

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
SUCCESSION CAUSE NO.14 OF 2003

**IN THE MATTER OF THE ESTATE OF THE LATE MARKO
MUKHWESO MUIDAKHO (DECEASED)**

**BILHAH SHILAHALA SHIYUKAH.....
.....APPLICANT**

VERSUS

**ROSE MUCHINJA IMBEGA.....1ST
RESPONDENT**

**FREDA NYANGA WAFULA.....2ND
RESPONDENT**

RULING

1. This matter relates to the estate of the late Marko Mukhewso Muidakho (deceased) and the matter at hand is an application brought by way of Notice of Motion dated 4/9/2025 by Bilhah Shilahala Shiyukah, the applicant. In that application the applicant seeks the following reliefs namely;

- i) That this Hon. Court be pleased to order the County Surveyor Trans-Nzoia County to visit, survey and prepare a report on Plot Numbers 17402,17403 and 17404 situated within Milimani Area Kitale Municipality for purposes of confirming;
 - a) *The existence of the said plots.*
 - b) *The respective acreage/measurements of each plot.*

*c) The current occupation and/or
development on the plots.*

2. The respondents Rose Muchinja Imbega and Freda Nyanga Wafula in response to the application raised a preliminary objection dated 22/9/2025 raising the following grounds namely;

(a) That this court lacks jurisdiction to hear and determine the said application as the issues raised fall within the jurisdiction of Environment and Land Court.

(b) That the application is an abuse of the court process.

3. This court directed that the preliminary objection be canvassed by way of written submissions and the respondents filed their written submissions dated 6th January 2026 vide their learned counsel Katama Ngeywa & Co Advocates.

4. The respondents submit that it is undisputed fact that the applicant is not a dependant to the deceased in this cause. That she claims to have purchased parcel numbers 17402, 17403 and 17404 from the deceased. That they have disputed those claims which to them means that the dispute became a land dispute involving a contract in land which in their contention falls within the meaning and scope of

section 13(2) (d) of the Environment and Land Court Act, 2011.

5. They submit that the dispute arising falls outside the jurisdiction of this court. They urge this court to down its tools and rely on the decision of **Owners of the Motor Vessel "Lillian"(S) -v-s Caltex Oil (K) Ltd 1989 KLR** where it was held that where a court lacks jurisdiction there is no basis for a continuation of proceedings.
6. The respondents submit that the applicant's claim falls under section 13(2) (d) of Environment and Land Court Act which takes away the jurisdiction of the High Court by operation of Article 165(5) of the Constitution. They urge this court to look at the facts and apply the pre-dominant purpose test which was well illustrated in the case of **Suzanne Butler & 4 Others -vs- Redhill Investment & Anor** where the court held that when a court is faced with a controversy about whether a particular case is dispute falling under Environment and Land Court or High Court, jurisdiction hinges on the predominant purpose of the transaction that is whether the contract primarily concerns the sale of land or any other purpose.
7. The respondents contend that the applicant is attempting to enforce an agreement entered between him and the deceased which agreement is contested. They therefore reason that there is need to call evidence and test the efficacy or the validity of the transaction which to them is

only possible if a substantive suit is filed in the Environment and Land Court.

8. They submit that their preliminary objection has met the threshold illustrated in **Mukisa Biscuits Manufacturing Co Ltd -vs- West End Distributors Ltd 1969EA 696** where it was held that a preliminary objection consists of a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
9. The applicant has opposed the preliminary objection through written submission dated 13/1/2026 through her learned counsel B.S Advocates LLP.
10. The applicant contends that she is not seeking to enforce a land sale agreement against a living person. That she seeks protection of her interests in the estate of the deceased as a purchaser.
11. She points out that the respondents have recognized her interests because she is listed in the schedule of distribution No.34. She submits that the respondents admit the transaction with only dispute touching on size or acreage of the purchased portion.
12. According to the applicant the dispute concerns the following;
 - (i) *Administration of the estate.*
 - (ii) *Settlement of liabilities.*

(iii) Validity and regularity of a rectified confirmation of grant.

13. To the applicant the above issues fall squarely within the jurisdiction of this court. She relies on the provisions of section 47 of Law of Succession Act and the inherent power of this court under Rule 73 of Probate and Administration Rules.

14. The applicant further points out that purchasers of estates of a deceased person from deceased person are not strangers in succession proceedings. That section 3 of Law of Succession Act recognizes them as creditors of the estate. She further contends that Rule 41(3) of Probate and Administration Rules empowers this court to resolve creditors claims before confirmation of grant.

15. She claims that the respondents' contention about the import of section 13(2) of Environment and Land Court Act and Article 162(2) of the Constitution is misleading because she is not staking her claim against the respondents in their private capacity but she is challenging the process of distribution, validity of rectification of grant and the compliance with the succession law.

16. She relies on the following authorities;

(i) Re estate of Thiong'o Ngugi (dcd) (2019)eKLR.

(ii) Re estate of Peter Mbiyu Koinange (dcd) (2015)eKLR.

(iii) Re estate of M'Ngarithi M'Miriti (dcd) (2017)eKLR

**(iv) Re estate of Alice Mumbua Mutua (dcd)
(2021)eKLR**

In the above decisions the courts held that a purchaser's claim is a liability on the estate which ought to be resolved within the succession cause and that for purposes of distribution of an estate of deceased person probate court has jurisdiction to determine them.

17. She further faults the preliminary objection raised stating that the issues raised are not purely points of law but fact because the dispute touches on acreage (fact) and that a preliminary objection founded on disputed fact cannot be sustained.
18. This court has considered the preliminary objection raised by the respondents and the response made. A preliminary objection or point of law raised is usually raised by a litigant at a preliminary stage to challenge the propriety or regularity of a suit or claim brought by the opposing side usually either touching on the jurisdiction of the court to entertain it, or owing to limitation period on grounds that the claim is time barred or for reasons of procedural misstep the matter is improperly before court.
19. There are important guidelines or requirements for a preliminary objection to be raised and sustained;
 - (i) It must be raised at the earliest opportunity though at any stage of the proceedings before judgment/ruling is delivered.**

- (ii) It must be based on pure point of law or legal arguments rather than on disputed facts.**
- (iii) A preliminary objection cannot be sustained if it is based on a disputed fact that has to be ascertained by evidence.**

The above test was well laid out in the case cited by the respondents in the case of **Mukisa Biscuits Manufacturing Co Ltd -vs- West End Distributors Ltd (1969)EA 696** where the court held;

“So far as I am aware a preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a preliminary objection may dispense of the suit..... 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 has to be ascertained or if what is sought is the exercise of judicial discretion.....”.

- 20. Applying the above test this court will now consider the matter raised to see if it meets the threshold.
- 21. The preliminary objection raised by the respondents touches on the jurisdiction of this court to determine or entertain the application dated 4/9/2025. In the said application, in summary the applicant claims to have bought 3 plots from the deceased to wit Plot numbers 17402, 17403 and 17404 situate within Milimani Area Kitale Municipality. The respondents concede the purchase but contests the

acreage bought. Their position is that the applicant only purchased one plot to with Plot number 17402 which they distributed to her. The certificate of confirmation issued in this cause and dated 24/9/2024 captures that fact. The applicant is listed as No.34 in the list of beneficiaries.

22. The gist of the application before me concerns the acreage purchased by the applicant. The issue to be determined is whether the applicant purchased and paid full consideration to the deceased for the 3 plots as alleged or only one plot as stated by the respondents.

23. The other issue is whether the said plot(s) exist or not and whether the applicant has developed/or in occupation of the part of the estate purchased and whether what was distributed to her is regular or not.

24. I have looked at the provisions of section 13(2) of the Environment and Land Court Act cited by the respondents. It provides;

“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
(e) any other dispute relating to environment and land.”**

25. While the dispute raised by the applicant touches on land, it is apparent that probate matters invariably also can relate to land but it does not mean that any dispute to do with ownership must fall within the scope and jurisdiction of Environment and Land Court. Where a dispute touches on the administration of an estate of a deceased person, section 2(1) as read with section 47 of Law of Succession Act takes effect. Section 2(1) of Law of Succession Act provides;

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”

Section 47 of the Law of Succession Act states;

“The High Court shall have jurisdiction 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.”

26. This court is well guided by the decision of **Suzanne Butler & 4 Others -vs- Redhill Investment & Anor (2017)eKLR** again cited by the respondents with respect to

application of pre-dominant purpose test where there is a dispute on whether a matter falls within the jurisdiction of Environment and Land Court or High Court. The question I ask myself is what is pre-dominant in the dispute raised by the applicant? Is it a question purely based on validity of Land Sale agreement or it is an issue touching on transaction done by deceased touching on the estate.

27. This court looking at issues at hand and facts presented finds that what is pre-dominant in the issues raised in the subject application is the administration of the estate of the deceased herein and more specifically the distribution of assets comprising the estate to among other listed beneficiaries, the applicant herein. It could be a different ball game however if the dispute was touching on the ownership of the estate or parts of the estate as between the deceased and any other claimant. That in my considered view would have been ownership dispute which would have crystalized the dispute within the scope of disputes stipulated under section 13(2) of Environment and Land Act and hence the right court properly seized to determine it would then be Environment and Land Court.

In this instance however, as correctly pointed out by the applicant, the respondents concede the purchaser's interest on the estate. The only contest or dispute is the size or extent of the interest. It is undisputed fact that the deceased entered into an agreement and indeed sold a

parcel to the applicant. The provisions of section 3 of Law of Succession Act clearly indicates that the portion that was sold to the applicant cannot be termed '**free property**' but a liability which needs to be considered before the provisions of Rule 41(3) of Probate and Administration Rules take effect.

28. This court takes the position that claims by purchasers from deceased persons especially where deceased gave possession(s) to purchaser and expressed no reservations in his lifetime are liabilities to the estate which need to be resolved before distribution of net estate is considered. This court in that regard is persuaded by the decision **Re estate of Musau Kitari (dcd) (2022) KEHC 15474 (KLR) (Ruling)**.

29. At this preliminary stage, this court cannot be in a position to verify the applicant's claims on the estate before the documents are tendered and subjected to interrogation and scrutiny in a full trial.

30. Flowing from the above it suffices to state that to extent that the applicant's claim touches on the distribution of an estate of deceased person and more specifically the propriety of allocating her only one parcel number 17402 and not the other portions claimed, this court finds that it has jurisdiction under section 47 of Law of Succession Act to entertain the dispute. The preliminary objection dated 22/9/2025 is without merit and is overruled.

Costs shall be in cause. I direct that directions with respect to the application dated 28/7/2025 be taken upon delivery of this ruling.

DELIVERED, DATED and SIGNED at KITALE this19th day ofFEBRUARY....., 2026.

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Ruling delivered in open court
In the presence of
Lichuma holding brief for Ngeiywa for Respondent
Kapten for petitioner/applicant
Chemosop/Joseph - Court Assistants