



**Ekessa v Magero & another (Land Originating Summons E014 of 2025)
[2026] KEELC 1187 (KLR) (26 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 1187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
LAND ORIGINATING SUMMONS E014 OF 2025**

BN OLAO, J

FEBRUARY 26, 2026

BETWEEN

JULIE WENDY EKESSA APPLICANT

AND

FESTA ALOO MAGERO 1ST RESPONDENT

**KEFINA NANYAMA MAGERO (SUED AS THE LEGAL ADMINISTRATORS
OF THE ESTATE OF THE LATE RAPHAEL MAGERO ALIAS MAGERO
OCHODO) 2ND RESPONDENT**

RULING

1. Julie Wendy Ekessa (the Applicant in the Originating Summons dated 24th March 2025) moved to this Court seeking the substantive remedy that she has acquired 4 acres out of the land parcel No South Teso/Amukura/103 (the suit land) by way of adverse possession and that the said portion of the suit land which is registered in the name of Raphael Magero Ochodo alias Magero Ochodo now deceased and whose Estate is Administered by Felesta Aloo Magero and Kefina Nanyama Magero (the 1st and 2nd Respondents respectively), be cancelled and the said 4 acres be registered in the names of the Applicant. The basis of the Originating Summons is not relevant for purposes of this ruling. What is relevant is that the Respondents have filed a Preliminary Objection dated 18th July 2025 and which is the subject of this ruling.
2. By the said Preliminary Objection, the Respondents have raised the following two issues:
 1. That to the extent that the Originating Summons are concerned with the land portion measuring 4 acres comprised in South Teso/Amukura/103 which is part of the Estate of Raphael Magero Ochuodho (deceased) and whose succession process is still on-going in Busia Succession Cause No E582 of 2022, this Honourable Court lacks the jurisdiction to hear and determine this matter as the Court should not hear this case until the succession cause is



finalized. The same will be in violation of Section 45 of the *law of Succession Act* which prevents un-authorized dealings with a deceased person's property before the Succession process is completed.

2. That the Honourable Court lacks jurisdiction in cases concerning succession disputes as was held in the cases of Beatrice Wambui Kiarie & 2 Others -V- Tabitha Wanjiku Ng'ang'a & 9 Others 2018 eKLR where the ELC declined jurisdiction in cases concerning succession disputes.

On 21st July 2025, the parties agreed to canvass the Preliminary Objection by way of written submissions.

3. Submissions were subsequently filed both by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Applicant and by Mr Omeri instructed by the firm of Omeri & Company Associates for the Respondents.
4. The thrust of the Preliminary Objection is that this Court lacks the jurisdiction to determine this suit because the suit land is the subject of an on-going succession cause being Busia Succession Cause No E582 of 2022. Although the pleadings in the said Busia Succession Cause No E582 of 2022 have not been availed for my perusal, I have no doubt in my mind that the said succession cause indeed exists because it has not been disputed.
5. There is also no doubt that an issue of jurisdiction is a proper Preliminary Objection which this Court must determine at the earliest opportunity. As was held in the case of Owners of the Motor Vessel "lillian S" -V- Caltex Oil (Kenya) Ltd C.A. Civil Appeal No 50 of 1989, [1989 eKLR], per Nyarangi JA;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

Jurisdiction is a matter of law as held in the case of Mukisa Biscuit Manufacturing Company Ltd -V- West End Distributors 1969 E.A 696.

6. Having established that the Respondent's Preliminary Objection dated 18th July 2025 raises an issue of jurisdiction which is a matter of law and therefore falls within the definition of a Preliminary Objection as defined in the case of Mukisa Biscuit Manufacturing Company Ltd -v- West End Distributors (supra), the next issue to determine is whether infact this Court has no jurisdiction to determine this suit because of the pendency of Busia Succession Cause No E582 of 2022.
7. In trying to persuade this Court to up-hold the Preliminary Objection, counsel for the Respondents has made the following submissions in paragraph 1 page 1:

"The Respondent herein filed a Preliminary Objection dated 18.7.2025 on a point of law on the entire Originating Summons by the Applicant on the grounds that to the extent that the Originating Summons are concerned with the land portion measuring 4 acres comprised in South Teso/Amukura/103 which is part of the



Estate of Raphael Magero Ochodo (deceased) and whose succession process is still on going in Court, that is Busia Succession Cause No E582 of 2022, this Honourable Court lacks jurisdiction to hear and determine this matter as the Court should not hear the case until the succession cause is finalized and that the Honourable Court lacks jurisdiction in cases concerning succession disputes. By the time we prepared this submission we had not received any response from the Applicant on the Respondents Notice of Preliminary Objection.”

Then in paragraph 2 of the submissions, the same counsel adds thus:

“From the Respondent’s Preliminary Objection, the main issue for determination is whether or not the Honourable Court lacks jurisdiction to hear and make determination in a matter concerning a parcel of land which is part of the estate of the deceased whose succession process is still on-going in another Court.”

Further on, in paragraph 10 of his submissions, counsel for the Respondents cites the case of Beatrice Wambui Kiarie & 2 Others -V- Tabitha Wanjiku Ang’ang’a & 9 Others 2018 eKLR where M. C. Oundo J has stated at paragraph 48 thus:

“There having been a will in place, I do find that that (sic) although it is clear from the provisions of Article 162 (2) (b) of *the Constitution* and sections 4 and 26 of the *Environment and Land Court Act* that this Court has unlimited and original jurisdiction to deal with disputes relative to the environment and the use and occupation of, and title to land in the whole country. However, in the present case and looking at the plaint filed by the Plaintiff, and the annexures thereto, I find that the issue raised herein is a succession dispute that ought to have been filed either in the high Court or chief magistrate’s Court. Emphasis added.

What is clear from the judgment of M.C. Oundo J. in the Beatrice Wambui Kiarie & 2 Others -v- Tabitha Wanjiku Ng’ang’a (supra), is that the dispute which was before the Judge was “a succession dispute”. The dispute before me is not a succession dispute. It is a claim to the suit land by way of adverse possession. Even if the subject matter in the succession cause is the suit land, the Court handling that cause has no jurisdiction to handle any dispute relating to ownership of land or indeed a claim to land by way of adverse possession. That is the preserve of this Court and not of the Succession Court. The *Law of Succession Act* and the Rules thereunder confer upon the Succession Court the jurisdiction to determine the Estate of the deceased and distribute it among the beneficiaries. Disputes between the deceased and third parties such as in this case have to be resolved in accordance with the provisions of the relevant laws including the *Civil Procedure Act* and the Rules set out therein. That is why the Applicant has moved to this Court citing the provisions of Order 37 of the Civil Procedure Rules as well as Sections 7 and 38 of the Limitations of Actions Act. Indeed, that is why Rule 41 (3) of the Probate and Administration Rules provides that:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share under Order XXXVI,



rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

It is clear from the above that in fact it is the Succession Court which should set aside the portion measuring 4 acres out of the suit land to await the determination of this suit and not the other way round as submitted by the Defendant’s counsel in paragraph 13 of his submissions “that it will be proper, efficient and effective for this Honourable Court to put on hold to this matter until the succession case is completed.” It must also be remembered that the Defendants have been sued as the Legal Administrators to the Estate of the deceased Raphael Magero Ochodo alias Magero Ochodo. It is now well settled that a claim for land by way of adverse possession can be filed against the Estate of a deceased person – see *Karuntimi Raiji -v- M’makinya M’itunga* 2013 eKLR. Under the doctrine of adverse possession, the Plaintiff’s claim to the suit land runs against the title and not necessarily against the current holders of the title. See also *Peter Thuo Kairo -V- Kuria Gacheru* 1988 2 KLR III where the Court of Appeal reiterated that a claim for land by adverse possession subsists not only against the present holders but also against their predecessors in title. If the Defendants’ intention in raising this Preliminary Objection is to scuffle the Plaintiff’s claim by prioritising the Succession Cause, I must caution him that even the distribution of the deceased’s Estate will always be subject to the overriding interests of persons like the Plaintiff if indeed they have any valid claim to the suit land or any portion thereof. That, of course, will always be subject to the evidence which will be produced before the trial Court.

8. The other limb of the Preliminary Objection is that this suit will be in violation of Section 45 of the *Law of Succession Act* which prevents unauthorized dealings with the Estate of a deceased person. That Section reads:

“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.”

Sub-section (2) goes on to provide that any person who contravenes the above provision shall be guilty of an offence and liable to imprisonment to a fine not exceeding ten thousand shillings or imprisonment not exceeding one year or both. The *Law of Succession Act* does not define the term “intermeddle.” It must however, inter alia, mean the un-authorized handling, disposal or management of a deceased person’s Estate without authority. The Plaintiff in this case cannot, by any stretch of imagination, be said to be intermeddling with the Estate of the deceased Raphael Magero Ochodo alias Magero Ochodo. He has sued the Defendants as the Legal Administrators to that Estate, a fact that is not denied. A person pursuing what he feels is a legitimate claim against the Estate of a deceased person cannot be intermeddling with that Estate. Such person is only invoking the legal process to make a claim to part of the Estate. He may or may not succeed at the trial. Meddling, as per the Oxford Dictionary includes an intrusive or unwarranted interference. This suit does not fall under that category.

9. The up-shot of all the above is that the Preliminary Objection dated 18th July 2025 is devoid of any merit. It is accordingly dismissed with costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026



RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 26TH DAY OF FEBRUARY 2026 WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

Explanatory notes:

This ruling was due on 21st January 2026. However, following my transfer from Busia to Iten Court which was w.e.f 15th January 2026 and in view of the fact that I had to prioritize part-heard cases, it has been delayed. The delay is regretted.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

