



**In re Estate of Abdulkarim Chatur Popat also Known as Abdulkarim Chaturbhai (Deceased)
(Succession Cause 346 of 2013) [2023] KEHC 24516 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 346 OF 2013
G MUTAI, J
OCTOBER 27, 2023**

BETWEEN

AZIM ABDULKARIM CHATUR POPAT APPLICANT

AND

ADIL ABDULKARIM CHATUR POPAT 1ST EXECUTOR

GULZAR ABDULKARIM CHATUR POPAT 2ND EXECUTOR

KARIM SAIFUDDIN ANJARWALLA 3RD EXECUTOR

AND

ALNASHIR ABDULKARIM CHATUR POPAT BENEFICIARY

RULING

Introduction

1. This matter came up before me on 29th June 2023 for mention. The purpose of the mention, as stated by Mr. Karega, learned counsel for the 1st, 2nd and 3rd Co executors/respondents, was twofold, to adopt a consent entered into by Gulzar Abdulkarim Chatur Popat (the 2nd co-executor/respondent) (hereafter “Gulzar”) and Alnashir Abdulkarim Chatur Popat (beneficiary/respondent) (hereafter “Alnashir”) and to take a date for hearing of the pending summons for confirmation of grant. Mr. Macharia, learned counsel for Azim Abdulkarim Chatur Popat (the 4th co-executor/applicant) (hereafter “Azim”), objected to the said consent. The court, upon being convinced on the basis of oral submissions that the matter is urgent, fixed the cause for further mention on 3rd July 2023. On the latter date, this court adopted the consent despite protestation by Azim’s advocate. I directed Mr. Macharia to file his objection in writing and to serve Messrs. Regeru and Karega. I also directed that the summons for the confirmations of grants dated 22nd October 2014 be heard on 17th July 2023.



2. The matter wasn't heard on 17th July 2023 as Mr. Macharia sought more time to file the affidavit of Mr. Jameel Popat. After a discussion between the advocates, it was agreed that:-
 1. Mr Macharia would file whatever documents he wished to file within seven days of the said date;
 2. Messrs. Karega and Regeru would file responses to whatever Mr. Macharia filed within 14 days thereafter;
 3. Mr. Macharia would have 14 days thereafter to respond. His response would be filed together with written submissions;
 4. Messrs. Karega and Regeru would have 14 days thereafter to file their written submissions;
 5. Mr. Macharia was given leave to file replying submissions limited to points of law within seven days of being served with Messrs. Karega and Regeru's submissions; and
 6. Highlighting of the written submissions was slated for 27th September 2023.
3. The Submissions could not be highlighted on 27th September 2023 as Mr. Macharia's firm had filed, for and on behalf of their client, an application dated 21st September 2023.

The 4th Executor/Applicant's dated 21st September, 2023

4. Azim's said application was expressed as being brought under Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010, Section 3A of the [Civil Procedure Act](#), Sections 26, 27 & 28 of the [Law of Succession Act](#), Articles 25, 50 and 159 of the [Constitution](#) of Kenya, 2010, "the inherent jurisdiction of the court and all other enabling provisions of the law". It sought the following orders:-
 1. This honourable court be pleased to order an account of the net estate of the deceased by the 1st co-executor/respondent;
 2. This honourable be pleased to make a declaration that the applicant herein is entitled provision that is not only adequate and reasonable but also just and equitable considering the pecuniary magnitude of the deceased's estate and the financial status of the other beneficiaries;
 3. This honourable court be pleased to find that it is in the interest of justice that a fair, accurate, current inventory and valuation report of the deceased's estate be availed to facilitate the making of reasonable provision to the applicant herein;
 4. This honourable court be pleased to make reasonable provision for Azim Abdulkarim Chatur Popat out of the net estate of the deceased; and
 5. The cost of the application be provided.
5. The application is supported by Azim's affidavit and the grounds listed in the body of the application, which in the main, are that the estate is under the control of the co-executors/respondents. The co-executor/respondents are the main beneficiaries of the deceased's estate. He deposed that they have not fully accounted for the deceased vast estate and have withheld information about his offshore wealth. He also averred that the bequest made to him by the deceased in his lifetime was being withheld by Adil Abdulkarim Chatur Popat and that he needed reasonable provisions.



The 1st to 3rd Co-Executor/Respondents Preliminary Objection

6. The 1st, 2nd and 3rd co-executors/respondents raised a Preliminary Objection against the 4th executor/applicant's application. The said objection is dated 25th September 2023, and it's based on two grounds to wit that;

1. The application is {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}} as the fourth executor/ applicant filed a similar Chamber Summons application on 1st November 2015. The said application was settled by a consent filed in court on 25th September 2017. An attempt to set aside the said consent was found by this court to be an abuse of the process of court and was struck out with costs on 14th December 2018; and

2. The application is an abuse of the process of court and was filed outside the clear timelines given to the parties on 17th July 2023 and was meant to derail the hearing set for 27th September 2023.

Alnashir's Preliminary Objection

7. The beneficiary/ respondents' preliminary objection is similar to that of the 1st, 2nd and 3rd co-executors/respondents. It seeks to have the notice of motion dated 21st September 2023 struck out on the ground that it is {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}, res {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} subjudice}} and for being an abuse of the process of court.

8. In the said Preliminary Objection Alnashir averred that the orders sought in the Notice of Motion dated 21st September 2023 were the subject matter of Azim's summons for Revocation of Grant dated 1st November 2015, which sought the following orders:-

“ 3

- (d). That the grant of probate be varied to make reasonable provision for the applicant, Azim Abdulkarim Popat and Alnashir Abdulkarim Popat; and

4. That the co- executor of the grant of probate herein, Adil Abdulkarim Chatur Popat and Karim Saifuddin Anjarwalla, do render an account of the administration of the grant of probate from the date of the publication of the will.”

9. He stated that Azim's said summons was compromised and settled vide a letter of consent filed in Court on 25th September 2017, which consent read in part as follows:-

- “ 2. The application dated 1st November 2015 be and is hereby marked as settled with no order as to costs”.



10. It was urged that the applicant attempted to set aside the consent. However, the application was struck out by this Court on 31st July 2018 for being an abuse of the Court process. It was thus stated that by dint of the said decision, the letter of consent dated 25th September 2017 remains binding on the parties. Azim is therefore estopped from litigating the same issues between the same parties, which were fully and finally settled by the said consent.
11. Alnashir submitted that the application is *res judicata* as the summons for confirmation of grant dated 22nd October 2014 is pending hearing. In opposition to the said summons, Azim and his son Jameel have sought orders for accounting and valuation of the deceased's estate. Lastly, he averred that the application was filed in bad faith with the aim of delaying and or obstructing confirmation of the grant and the winding up of the distribution of the deceased's estate. The application thus amounts to gross abuse of the Court process and ought to be struck out with costs.

Submissions of the Parties

12. The preliminary objections were argued on 27th September 2023.

Submissions of Alnashir Popat

13. Mr. Njoroge Regeru, SC, submitted that the application dated 21st September 2023 is *res judicata* as the matter has already been heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality. *res judicata* as prayers sought therein are similar to those sought in the Notice of Motion dated 1st November 2015. The latter application was compromised by consent. An attempt made by Azim to set aside the consent was struck out. Azim didn't appeal against the said decision. It was submitted that the provision of accounts and the taking of inventory was the subject of a pending summons for confirmation of Grant. The matter was thus *res judicata* as the application was filed in bad faith with the aim of delaying and or obstructing confirmation of the grant and the winding up of the distribution of the deceased's estate. The application thus amounts to gross abuse of the Court process and ought to be struck out with costs.

res judicata. Further, it was argued that the timing of the application shows that it was intended to defeat the hearing of the summons for confirmation of Grant.

14. Mr. Regeru submitted that the doctrine of *res judicata* applies to applications as it does to suits and referred me to the case of *Accredo AG & 3 others v Steffano Ucceli & another* [2019]eKLR where the Court of Appeal quoted with approval the decision in *Suleiman Said Shabbal v Independent Electoral and Boundaries Commission & 3 others* [2014]eKLR where it was stated:-

“to constitute *res judicata* as the matter has already been heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality. *res judicata*}, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy”



Submissions of the 1st, 2nd & 3rd Co-Executors/Respondents

15. Mr. Karega adopted the submissions of Mr. Regeru in support of his Preliminary Objection dated 25th September 2023. He also relied on the bundle of authorities that he had filed. Relying on the decision of the Court of Appeal in *Tongelech v Chimir & 2 others* [2023]KECA 733 (KLR) Mr. Karega submitted that {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}} was applicable even where the final determination was made by way of consent. In the said decision the Court of Appeal stated:-

“...The suit was between the same parties or those claiming under the same title, and the same was determined by a Court of competent jurisdiction, albeit by consent of the parties;

31. In the light of the foregoing, we are satisfied that the trial Court was right in making a finding that the suit was {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}...”

Submissions of 4th Co-Executor/Applicant

16. Mr. Macharia submitted that the 2 Preliminary Objections lacked merit. He argued that his client executed the impugned consent as he was then in financial distress. He urged that his consent was conditional and not a blank cheque as implied. He further submitted that what he seeks is similar to what Alnashir sought. Both, he argued, seek proper accounts of the estate. He sought to distinguish the decision of Mugure Thande, J on the grounds that there were then proceedings before the London Court of International Arbitration, which have since, in 2021, been terminated after Azim was unable to pay a deposit of US Dollars 650,000.00.

17. He referred this Court to the decision of the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR where principles relied on by Courts when deciding whether a case is {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}} was discussed. He distinguished the Tongelech case on the ground that the matter in dispute was title to land.

18. He submitted that offshore wealth wasn't dealt with previously in any case. Further, there are exceptions to the doctrine of {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}, among which was substantial injustice and the need to allow parties an opportunity to have their cases determined on merit.

19. Mr. Macharia submitted that the application was filed in good faith. He urged that the issues in contestation hadn't been settled on merit. For that reason, he submitted that the 2 Preliminary Objections ought to be dismissed so that the application could determined on merits.



Replies by the Respondents

20. Messrs. Regeru and Karega reiterated their previous submissions. Mr. Regeru, SC urged that the consent was brief and to the point. Consents, he argued, are akin to contracts, are binding on the parties thereto and can only be set aside if fraud, duress or coercion is proved. Regarding the decision of my sister Judge, it was urged that the same was made on merit and had not been appealed against, reviewed or otherwise set aside. Counsel submitted that I couldn't sit on appeal against a decision of a judge of equal rank. Azim, it was argued, authored his own misfortune and had no one to blame but himself.
21. Mr. Regeru distinguished the Supreme Court decision in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR. Firstly, on the ground that consent order was absolute, as it disposed of all the issues. Secondly, the finding of the Supreme Court was that the High Court sitting as the Constitutional Court, had jurisdiction to grant a wide array of orders. In contrast, the Probate and Administration Court is governed by the *Law of Succession Act*, a self-contained piece of regulation. This Court is therefore restricted to what the said *Act* and the *Probate and Administration Rules*, 1980 provide.
22. Mr. Karega submitted that alternative resolution of disputes is encouraged by Article 159 of the *Constitution* of Kenya, 2010. He further submitted that parties agreed as to how the disputes between them would be resolved. As to what transpired at the London Court of International Arbitration, he urged that it was outside the purview of this Court. Coercion and fraud had been considered by Lady Justice Thande. He argued that I couldn't possibly sit on appeal against her decision. He urged that the application is barred by section 10 of the *Arbitration Act*. Mr. Karega distinguished the Supreme Court decision saying that it had no relevance to the matter before this Court. He thus urged me to strike out the application for being *res judicata*. He argued that a cause of action may not be relitigated once it has been judged on the merits; finality. *res judicata*.

Analysis and determination

23. The Preliminary Objections raised by the two parties questioned my jurisdiction to hear and determine the application dated 21st September 2023. Being an issue of jurisdiction, I must first determine if I have jurisdiction, for without jurisdiction, I must down my tools. In *The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR Nyarangi JA succinctly stated as follows:-
- “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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
24. I must now determine whether the preliminary objections were properly raised. The Court of Appeal for Eastern Africa in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969]EA 696 determined the parameters of what a preliminary objection is. Law JA, in the leading opinion, stated that:-
- “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 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”.

25. Sir Charles Newbold, P added, in his consenting judgment, that: -

“A Preliminary Objection is in the nature of what used to be called 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.”

26. I have looked at the applications filed by Azim in 2015 and 2023. The summons dated 1st November 2015 sought the following orders:-

“3

(d). That the grant of probate be varied to make reasonable provision for the applicant, Azim Abdulkarim Popat and Alnashir Abdulkarim Popat; and

4. That the co-executor of the grant of probate herein, Adil Abdulkarim Chatur Popat and Karim Saifuddin Anjarwalla, do render an account of the administration of the grant of probate from the date of the publication of the will.”

27. The application dated 21st September 2023 on the other seeks the following orders:-

1. This honourable court be pleased to order an account of the net estate of the deceased by the 1st co-executor/respondent;
2. This honourable be pleased to make a declaration that the applicant herein is entitled provision that is not only adequate and reasonable but also just and equitable considering the pecuniary magnitude of the deceased's estate and the financial status of the other beneficiaries;
3. This honourable court be pleased to find that it is in the interest of justice that a fair, accurate, current inventory and valuation report of the deceased estate be availed to facilitate the making of reasonable provision to the applicant herein;
4. This honourable court be pleased to make reasonable provision for Azim Abdulkarim Chatur Popat out of the net estate of the deceased; and
5. The cost of the application be provided.

28. It would appear to me to clear beyond peradventure that prayers 2 and 4 of the application dated 21st September 2023 are similar to those sought in prayer 3(d) of the Chamber Summons dated 1st November 2015 in as much as they seek reasonable provision for Azim out of the estate of the deceased. Prayers 1 and 3 seek to have the accounts and inventory of the estate taken. These prayers, phrased differently, were raised in prayer 4 of the 2015 Chamber Summons.

29. The similarity of the applications does not, on its own, make the instant application {{term{refers To | title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}. The Court of Appeal in the *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR



listed five elements that must be present for *res judicata* to apply: a cause of action must have already been heard and determined on merits by a competent court and therefore may not be pursued further by the same parties; a cause of action may not be relitigated once it has been judged on the merits; finality. *res judicata* to be proved. They stated that: -

“*Res judicata* is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Thus, for the bar of *res judicata* to apply, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

a cause of action may not be relitigated once it has been judged on the merits; finality. *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
30. To make my determination, I will address each of the five elements, noting, as the learned Judges of Appeal did, that they are conjunctive and not disjunctive.

Were the issues the application before the court directly or substantially in issue in the former application?

31. What is before me is an application. Section 7 of the *Civil Procedure Act* refers to “suits”. I must establish if *res judicata* to be proved. They stated that: -

a cause of action may not be relitigated once it has been judged on the merits; finality. *res judicata* can be raised in respect of applications. Does the doctrine of *res judicata* apply to applications? It must be established that the cause of action was already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;



a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}} apply to applications? The Court of Appeal in the case of *Accredo AG & 3 others v Steffano Uccelli & another* [2019]eKLR found that it does when it held in paragraph 36 of the judgment that:-

“Therefore, the issue of the 2nd Appellant’s shareholding and management was directly and substantially in issue in the ruling dated 30th April 2015, hence could not be raised again, as we find was the case in the application whose ruling gave rise to the instant appeal”.

32. I have compared the 2015 and 2023 applications above. The two, though differently worded, seek the same orders. The issues in this application were directly in issue in the previous application. The mere fact that the applicant chose to dress his new application in a different garb does not change its essential character.

Was the former suit between the same parties?

33. The answer to this question is in the affirmative and needs no elaborate exposition.

Are the parties litigating under the same title?

34. In the 2015 application Azim made a claim against his co-executors in their capacity as such, as a co-executor and a beneficiary. That is the capacity he filed the instant application.

Were the issues in the instant application heard and finally determined in the former suit?

35. The previous application was settled when the parties entered into a consent. That consent fully and finally resolved whatever disputes the parties had against each other.

36. I do not agree that final determination can only arise when there is a contested hearing. In my view resolution of a dispute by consent if it leads to final determination is sufficient. I am guided by the decision of the Court of Appeal in *Tongelesh v Chamir & 2 others* [2023]KECA 733 (KLR) wherein they held that a determination by Court of competent jurisdiction albeit by consent was sufficient for a Court to find that a suit was {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}.

Was the former Court competent to try this application?

37. The Court that heard the previous application was this Court, albeit differently constituted. That Court had jurisdiction, just as I do, to try this application.

38. The 4th co-executor/applicant’s counsel submitted that {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}} is inapplicable in this case. In support of his case he relied on the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* KESC 39 (KLR) where the Supreme Court held that:-

“We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition.



It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different”

39. In my view, the determination in the above case is only applicable in judicial review and constitutional petitions. The courts exercising such jurisdiction have many remedies that they can grant, such that a final determination of an issue may not be possible. The reliefs granted by the Probate and Administration Court, on the other hand, are limited.

40. I therefore find and hold that this application is {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}} as the five elements set out in the *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR have been satisfied.

Is the application for accounts subjudice?

41. Section 6 of the *Civil Procedure Act* states as follows:-

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”

42. The doctrine of res sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it.

43. Just as with {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}, {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} subjudice}}, in my view, applies to applications as it does to suits. Thus where a similar suit, issue, or application is pending before another court with jurisdiction to determine it, I may not hear the same.

44. The court stated as follows in *Kenya Bankers Association v Kenya Revenue Authority* [2019] eKLR on the issue of Res *sub judice*:-

“in addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The ex parte applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed.

A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of *sub judice* does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same. *In Re the matter of*



the Interim Independent Electoral Commission, the Supreme Court cited with approval the Australian decision where it was held: -

“... we do not think that the word “matter” ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the court...”

45. I have looked at the pending summons for confirmation of the grant. In the said application, the 4th executor/applicant and his son seek accounts and inventory of the estate. Those prayers have also been sought in the application dated 21st September 2023. I thus find and hold that the prayers in the instant application are res subjudice.

Is the application an abuse of the process of Court?

46. The 4th co-executor/applicant filed his latest applications just a few days prior to the hearing of the summons for confirmation of grant. In my view, this is troubling as it appears to have been intended to prevent the hearing, on merit, of the summons for confirmation of grant.

47. I therefore find and hold that the application dated 21st September 2023 was filed to defeat the conclusion of this matter. That being so the said application is an abuse of the process of Court.

Disposition

48. I find and hold that the application dated 21st September 2023 is `{{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;`

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}

49. I also find that prayers for provision of accounts and inventory are subjudice as similar issue is pending before this court.

50. Given the manner in which the application was filed and what would appear to be its intent, I find and hold that the application dated 21st September 2023 is an abuse of the process of court.

51. Consequently, the application dated 21st September 2023 is struck out with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Njoroge Regeru, SC and Mr. Amuka for Mr. Alnashir Popat;

Mr. Tom Macharia and Ms. Janice Omumo for the 4th co-executor/applicant;

Ms. Ongeso holding brief for Mr. Karega for the 1st, 2nd and 3rd co-executors/applicants;

