



REPUBLIC OF KENYA



**Makokha v Omondi & 2 others (Land Case E169 of 2025)  
[2025] KEELC 8121 (KLR) (25 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8121 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
LAND CASE E169 OF 2025  
CG MBOGO, J  
NOVEMBER 25, 2025**

**BETWEEN**

**PAULINE MARY MAKOKHA ..... PLAINTIFF**

**AND**

**HESBON OMONDI ..... 1<sup>ST</sup> DEFENDANT**

**ZILPAH CHEPKEMOI BETT ..... 2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before this court for determination are the notice of motion dated 4<sup>th</sup> April, 2025 and the notice of preliminary objection dated 3<sup>rd</sup> June, 2025 respectively. The notice of motion dated 4<sup>th</sup> April, 2025 is filed by the plaintiff applicant, and it is expressed to be brought under Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *akn ke act 1924 3 Civil Procedure Act* seeking the following orders: -
  1. Spent.
  2. Spent.
  3. Spent.
  4. That pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> defendant respondent, his agents, employees, servants or any other persons acting under his instructions or authority from entering upon, trespassing on, remaining on, constructing on, dealing with, alienating, wasting, selling, transferring or in any other way interfering with all that parcel of land known as Land Reference No. 2 241 Nairobi Gitanga Road (the 'suit property').



5. That the 3<sup>rd</sup> respondent be and is hereby restrained from processing, registering, or effecting any transactions related to the suit property pending the determination of this suit.
  6. That the OCS Kilimani Police Station or any other law enforcement agency ensure compliance with these orders.
  7. That costs of this application be on cause.
2. The application is premised on the grounds inter alia that the late Raphael Charles Makokha is the registered owner of the land known as LR. No. 2 241 passed away on 30<sup>th</sup> April, 2013. The application is further supported by the affidavit of the plaintiff applicant sworn on even date. The plaintiff applicant deposed that she is the widow of Raphael Charles Makokha who died intestate on 30<sup>th</sup> April 2013. She deposed that following the demise of the late Raphael, and together with the 2<sup>nd</sup> defendant respondent, they were appointed administrators of the estate. That contrary to the express provision of the orders of the court issued in Succession Cause No. 106 of 2014, the 2<sup>nd</sup> defendant respondent continued to collect rent from tenants until February 2016 when the tenants vacated the suit property.
  3. The plaintiff applicant deposed that on 27<sup>th</sup> June, 2023, the 2<sup>nd</sup> defendant respondent filed an affidavit in the Succession Cause stating that the suit property ceased forming part of the estate of the deceased, and that it was transferred to the 1<sup>st</sup> defendant respondent. She deposed that the registration of transfer of the suit property in 2016 in the name of the 1<sup>st</sup> defendant respondent by the 3<sup>rd</sup> defendant respondent after the death of the deceased and prior to the confirmation of grant is null and void. The plaintiff applicant deposed that the entries made on 26<sup>th</sup> August, 2016 were effected illegally, unprocedurally and fraudulently by the defendants respondents.
  4. The plaintiff applicant further deposed that the suit property is an income generating asset, and that its loss would cause irreparable harm to the estate. Further, that the property bears sentimental attachment to the children and the family, and allowing the 1<sup>st</sup> defendant respondent to continue deriving any benefit from an illegality would be a mockery to the rule of law and the principles of equity.
  5. The 1<sup>st</sup> defendant respondent filed his replying affidavit sworn on 6<sup>th</sup> June, 2025. He deposed that he is the registered owner of the suit property having purchased the same from the deceased on 22<sup>nd</sup> January, 2009 at a consideration of KShs.80,000,000 -. Further, that the process of transfer was initiated by the deceased prior to his death and completed after his death. The 1<sup>st</sup> defendant respondent deposed that upon purchase of the suit property, they executed a conveyance which was lodged for registration and stamp duty paid in the year 2009. He deposed that the transfer was not registered owing to a subsisting charge in favour of East Africa Building Society.
  6. The 1<sup>st</sup> defendant respondent deposed that in the year 2012, the deceased lodged an executed discharge of charge which was registered on 28<sup>th</sup> April, 2015. Further, that following the letters of grant of administration, the 2<sup>nd</sup> defendant respondent unknowingly collected rent from his tenant but she later refunded. That since the purchase of the suit property, he has been paying all the rates due to the county government.
  7. The 2<sup>nd</sup> defendant respondent filed her replying affidavit sworn on 30<sup>th</sup> May, 2025. The 2<sup>nd</sup> defendant respondent deposed that she has no interest in the suit property, and that she did not participate in the transfer and registration of the 1<sup>st</sup> defendant respondent as the owner of the said property. Further, that some of the issues were raised in Busia HC P & A No. 106 of 2014 which was determined. The 2<sup>nd</sup> defendant respondent deposed that she has never breached any fiduciary trust bestowed on her, and that the instant application is misconceived and incompetent ab initio.



8. The 1<sup>st</sup> defendant filed the notice of preliminary objection dated 3<sup>rd</sup> June, 2025 challenging the said application on the following grounds:-
  1. The entire suit as filed is defective and bad in law.
  2. This honourable court lacks the requisite jurisdiction to entertain the instant suit as the cause of action is about probate and administration of an estate of a deceased.
  3. If the contents of paragraph 14,15,16,17 and 18 of the Plaintiff's plaint were to be believed, then it is not in doubt that the dispute herein is about administration of an estate of a deceased person which squarely falls within the jurisdiction of the probate court.
  4. The suit as it is, is unmeritorious as the threshold to grant the prayers sought cannot be met.
  5. The suit as filed is premature, non-starter and if anything is an abuse of the court process.
9. The application and the objection were canvassed by way of written submissions. The plaintiff applicant filed her written submissions dated 20<sup>th</sup> June, 2025. With regard to the preliminary objection, the plaintiff applicant submitted that it offends the trite law that an objection must raise a pure point of law and which should be based on uncontested facts. She relied on the case of Mukhisa Biscuit Manufacturing Ltd v West End Distributors Ltd [1969] E.A 696. She submitted that the remedies sought in the plaint fall squarely within the jurisdiction of this court as it relates to ownership, occupation and title to land. Further, that the matter in Busia High Court did not determine the legality of transfer or ownership. She submitted that the issues in this suit are live, justiciable and not res judicata. Reliance was placed in the cases of Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) and Christopher Orina Kenyariri t a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] KECA 578 (KLR).
10. The plaintiff applicant further submitted that she has sued the 2<sup>nd</sup> defendant respondent not in her capacity as a co-administrator but as an intermeddler and a facilitator of fraud. To further buttress on this submission, the plaintiff applicant relied on the cases of Koinange & 2 others (Suing as Administrators of the Estate of the Late Charles Karuga Koinange) v Mitithiru Company Limited [2024] KEELC 1414 (KLR), and Boskwony v Biwott & 5 others [2023] KEELC 20100 (KLR).
11. With regard to her application, the plaintiff applicant submitted that the same ought to be allowed owing to the 1<sup>st</sup> defendant respondent's failure to file any replying affidavit and the inadequate and evasive response by the 2<sup>nd</sup> defendant respondent. She relied on the cases of Re Estate of Job Ndunda Muthike (deceased) [2018] KEHC 3138 (KLR), Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others [2012] KEHC 5590 (KLR), Konchellah v Sunkuli & 2 others [2018] KESC 58 (KLR), and Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642(KLR).
12. While further relying on the cases of Giella v Cassman Brown & Co. Ltd (1973) EA 358, American Cynamid Co. v Ethicon Limited (1975) AC 135, Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR) and Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR), the plaintiff applicant submitted that she has presented a strong prima facie case based on the compelling evidence on illegal transfer of the suit property.
13. The 1<sup>st</sup> defendant respondent filed his written submissions dated 23<sup>rd</sup> June, 2025 where he raised two issues for determination:-
  1. Whether this honourable court should uphold the 1<sup>st</sup> defendant's notice of preliminary objection dated 3<sup>rd</sup> June, 2025; and



2. Whether the plaintiff's notice of motion application dated 4 April, 2025 is meritorious.
14. On the first issue, the 1<sup>st</sup> defendant respondent submitted that the objection meets the legal threshold enunciated in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. He submitted that the suit raises a pure point of law as the suit as filed offends Section 79 and 82 of the *akn ke act 1972 14 Law of Succession Act*. He relied on the cases of *Republic v Nairobi City Council & 3 others Exparte Christine Wangari Gachege Suing on behalf of the Estate of Rahab Wanjiru Evans* [2014] eKLR, and *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR.
15. On the second issue, the 1<sup>st</sup> defendant respondent submitted that the application is without merit. While relying on the cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, and *Ondieki v Ndusi* (Environment and Land Appeal E024 of 2021) [2022] KEELC 12778 (KLR) (4 October 2022) (Judgment), he submitted that the plaintiff applicant did obtain interim orders to preserve the property from the probate court in Busia which orders are still subsisting the implication that the suit property is not in danger of being wasted.
16. The 2<sup>nd</sup> defendant respondent filed her written submissions dated 10<sup>th</sup> July, 2025. She submitted that joint administrators of the estate of a deceased must act jointly in bringing any suit on behalf of the said estate. She further submitted that the plaintiff applicant lacks capacity to institute this suit due to lack of consent by her co-administrators. Further reliance was placed in the cases of *Theresa Wanjiro* (Suing as the administrator of the estate of *Joseph Gichuki Riunge v Andrew Kimata Gachanga & another; George Mwai Mburu* (3<sup>rd</sup> party) [2021] eKLR, *Kimani & 2 others* (Suing as the legal representatives and beneficiaries of the Estate of the late *Paul Kimani Muna*) v *Njeri & 3 others* (Environment and Land Judicial Review Case E002 of 2023) [2024] KEELC, and *Migwi* (Suing on His own and also on behalf of the estate of *Migwi Mariga-deceased*) v *Ngunjiri & another* (Environment & Land Case E044 of 2023) [2024] KEELC 476 (KLR) (6 February 2024)(Ruling).
17. In conclusion, the 2<sup>nd</sup> defendant respondent urged the court to find that the plaintiff lacks capacity, and that the suit is defective and incompetent.
18. I have considered the application, the preliminary objection, the replies thereof and the written submissions filed by the respective parties. I am of the view that the issue for determination are as follows:-
  - a. Whether the notice of preliminary objection has merit; and
  - b. Whether temporary orders of injunction ought to issue pending the determination of the suit.
19. Law, J.A. in *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors* (1969) EA 696 stated as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”



20. Also, the case of John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR, it was held that:-

“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”

21. Further, Ojwang J (As he then was) in Oraro -vs- Mbaja (2005) KLR 141 where after quoting the statement of Law, JA. in the Mukisa Biscuits case (supra) went on to state that:-

“A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

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...”

22. From the above cited authorities, it is clear that for a preliminary objection to succeed, the same must consist of a pure point of law, with the facts not disputed by the opposing party. Also, a preliminary objection should possess the ability to dispose of the issue that is before court without going to trial and lastly, the same ought to stem from and not outside of pleadings.

23. Having looked at the preliminary objection as drafted, the same does not raise pure points of law. Grounds 1, 3, 4 and 5 are contested and in my view would require evidence to ascertain its veracity. The only ground that raises a pure point of law is ground 2 which argues that this court lacks jurisdiction to entertain the suit as the cause of action is about probate and administration of an estate of a deceased person.

24. It is trite law that jurisdiction is everything, and without it, the court cannot make any one more step to deal with an issue or a matter that it has no jurisdiction over, and in any case, the resultant effect would be that all proceedings emanating therefrom would be a nullity. However, I am not persuaded that this court lacks jurisdiction to determine the suit. In the undated plaint filed by the plaintiff, she seeks the following orders:-

- a. An order of permanent injunction restraining the 1<sup>st</sup> defendant herein whether by himself, his agents, servants, employees, invitees, and or otherwise whomsoever from entering upon or trespassing, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using, residing and remaining or representing to any person that he is the duly registered owner or in any manner whatsoever from interfering with the proprietary rights of the estate of Raphael Charles Makokha over all that piece of land known as Land Reference No. 2 241 Nairobi Gitanga Road.
- b. A declaration that the late Raphael Charles Makokha is the legitimate and registered owner of parcel of land known as Land Reference No. 2 241 Nairobi Gitanga Road.



- c. A declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> defendants intermeddled with the estate of Raphael Charles Makokha in respect of the transfer of Land Reference No. 2 241 Nairobi, Gitanga Road to the 1<sup>st</sup> defendant herein.
  - d. An order directing the 3<sup>rd</sup> defendant to rectify the register in respect of all that property known as Land Refenrece No. 2 241 Nairobi, Gitanga Road and cancel entry No. 20 made on 26<sup>th</sup> August, 2016 in favour of the 1<sup>st</sup> defendant herein and all other subsequent entries.
  - e. An order do issue directing the 3<sup>rd</sup> defendant to rectify the register of all that property known as Land Reference No. 2 241 Nairobi, Gitanga Road and register the owner as the Late Raphael Charles Makokha.
  - f. An order do issue directing the 1<sup>st</sup> defendant to submit the certificate of title it holds for all property known as Land Reference No. 2 241 Nairobi, Gitanga Road to the 3<sup>rd</sup> defendant herein within 14 days of the judgment of the court for cancellation.
  - g. An order do issue directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to pay to the Estate and to account for all rental income received from the suit property from 26<sup>th</sup> August 2016 to date.
  - h. An award of general damages against the defendants for harm caused by their unlawful conspiracy and fraudulent actions.
  - i. Costs of the suit to be borne by the defendants.
25. In the plaint, the plaintiff further pleaded acts of fraud, unlawful and unprocedural acts with regards to the transfer of the suit property. From the pleadings, and the prayers sought, this court has jurisdiction to hear and determine the suit. For this reason, the notice of preliminary objection fails.
26. On the second issue, the conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Co. Limited* (1973) EA 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows:-
- “Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
27. The plaintiff applicant argued that the suit property belongs to her late husband who passed away on 30<sup>th</sup> April, 2013, and that contrary to the express orders of the court issued in Succession Cause No. 106 of 2014, the 2<sup>nd</sup> defendant respondent continued to collect rent until August, 2016. The arguments advanced by the plaintiff applicant challenge ownership of the 1<sup>st</sup> defendant respondent on grounds that the same was done after the demise of her husband which amounts to intermeddling with the estate of the deceased among other issues.
28. The 1<sup>st</sup> defendant respondent contended that he is the owner of the suit property having acquired the same from the late Raphael prior to his demise through an agreement sometime in the year 2009. The 2<sup>nd</sup> defendant respondent maintained that she has no interest in the suit property, that she did not participate in the registration and transfer of the same, and that the issues raised herein were also raised in *Busia HC P&A No. 106 of 2014*.



29. In a bid to determine whether the plaintiff applicant has met the grounds for grant of temporary orders of injunction, I carefully perused the documents annexed in her supporting affidavit. My attention was drawn to the ruling delivered by the High Court in Busia on 15<sup>th</sup> October, 2024. In this ruling, the court granted prayer (h) to the effect that the interim order for the preservation of LR. No. 2 241 Nairobi Gitanga Road shall remain in force, until other or further orders.
30. Paragraph 32 of the said ruling stated as follows:-
- “LR. No. 2 241 Nairobi Gitanga Road has never been registered in the name of the deceased, and the material on record points to the deceased having sold his interest in it in 2009 to Hesbon Omondi”
31. From the ruling, and having looked at the annexures, there is no title showing that the deceased was the registered proprietor of the suit property besides the official search. The same record indicates that the 1<sup>st</sup> defendant respondent is the owner of the suit property. More so, the plaintiff applicant has not established any proof that she benefited directly from the proceeds of the rent, if any, that would prove substantial loss on her part and the children of the deceased. In my view, the plaintiff applicant has not established a prima facie to enable the court’s intervention at this stage. The contentions raised over the suit property challenging the ownership of the property by the late Raphael and the 1<sup>st</sup> defendant respondent are best fit to be tried during the hearing. There is no proper ground (s) that have been proven that merit injunctive relief.
32. Let me also add that the high court issued orders as stated in paragraph 29 above, which I find sufficient in these proceedings. Until the orders are set aside, this court has no business interfering with the same.
33. For this reason, the notice of motion dated 4<sup>th</sup> April, 2025 and the notice of preliminary objection dated 3<sup>rd</sup> June, 2025 lack merit and they are both dismissed. Each party shall bear its own costs.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY**

**THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**HON. MBOGO C.G.**

**JUDGE**

25 11 2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Odiwuor holding brief for Ms. Mary Sheila Onyango for the Plaintiff Applicant

Mr. Pius Boaz Agutu for the 1<sup>st</sup> Defendant Respondent

