REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HC P&A NO. E003 OF 2023

IN THE MATTER OF THE ESTATE OF THE LATE RICHARD OCHIENG OLWENGE……DECEASED

BETWEEN

FANUEL ODHIAMBO OCHIENG……1ST PETITIONER

MARGARET ATIENO OCHIENG……2ND PETITIONER

IAN OCHIENG SEDA……3RD PETITIONER

AN ATIENO ONYANGO……4TH PETITIONER

AND

JEANNETE AUMA OCHIENG……1ST OBJECTOR

MARGARET ATIENO OCHIENG……2ND OBJECTOR

GRACE AKINYI OCHIENG……3RD OBJECTOR

SHEILA ADHIAMBO OCHIENG……4TH OBJECTOR

RULING

1. The 1st and 2nd Objectors have filed objections to making of grant dated 23rd June 2025 wherein they opposed the Petitioners herein from proceeding to obtain grant in the estate of the deceased herein. The Petitioners upon being served with the said objection, filed a Notice of Preliminary objection dated 19/8/2025 wherein they raised the following grounds:

    1) That the instant Joint Notice of Objection to grant of Letters of Administration dated 23rd June 2025 and filed in court on 25th June 2025, as now presented by the 1st and 2nd Objectors for determination by the court, constitutes the same ground of objection as were presented by the same 1st and 2nd Objectors along with two other Objectors, in this very Succession cause vide their then Joint Notice of Objection to the issuance of Grant of Letters of Administration dated 1st September 2023, in which both these two separate Notices of Objections raise the same issues of fact and law, for determination by the court.

    2) That this Honourable Court having heard and determined the earlier Joint Notice of Objection dated 1st September 2023, on merit upon hearing the parties in this Succession Cause of Objection, and Replying Affidavits in opposition to the same,

and having each presented witnesses on the same, and written submissions on the same, and a determination of the same having been rendered by this very Honourable Court vide its Ruling delivered on 9th May 2025, this Honourable Court is now divested of authority and or jurisdiction to hear and determine this instant Notice of Objection dated 23rd June 2025 or any subsequent proceedings on the same, by dint of the doctrine of Res Judicata, as contemplated under the express and mandatory provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya, as read with the overriding objectives of this Court as set out in Sections 1A and 1B thereof.

3) The 1st and 2nd Objectors, Jeannete Auma Ochieng' and Margaret Ochieng' having opted to file, serve and pursue their Joint Notice of Appeal by way of appeal against the said determination of this Honourable Court as delivered on 9th May 2025, before the Court of Appeal in Kisumu vide Kisumu Court of Appeal Civil Application Nos. E086 and E090 both of 2025, Estate of Richard Ochieng' Olwenge (deceased) Jeannete Auma Ochieng and Margaret Ochieng' vs Fanuel Odhiambo Ochieng, Joram Omondi Ochieng', Ian Seda Ochieng, Anne Atieno Onyango, Grace Akinyi Ocheing' and Sheila Adhiambo Ochieng' this Honourable Court now lacks authority and or jurisdiction to hear and

determine the instant Notice of Objection, whether by way of a rehearing as proposed by the 1st and 2nd Objectors, or even review, if they would have been minded to do so.

4) That in the instant Notice of Objection to the making of Grant is misconceived, frivolous and constitutes a gross abuse of the court process. It ought to be struck out with costs to the Petitioners.

2. The parties agreed to canvass the aforesaid Notice of Preliminary Objection by way of written submissions. The Petitioners as well as the 1st and 2nd Objectors complied. The 3rd Objector had earlier teamed up with the Petitioners and therefore she is in the camp of the Petitioners. The 4th Objector did not file submissions but indicated that she would await the outcome of the determination of the aforesaid Notice of Preliminary Objection.

3. The Petitioners' submissions are dated 12th November 2025. It was submitted that the Notice of Preliminary Objection meets the threshold in the case of **Mukisa Biscuits Manufacturing Company Ltd V West End Distributors Ltd [696] EA.** Learned counsel further submitted that the objection raised by the 1st and 2nd Objectors is res judicata and that the same offends the provisions of Section 7 of the Civil Procedure Act. It was submitted that the issue of res judicata is a valid point and the basis of the Notice of the Preliminary Objection. Learned counsel went ahead to

demonstrate that the two Objectors had earlier filed a similar objection which was heard by way of viva voce evidence by this court and a ruling thereon delivered and that the same Objectors have come back again with the same objection that has already been determined. It was further contended that the said objectors have since moved the Court of Appeal vide Kisumu Court of Appeal Civil Application No. E086 and No. E090 both of 2025 which are still pending determination and hence this court now lacks authority or jurisdiction to determine the instant objection whether by way of a re-hearing as proposed by the Objectors or even review. Learned counsel sought reliance in the case of **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another [Motion No. 42 & 43 of 2014 [2016] KESC 6, KLR[19th May 2016] as per Hon. JUSTICES Mutunga, Rawal, Ibrahim, Ojwang, and Ndungu SCJJ.** held unanimously as follows regarding the doctrine of res judicata:

> 52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.
>
> 54. The doctrine of res judicata, in effect, allow a litigant only one bite at the cherry. It prevents a

litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the casue of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clodg the courts, apart from occasioning unnecessary costs to the paties; and it ensures that litigation comes toan end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. it emerges that, contrary to the Respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial -justice principle of Article 159 of the Constitution. It is intended to override technicalities of procedure. Res judicata entails more that procedural technicality and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012 have observed tht the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to

the special scenarios of fraud, mistake or lack of jurisdiction (p.293):

"The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened an has little to do with the merit of the decision.

57. The essence of res judicata doctrine is further explicated by Wigram V-C in Henderson v Henderson (1843) 67 ER 313, as follows:

"Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forwarddd, as art of the subject in contest, but which was not brought forward, only because they have, from negligence,

inadvertence, or even accident, omitted part of their case.

The plea of res judicata applies, except in special cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.

This test is summarized in Benard Mugo Ndegwa v. James Nderitu Githae & 2

Others, (2010) eKLR, under five distinct heads:

(i) The matter in issue is identical in both suits;

(ii) The parties in the suit are the same'

(iii) Sameness of the title/claim;

(iv) Concurrence of jurisdiction; and

(v) Finality of the previous decision.

Again, in the case of **Mumira v Attorney General (Constitutional Petition E007 of 2020) [2022] KHC 271 (KLR) (8 April 2022) (Ruling)** opined that:

" 10.**This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions."**

It was therefore submitted that this court is now divested of jurisdiction to hear and determine the instant objection as the same raises similar grounds as

the one dated 1st September 2023 which was duly determined. Further, the Objectors having moved to the Court of Appeal should concentrate on that said appeal before coming back to this court. The Petitioners therefore urged this court to allow the Notice of Preliminary Objection and proceed to strike out the Objectors' Notice of Objection with costs as the same is misconceived, frivolous and constitutes a gross abuse of the court process.

4. The 1st and 2nd objectors' submissions are dated 14th November 2024. The two objectors have condensed the Petitioner's grounds into two namely whether the Notice of Objection offends the doctrine of res judicata and whether the Notice of Objection is an abuse of the Court process for this curt to heard and determine the objection while the Objectors have presented an appeal pending before the Court of Appeal over the same issue.

5. Learned counsel of the two objectors kicked off his submissions by revisiting the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd V West End Distributors Ltd [696] EA** in determining whether the said Preliminary Objection meets the threshold as enunciated in the said case. In the said case the Court defined preliminary objection and explained as follows:

> "***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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer dispute to arbitration."

Sir Charles Newbold, in the same judgment went ahead to expound on the subject as :-

*" **A preliminary objection is in the nature of what used to be a demurrer. It arises a pure point of law which is argued on the assumption that all fact pleaded by the other side are correct . It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion.".***

What constitutes a preliminary objection was further expounded in the case of **Oraro vs. Mbaja [2005] 1 KLR 141**where the Court held as follows:

"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 the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which

should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point 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. 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..."

6. It was further submitted that the Notice of Preliminary Objection looked at in its raw form and based on the guidance offered by the above cited caselaw, it is clear that other than the title, nothing else speaks anything close to a preliminary objection as no law has been cited in support of

the grounds set out in the Notice of Preliminary Objection and that is why the Petitioners have struggled in their submissions to bring out their objection by referring the court to affidavits and documents filed in response to the 1st and 2nd Objectors' Notice of Objection. It thus follows that even without going in depth, this Notice of Preliminary objection cannot see the light of day as the Petitioners are now inviting the court to look at the factual evidence contained in the Replying affidavit so as to make a determination on the preliminary objection raised which move in effect removes the Petitioners' preliminary objection from being a pure point of law.

7. Learned counsel further relied on the case of **A K N v J N M NAIROBI HCCC 58 OF 2014 OS** where the court concluded as follows:

> **"This court is of the considered view that the issues raised in the Preliminary Objection herein are of a nature that would apparently require calling of evidence, it raises questions of fact and law in regard to which both the Applicant and Respondent are in several respects in disagreement. The court has to establish whether or not there is marriage relationship as to between the parties. The Preliminary Objection is thus not sustainable. A party, who raises a Preliminary Objection, must do so only on a pure point of law and nothing else. Patently, the issues**

raised by the Respondent in the Preliminary Objection are contested by the Applicant; this court will therefore have to investigate these disputed facts. The Preliminary Objection does not meet what Law JA envisaged in the *Mukisa Biscuit case* cited above. Even though it is not disputed that the a decree of divorce was granted in 1983, there are allegations of cohabitation, allegations which the court must investigate and a decision can only be made on the basis of a full knowledge of these facts such as can only be obtained from the proceedings on the merits. The court would then make a determination as to presumption of marriage based on the evidence so adduced before it. The court is therefore not satisfied that a proper preliminary objection has been raised or argued before it as would, if upheld, lead to the disposal of the suit."

Again, in the case of **Litein Tea Factory Company Limited & another v Davis Kiplangat Mutai & 5 others [2015] eKLR** where the Court while dismissing the preliminary objection had this to say**:**

"I should state here in respect of a preliminary objection; that the shaping of the preliminary objection needs thought, clarity and care as it is intended to invoke the jurisdiction of the court to determine the case in limine and in a

summary manner. Invariably, the effect of a successful preliminary objection is that the parties' rights in the suit are determined completely. And, therefore, because of the said importance of a preliminary objection in adjudication of cases, courts of law have emphasized on clarity of thought and conciseness of expression in formulating a preliminary objection before any objection could qualify as a preliminary objection in the sense of the law. Therefore, the art so insisted upon is not intended to give pleasure to a reader, but to properly invoke the jurisdiction of the court to deal with a case summarily and in limine. These things I have stated are better appreciated when looked at within the principles of justice enshrined in the Constitution of Kenya, 2010 especially Article 159 on substantive justice. In this case, except ground 3 of the objection, all the other grounds are expressed in loose terms, and are like tangled wool which would require copious explanations and probing of evidence to unravel."

8. As regards the issue of whether the Notice of Objection offends the doctrine of res judicata under Section 7 of the Civil Procedure Act, it was submitted that the same is not

applicable in Succession matters which provides under Rule 63 of the Probate and Administration Rules as follows:

> **“ Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and 31Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules**.

It was submitted that the reason for exempting Section 7 of the Civil Procedure Act is that most disputes relating to an estate of the deceased person more often than not involved the same players who are the beneficiaries of the estate. The issues in dispute may also not vary because the deceased's estate cannot change and it is perhaps because of this that the drafters of the Law of Succession act deemed it fit to exempt the provisions of Section 7 of the Law of Succession Act from being applied in succession matters as It would have been travesty of justice for a beneficiary to be locked out from raising objections simply because the issues raised are more or less the same.

9. It was further submitted that Section 67 (1) of the Law of Succession Act provides that no grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired. It was contended that the 1st and 2nd Objectors are out to exercise their right as provided under Section 67(1) as read together with Section 68 of the Law of Succession Act by filing the instant Notice of Objection and hence it bits logic for the Petitioners to argue that the Notice of objection is *res judicata* yet no previous notice had been published in the Kenya Gazette over the estate as contemplated under Section 67 of the Law of Succession Act and an objection raised after the Notice was published which objection has been determined with finality by this Court.

10. It was also submitted that the Petitioners have issued out a notice inviting any persons to raise objections if any towards the need to proceed to obtain a grant. It was contended that the Petitioners should not deny the Objectors a right to contest the making of the Grant since similar objections could still have been made by different persons if need be.

11. It was the view of counsel that it is clear that the

Petitioners' argument is not grounded in any law which law should have its basis on the Law of Succession act which is the substantive Law in matters to do with administration of the estate of a deceased's person and as consequence the Notice of preliminary objection ought to be struck out . In so submitting we rely on the case of Priscilla Vugutsa Kamaliki v Mary Runyanyi Ochieng [2016] KEHC 7236 (KLR) where the Court held as follows:

"The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of theCivil Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought

are not some of the provisions imported into the Law of Succession Act.

What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out.

The applicant has also relied on Article 159(2) (a) (b) and (d) of the Constitution of Kenya 2010.

Article 159 (2) provides that in exercising judicial authority which is derived from the people,Courts and tribunals established by or under the Constitution shall be guided by the following principles:-

> **a. Justice shall be done to all, irrespective of status;**
>
> **b. Justice shall not be delayed;**
>
> **c. ……..**
>
> **d. Justice shall be administered without undue regard to procedural technicalities; and**
>
> **e. ……**

In my considered opinion the applicant sought refuge in Article 159 (2) basically because it may have dawned on her that there was no shelter for her under the provisions of the Civil Procedure Act and the Rules made thereunder upon which this application is anchored. I must however point

out that Article 159 of the Constitution is not a panacea for all problems. It is not lost to his Court that where there is a specified law under

which certain actions are to be brought before the Court, that law ought to apply unless there are cogent reasons put forward by the applicant justifying a

departure from such law/rules. In the instant case, the applicant could have premised this application in Rule 73 of the Probate and Administration Rules, which rule clothes this Court with inherent power to make such orders as may be necessary for the ends of justice just like Sections 1A, B and 3A of the Civil Procedure Act do for actions brought under the Civil Procedure Act. I therefore do not think that Article 159(2) of the Constitution can provide any oxygen to the applicant to breathe through the application which is fit for striking out."

12. It was further submitted that the preliminary objection would not be sustainable in any event as the provisions of Section 7 of the Civil Procedure Act as this Court would need to dig deeper through factual evidence to determine the Petitioners' allegations hence removing it from the ambit of being a pure point of law.

13. As regards whether the Notice of Objection is an abuse of the Court process for this curt to hear and determine the

objection while the Objectors have presented an appeal pending before the Court of Appeal over the same issue, it was submitted that no law has been cited which bars this court from handling the 1st and 2nd Objectors Notice of Objection on account of the fact that the there is a Notice of Appeal lodged to the Court of Appeal over a ruling delivered in the matter in respect of the Notice of Objection to the Making of Grant dated 1/9/2023. It was contended that Section 47 of the Law of Succession gives this Court a wide latitude to entertain **any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.** We thus submit that in the absence of any law cited ousting this court's jurisdiction to handle the Notice of Objection to Making of a Grant dated 23/6/2025 as laid out is section 47 of the Law of Succession Act, the Petitioners objection on this ground must fail.

Further, it was submitted that the Petitioners feel that the court may be conflicted if it were to depart from its earlier orders then they should apply to have the application handled by a different judicial officer and not to have the Notice of Objections struck out just because the court's ruling has been challenged on appeal. It was finally submitted that the preliminary objection raised does not meet the criteria of being a pure point of law. Reliance was placed in several cases namely**;_Oraro Vs._Mbaja [2005] 1 KLR 141, A K N v J N M Nairobi HCCC 58 of 2014 OS**

Litein Tea Factory Company Limited & Another V Davis Kiplangat Mutai & 5 Others [2015] eKLR and Priscilla Vugutsa Kamaliki v Mary Runyanyi Ochieng [2016] KEHC 7236 (KLR)

14. It was finally submitted that the Preliminary Objection dated 19/8/2025 lacks merit and should be struck out with costs.

15. I have considered the Preliminary Objection as well as the submissions tendered. I find the issue for determination is whether the said preliminary objection has merit.

16. The issue of a Preliminary Objection was established and set out in the celebrated case of **Mukisa Buscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA 696** where it was held that:

> ***"A preliminary objection consists 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 curt or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 had to be ascertained or if what is sought is the exercise of judicial discretion."

In the aforesaid authority, Sir Charles Newbold went ahead to expand on the subject as follows:

> ***"so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implicate 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 the contract giving rise to thesuist to refer dispute to arbitration."***

Further, in the case of Oraro Vs. Mbaja [2005] 1 KLR 141, it was held 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 the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing***

practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point 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. 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…"

17. Also, in **A K N v J N M NAIROBI HCCC 58 OF 2014 OS** where the court concluded as follows:

"This court is of the considered view that the issues raised in the Preliminary Objection herein are of a nature that would apparently require calling of evidence, it raises questions of fact and law in regard to which both the Applicant and Respondent are in several respects in disagreement. The court has to establish whether or not there is marriage relationship as to between the parties. The Preliminary Objection is thus not sustainable. A party, who raises a Preliminary Objection, must do so only on a pure point of law and nothing else. Patently, the issues raised by the Respondent in the Preliminary Objection are contested by the Applicant; this court will therefore have to investigate these disputed facts. The Preliminary Objection does not meet what Law JA envisaged in the *Mukisa Biscuit case* cited above. Even though it is not

disputed that the a decree of divorce was granted in 1983, there are allegations of cohabitation, allegations which the court must investigate and a decision can only be made on the basis of a full knowledge of these facts such as can only be obtained from the proceedings on the merits. The court would then make a determination as to presumption of marriage based on the evidence so adduced before it. The court is therefore not satisfied that a proper preliminary objection has been raised or argued before it as would, if upheld, lead to the disposal of the suit."

Further in the case of Litein Tea Factory **Company Limited & another v Davis Kiplangat Mutai & 5 others [2015] eKLR where** the Court while dismissing the preliminary objection had this to say**:**

"I should state here in respect of a preliminary objection; that the shaping of the preliminary objection needs thought, clarity and care as it is intended to invoke the jurisdiction of the court to determine the case in limine and in a summary manner. Invariably, the effect of a successful preliminary objection is that the parties' rights in the suit are determined completely. And, therefore, because of the said importance of a preliminary objection in adjudication of cases, courts of law have

emphasized on clarity of thought and conciseness of expression in formulating a preliminary objection before any objection could qualify as a preliminary objection in the sense of the law. Therefore, the art so insisted upon is not intended to give pleasure to a reader, but to properly invoke the jurisdiction of the court to deal with a case summarily and in limine. These things I have stated are better appreciated when looked at within the principles of justice enshrined in the Constitution of Kenya, 2010 especially Article 159 on substantive justice. In this case, except ground 3 of the objection, all the other grounds are expressed in loose terms, and are like tangled wool which would require copious explanations and probing of evidence to unravel."

18. An analysis of the Preliminary Objection visa viz the Objectors' Objection and rival affidavits and annextures, it is clear that this court has been invited to look at and consider the factual evidence contained in the rival affidavits so as to come to a determination as to whether or not the aforesaid preliminary objection raises pure points of law as envisaged in the **Mukisa Biscuit** Case (supra). As the court is now invited to venture into the facts of the case as contained in the rival affidavits, I find that the

Petitioners' objection appears to require the factual evidence in order for it to comply with the aforesaid threshold. Indeed, the Petitioners have urged the court to consider the fact that evidence had earlier been received and the objection determined and further that an appeal has been lodged by the Objectors and which is pending before the Court of Appeal. All these are matters of fact which should not be resorted to by the court in its attempt to determine whether the Preliminary Objection meets the criteria in the Mukisa Biscuit case (supra). It is the view of this court that the preliminary objection heavily relies on matters of facts which require the court to look into before making a determination. That being the position therefore, the same does not meet the aforesaid threshold. Looking at the said Preliminary Objection, the same appears to me to be akin to grounds of objection and/or grounds of opposition. If that is the position, then the Petitioners should allow the objection raised by the Objectors to be determined on merit. I find no prejudice would be suffered by the Petitioners if the objection is heard on its merits.

19. In view of the foregoing observations, it is my finding that the Petitioners' Notice of Preliminary Objection dated 19th August 2025 lacks merit. The same is dismissed with no order as to costs. The parties are now directed to proceed to take directions on the disposal of the 1st and 2nd Objectors Notice of Objection dated 23rd June 2025.

Dated and delivered at Siaya this 19th day of January 2026.

D. KEMEI

JUDGE

In the presence of:

Ragot……for the Petitioners.

M/s Ondwa…….for the 1st and 2nd Objectors.

Ragot for……3rd Objector.

Marsoi for Chumba……for 4th Objector.

Maureen/Kimaiyo…….Court Assistant.