



**Charo & 5 others v Chalalu (Suing as the Administrator of the Estate of Swaleh Said Chalalu)  
(Environment and Land Case E007 of 2025) [2026] KEELC 486 (KLR) (28 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 486 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT AND LAND CASE E007 OF 2025**  
**EK MAKORI, J**  
**JANUARY 28, 2026**  
**IN THE MATTER OF THE REGISTERED LAND ACT (REPEALED)**  
**AND**  
**IN THE MATTER OF THE LAND REGISTRATION**  
**ACT AND OTHER RELEVANT LAND ACTS**  
**=AND=**  
**IN THE MATTER OF AN APPLICATION FOR ADVERSE POSSESSION**

**BETWEEN**

**RIZIKI KARISA CHARO ..... 1<sup>ST</sup> APPLICANT**  
**SERAH MAPENZI JOHN ..... 2<sup>ND</sup> APPLICANT**  
**ISHMAIL THOYA JOHN ..... 3<sup>RD</sup> APPLICANT**  
**IBRAHIM NYUNDO JOHN ..... 4<sup>TH</sup> APPLICANT**  
**CECILIA NEEMA JOHN ..... 5<sup>TH</sup> APPLICANT**  
**JOSHUA KWICHA JOHN ..... 6<sup>TH</sup> APPLICANT**

**AND**

**SAID SWALEH CHALALU (SUING AS THE ADMINISTRATOR OF THE**  
**ESTATE OF SWALEH SAID CHALALU) ..... RESPONDENT**

**RULING**

1. The applicants herein have brought the current proceedings by way of an Originating Summons (OS) dated 20th March 2025, under Section 38 of the [Limitation of Actions Act](#), seeking a declaration that



- they have acquired prescriptive rights over a portion of Land Parcel No. WITU II/TANA/215 by adverse possession, having been in continuous, peaceful, and open occupation of the land for more than twelve (12) years.
2. At the same time, the applicants filed Notices of Motion dated 20<sup>th</sup> and 25<sup>th</sup> March 2025 seeking interim injunctive orders to preserve the suit property pending the hearing and determination of the OS. The interim relief was sought in the Garsen Land Case No. 6 of 2015, which concerned the same subject matter.
  3. In response to the application, the respondent filed a replying affidavit, sworn on 12<sup>th</sup> May 2025, together with a Notice of Preliminary Objection (PO) dated the same day, challenging both the applicants' standing and the competence of the suit. The affidavit sets forth a series of factual and legal assertions.
  4. Accordingly, the applicants filed a further affidavit, sworn on 19<sup>th</sup> June 2025, by the 2<sup>nd</sup> applicant, Serah Mapenzi John. The applicants have also filed formal grounds of opposition to the preliminary objection.
  5. Parties were directed to file written submissions addressing both the PO and the substantive applications for temporary injunction. They complied.
  6. Based on the materials and submissions placed before me, the issue for this court's decision is whether the PO raised is germane, whether an injunction should be issued at this stage, and who should bear the costs of the proceedings to date.
  7. The respondent in the PO averred that the subject property in the instant suit was the subject of litigation in Garsen Civil Suit No. 6 of 2015, in which the applicants' father, one Christopher John Katana (now deceased), was the defendant and the respondent's father, one Swaleh Said Chalalu (deceased), was the plaintiff. The said Swaleh Said Chelule met his demise during the pendency of the said suit, prompting the respondent herein to apply for a Limited Grant of Letters of Administration to prosecute his father's case. Letters of Administration Ad Litem were issued on 9<sup>th</sup> July, 2020, by the Senior Principal Magistrate Court in Garsen upon compliance with the provisions of Order 24 of the Civil Procedure Rules. The suit was subsequently heard and determined on the merits in favor of the respondent's deceased father.
  8. The respondent averred that before the decree could be executed, the applicants herein, fully aware of what had transpired and that their deceased father had been sued in respect of the suit property, moved with speed, hoping to arrest the execution of the eviction order issued by the court through the instant proceedings by way of OS. The respondent has raised a Notice of PO opposing the applicants' applications, alleging that they are defective, bad in law, and an abuse of the court process, having been brought in contravention of section 45 of the *Law of Succession Act*, because the applicants are heirs and/or beneficiaries of the Estate of Christopher John Katana and could only approach the court as legal representatives of the deceased estate upon successfully applying for a grant of letters of administration.
  9. The respondents see this attempt as an abuse of the court process.
  10. In response to the PO, the applicants argue that res judicata, based on prior litigation against their deceased father, does not apply. They claim these objections are premature and mistaken. The applicants filed the suit in their personal capacity as occupants, not as representatives of their late father's estate. Moreover, in filing the OS, the applicants seek to vindicate their independent rights of occupation and possession. The mere fact that there was a prior suit against their father does not, in itself, extinguish their right to seek declaratory relief regarding their own occupation. This is



particularly true where the applicants' occupation of the suit premises is open and exclusive, and there is no effective interruption or contestation by the registered owner.

11. In the leading decision of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, the court set the parameters of a PO 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.”
12. In *Attorney General & Another v Andrew Mwaura Githinji & Another* [2016] eKLR, the court clarified the meaning and scope of a PO, stating that:
  - a. A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.
  - b. A preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion.
  - c. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
13. The applicants in this matter were and are aware of a prior suit involving their father over the same subject matter. They have moved this court, sitting as a court of first instance, to “stay” the orders of the Magistrate’s court, not as an appellate court, but by way of a fresh suit. I agree with the respondents that this court cannot do so through the channels proposed by the applicants, as that would constitute an abuse of the court process and would be an appeal of the Magistrates’ court decision through the back door. See *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others*, Civil Appeal No. 25 of 2002 [2009] KLR 229.
14. The respondent avers that the suit before the magistrates’ court was subsequently heard and determined on the merits in favor of the respondent’s deceased father, and the court gave orders, inter alia:
  - i. A declaration that the Swaleh Said Chalalu(deceased) is the lawfully registered owner of the suit plot No. Witu/II/Tana/215.
  - ii. A permanent injunction to issue restraining the Defendant, his agents, servants, representatives, family members, assignees, or any other persons claiming under him from intruding, occupying, trespassing, constructing, cultivating, or adversely dealing with the suit plot.
  - iii. An eviction order to issue against the Defendant, his agents, servants, or any other persons to demolish and/or pull down the illegal structures on the suit plot and vacate from therein within 90 days from the date of this judgment.
  - iv. The OCS Kipini Police Station to ensure supervision and compliance with Order (c) above.
  - v. There shall be no order as to costs.
15. On the other hand, the applicants contend that their claim here is based on adverse possession and they have brought this suit individually, having lived on the suit property for over 12 years, and that they believe the stay on that suit property has entitled them to the benefit of the doctrine of adverse possession.



16. In bringing their own separate suit under the banner of adverse possession, they are, in my view, entitled to do so.
17. At this point, the court will not be able to determine whether the issue of adverse possession was raised in the previous suit and how it affected the applicants. In any event, if the issue were decided in the Magistrates' Court, it would lack jurisdiction to entertain the same. See *Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso, alias Mutaragwa Kiruti Lepaso, alias Mutaragwa Kiroti Leposo, and in her own Capacity) & 3 others* [2024] KECA 1417 (KLR).
18. To that extent, although the PO raised germane issues regarding the decision in the Magistrates' Court in relation to the current suit, a PO cannot resolve the matter outright. It will be an issue for trial or through affidavits in an application to strike out the suit.
19. In pending applications for an injunction, the court must be satisfied that the test in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 has been met:

“First, 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 (*E.A. Industries Vs. Trufoods* (1972) E.A. 420).”
20. If I understand the applicants correctly, they seek injunctive orders to evade the decree in *Garsen Land Case No. 6 of 2015*, which arose from the final judgment delivered on 10th August, 2023, in favor of the respondent's father herein, one Swaleh Said Chalalu-deceased. As already discussed, it cannot be countenanced by this court, sitting as a court of first instance, to review the judgment and orders issued by the Magistrates' court. The court must be approached appropriately via an appeal.
21. Consequently, the orders sought in the motions dated 20th and 25<sup>th</sup> March 2025 are declined, and the applications are dismissed.
22. Since both the PO and the applications have been declined, there will be no order as to costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY IN NYERI ON THIS 28TH DAY OF JANUARY 2026, IN THE ABSENCE OF COUNSELS AND THE PARTIES, WHO WERE AWARE OF TODAY'S RULING.**

**E. K. MAKORI**  
**JUDGE**

