

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**PROBATE AND ADMINISTRATION CAUSE NO. E022 OF 2022**

**ESTATE OF THE LATE PIUS MASAMBAKA PETER**

**ROSE KHABAISA TALAM.....PETITIONER**

**VERSUS**

**CHRISTOPHER KIPYEGO TALAM.....1<sup>ST</sup> OBJECTOR**

**BETTY JEBET.....2<sup>ND</sup> OBJECTOR**

**JOSEPH GITARI KATHURU.....3<sup>RD</sup> OBJECTOR**

**GITAU KAMAU KARIRA.....4<sup>TH</sup> OBJECTOR**

**KENNETH KUBASU.....5<sup>TH</sup> OBJECTOR**

**RULING**

1. This Ruling is in respect to a Preliminary Objection in connection to the question of persons who claim to have purchased parcels of land, either directly from a now deceased person, or through other people, but which parcels of land have never been transferred to such alleged purchasers, and therefore still remain registered in the name of the deceased. The ever-recurring question, which again arises herein, is whether such claimants should lodge their claims at the **Probate and Administration Court** handling the Succession Cause filed to distribute the estate of the deceased, or at the **Environment and Land Court (ELC)**.
2. The background of the matter is that the deceased, **Pius Masambaka Peter**, died on 15/04/2016 at the age of 68 years. By the Petition dated 11/02/2022, the Petitioner, **Rose Khabaitsa Pius**, claiming as a widow, through **Messrs Kipkorir Cheruiyot & Kigen Advocates**, applied for Grant of Letters of Administration to manage the estate of the deceased. She listed herself and 9 children as beneficiaries of the estate, and 11 parcels of land as the assets comprising the estate.
3. However, before the Petition could be processed, 3 respective Objections, all dated 19/05/2022 were filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Objectors, through **Messrs J.C. Chumba & Co. Advocates**. All the Objectors basically claimed that they purchased various parcels of land among those listed in the Petition, from third parties who had themselves earlier purchased the same from the deceased, who later died before transferring the properties to the purchasers. They accused the Petitioner, as the widow of the deceased, and her family, of refusing to include their names in the list of beneficiaries as purchasers despite the estate having an obligation to transfer the properties to them, as they possess legal and equitable rights thereon.

4. The particulars of the claims can basically be summarized as follows:
  - a) 1<sup>st</sup> Objector, **Christoher Kipyego Talam**, was alleged to have, together with one **Simon Kipkorir Yator**, purchased the parcel number **Uasin Gishu/Kimumu/1433** from one **Shadrack Livoiywa Likhaji** on 23/07/1988, who had himself purchased the same from the deceased. It was claimed that the 1<sup>st</sup> Objector took possession of the property and even built a residential home thereon, and that, on his part, the said **Simon Kipkorir Yator** sold his portion to one **Betty Jebet (2<sup>nd</sup> Objector)** in 2011.
  - b) For the 2<sup>nd</sup> Objector, **Betty Kibet**, her claim affirmed the 1<sup>st</sup> Objector's contention and alleged further that the property **Uasin Gishu/Kimumu/1433** was subsequently sub-divided into sub-plots and given the sub-parcel numbers, **Uasin Gishu/Kimimu/6997** and **Uasin Gishu/Kimumu/1433**, respectively.
  - c) For the 3<sup>rd</sup> Objector, **Joseph Gitari Kathuru**, it was claimed that he purchased the parcel of land **Uasin Gishu/Kimimu Settlement Scheme/1448** which however he had not occupied as a result of the 2007 post-election violence, which caused him to flee from Eldoret and he later moved to Meru where he subsequently obtained employment.
5. From the record, I gather that after some discussions amongst the parties, some interlocutory issues were settled, including what appeared to have been settlement of the 1<sup>st</sup> and 2<sup>nd</sup> Objector's claims upon which the County Surveyor was directed to conduct a Survey of some of the parcels of land, which survey seems to have been carried out but the parties however differed on. In the meantime, the 3<sup>rd</sup> Objector's case was set down for *viva voce* trial.
6. However, before the 3<sup>rd</sup> Objector's case could take off as directed, two new Objectors, the 4<sup>th</sup> and the 5<sup>th</sup> Objectors, both represented by **Messrs Miyenda & Co. Advocates**, joined the fray. The grounds alleged on behalf of the two can be summarized as follows:
  - a) For the 4<sup>th</sup> Objector, **Gitau Kamau Karira**, it was alleged that he purchased a ¼ acre portion of land from the deceased in the year 1992, upon which the deceased surrendered to him the original title deed for the parcel of land **Uasin Gishu/Kimumu/252** to facilitate survey and sub-divisions. It was alleged that he, in turn, surrendered the title deed to his then Advocate, who however died in 2018 before causing the sub-division to be carried out, but that the original title deed is now untraceable.

- b) For the 5<sup>th</sup> Objector, **Kenneth Kubasu**, it was alleged that he was hired by the deceased to survey and sub-divide the parcel of land **Uasin Gishu/Kimumu/252** into its present status and for this purpose, the deceased surrendered to him and the 4<sup>th</sup> Objector, the original title deed for the property. It was alleged that the 5<sup>th</sup> Objector later relocated to Nairobi and authorized the 4<sup>th</sup> Objector to claim his (5<sup>th</sup> Objector's) ¼ acre share from the deceased on his (5<sup>th</sup> Objector's) behalf, and the ensuing title deed be deposited with **Messrs Miyenda & Co. Advocates** for collection. It was stated that the parcel of land is now fully sub-divided and it is imperative that the shares due to the 4<sup>th</sup> and 5<sup>th</sup> Objectors be factored in.
7. More spanner was thrown in the works when the Petitioner, more than 3 years after the Objections were first lodged, filed the Preliminary Objection dated 15/09/2025 challenging all the Objections. It was urged that this Court lacks jurisdiction to determine the Objections as they raise questions regarding alleged purchase of land, which questions will involve the scrutiny of documents including, but not limited to Sale Agreements to determine their authenticity and proof of payment, which duty falls squarely under the **Environment and Land Court (ELC)**. **Section 13(2)** of the **Environment and Land Court Act** was cited and it was urged that this Court should down its tools pending the hearing and interpretation, by the **ELC**, of the alleged Sale Agreements and evidence on proof of payment.
8. I note that there are is also on record the “**Replying Affidavit in Response to Objection to Making of Grant**”, sworn by the Petitioner on 1/09/2025. The same is filed through **Messrs Kipkorir Cheruiyot & Kigen Advocates**, and basically reiterates the matters stated in the Preliminary Objection.
9. There is also on record the Replying Affidavit sworn by the 3<sup>rd</sup> Objector, filed through **Messrs Kimaru Kimutai & Co. Advocates**. The Affidavit does not however disclose when it was sworn and although there seems to be a signature made thereon by the presumed Commissioner for Oaths before whom the same was witnessed, he or she has neither affixed his/her stamp nor disclosed his/her name. Be that as it may, in the Affidavit, the 3<sup>rd</sup> Objector basically deponed that he considers himself a liability of the estate of the deceased, and it is envisaged that in such cases, debts and liabilities are settled first before the estate is distributed
10. There are also 3 sets of written Submissions on record in respect to the Preliminary Objection. The Petitioner, through **Messrs Kipkorir Cheruiyot & Kigen Advocates**, filed **Eldoret High Court P&A Cause No. E022 of 2022**

the Submissions dated 22/09/2025, the 3<sup>rd</sup> Objector, through **Messrs Kimaru Kimutai & Co. Advocates**, filed the Submissions dated 17/11/2025, and the 4<sup>th</sup> and 5<sup>th</sup> Objectors, through **Messrs Miyenda & Co. Advocates**, filed the joint Submissions dated 2/10/2025.

11. I will not set out the contents of the respective Submissions as they all basically, simply, reiterate the rival contentions already recounted above, save for citing case law and statutory provisions.

### **Determination**

12. The issue arising for determination herein is evidently; **“whether this Court possesses the jurisdiction to entertain the Objector’s claims in this Succession Cause considering that the Objectors are claiming as purchasers of portions of parcels of land which are still registered in the name of the deceased.”**

13. Regarding the description of what a Preliminary Objection constitutes, the Supreme Court, in the case of **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others**, while following the oft-cited decision of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, restated the following:

**“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”.**

14. The Supreme Court, further in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR**, guided that:

**“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement.**

**It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”**

15. It is therefore evident from the foregoing that as was further held by **Ojwang, J (as he then was)** in the case of **Oraro vs. Mbaja [2005] 1 KLR 141**, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary point, may dispose of the action. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a plea of **Res Judicata**. A Preliminary Objection therefore raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct, and cannot be raised if any fact is to be ascertained, or if what is sought is the exercise of judicial discretion.
16. As aforesaid, there is on record the **“Replying Affidavit in Response to Objection to Making of Grant”**, sworn by the Petitioner and filed on 1/09/2025, which basically reiterates the matters stated in the Preliminary Objection. However, considering the wording of the Affidavit as one **“in Response to Objection to Making of Grant”**, I do not think that it was filed in support of the Preliminary Objection, but rather as a separate and distinct pleading. The above wording was, I believe, an intended and clever way of saving the Preliminary Objection, since inviting the Court, when determining a Preliminary Objection, to interrogate factual matters deponed in an Affidavit may render such Preliminary Objection incompetent as it may be deemed to have failed the **Mukisa Biscuit case (supra)**. The same reasoning applies to the Replying Affidavit sworn by the 3<sup>rd</sup> Objector. I will therefore not consider any factual matters raised in the Affidavits and proceed only on the basis of the **“point of law which has been pleaded”** and which **“arises by clear implication out of pleadings”** as guided in the **Mukisa Biscuit case (supra)**.
17. Regarding the question whether the 5 Objections lodged in this matter constitute claims that ought to be placed before the **Environment & Land Court (ELC)**, that issue has been canvassed and addressed upon in several Court decisions and it is therefore not moot as an issue.
18. For instance, **M.K. Ibrahim J (as he then was)**, in the case of **In the matter of the Estate Peter Igamba Njoroge, Nakuru Succession Cause Number 432 of 2009**, made the following statements:

**“I have also considered the second question which really is of *locus standi* or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position is law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father.**

**In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.**

**The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.**

**Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.**

**In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.**

**I therefore do hereby hold that this court has no jurisdiction to determine the claim or trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning**

of hearing or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction of the court. This will only go to the question of costs.”

19. On the same question, **W. Musyoka J**, the case of **In Re Estate of Mbai Wainaina (Deceased) [2015] eKLR**, held as follows:

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the law of succession Act is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land court. Consequently, and for the reasons above stated, I wish to find and hold that this court has no mandate to resolve the proprietary interest on land based on the alleged trust”.

20. **A.K. Ndungu J**, in the case of **In re estate of Solomon Mwangi Waweru (deceased) (2018) eKLR**, on his part, remarked as follows:

“13. Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”

.....

14. It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in

respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.

21. **W. Musyoka J**, again, in the case of **In the matter of the Estate of Stone Kakhuli Muinde (Deceased) [2016] eKLR**, stated that:

“24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.

25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.

26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.

27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.
29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.”
22. Musyoka, J, yet again, in the case **Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR**, reiterated the following:

“26. It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. ....”

23. I fully associate myself with the views expressed in the above decisions. **Article 162(b)** of the **Constitution of Kenya 2010** donates to the **ELC**) the sole mandate to determine issues of ownership, use and occupation of land. Looking at the matters alleged in the Objections filed in this case, I have no doubt in my mind that the same are matters that fall squarely within the province of the **ELC**, and not this Succession Court. The Objectors, if the statute of limitation still allows them, may move to the **ELC** for determination of their claims at that forum. If and when the **ELC** rules in their favour, then, at that point, they may return to this Succession Court for implementation of the decision of the **ELC**. Once they have filed a suit at the **ELC**, they may also, perhaps, move this Court to stay distribution of the estate in this Succession Cause, or of only the parcels of land in contention pending determination by the **ELC**.
24. In conclusion, I may state that while it is true that where a third party claims to have purchased property from a deceased person during the lifetime of the deceased, such claimant is treated as a “**creditor**” of the estate of the deceased rather than a beneficiary. If the family admits the sale, then the Succession Court may recognize that interest and exclude that portion from distribution. However, a Succession Court, generally, cannot determine ownership of land if, as herein, the claim by such third party is heavily contested by the family of the deceased. While a Succession Court possesses the jurisdiction to determine the distribution of a deceased person's “**free estate**”, complex disputes on whether the deceased indeed sold land to third parties whose interests have not been included in the schedule of distribution fall under the exclusive jurisdiction of the **ELC**.

### **Final Orders**

25. In premises, I order and rule as follows:

- i) The Preliminary Objection dated 10/03/2025 filed by the Petitioner is hereby upheld.
- ii) The Objections to the making of Grant filed in this Succession Cause by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objectors are therefore all struck out on the ground that the claims and matters raised therein fall under the jurisdiction and/or mandate of the **Environment and Land Court**.
- iii) However, regarding the 1<sup>st</sup> and 2<sup>nd</sup> Objectors, there being indication that their claims may have been accepted by the Petitioner and/or compromised, the 1<sup>st</sup> and 2<sup>nd</sup> Objectors are at liberty to move the Court for adoption of such compromise, settlement, or consent, if any exists, in which case, the portion of the above order

striking out the 1<sup>st</sup> and 2<sup>nd</sup> Objections will not apply. For avoidance of doubt therefore, if no such settlement or consent exists, the 1<sup>st</sup> and 2<sup>nd</sup> Objector's claims shall still stand struck out.

iv) I do not make any order on costs considering the delay by the Petitioner to raise the Preliminary Objection.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY 2026**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**Mr. Kimurgor h/b for Ms. Akech for the Petitioner**

**N/A for 1<sup>st</sup>-5<sup>th</sup> Objectors**

**Court Assistant: Brian Kimathi**