



**Makwana v Shariff & 2 others (Environment and Land Case
E073 of 2025) [2026] KEELC 1912 (KLR) (4 March 2026) (Ruling)**

Neutral citation: [2026] KEELC 1912 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E073 OF 2025**

**A OMBWAYO, J
MARCH 4, 2026**

BETWEEN

KAMLESH JAYANTILAL MAKWANA PLAINTIFF

AND

FAREED MOHAMED HUSSEIN SHARIFF 1ST DEFENDANT

SAMEER MAKWANA & ANOTHER & ANOTHER 2ND DEFENDANT

RULING

1. This ruling is in respect of the Defendant's Notice of Preliminary Objection dated 28th July, 2025 which is raised on the following grounds:
 1. That the aforesaid Application is incurable defective, bad in law, incompetent, frivolous, vexatious, scandalous, still born, none-starter and abuse of the Court's process.
 2. That the Plaintiff/Applicant filed a suit of similar nature in the High Court family division being HCFOs No. E003 OF 2025 which suit was struck out on 16th June, 2025 in the said circumstances the instant application is Res-Judicata.
 3. That the said Applications contravenes the mandatory provisions of Section 26 of the [Land Act](#).
 4. That the said Applications contravene Section 29 of the [Law of Succession Act](#).
 5. That the said Applications contravenes the mandatory provisions of Section 31 of the [law of Succession Act](#).
 6. That the said Applications contravenes the mandatory provisions of Section 34 of the [law of Succession Act](#).



7. That the said Applications contravenes the mandatory provisions of Section 45 of the *Law of Succession Act*.
8. That the Plaintiff/Applicant is guilty of the doctrine of laches.
9. That the said Applications do not meet the threshold required for grant of interlocutory injunction.
10. That the gift contemplated in the said Applications and the entire suit does not meet the threshold required for valid gifts.
11. That in light of paragraph 1-10 above, this Honourable Court has no jurisdiction to entertain the said Applications.

Defendant's Submissions

2. Mr. Opwapo, counsel for the Defendants filed submissions dated 11th September, 2025. Counsel submitted that the Plaintiff's claim contravenes Section 26 of the *Land Registration Act*. Counsel submitted that the Grant of letters of Administration adduced in the Replying Affidavit dated 30th July, 2025 sworn by the 2nd Defendant have not been revoked. It was counsel's submission that there is no material before this Honourable Court that shows that Narandra Meghji Jadavji Makwana (deceased) left a gift in contemplation of death. Mr. Opwapo further submitted that the general Power of Attorney purported to have been donated by the deceased person on 13th January, 2015 does not make reference to the suit property.
3. Counsel went on to submit that it is the 1st Defendant/Respondent who possesses a valid grant of letters of administration in respect of the Estate of his late father that is allowed to possess and/or dispose of the suit property. Counsel submitted that the law does not allow the Plaintiff to possess and/or intermeddle with the suit property. It was counsel's submission that the delay by the Plaintiff is inordinate and further the applications do not meet the threshold required for interlocutory injunctions. Counsel submitted that the Plaintiff's explanation of the gift *inter vivos* and *causa mortis* is vague on when and how the said gifts were allegedly given to the Plaintiff.
4. The Defendants legal counsel submitted that the court has no jurisdiction to entertain the instant applications or the entire suit and asked the court to dismiss the same. Counsel asked the court to uphold the Notice of Preliminary Objection dated 28th July, 2025 with costs to the Defendants.
5. Counsel relied on the following cases: *Mukisa Biscuit Manufacturing Co Ltd vs West End EA 696, Tarabana Company Limited vs Sehmi & 7 others (Civil Appeal 463 of 2019) (KECA 76 (KLR))*, *In the Estate of Gideon Manthi Nzioka (Deceased) [2015] KEHC 944 (KLR)*, *Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited (2014) eKLR*, *Giella vs Cassman Brown, Mugo vs Equity Bank Limited (Civil Appeal No E062 OF 2023) eKLR*, *In the matter of the Estate of Godana Songoro Guyo (Deceased) (2020) eKLR*, *Owners of Motor Vessel "Lilians" vs Caltex Oil Kenya Limited (1989)* and *Dickson Ngigi vs Commissioner of Lands & Another-Petition No 9 of 2019*.

Plaintiff's Submissions

6. Mr. Oduor, counsel for the Plaintiff filed submissions dated 2nd February, 2025. Counsel submitted that the Preliminary Objection ought to fail as it is vexatious and it delays these proceedings. It was counsel's submission that the Preliminary Objection has not laid any ground for the application of the



doctrine of laches. Counsel relied on the case of Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969) EA 696. Counsel prayed for costs.

Analysis and Determination

7. The issue for determination is whether the Defendant's Notice of Preliminary Objection dated 28th July 2025 is merited. The Court of Appeal in the case of Nitin Properties Ltd v. Singh Kalsi & another [1995] eKLR held as follows:
8. 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."
9. The Supreme Court in the case of Hassan Ali Joho & another -Vs- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR held thus:

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"
10. The Defendants have raised eleven grounds in the Notice of Preliminary Objection dated 28th July, 2025. The main issues raised concerned res-judicata, whether the Plaintiff has contravened statutory provisions and whether the Plaintiff has delayed in approaching the court. On the issue of Res- judicata, the court in the case of George Kamau Kimani & 4 others v County Government of Trans- Nzoia & another [2014] eKLR held as follows:
11. I have considered the points raised by the first defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection."
12. The Defendant in the Preliminary Objection has also faulted the Plaintiff for contravening various provisions of the Land Act and the Law of Succession Act. In the case of Oraro vs Mbaja 2005 1 KLR 141 the court held thus:

A 'Preliminary Objection', correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed."
13. The Defendant has also stated that the Plaintiff is guilty of the doctrine of laches which is a factual issue and should not be raised by way of a preliminary objection. In a nutshell, this Court finds that the doctrine of res judicata cannot be raised by way of Preliminary Objection because the issues raised in the preliminary objection will require proof. The applicant has not demonstrated the sameness of parties, issues and that the previous matter was adjudicate and a decision made on merit through the



Preliminary Objection. Defendants Notice of Preliminary Objection dated 28th July, 2025 lacks merit and is hereby dismissed with costs.

SIGNED BY/FOR:

HON. JUSTICE ANTONY O. OMBWAYA

