the provision of Section 76 of the act is open-ended. Such applications can be made at any time. I am guided by the case of In re Estate of Josephine Magdalena Motion (deceased) [2016] eKLR where the court stated that:-

“My reading of this is that an application founded on section 76 of the Law of Succession Act can be made at any time. There is no limitation set by the provision for the making of the application. The provision is open-ended. Of course there is room for bringing in the test of reasonableness into the play. That, however, does not introduce time limitation; it merely requires the court to bring in to bear reasonableness in its exercise of discretion on whether or not to revoke a grant...

The Limitation of Actions Act prescribes periods for limitations of actions and arbitrations. My reading of the actions to which that statute applies is that it does not include succession causes, or, at any rate, causes or actions governed by the Law of Succession Act. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the Civil Procedure Act and Rules. It does not envisage the special proceedings governed by such statutes as the Law of Succession Act.”

31. I am in agreement with the above holding. I therefore find and hold that the second and third grounds of the preliminary objection have no merit and must therefore fail.
32. Enid and Elizabeth are siblings. The estates, the subject matter of the two proceedings, belong to their deceased sisters. I do not think that at this point this Court can determine if the respective applications are abuse of the court process. That determination may only be made after the applications are considered on merit. The fourth ground of the preliminary objection must also fail.
33. I have not found merit in the preliminary objections. The same are hereby dismissed.
34. As this is a succession matter involving close family members, it would not be appropriate to make orders as to costs.
35. Orders accordingly.

**DATED AND SIGNED IN MOMBASA THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024.**

**GREGORY MUTAI**

**JUDGE.**

In the presence of:-

Mr. Mwalimu for the Applicant;

Ms. Essajee for the Respondent; and

Arthur – Court Assistant.

