

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KITALE

ELC NO. E001 OF 2024

AMUHAYA SAGINI NICKSON-----
PLAINTIFF/APPLICANT

VERSUS

SAMMY COLLINS-----1ST
DEFENDANT/RESPONDENT

TITUS BARAZA-----2ND
DEFENDANT/RESPONDENT

EDWIN M. MAKHANU-----3RD
DEFENDANT/RESPONDENT

CALEB SIMIYU MAKHANU-----4TH
DEFENDANT/RESPONDENT

RULING

1. When this matter came for the main hearing on **16/2/2026**, it could not take off due to sickness on the part of the defendants' counsel, as well as a preliminary objection dated **26/1/2026** by the plaintiff. The grounds of the preliminary objection are that:

- (1) The 1st, 3rd, and 4th defendants have no *locus standi* to file and sustain the amended statement of defence dated 12/3/2025, for want of compliance with Order 2 Rule 2 of the Civil Procedure Rules, given that all the title deeds namely; Trans Nzoia/Botwo/53, 484, 496,**

485, and Trans Nzoia/Botwo/54, listed therein to which they asserted their rights against the plaintiff's land title No. Trans Nzoia/Botwo/521 have none of their names.

- (2) The 2nd defendant has no *locus standi*, as land title Nos. Trans Nzoia/Botwo/53, 54, and 497 alluded to in the statement of defence dated 18/9/2025, through which he seeks to affirm his rights against the plaintiff's land title No. Trans Nzoia/Botwo/521 has none of his name.**
- (3) The 2nd defendant alleged purchase of Trans Nzoia/Botwo/54 through purchase agreements dated 25/9/2019, in the list of documents dated 18/9/2025, is not only overridden by title to the same, which is in the name of his father Henry Mulongo but also the agreement is void for it violates the Law Society of Kenya Conditions of Sale 1989/2015 Editions as regard attestation and also Section 3(3) of the Law of Contract Act.**
- (4) The letters of administration by the 2nd defendant, dated 19/3/2024, through which he seeks to have a locus standi before this court, are void because they were nullified by the court in Kitale CM Succession Cause No. E204 of 2023, where the amended letters dated 2/10/2024 were issued to their father, Henry Mulongo Makhanu.**
- (5) That the 4th defendant's counterclaim dated 18/9/2025 is defective for want of compliance with Order 7 Rules 3 and 12 of the Civil Procedure Rules in view of**

the nullification of the purported letters of administration as alluded to in No. (4) above.

(6) That even though the 4th defendant is suing on behalf of the estate of Hellen Inzayi Mulongo (deceased), he has failed to produce a single property registered or jointly owned by the deceased.

(7) That both the amended statements of defence by the defendants and the counterclaim raise succession matters, which ought not be disposed of by way of counterclaim, but in a separate independent suit as per Order 7 Rule 12 of the Civil Procedure Rules.

(8) That consequent to the above, since the issue of locus standi goes to the jurisdiction of the court, this court lacks jurisdiction to entertain the 1st, 2nd, 3rd, and 4th defendants' amended statements of defence as well as the 4th defendant's counterclaim therein.

2. The plaintiff relies on written submissions dated **20/2/2026**, isolating three issues for the court's determination. On whether the preliminary objection is res judicata, it is submitted that the legal basis of a preliminary objection is derived from **Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors Ltd [1969] EA 696**, and the preliminary objection before the court falls under the said definition.

3. On *res judicata*, the plaintiff relies on **Section 7** of the Civil Procedure Act, **Uhuru Highway Developers Ltd -vs- Central Bank of (K) Ltd [1999] eKLR**. It is submitted that the defendants pleaded their issues as ordinary defendants against the claim for trespass without disclosing their capacities as noted in the ruling dated **23/7/2025**, while in the counterclaim, the 4th defendant as the plaintiff, and the defendants not only changed the title of their suit but also changed their capacities to sue from that of being ordinary defendants defending a claim of trespass, to that of suing as legal representatives of the estate of the late Hellen Inzayi (deceased), where they claimed life interest in her alleged properties, with parties to the counterclaim being different.
4. The plaintiff submits that the notable change in title, parties to the suit, and the new capacity under which the defendants pleaded generally changed the substance and form of the suit. Consequently, the plaintiff submits that new issues for consideration emerged, including but not limited to:
- (a) *The validity of the letters for administration upon which the 4th defendant purportedly relied, to acquire locus standi, and*

- (b) Whether the deceased had any property other than jointly or individually forming part of the substratum of this suit.*
- (c) Whether there was any nexus between the plaintiff, who was an innocent purchaser for value without notice, and the estate of the deceased.*
- (d) Whether there were any practice steps by the defendants or the deceased herself to object to the issuance of title **No. Trans Nzoia/Botwo/521** by the Land Registrar, or any suit against the plaintiff would arise since the deceased died on **12/11/2012** as per the letters of administration, and there is no evidence she objected to the issuance of any of the title deeds.*
- (e) Jurisdiction of the court to entertain the counterclaim or whether it ought to be disposed of in a separate suit or not.*
5. The plaintiff submits that no reasonable defence in law and is merely an abuse of the court process, for the land is not customary land, the plaintiff is an innocent purchaser for value without notice, the sanctity of title must be respected and protected, the issue of life interest ought to be pursued elsewhere, the sale agreement relied upon by the 2nd defendant is void in law, the letters of administration dated **19/3/2024** have been nullified and re-issued to Henry Mulongo Makhanu, the issues raised by the defendants on succession matters are before the wrong forum, or should be

raised in an independent suit, in the notice of motion dated **12/3/2025**, the defendants had conceded the issue of lack of locus standi then, which has now been validated after the revocation.

- 6.** On jurisdiction to entertain the defence and counterclaim, the plaintiff submitted that lack of capacity is a grave defect that cannot be overlooked by the substantial shift in the issues for determination from those previously addressed through ruling dated **10/12/2024** and **23/7/2025** herein renders the preliminary objection an exception to the doctrine of res judicate, generally and in particular since there are new parties to the suit namely, 1st and 3rd defendants in the counterclaim presently unlike in the past rulings, and the new issues by the 2nd defendant relating to an purchase of land title **No. Trans Nzoia/Botwo/54**, whose registered owner was not Henry Mulongo Makhanu, and the issue of consideration, validity of the letters of administration.
- 7.** The plaintiff submits that only two applications have previously been heard and determined, one dated **3/1/2024**, before Henry Mulongo Makhanu and Emmanuel Sikukuu became parties, in which the issue of succession dispute was not one for

determination. Regarding the 2nd application dated **12/3/2025** for stay of the proceedings, the plaintiff submits that the court did not address and determine the same on the merits.

- 8.** On *locus standi* by the 1st, 2nd, 3rd, and 4th defendants, the plaintiff submits that the amended statements of defence and counterclaim are brought by persons lacking capacity and cannot be overlooked by the court or salvaged through **Article 159** of the Constitution, and go to the jurisdiction of the court. Reliance is placed on **Julian Adoyo Onyango -vs- Francis Kiberenge Abano [2015]eKLR.**
- 9.** The defendants rely on written submissions dated **9/3/2026** to oppose the preliminary objection, raising a single question for determination: whether the preliminary objection is merited or not. The defendants submit that a preliminary objection must meet the three conditions conjunctively as set out in **Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors Ltd** (*supra*) and **Jack Kaguu Githae -vs- James Mugo Kingao & Others [2019] eKLR.**
- 10.** The defendants submit that the eight grounds of the preliminary objection dated **26/1/2026** would require the court to investigate the matter,

ascertain disputed facts, examine the evidence, and, in so doing, exercise judicial discretion in its final determination as regards grounds **(1)**, **(2)**, and **(3)**. Reliance is placed in **Independent Electoral and Boundaries Commission -vs- Jane Chepernger & Others [2015] eKLR, and Jack Kaguu Githae -vs- James Mugo (supra)**.

11. On ground number **(4)** of the preliminary objection, the defendants submit that the question of whether the letters of administration were nullified and reissued in favour of Henry Mulongo Makhanu requires validation and factual assessment by the court, hence it is not a pure point of law. On ground number **(5)** of the preliminary objection, the defendants submit that the court will have to examine if **Order 7 Rules 3** and **12** of the Civil Procedure Rules were complied with by the 4th defendant, rendering the plaintiff's complaint evidentiary in nature, on disputed facts.

12. On ground **(6)**, the defendants submit that the issue of ownership of the land of the deceased individually or jointly requires evidence or establishment and factual or disputed facts, which should be a matter for the trial court at a hearing. Reliance is placed on **Muriakiara -vs- Ngugi ELC No. 161 of 2024**.

- 13.** Further, on ground **(7)** of the preliminary objection, the defendants submit that the same requires the court to examine the pleadings, their factual basis, which issues are intertwined with the merits of the dispute, which can only be resolved at the main hearing. Reliance is placed on **Gachoki & Another -vs- Kago Kerugoya Civil Appeal No. 58 of 2019.**
- 14.** On ground number **(8)**, the defendants submit that jurisdiction is a creature of either a statute, or the constitution, or both, as held in **Samuel Kamau Macharia & Another -vs- KCB Limited & Others [2012] eKLR.**
- 15.** In this case, it is submitted that the court under **Article 162(2)(b)** of the Constitution and **Section 13** of the Environment and Land Court Act has both original and appellate jurisdiction to hear and determine all disputes relating to environment and land, and that the current dispute is covered. The defendants submit that the 4th defendant's counterclaim concerns title, interests, entitlement, and rights in and to land, including the validity of title documents, contractual transactions affecting land, and the estate of the deceased as it relates to land ownership. Reliance is placed on **Njeri -vs- Kieleko & Others ELC No. E127 of 2024.**

16. It is submitted that the counterclaim is properly before the court as held in **County Government of Kilifi -vs- Mombasa Cement Ltd Civil Appeal No. 11 of 2016**. The defendants submit that the issue of *res judicata* was not raised in the preliminary objection; hence cannot be introduced through written submissions, and the plaintiff should not be allowed to expand the scope of the preliminary objection through submissions. Reliance is placed on **Joseph Muchemi Wanyeki -vs- Premji Bhimji Kerai & Another Civil Appeal No. 65 of 2019**. The defendants submit that even if *res judicata* was a valid objection, it can best be raised by way of a formal application and not through written submissions as held in Kitale, **George Kamau Kimani & Others -vs- County Government of Trans Nzoia & Another [2014] eKLR**.
17. A preliminary objection was defined in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd** (*supra*) as a pure point of law which has been pleaded or which arises by clear implication out of the pleadings, which, if argued as a preliminary point, may dispose of a suit. Examples include an objection to the jurisdiction of the court,

a time-barred suit, or a lack of capacity to sue or be sued.

18. The court observed that a preliminary objection is raised on the assumption that all facts pleaded by the other side are correct. The court went on to say 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. The court warned that the improper way or practice of raising points by way of preliminary objection that does nothing but unnecessarily increase costs or confuse the issues must stop.

19. In **Oraro -vs- Mbaja [2005] KEHC 3182 [KLR]**, the court said that anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information that stands to be tested by the normal rules of evidence. The court said that if a matter comes before the court directed as a preliminary objection, it will not come to co-exist with such a factual scenario as may lead the court to exercise its discretion.

20. In **Isaac Aluoch Aluoch Alouchier -vs- Independent Electoral and Boundaries Commission & Others [2022] eKLR**, the court said that a point of law on jurisdiction can be raised

at any time, formally by a preliminary objection, grounds of opposition, viva voce during arguments, or by the court *suo moto*, because challenging the jurisdiction of the court is a threshold issue. The court said that, as held in **Samuel Kamau Macharia & Another -vs- KCB Ltd** (*supra*), the court cannot expand its jurisdiction through judicial craft or innovation, nor can parties by mutual consent, or otherwise, confer jurisdiction where none exists.

- 21.** On what is a pure point of law, the court in **Aviation and Allied Workers Union -vs- Kenya Airways Ltd & Others [2015] eKLR**, restated that a preliminary objection may only be raised on a pure point of law, and that to ascertain such pure point of law, the court has to satisfy that there is no proper contest to the facts of the matter, that the facts are deemed agreed as they are prima facie presented in the pleadings on record.
- 22.** On whether *res judicata* may be raised as a preliminary objection, the court in **George Kamau Kimani & Others -vs- County Government of Trans Nzoia & Another [2014] eKLR** held that one cannot raise a ground of *res judicata* by way of a preliminary objection, and that the best way to raise a ground of *res judicata* is through a notice of

motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata* by ascertaining the facts by way of evidence.

23. The preliminary objection raised by the plaintiff is largely related to three issues. The first issue is that the capacity in which the defendants filed their amended statements of defences and the counterclaim has been nullified by the succession court, hence they lack the requisite standing to advance the said defences and counterclaim in challenging the main suit. The court is asked to strike out those defences and counterclaim. The second limb is that the issues raised in the said defences, generally and in particular the counterclaim, are outside the jurisdiction of this court as set out in **Section 13** of the Environment and Land Court Act and **Article 162 2(b)** of the Constitution.

24. The defendants, on the other hand, submit that the counterclaim is properly before the court under **Order 7 Rule 9** of the Civil Procedure Rules, the issues raised therein fall under the jurisdiction of the court and not elsewhere and that the preliminary objection is not a pure point of law for it requires the court to rely on contested facts or

issues or evidence which is outside the purview of a preliminary objection as per caselaw, and that the facts or issues raised in the preliminary objection, if they are merited, call for ventilation at the main trial through viva voce evidence.

25. In **Alfred Njau & Others -vs- City Council of Nairobi (1982-88)1 KAR 229**, *locus standi* was defined as the right to appear or be heard in court or other forum. The plaintiff takes the view that all the defendants pleaded their issues as ordinary defences based on the claim of trespass without disclosing their capacities which they claim, but in the counterclaim by the 4th defendant, the defendants not only changed the title of their suit but also changed their capacities to sue from that of being ordinary defendants defending a claim of trespass, to that of suing as legal representatives of the estate of Hellen Inzayi (deceased), where they claim life interest in the alleged suit property.

26. The plaintiff submits that the notable change in the title, parties to the suit, and the new capacity under which the defendants plead changed the substance and form of the suit, with almost five issues for consideration emerging, making the counterclaim untenable. The plaintiff submits that even after the counterclaim was filed, the *locus standi* of the 2nd

defendant has now been withdrawn by the probate court that had initially granted the letters of grant.

- 27.** The plaintiff also raises a preliminary objection as regards the 2nd defendant's *locus standi*, whose alleged rights or interests as regards the suit land, based on the documents relied upon, suffer infirmities under **Section 3(3)** of the Law of Contract Act and the Law Society of Kenya Terms and Conditions of Sale **1989 & 2015** Edition.
- 28.** In **Aluochier -vs- Independent Electoral and Boundaries Commission** (*supra*), the Supreme Court, held that as a matter of practice, before considering the merits of any appeal before it, first ascertains if it has been properly moved, as held in **Owners of the Motor Vessel Lilian 'S' -vs- Caltex Oil (K) Ltd [1989] eKLR**, that jurisdiction is everything, and without it, a court down its tools.
- 29.** Further, the court held that whether or not jurisdiction has been properly invoked depends on either the nature of the pleadings or the cause of action, the nature of the proceedings, or the reliefs sought. The Environment and Land Court and courts of equal status are creatures of the Constitution and the Environment and Land Court Act, as discussed by the Supreme Court in **Republic -vs- Karisa Chengo & Others [2017] eKLR**.

30. While ascertaining whether a court has jurisdiction or not, *Ngugi J and Munyao J*, as they then were, in **Suzanne Achieng Butter & Others -vs- Redhill Heights Investment Ltd & Another [2016] eKLR**, and **Lydia Nyambura Mbugua -vs- Diamond Trust Bank (K) Ltd & Another [2018] eKLR**, held on utilization of the predominant purpose test, the subject matter or issue, before the court. The predominant purpose test was also settled on in **Co-operative Bank of Kenya Ltd -vs- Patrick Kangethe Njuguna & Others [2017] eKLR**.
31. In **Bank of African (K) Ltd & Another -vs- TSS Investment Ltd & Others [2023] KECA 410 [KLR]**, the court emphasized that the Environment and Land Court has only jurisdiction over disputes related to the use of land and contracts associated with the use of the land and cannot assume jurisdiction over commercial disputes such as those on mortgages, charges or any contract that is not incidental to the use of land.
32. **Ashmi Investments Ltd -vs- Riakina Ltd & Another Petition No. E014 of 2023**, the court cited **Kampala International University -vs- HFCK Ltd [2014] KESC 11 [KLR]**, that without jurisdiction, a court of law is incapable of rendering

any valid ruling, order, or judgment. The Environment and Land Court and the Family Division of the High Court of Kenya have distinct and separate jurisdiction on succession matters under **Article 162 2(b)** and **165** of the Constitution and **Section 13** of the Environment and Land Court Act and **Section 47** of the Law of Succession Act.

33. In **Re Estate of Stone Kathuli Muinde (deceased) [2016] KEHC 3125 [KLR]**, the court said that the question regarding the estate of the deceased by an outsider or third parties does not fall before the High Court, for it is not its jurisdiction to determine ownership.

34. The primary pleadings by the plaintiff are the amended plaint dated **21/1/2025**. The plaintiff describes himself as the purchaser of land title **No. Trans Nzoia/Botwo/521**, bought from Henry Mulongo Makhanu, the father of the defendants, through a sale agreement and transfer forms dated **29/12/2010**, **23/9/2023**, and **16/11/2023**, respectively.

35. The plaintiff avers that on **25/11/2023**, the defendants trespassed into his land, demolished the fence, moved the beacons, tilled his land using a tractor and damaged various crops therein, and threatened to take away his mother's and servants'

lives, who reside on the farm. He seeks special damages of **KShs. 250,000/=**, general damages of **Kshs. 300,000/=** as loss of harvest, an injunction, and an order directing the defendants to remove the illegally erected boundary fence over title **No. Trans Nzoia/Botwo/521** and erect the beacons at their initial points, based on the plaintiff's mutation plan.

36. The 1st, 2nd, 3rd, and 4th defendants rely on an amended defence dated **12/3/2025**. They deny that the plaintiff is the registered owner of title **No. Trans Nzoia/Botwo/521**. They termed the title as illegally and fraudulently created from the title **No. Trans Nzoia/Botwo/53**, originally known as **Botwo Farm Plot No. 42** (initially jointly purchased by their late mother and their father, Henry Mulongao Makhanu). They fraudulently, unlawfully, and discreetly registered in the name of their father to the exclusion of their late mother.

37. The defendants aver that their father created, subdivided, and sold a portion of the mother title without letters of administration to the estate of their late mother, who had a stake in the mother title and its resultant subdivision. The defendants termed the subdivision, survey, sale, and transfer of the resultant portion to the plaintiff as fraudulent,

illegal, and amounting to intermeddling with the estate of their late mother, to which their father lacked the capacity to pass any title thereof to the plaintiff.

38. The defendants allege that the alleged sale agreement dated **23/9/2023** does not contain a provision on an access road or **0023** points to the suit land as a separation of the suit land from an adjacent parcel **No. 54**. The defendants deny issuance of a Land Control Board Consent on **28/9/2023** to the plaintiff after which he fenced off his land.

39. The defendants aver that since their father had no valid title to pass to the plaintiff, any transactions relating to the same are null and void. The defendants deny the alleged trespass and commission of acts of destruction to the suit property as alleged by the plaintiff, whom they deny has ever possessed the suit land, otherwise they are the ones in quiet possession and occupation of the same.

40. The defendants aver that the **Criminal Case No. E4176 of 2023** was stayed by **Kitale HC Criminal Petition No. E015 of 2024**. The defendants aver that title to the suit land has been challenged as

defeasible or incapable of conferring any absolute interest, for they have always been in possession, occupation and use of the suit property, hence the plaintiff cannot waive a title deed on the court's face and state that he is a legitimate owner of the suit land in view of the said challenges. The 4th defendant opposed the suit through a statement of defence and counterclaim dated **18/9/2025**.

41. The issue for my determination is whether the preliminary objection meets the jurisprudence governing preliminary objections. It is a trite law that parties are bound by their pleadings and issues for determination flow from those pleadings. See **Stephen Mutinda Mule & Others -vs- Independent Electoral and Boundaries Commission & Others [2014] eKLR.**

42. The plaintiff takes the view that the defendants, generally and in particular the 2nd and 4th defendants, lack capacity to sustain their statement of defence and counterclaim, which should be struck out, and to which also raises different causes of action to the main suit, and should, for convenience, be tried separately in a different forum.

- 43.** The argument raised by the plaintiff was raised in **Sol Electronics (K) & Others -vs- Raikandalia & Another Civil Appeal No. 384 of 2018 [2025] KECA 970 [KLR] (23rd May 2025) (Judgment).** The court cited **D.T. Dobie Co. (K) Ltd -vs- Muchina [1980] eKLR** and **County Government of Kilifi -vs- Mombasa Cement Ltd [2017] eKLR**, that striking out a suit should be sparingly used to avoid driving out a litigant from the seat of justice, and that under **Order 7 Rule 3** of the Civil Procedure Rules, the court may reject a counterclaim where it would not be convenient, or on wherein the opinion of the court, the counterclaim ought not to be allowed, on a case to case basis, which is a discretionary power of the court to be exercised judiciously.
- 44.** The court said that it is within the discretion of the court to decide whether a counterclaim should be determined within the suit or be tried as a separate suit, more so when the two raise different causes of action. A counterclaim is not an incidental appendage to a suit; it is a substantive claim which must be determined on its own terms.
- 45.** In **City Finance Ltd & Others -vs- Nyanja Holdings Ltd & Others Civil Appeal No. 224 of 2020 and E166 and E174 of 2021**

(consolidated) [2026] KECA 106 [KLR] (30th January 2026) (Judgment), the court held that where a court reaches a finding that would depose a counterclaim, it must still say so plainly and reach clear consequential conclusion(s).

46. In **County Government of Kwale & Others -vs- Rahimkhan & Others [2023] KECA 308**, the court said that a counterclaim is a case on its own right, completely different from the plaintiff's, only brought within the main suit for convenience, it will fall or succeed on its own merit and that it is a form of a cross suit in which the parties transpose roles, whereby the defendant becomes the plaintiff and the plaintiff the defendant.

47. In **County Government of Kilifi -vs- Mombasa Cement Ltd (supra)**, the court cited **Sh. Jag Mohan Chawla & Another -vs- Dera Radha Swami Satsang & Others**, the Supreme Court of India held that a counterclaim is to be treated as a cross suit, with all the indicia of pleadings as a plaint, including the duty to aver his cause of action and payment of requisite court fees. The court said that instead of relegating the defendant to an independent suit, to avert multiplicity of the proceedings and needless protraction, the legislature intended to try both the suit and the

counterclaim in the same suit as a suit and cross-suit and have them disposed of in the same trial.

48. What the plaintiff has brought before the court is a claim for trespass against the defendants. Trespass is a tort governed by **Section 3(1)** of the Trespass Act, **Cap 294**, Laws of Kenya. It is defined as a violation of the right to ownership by wrongdoers or trespassers without justification, consent, or authority. See **M'Ikiara M'Mukanya & another - vs- Gilbert Kabere M'Mbijiwe [1983] eKLR.**

49. In this suit, it is the plaintiff who identified and brought the defendants to court, claiming wrongful entry into his land and commission of acts of destruction or encroachment. The defendants have pleaded their alleged justification as children of the seller and whose late mother had a life interest in the disputed land, which rights or interests their father allegedly ignored in the sale.

50. The plaintiff takes the view that the statement of defences and counterclaim is brought by persons whose capacity is no longer in existence after the initial grant was revoked during the subsistence of this case. The court is asked to find the same incompetent, disclosing no cause of action, and or raising a competently different issue inconsistent with the primary suit.

51. In **Mburu -vs- Kariuki & Another Civil Appeal No. 15 of 2020 [2026] KECA 529 [KLR] (13th March 2026) (Judgment)**, the court said that pleadings as filed by the parties must be given a holistic consideration, taking into account that the dispute before the court and the dispute in the primary suit and cross-suit, calling for determining of the two in one proceedings. The court said that a counterclaim is deemed as a separate suit, usually determined in the main suit for purposes of legal convenience.
52. In **Mohamed -vs- Board of Management Pentrose Community School & another (Civil Appeal E136 of 2023) [2026] KECA 501 (KLR) (13 March 2026)**, the court cited *Clerk & Lindsell on Torts 21st Edition at page 1245* and **Church Commissioners for Kenya of the Anglican Church of Kenya -vs- Wayuga [2024] KECA 1048 [KLR]**, that in a claim for trespass, the person alleging it must demonstrate a valid proprietary interest in the land in question which has been infringed, violated or invaded by another person without approval, consent or lawful justification.
53. In **Presbyterian Foundation -vs- Kibera Siranga Self Help Group Nursery School Civil Appeal No. 64 of 2014 [2023] KECA 371 [KLR]**, the

court held that the root title is the deed to which the title to a property is ultimately traced, to prove that the owner has a good title, and where there are competing interests, the parties are required to give evidence of title starting with a good root of title followed by an unbroken chain of ownership, starting with its origin, recognizable description of the property, and lastly with nothing to cast any doubt on the title.

54. In **Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) -vs- Mwatsami (Civil Appeal E015 of 2020) [2024] KECA 579 (KLR) (24 May 2024) (Judgment)**, the court said trespass occurs when a person directly enters upon land in possession of another without permission and remains there, places or projects any object upon the land.
55. In **Muthiora -vs- Marion Muthama Kiara (Suing on behalf of the estate of Erastus Muthama Kiara (deceased) [2022] KECA 28 KLR)**, the court held that any unauthorized entry, whether present or continuous, is trespass. A claimant to a claim for trespass has to prove immediate exclusive possession and wrongful entry by an intruder

without justification, consent, or authority. See **M'Ikiara M'Mukunya -vs- M'Mbijiwe** (*supra*).

56. The defendants have challenged the capacity of their father to dispose of the land to the plaintiff. The title held by the plaintiff is being challenged by the defendants. When a registered proprietor's root of title is under challenge, a claimant on trespass must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal, and free of any encumbrances, including any interests which need not be noted on the register.

57. In **Jamal Salim -vs- Yusuf Abdulahi Abdi & another [2018] KECA 14 (KLR)**, the court said that trespass to land consists of any unjustifiable intrusion by one person upon land in possession of another. All registered land is subject to overriding interests as may for the time being subsist and affect the same without being noted in the register as per **Section 25(2)** of the Land Registration Act, as held in **Shah & 7 others -vs- Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR)**.

58. The defendants are alleging interests that their late mother and father jointly acquired or that their father, as the registered owner of the land, dwelt

with the land contrary to any existing life interest belonging to their late mother. **Article 40(6)** of the Constitution and **Section 26** of the Land Registration Act only offer protection to titles to land whose acquisition was regular, procedural, formal, and obtained free of any irregularities or encumbrances, including those not captured on the title register.

59. The defendants have raised pertinent issues in the amended statement of defence and counterclaim, which challenge the title held by the plaintiff and the capacity of the seller to dispose of the title to the suit property, alleged to have been subject to overriding interests. The burden is placed on the plaintiff as a purchaser for value without notice to undertake due diligence to verify the land history and any pre-existing interests under **Section 28(h)** of the Land Registration Act. See **Dias Property Ltd & Another -vs- Githae & Others Petition No. E019 of 2024.**

60. In **Re Estate of Mbui Wainaina (deceased) [2015] eKLR**, the court said that the mandate of the probate court is limited by the Law of the Succession Act, not to extend to determining issues of ownership of property and declaration of trusts.

See **Mburu -vs- Wainaina [2025] KECA 181 [KLR] (6th February 2025) (Judgment)**.

61. As to the other grounds, the court in **Hassan Ali Joho & Another -vs- Suleiman Said Shabbal & Others** and in **Independent Electoral and Boundaries Commission -vs- Jane Cheperenger & Others [2015] eKLR**, held that the preliminary objection serves two purposes, inter alia, to spare judicial time for only the deserving causes of dispute settlement. The court said that it is distinctly improper for a party to resort to a preliminary objection as a sword for winning a case, otherwise destined to be resolved judicially and on the merits.

62. A preliminary objection, as held in **Henry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another [2014] eKLR**, has a limited scope. An alleged preliminary objection based on disputed facts or requiring evidential support, as the one before the court, does not fall under the definition in **Mukhisa** (*supra*) and **Oraro** (*supra*). There are contested issues before this court that rule out the alleged preliminary objection. See **Aviation & Allied Workers Union of (K) -vs- Kenya Airport & Others [2015] eKLR**.

- 63.** *Locus standi* signifies the right to be heard. In **Law Society of Kenya -vs- Commissioner of Lands & Others, Nakuru HC Civil Case No. 464 of 2000**, the court held that a person must have sufficiency of interest to sustain their standing to sue in a court of law. It is the plaintiff who sued the defendants for trespass.
- 64.** Therefore, the plaintiff cannot limit or dictate how and in what capacity the defendants shall opt, choose to take to defend themselves or justify the alleged trespass.
- 65.** Striking of a suit is a drastic remedy to be sparingly issued. The pleadings before the court by the defendants raised triable issues warranting a full trial. As held in **Kensalt Ltd -vs- Water Resources Management Authority SCOK Petition Appl. No. 8 of 2016**, parties' ultimate rights should not be decided at an interlocutory stage, except in the clearest of circumstances. Looking keenly at the preliminary objection, it does not fit the bill. Still, the court does not find the

defence and counterclaim as disclosing no reasonable cause of action. Equally, the two statements of defence and counterclaim do not fit the description of an abuse of the court process.

66. The upshot is that I find the preliminary objection dated **26/1/2026** lacking merit. It is dismissed with costs.

67. Orders accordingly.

Ruling dated, signed, and delivered via **Microsoft Teams/Open Court** at **Kitale** on this **15th** day of **April 2026**.

In the presence of:

Court Assistant - Dennis

Mr. Ruto for the defendants present

Aswani for the plaintiff



**HON. C.K. NZILI
JUDGE, ELC KITALE.**