



REPUBLIC OF KENYA



**In re Estate of Wachira Wanjahi Mbogo (Deceased) (Probate & Administration
18 of 2007) [2025] KEHC 3560 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION 18 OF 2007**

MA ODERO, J

MARCH 21, 2025

IN THE MATTER OF THE ESTATE OF WACHIRA WANJAH MBOGO (DECEASED)

RULING

1. Before this Court is the Notice of Preliminary Objection dated 29th October 2024 filed by the Respondent Ndirangu Wachira Wanjahi. The Applicants Samwel Maina Wachira and Charles Mwita Wambugu opposed the Preliminary Objection. One Esther Wangui Gitonga filed an Affidavit dated 25th December 2024 opposing the Preliminary Objection.
2. The matter was to be canvassed by way of written submissions. However neither parties filed any written submissions in respect to the Notice of Preliminary Objection.

Background

3. The Applicants filed in Court the Summons for Revocation of Grant dated 8th July 2024. The Respondent opposed that application through the Replying Affidavit dated 29th October 2024.
4. Before the application could be heard, the Respondent filed the Notice of Preliminary Objection dated 29th October 2024 in which he argued that the Summons dated 8th July 2024 was ‘Res Judicata’ and amounted to an abuse of court process.

Analysis And Determination

5. I have carefully considered the Preliminary Objection as well as the written submissions filed by both parties.
6. The definition of what constitutes a Preliminary Objection was given in the case of Mukisa Biscuit Manufacturing Company Ltd -vs- West End Distributors Ltd [1969] E.A in which the court stated as follows.

“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



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 is used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is exercise of judicial discretion.”

7. In *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Limited & 3 Others* [2015] eKLR, the Supreme Court of Kenya stated that

‘a Preliminary Objection may only be raised on a “pure question of law”

8. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record.”

9. Therefore in order for a Preliminary objection to succeed, the following tests must be satisfied;-

(i) The Preliminary Objection should raise a pure point of law.

(ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.

(iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.

(iv) A valid Preliminary Objection ought if successful dispose of the entire suit.

10. Therefore a genuine and proper Preliminary Objection can only raise pure points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.

11. The main grounds on which this Preliminary Objection is based is that the summons for revocation of Grant dated 8th July 2024 is Res Judicata. That the same issues were raised and determined vide the Ruling delivered by Hon. lady Justice Muchemi on 15th June 2023.

12. Section 7 of the *Civil Procedure Act* sets out the principle of ‘Resjudicata’ in the following terms;-

“7. 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 under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

13. The Court of Appeal expounded further on this principle in the case of *IEBC -VS- MAINA KIAI & 5 OTHERS* Civil Appeal No. 105 of 2017, where it was stated:-

“Thus for the bar of 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, 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.”

14. In the same case the Court went on to state thus:-

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a to obtain at last, outcomes favourable to themselves. Without it, there would no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

- 15. I have considered the summons dated 8th July 2024. It seeks amendment of the Rectified Grant made to the Applicants on 3rd July 2018.
- 16. I have equally perused the Ruling delivered by Justice Muchemi on 15th June 2023. The ruling related to a Summons dated 27th January 2022 seeking revocation of the Grant issued on 3rd July 2018 to the same Applicants.
- 17. In that ruling the learned Judge considered all issues and dismissed the Summons for revocation of Grant. The Respondents cannot now file another summons seeking to revoke the same grant. They may either seek review of the ruling or file an appeal against the same. Under the principle of Res Judicata this court cannot re-visit the issue of revocation of the same Grant as that issue has already been determined, by a court of concurrent jurisdiction.
- 18. A look at the summons dated 8th July 2024 reveals that the Applicants main grievance appears to be the mode of distribution of the estate which they term unfair.
- 19. In a situation where a litigant opposes the ‘mode of distribution’ of an estate the remedy is Not to file a Summons to revoke the Grant. The proper procedure is to file an objection to the confirmation of the Grant – this is what the Applicants ought to do.
- 20. Finally I find merit in this Preliminary Objection. The summons dated 8th July 2024 is Res Judicata and also amounts to an abuse of court process. The same is allowed. The Summons for revocation of Grant dated 8th July 2024 is hereby struck out. Each party to meet their own costs.

DATED IN NYERI THIS 21ST DAY OF MARCH 2025.

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MAUREEN A. ODERO

JUDGE

