

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KAKAMEGA**  
**ELC CASE NO. E057 OF 2025**

**MILICENT KABERA KARANI.....APPLICANT**

**VERSUS**

**PROTUS MATUBO MUCHITI (Sued on his own  
behalf and as personal representative  
of JOSEPH MUCHITI SHILULU.....  
.....RESPONDENT**

**RULING**

**Introduction**

1. Before court is a Notice of Preliminary objection dated 1<sup>st</sup> October 2025 filed by the respondent raising the following ground against the suit herein;

**a) That the applicant does not have the requisite locus standi to institute this suit and should therefore be struck out with costs.**

2. The Preliminary objection was disposed by way of written submissions. The respondent filed submissions dated 13<sup>th</sup>

October 2025 while the applicant filed submissions dated 5<sup>th</sup> February 2026.

### **Respondent's submissions**

3. Counsel for the respondent submitted that from the Supporting affidavit of the applicant, she identifies herself as the daughter of one JOSEPH KABERA KARANI and that Article 22 (2) (b) of the Constitution of Kenya requires one to identify under what capacity they have instituted their claim. Counsel argued that if the applicant is the daughter of Joseph Kaberi Karani and he is deceased, then she has to take out grant of letters of administration.
  
4. It was further submitted for the respondent that Joseph Kabera Karani was a polygamous man who had three wives, namely; Alice Kabera, Julia Kabera and Catherine Kabera. That the first two wives are deceased and so the applicant ought to identify herself with Catherine Kabera. Counsel insisted that there are other beneficiaries

entitled to the orders sought by the applicant but that the applicant has failed to identify them.

5. Counsel also argued that the applicant having not been privy to the agreements by her father done in 1992, she does not know the facts of the case.

6. Contention was also made on behalf of the respondent that if adverse possession rights were acquired in 2004, waiting for 21 years to file the current claim is unnecessarily too long, considering that she is a resident of Shirere in Kakamega County, where the suit property is situated.

### **Applicant's submissions**

7. Counsel for the applicant submitted that the preliminary objection was misplaced and that the respondent does not understand the provisions under which the suit was brought. Counsel referred to section 38 of the Limitation of Actions Act and submitted that the applicant was seeking the suit property under the doctrine of adverse possession. That the claim is made by the applicant

personally and not in a representative capacity to warrant the requirement of grant of letters of administration.

8. It was the applicant's submission that the mention of agreements by the applicant's father was meant to show the year of possession but that her claim is based on her personal use of the suit property. On allegations raised regarding Joseph Kabera Karani being polygamous, counsel submitted that the same do not have any bearings on the preliminary objection. Counsel argued that the suit is filed by the applicant in her own capacity and not a representative capacity hence the preliminary objection ought to be dismissed.

**Analysis and determination.**

9. The court has carefully considered the preliminary objection herein as well as rival submissions filed. The issue that arise for the court's determination is whether the preliminary objection is merited.
10. It is trite that a preliminary objection is a pure point of law which is raised on the pleadings on the basis that all the facts relied upon are not disputed.

11. In the case of **Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors (1969) EA 696** the court described what constitutes a preliminary objection 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 a contract giving rise to the suit to refer the dispute to arbitration”.**

**In the same case Sir Charles Newbold, P. stated:**

**“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.**

12. In the instant case, the respondent argued that Article 22 (b) (2) of the Constitution of Kenya requires a party to identify under what capacity they are instituting their case and that the applicant having stated in her supporting affidavit that she is daughter of one Joseph Kaberi Karani who is deceased, she ought to have taken out letters of administration.

13. On her part, the applicant argued that she had brought the suit in her personal capacity claiming adverse possession and that the suit is not a representative suit to require grant of letters of administration. That the mention of agreements by her father are intended to show the time of her entry into the suit property and does not mean that she ought to obtain letters of administration.

14. Section 82 of the Law of Succession Act requires that for a person 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, they ought to be the deceased's personal representative. Therefore, the court ought to consider whether or not the suit filed herein is

an attempt to enforce the cause of action that has survived the deceased father of the applicant.

15. The court has considered the applicant's pleading in this suit which are her Originating Summons and supporting affidavit, whereof she seeks the suit property under the doctrine of adverse possession and trust. She maintains in paragraph 7 of her supporting affidavit that her use and possession of the suit property has been quiet, peaceful and to the defendant's exclusion for a period of over 12 years since 1992. She further alleged in paragraph 8 thereof that the suit property is held by the respondent in trust for her.

16. There is no mention of or inference that she has filed the instant suit on behalf of or for the benefit of the estate of her late father. It is clear that she has filed the claim herein for her personal benefit and in her personal capacity and therefore, the mere mention of her late father in her pleadings does not amount to a claim on behalf of the estate of her late father to require her to have grant of letters of administration.

17. In the premises, I find and hold that the preliminary objection dated 1<sup>st</sup> October 2025 lacks merit and the same is hereby dismissed with costs to the applicant.

18. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
VIRTUALLY THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2026  
THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM**

**A. NYUKURI  
JUDGE**

**In the presence of:**

No appearance for the applicant

No appearance for the respondent

Court Assistant - Delphine