

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT KAPSABET**  
**ELCLC CASE NO. E023 OF 2025**

**EZEKIEL MAREIYO MENGICH.....1<sup>ST</sup>**  
**PLAINTIFF**

**CHARLES KIPLETING MENGICH.....2<sup>ND</sup>**  
**PLAINTIFF**

**RAEL MENGICH KORIR.....3<sup>RD</sup>**  
**PLAINTIFF**

**LENAH MAREIYO.....4<sup>TH</sup>**  
**PLAINTIFF**

**HELLEN JEBET LAGAT.....5<sup>TH</sup>**  
**PLAINTIFF**

**SALINA JEPKORIR RONO.....6<sup>TH</sup>**  
**PLAINTIFF**

**JOB LAGAT.....7<sup>TH</sup>**  
**PLAINTIFF**

**-VERSUS-**

**KIPSILGICH MAREIYO**  
**NATHAN.....DEFENDANT**

**RULING**

1. By a preliminary objection dated 16<sup>th</sup> September 2025, the defendant through Kalya and Company Advocates, is seeking that the plaintiff's entire suit commenced by way of a plaint dated 10<sup>th</sup> September 2025, be dismissed with costs upon the grounds thus;

a) Want of Locus Standi/Representative Capacity

i) The Plaintiffs lack the requisite *locus standi* to institute and maintain this suit as they have not obtained any Grant of Letters of Administration, whether limited or full, over the estate of their deceased mother (Bot Ngelechei). The entire claim, being predicated upon rights allegedly accruing to the said deceased, is therefore incompetent and a nullity *ab initio*.

ii) The suit offends Section 82(a) of the Law of Succession Act (Cap 160) which vests the power to enforce causes of action on behalf of the deceased solely in duly appointed personal representatives.

iii) The suit offends Order 31 Rule 1 of the Civil Procedure Rules, 2010, which mandates that every suit on behalf of a deceased person be instituted in the name of his or her legal representative.

iv)The Plaintiffs have not pleaded nor exhibited any such representative capacity.

b) Want of mandatory written authority

i) The verifying affidavit and supporting affidavits have been sworn by the 1<sup>st</sup> Plaintiff Ezekiel Mareiyo Mengich on his own behalf and on behalf of 6 other Plaintiffs, yet no written authority has been signed by the said Plaintiffs nor has the same been annexed as required under Order 1 Rule 13(1) and (2) of the Civil Procedure Rules, 2010.

ii) Consequently, the suit offends the provisions of Order 1Rule 13 (1) and (2) of the Civil Procedure Rules, 2010 expressly provides that where there are several Plaintiffs, one or more may be authorized by the others to appear, plead or act on their behalf, but such authority must be in writing signed by the parties giving it and shall be filed in the suit. The absence of such authority renders the entire pleadings and affidavits defective.

c) Limitations of Actions

i) The Plaintiff's claim is statute-barred under Section 7 of the Limitation of Action Act (Cap 22), which

provides that an action may not be brought to recover land after the expiry of twelve (12) years from the date the right of action accrued.

- ii) The Plaintiff's mother died in 1973, and more than 52 years have elapsed without any claim being brought to assert her alleged interest

d) Estoppel/acquiescence

- i) The Plaintiffs are stopped from challenging the Defendant's registered title, having for over five decades acquiesced to his sole ownership and possession of the suit properties. The families have peacefully co-existed on the properties since the 1963 without objection or litigation, and their prolonged silence bars them in equity from asserting a contrary right.
- ii) A party who by conduct has led another to believe in the existence of a certain state of affairs is estopped from asserting a different state of affairs to the detriment of the other. The Plaintiff's inaction and acceptance of the Defendant's ownership over a long period disentitles them from equitable relief.

2. In the plaint, the plaintiffs through Rotich, Langat and Partners Advocates, sued the defendant for two principal orders;

a) An order of permanent injunction restraining the Defendant or his agents from subdividing transferring and or alienating the suit parcel NANDI/NDALAT/SETTLEMENT/1081 (The suit land) and/or in any way disposing and or evicting the Plaintiffs from suit land.

b) An order cancelling the title of the suit land and reverting it back to NANDI/NDALAT/SETTLEMENT/395 and NANDI/NDALAT/SETTLEMENT/396.

3. Simultaneously, the plaintiffs initiated an application by way of a Notice of Motion of even date seeking orders, inter alia; That, this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent, Respondent or his agents from subdividing, transferring and or alienating the suit land and/or in any way disposing and or evicting the Applicants from the suit land pending hearing of the main suit.

4. On 16<sup>th</sup> September 2025, this court directed, inter alia, that the preliminary objection to take precedence over the application and other issues herein and that pending the hearing and determination of the preliminary objection, there be an interim preservation order namely maintenance of status quo over the suit land in line with **Section 13 (7) of the Environment and Land Court 2015 (2011)**.
5. Further, the court directed that the preliminary objection be heard by way of written submissions. Accordingly, learned counsel for the defendant and learned counsel for the plaintiff filed their submissions dated 7<sup>th</sup> September 2025 and 22<sup>nd</sup> September 2025 respectively.
6. Learned counsel for the defendant did submit that the plaintiffs' claim relates to estate of the deceased contrary to **Section 82 (a) of the Law of Succession Act Chapter 160 Laws of Kenya and Order 31 Rule 1 (Supra)** and relied upon **Otieno-vs-Ougo (1986-1989) EALR 468 quoted in Rajesh Pranjivan Chudasama - vs- Sailesh Pranjivan Chudasama (2014) eKLR** that an administrator who has taken letters of administration can lodge a legal action otherwise the action is rendered

incompetent ab initio. Further, reliance was made on **Alfred Njau & others-vs-Nairobi City Council (2014) KECA 250 (KLR) and Trouistik Union International Ltd & another-vs-Jane Mbeyu & another (1993) eKLR** on locus standi as well as the locus classicus case of **Mukisa Biscuit Manufacturing Company Ltd-vs-West End Distributors Ltd (1969) EA 696** that a preliminary objection must be on points of law and not on facts to be ascertained by way of evidence.

7. Moreover, counsel cited **Order 1 Rule 13 (supra)** and submitted that the 1<sup>st</sup> plaintiff swore affidavit in his personal capacity leaving doubt if authority of the other plaintiffs existed as noted in the case of **Research International East Africa Ltd-vs- Julius Arisi & 213 others (2007) eKLR**. That the suit is irredeemably time barred as stipulated under **Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya** and due to co-existence of the parties on the suit land, the doctrine of acquiescence is applicable herein as observed in the case of **Serah Njeri Mwobi-vs John Kimani Njoroge (2013) eKLR**. That therefore, the suit undermines the sanctity of title under **Section 26 of the Land Registration Act**

**2015 (2012) and Article 40 of the Constitution of Kenya 2010.** That accordingly the doctrine of estoppel applies as the suit is barred both in law and in equity.

8. Learned counsel for the plaintiff opposed the preliminary objection and submitted that the same is misconceived, solitary and hanging because it does not germinate from any pleading duly filed by defendant in response to the suit. That it is founded upon facts to be ascertained at the trial of the suit. Counsel relied on the case of **Kandara Residence Association & another-vs-Ananas Holdings Limited & 4 others; Director of Survey & 3 others others (Interested parties) (2020) eKLR** that a preliminary objection must be on pure points of law with no facts to be ascertained at the hearing of the case. That in the case of **Henry Wanyama Khaemba-vs-Standard Chartered Bank Ltd & another (2014) eKLR**, it was held a preliminary objection should not be on issues which require probing of evidence as even evident from the submissions of the opposite party.
9. Also, counsel cited the case of **D.T Dobie & Company (Kenya) Ltd-vs-Muchina (1982) KLR 1** that 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. On that account, counsel cited the case of **Karl Webnar Clausen-vs-Commissioner of Lands & others (2019) eKLR** on cause of action. That it follows that the preliminary objection is incompetent, lacks merit and ought to be dismissed with costs to the plaintiff.

10. In the foregone, the issues to address at this stage of the suit are whether;

a) The preliminary objection is sustainable and

b) what orders can the court give for the ends of justice herein?

11. Concerning the ground of locus standi/representative capacity, learned counsel for the defendant contended that the plaintiff's claim is over the estate of their deceased mother, Bot Ngelechei (Deceased) without first having obtained limited or full grant of letters of administration thereof. Learned counsel for the plaintiffs stated that the plaintiffs are not suing as personal representatives of estate of the deceased person

and as envisaged in Mukisa case (supra), no pleading has been filed by the defendant in this suit.

12. I take into account, the meaning of ‘Legal Representative’ and ‘Personal Representative’ under section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya and section 3 of the Law of Succession Act Chapter 160 of the Laws of Kenya respectively. Also, I note, inter alia, **Otieno, Chudasama, Troistik Union and Njau cases (all supra)** and the capacity in which the plaintiffs have instituted this suit hence, the point of law raised herein is to be ascertained during the hearing of the suit.

13. On that score, I subscribe to the decision in the case **of Mukisa Biscuit (supra) at pages 700/701 paragraphs D-F** where the Court held;

***‘.....A preliminary objection consists of a matter 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.....It cannot be raised if any fact has to be ascertained or***

***if what is sought is the exercise of judicial discretion.....'***

14. As regards mandatory written authority, the defendant's contention is that the 1<sup>st</sup> plaintiff has no written authority from the other plaintiffs in this suit. It is abundantly clear that the 1<sup>st</sup> plaintiff is duly authorised by his co-plaintiffs to make and swear the verifying affidavit sworn on 10<sup>th</sup> September 2025 accompanying the plaint of even date. This position is disclosed in paragraph 1 of the affidavit.

15. Furthermore, the authority of even date duly signed by the plaintiffs is accompanying the verifying affidavit. Paragraph 1 thereof is pretty clear on the authorization of the 1<sup>st</sup> plaintiff by his co-plaintiffs herein and the same is captured at paragraph 12 of the plaintiffs' submissions.

16. Pertaining to the ground of Limitation of actions, it is notable that the defendant is yet to file any pleading herein as observed in **Mukisa Biscuit case** (supra). Further, from the certificates of official search accompanying the application as well as contained in the plaintiffs' list of documents annexed to the plaint and paragraphs 10 and 11 of the plaintiffs' submissions, this

point of law is blurred with factual details liable to be contested and in any event, to be proved through evidence.

17. So, I embrace the reasoning in **Oraro-vs-Mbaja (2005) 1 KLR 141, where Ojwang J** (as he then was) addressed the issues of preliminary objection with clarity as follows;

***‘ I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the matter of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.....where the court needs to investigate facts, a matter cannot be raised as a preliminary point.’***

18. On estoppel/acquiescence, the defendant stated that there has been the plaintiffs’ inaction or acquiescence of the defendant’s possession of the suit land over a long period. Bearing in mind **Makadara Residence Association and Henry Khaemba cases** (supra) and by

paragraphs 13, 14 and 15 of the plaintiffs' submissions, the facts require probing of evidence at the trial.

19. In that regard, in **Karata Ernest & others-vs-Attorney General Civil Revision No. 10 of 2010**, the Court of Appeal of Tanzania at Dar Es Salaam on 22<sup>nd</sup> December 2010, succinctly stated;

***'At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it.....All these are clear pure points of law.***

***All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the 'normal manner' when deliberating on the merits or otherwise of the concerned legal proceedings. On this premise, therefore, it is our considered opinion that the above reproduced point of objection was prima facie legally untenable.....'***

20. Moreover, the present suit, in its nature, is not plainly hopeless and so weak to be summarily dismissed. It

reveals reasonable cause of action and not beyond redemption; see **Clausen and D.T Dobie cases** (supra).

21. To this end, it is my considered view that the preliminary objection contains points of law which are blurred with disputed factual details to be tested by the rules of evidence. Therefore, the preliminary objection is unsustainable in light of the grounds which host it.

22. Thus, the preliminary objection dated 16<sup>th</sup> September 2025 is devoid of merit. The same is hereby dismissed with costs in the cause.

23. It is so ordered.

**DATED and DELIVERED at KAPSABET this 15<sup>th</sup> day of OCTOBER 2025.**

**HON. G MA ONGONDO**

**JUDGE**

**In the presence of; -**

1. Ms. Chesoo learned Counsel for the Defendant
2. Mr Rotich learned Counsel for the Plaintiffs
3. Walter, Court Assistant

