



REPUBLIC OF KENYA



**Likholo & 3 others v Otimba & 3 others (Environment & Land Case  
E062 of 2024) [2025] KEMC 128 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEMC 128 (KLR)

**REPUBLIC OF KENYA  
IN THE VIHIGA LAW COURTS  
ENVIRONMENT & LAND CASE E062 OF 2024  
JA AGONDA, SPM  
MAY 23, 2025**

**BETWEEN**

**WILLIAM NGOTA LIKHOLO ..... 1<sup>ST</sup> PLAINTIFF  
KACKLINE SEMO LIKHOLO ..... 2<sup>ND</sup> PLAINTIFF  
EUPHEMIAH BUYENGO NANDWA ..... 3<sup>RD</sup> PLAINTIFF  
HELLEN STANDI LIKHOLO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**NEWTON LIKHOLO OTIMBA ..... 1<sup>ST</sup> DEFENDANT  
LAND REGISTRAR, VIHIGA ..... 2<sup>ND</sup> DEFENDANT  
CHAIRMAN EMUHAYA LAND CONTROL BOARD ..... 3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a notice of preliminary objection 31<sup>st</sup> October, 2024, the defendants/applicants have raised on the following grounds:-
  1. That the plaintiff lacked legal capacity to institute this suit.
  2. That the reason through whom the plaintiff's claim is deceased and as such any claim arising therefrom cannot be sustained without proper legal representation.
  3. That the plaintiffs have not obtained letters of administration in respect of the estate of the deceased thereby rendering the suit incompetent and fatally defective.
  4. That the suit is improperly before this court and ought to be struck out with costs.



2. On the other hand, the plaintiffs/respondents' advocate filed their replying affidavit sworn on 20<sup>th</sup> February, 2025 by 1<sup>st</sup> plaintiff/respondent. He deposed that the preliminary objection was an afterthought and brought with ill motive and with unclean hands. He stated that he filed this suit on 22<sup>nd</sup> October, 2024 and served the defendants between 24<sup>th</sup> October, 2024 and 25<sup>th</sup> October, 2024. That 1<sup>st</sup> defendant neither enter appearance nor filed their defence until when ruling was delivered on 13<sup>th</sup> February, 2025. He averred that the preliminary objection had not been filed on 14<sup>th</sup> February, 2025 and it should not be used to prevent the hearing and determination of this suit on its merits. He stated that the application and the suit were filed to preserve the suit property from further wastage and changing hands illegally as the 1<sup>st</sup> defendant acquired title deed of the suit property as succession had not been done. He contended that they filed the application for letters of administration Ad Litem dated 10<sup>th</sup> February, 2025 as per copy annexed. He asserted that he was also granted limited grant of letter of administration on 17<sup>th</sup> February, 2025 as per copy annexed. He stated that he had locus standi and consent authority from the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs. He stated that the defendants were determined to sell the suit property having obtained consent for sub division that is in his possession. He averred that the plaintiffs are the only surviving family of the deceased. That the sale and transfer of suit property by the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant fraudulently, unlawfully and null and void and the preliminary objection was met to circumvent justice. He averred that the suit property was an ancestral land and the original registered owner was late Siyuka Likholo who died in 1979 before succession was effected and no legal process was followed by 1<sup>st</sup> and 2<sup>nd</sup> defendants' acquisition of the suit property and that they should not be condemned unheard.

### **Issues & Determination**

3. Having considered the preliminary objection herein. I have also considered the submissions by the counsel for the respondent and the case laws relied on. The issues for determination in this preliminary objection is:
  1. Whether the application is incompetent for having been filed before the applicants obtained a grant of letters of administration in respect to the estate of the deceased and without there being a succession cause in existence.
  2. What are the appropriate orders to be issued by the court?
4. The definition of a preliminary objection was well set out in the case of Mukisa Biscuit Manufacturing Co. Ltd-vs-West End Distributors Ltd (1969) EA 696.

So far as I am aware, 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.”
5. This was followed up by the judgment of Sir Charles Newbold in the same case:

A preliminary objection 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
6. It therefore follows that a preliminary objection is one that consists of a pure point of law. It is raised on assumption that all facts pleaded are correct and further that if demonstrated it can dispose of a matter.



7. On the first issue, whether the application is incompetent, the applicants filed the instant application before they were issued with a grant of letters of administration and without there being a succession cause filed in the case. It is trite law that a suit filed before the applicant is issued with a grant of letters of administration in respect to the estate of a deceased person is an incompetent suit. In the cases of Daniel Njuguna Mbugua-vs-Peter Kiarie Njuguna & 2 Others and Isaya Masira Momanyi-vs-Daniel Omwoyo (supra), the courts struck out suits that had been filed by parties prior to obtaining grants of letters of administration. The courts separately held that the plaintiffs in the cases lacked capacity and/or locus standi to file the suits on behalf of the estates of the deceased persons. In the latter case the court stated that the suit was incompetent and an abuse of the process of the court.
8. I also cite the case of In the matter of the Estate of Geoffrey Meitamei Lonina (Deceased) [2012] eKLR where the applicant was seeking for interlocutory orders in circumstances that were similar as in this case, Dulu J., held as follows:“Indeed, under section 45 (1) & (2) of the Law of Succession Act (Cap 160), this court has powers to protect the assets of a deceased person. However, in my view, only an administrator or an interested party in an existing administration cause, can apply for protection of the deceased’s assets. In the present matter, no application for letters of administration has been filed under sections 51, 53 or 54 of the Law of Succession Act. Therefore, in my view, the provisions of section 45 of the Act cannot be brought into play by the applicant. They have no legal standing in law to bring the present application and suit herein. On that account, I find that the application is misconceived. Even if the application was filed under the Civil Procedure Act, (Cap 21), it would still not succeed. This is so because, the application is filed without any existing cause or proceedings. It stands on its own as a Notice of Motion, and asks for interlocutory orders. An interlocutory application cannot stand on its own. Nor can substantive orders be given in such an application.”
9. In the instant application, I note that the plaintiffs/ respondents filed the plaint on 22<sup>nd</sup> October, 2024 regarding the estate of the deceased without obtaining letters of administration Ad Litem. It was after this court had delivered its ruling on 28<sup>th</sup> January, 2025 when the plaintiffs/respondents filed an application for letters of administration Ad Litem dated 10<sup>th</sup> February, 2025. Thus, the court issued Limited grant of letters of Administration on 17<sup>th</sup> February, 2025 and the plaintiffs/respondents confirmed this fact in their replying affidavit. I hold the view that the application is incompetent for having been filed before a grant of letters of administration was obtained. It is a grant of letters of administration that gives a person the mandate to deal with the property of a deceased person. This is made clear by Section 82(a) of the Law of Succession Act which lists the powers of a personal representative to include –“to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.”
10. I cite the case of John Marete Kirema & another v Gladys Karimi M’Muthamia & 3 others (2013) eKLR where it was argued that the applicant did not require a grant of letters of administration to pursue an application under Section 45 of the Law of Succession Act, Makau J. (as he then was) held that:“....an intended administrator or a person who has made a petition to be appointed as administrator is not a personal representative of the deceased person and therefore has no locus standi to bring any action independent or within the petition until a grant of letters of representation has been made to him or her as case may be. I therefore do not agree as this is a petition cause and not a civil suit as submitted by the counsel for the applicant, he does not require grant of letters of administration to pursue the application under Section 45 of the Law of Succession Act. Hence, in the absence of a grant the plaintiffs/respondents herein have no locus standi to deal with the property of the deceased in any manner.



11. The plaintiffs/respondents were subsequently issued with a grant of letters of administration ad litem on the 17<sup>th</sup> February, 2025, which was way later after the application was filed on 22<sup>nd</sup> October, 2024. However, the same cannot be used to support an application filed before the grant was issued. Section 80(2) of the Law of Succession Act is categorical that a grant only takes effect as from the date of issue and not earlier. A grant therefore does not operate retrospectively. The subsequent grant thereby cannot cure the defect.
12. Further to this, no succession cause has been filed in respect of the estate of the deceased. The net effect is that the application is not anchored on an existing suit. The interlocutory orders sought cannot be granted in a vacuum in the absence of an existing suit. In the premises I find that the application is fatally defective and the orders sought cannot issue.
13. On the second issue, whether any orders should issue, the plaintiffs/respondents alleged that the defendants/applicants have intermeddled with the estate of the deceased. The defendants/applicants stated that they proper purchased suit property as required by the law and have denied the allegation herein and contend that they purchased the suit property before the seller died.
14. It is an offence under Section 45 of the Law of Succession Act to intermeddle with the free property of a deceased person. There is no dispute in this matter that the plaintiffs/respondents have not obtained a grant of representation over the estate of the deceased. The deceased herein died in 1979. Forty Five years have now lapsed and no succession cause has been filed in the matter. Going by the affidavit of the 1<sup>st</sup> plaintiff/respondent, there is likelihood of the estate being wasted before appropriate measures are taken. It is the duty of the Probate Court to protect the estate of a deceased person where there is likelihood of it being wasted before a succession cause is filed. This power emanates from the provisions of Rule 73 of the Probate & Administration Rules that gives the court inherent power to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the court. In view of the fact that the orders sought herein cannot issue due to the defect in the application, it is desirable that the court makes orders for the preservation of the estate pending the filing of a succession cause in the matter. The order that commends itself to me is for the current status quo to be maintained pending the filing of a succession cause in the matter.
15. In the foregoing premises and based on the reasons stated hereinabove, the upshot of this court's ruling is that the preliminary objection dated 24<sup>th</sup> October, 2024 is merited. Consequently, I therefore uphold the same. Further the application and plaint dated 22<sup>nd</sup> October, 2024 is not merited on the grounds that the plaintiffs/respondents had no locus standi to file the same, the preliminary objection is upheld in its totality. The application is dismissed and the plaint is struck out. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN THE OPEN COURT THIS 23<sup>RD</sup> DAY OF MAY, 2025.**

**J.A.AGONDA**

**PRINCIPAL MAGISTRATE**

**On 23.05.2025**

Before: J.A. Agonda PM

C/A: Busuku

Parties:-

Plaintiffs/Respondents: Mr. Mare h/b Ms. Ombete



Defendants/Applicants: No Appearance

Court: Ruling delivered in the open court.

**J.A.AGONDA**

**PRINCIPAL MAGISTRATE**

