

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC L. NO. E025 OF 2025 (OS)

JOSEPH OTIENO OCHOLA
PLAINTIFF/APPLICANT

VERSUS

**RAJWALA ORIARO 1ST DEFENDANT/
RESPONDENT**

**OWINO AMIEN 2ND DEFENDANT/
RESPONDENT**

**AJOW AMIEN 3RD DEFENDANT/
RESPONDENT**

**BARAZA AMIEN 4TH DEFENDANT/
RESPONDENT**

RULING

1. The subject of this ruling is the Notice of Preliminary objection dated 10th September 2025 raised by the 1st - 4th Defendants/Respondents through the Law Firm of Sala & Mudany Advocates as follows to the effect that this suit offends the provisions of Section 45 Law of Succession Act Cap. 160. It is stated that the actions of the plaintiff/applicant amount to intermeddling with the estates of Aduda Okumu (deceased), Odhiambo Okumu (deceased) and Yanga Amien (deceased). That these deceased persons are the registered owners of the suit parcels. The Respondents s apply that this suit be dismissed with costs to the respondents.

SUBMISSIONS

2. The preliminary objection was canvassed by way of written submissions in relation to the preliminary objection as follows

The Written Submissions by the 1st - 4th Objectors

3. The objectors submissions in support of the preliminary objection are dated 10th September 2025. It is submitted that land parcels **UGENYA/MASAT/454** and **UGENYA/MASAT/455**, remain registered in the names of the deceased proprietors. That the Plaintiff/Applicant instituted

the suit against the children of the deceased persons, who are the Respondents herein, notwithstanding the fact that the suit properties form part of the free property of the deceased estates. It is emphasized that no succession cause has been concluded and no grant of representation has been issued or confirmed in respect of the said estates.

4. It is contended that Section 45(1) of the Law of Succession Act expressly prohibits any person from taking possession of, disposing of, or otherwise intermeddling with the free property of a deceased person. Further, Section 45(2) criminalizes such conduct and renders the intermeddler answerable to the rightful personal representative. Counsel argued that the statutory provision is couched in mandatory terms and bars any dealings with estate property in the absence of lawful authority through a grant of representation.
5. In support of the above position, counsel relied on the decision in **Benson Mutuma Muriungi v CEO Kenya Police SACCO & Another**, where the court observed that although the Act does not define “intermeddling,” the term includes any act that dissipates, diminishes, or puts at risk the free property of a deceased person. It was submitted that instituting and prosecuting a suit over estate property without authority falls squarely within this definition. That the filing of the present suit concerning estate property, without a duly appointed administrator, is equally void and incompetent from inception. That only a person holding a grant of letters of administration or probate has the legal capacity to sue or be sued on behalf of the estate of a deceased person. Other cases relied upon were **Morris Mwiti Mburugu v Denis Kimanthi M'Mburugu, In re Estate of Paul M'Maria (Deceased)** and **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another**.
6. It was therefore submitted that the Respondents, being merely children of the deceased persons and not administrators or executors of the estates, lack locus standi to be sued in their personal capacity in respect of the suit

properties. Equally, the Plaintiff has not demonstrated the existence of any lawful personal representative capable of being sued. Consequently, the entire suit is incurably defective for want of capacity and for offending the mandatory provisions of Section 45 of the Law of Succession Act.

The Written Submissions by the Plaintiff/Applicant/Respondent

7. The Plaintiff written submissions are dated 29th October 2025. It is submitted that the objection is misconceived in law, premature in procedure, and unsupported by evidence. Citing the case of Mukisa **Biscuit Manufacturing Co. Ltd v West End Distributors Ltd**, where Law JA defined a preliminary objection as one that raises a pure point of law argued on the assumption that all facts pleaded by the opposing party are correct. Counsel emphasized that a preliminary objection cannot be sustained where facts are contested or where evidence is required. It was argued that the Respondents' objection improperly invites the Court to determine disputed facts, including whether certain registered proprietors are deceased, whether succession proceedings have been undertaken, and whether any grant of representation exists. These, counsel contended, are evidentiary matters that cannot be resolved at a preliminary stage.
8. It is submitted that the suit parcels **UGENYA/MASAT/454** and **UGENYA/MASAT/455** are registered in the names of both living and deceased proprietors under a tenancy in common. It was argued that each proprietor holds a distinct and identifiable share capable of separate dealings. The Respondents, being living registered proprietors, have been sued in their own right as reflected in the land register. Counsel further stated that in respect of the deceased proprietors, the Applicant has already initiated Citation Causes to compel their beneficiaries or dependants to either accept or renounce letters of administration, and that such

succession processes may lawfully proceed concurrently with the present suit.

9. On the alleged violation of Section 45 of the Law of Succession Act, counsel relied on the decision in **Kiragu & 2 others v Kiragu & 7 others**, where the Court of Appeal clarified that intermeddling occurs where administrators or interested persons deal with estate property without lawful authority in a manner that diminishes the estate. Counsel argued that the Applicant has not undertaken any sale, transfer, or alienation of the suit properties. Instead, the Applicant has merely invoked the Court's jurisdiction to clarify proprietary interests in a co-owned parcel of land, which cannot amount to unlawful intermeddling.
10. The advocate distinguished the Respondents' reliance on **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another**, submitting that the cited case concerned a party who purported to sue on behalf of an estate without obtaining letters of administration. In the present matter, the Applicant does not purport to represent any estate but instead sues living registered proprietors in their personal capacities.
11. Counsel further relied on **Isabel Chelangat v Samuel Tiro Rotich & 5 Others**, where the court distinguished tenancy in common from joint tenancy, holding that in a tenancy in common the share of a deceased co-owner devolves to his estate and does not pass by survivorship. It was therefore argued that the existence of deceased co-proprietors does not extinguish the Applicant's right to litigate against living co-proprietors in respect of their respective shares.
12. The court is invited to invoke Articles 50 and 159(2)(d) of the Constitution of Kenya, 2010, as well as Sections 1A and 1B of the Civil Procedure Act, which enjoin the courts to administer substantive justice without undue regard to procedural technicalities. Counsel argued that striking out the suit at a preliminary stage would unjustly deny the

Applicant the constitutional right to be heard and would elevate technical objections above substantive justice.

13. The Applicant therefore prayed that the Preliminary Objection be dismissed with costs and that the main suit be allowed to proceed to full hearing on its merits in the interests of justice.

ANALYSIS AND DETERMINATION

14. I have keenly assessed the Notice of Preliminary Objection dated 10th September 2025, the written Submissions both in support and opposition to the Preliminary Objection and the authorities cited. The main issue for determination is Whether the Preliminary Objection meets the threshold founded in Law and precedents and if yes if it is merited.

Whether the Preliminary Objection meets the threshold founded in Law and precedents

15. According to the Black Law Dictionary a preliminary objection is defined as:

In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

16. In **Nitin Properties Ltd V Singh Kalsi & Another [1995] eKLR** the court stated thus; -

'A Preliminary Objection 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.'

17. The Tanzanian Court of Appeal sitting in Dar es Salaam, in **Karata Ernest & others vs Attorney General (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010)**, (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), expounded the issue of preliminary objections in a more exhaustive manner as follows: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only “consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the “normal manner” when deliberating on the merits or otherwise of the concerned legal proceedings.’

18. The court in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696** described a preliminary objection as hereunder; -

'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 the dispute to arbitration.'

19. The Supreme Court addressed its mind on this issue in the case of **Aviation & Allied Workers Union Kenya -**

Versus - Kenya Airways Limited & 3 Others [2015]

eKLR and stated:

“[14] This Court has had occasion in the past, to consider the nature of a preliminary objection. The Court endorsed the long-standing jurisprudence set in the Mukisa Biscuit case, on the nature of a preliminary objection. In Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Sup. Ct. Application No. 23 of 2014, the Court cited its earlier decision in the Joho case thus [paragraph 51]:

“The principles in the Mukisa Biscuit case were restated by this Court in the Joho case [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 ... 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’.”

[15] Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

20. Arising from the above decisions it is clear that a preliminary Objection must be raised on a pure point of

law and no fact should be ascertained from elsewhere. I will be guided accordingly.

21. The offence of intermeddling is codified at Section 45 of the Law of Succession Act which provides as follows: -

45. No intermeddling with property of deceased person

1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

2) Any person who contravenes the provisions of this section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

22. The plea of intermeddling is undoubtedly a point of law as it is based on section 45 of the Law of Succession Act. My task however is to determine whether the instant objection is indeed founded on a pure point of law or whether it is premised on contested facts requiring evidentiary interrogation.

23. The gravamen of the Respondents' objection is that this suit offends Section 45 of the Law of Succession Act, Cap 160, on account that the institution and prosecution of the proceedings amount to intermeddling with the estates of Aduda Okumu (deceased), Odhiambo Okumu (deceased)

and Yanga Amien (deceased), who are alleged to be the registered proprietors of the suit parcels **UGENYA/MASAT/454** and **UGENYA/MASAT/455**.

24. While the interpretation of a statute is undoubtedly a point of law, the application of that statute to a particular factual matrix often entails mixed questions of fact and law. The Court must first determine whether the acts complained of constitute “intermeddling” within the meaning of the statute. I do not see how the court can determine whether one has authority, has dealt with the property so as to diminish it and in what manner without interrogating facts, evidence and documentary proof. Clearly these are not self-evident matters arising purely from the pleadings. They are factual assertions which require proof. The Court cannot judicially notice such matters in the absence of evidence.
25. The Respondents’ objection therefore invites this Court to embark upon a factual inquiry at a preliminary stage. That, with respect, offends the well-settled principle in that a preliminary objection must proceed on the assumption that the facts pleaded by the opposite party are correct and must not require ascertainment of contested facts.
26. The other point raised is the issue of capacity of the defendants being sued as children of the deceased. From my review of the Originating Summons and the supporting affidavit of the Applicant, it is deponed that North Ugenya /Masat/1454 is registered in the name of Aduda Okumu, Odhiambo Okumu who are both deceased and the 1st defendant. As to North Ugenya /Masat/1455 it is stated to be registered to Yanga Amien (deceased) and 2nd 3rd and 4th defendants.
27. None of the deceased have been sued in this matter and therefore the issue of capacity does not arise. Had they been sued then I would be inclined to strike out the proceedings only as against them since a deceased

cannot be sued in his name. The parties that have been sued are all alive.

28. I think I have said enough why the preliminary objection cannot be upheld. It is not properly raised on a pure point of law and it is lacking in merit.

29. Accordingly, the Notice of Preliminary Objection dated 10th September 2025 is hereby dismissed.

30. The costs shall abide the outcome of the main suit.

Orders accordingly.

Dated at Siaya this 5th Day of March, 2026

HON. JUSTICE A. E. DENA
JUDGE
05/3/2026

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Ms. Awuor Holding Brief for Mr. Salah for Respondents/Objector

No appearance for the Plaintiff

Court assistant: Ishmael Orwa