



**In re Estate of Thomas Kisenga Katumo (Deceased) (Succession Cause
170 of 2011) [2025] KEHC 2424 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 170 OF 2011**

RC RUTTO, J

MARCH 6, 2025

**IN THE MATTER OF THE ESTATE OF THE LATE
THOMAS KISENGA KATUMO (DECEASED)**

BETWEEN

HENRY MULI KISENGA ADMINISTRATOR

AND

JAMES MUSAU KISENGA 1ST ADMINISTRATOR

JACKSON MASAVU KISENGA 2ND ADMINISTRATOR

BENJAMIN MAILU KISENGA 3RD ADMINISTRATOR

GABRIEL MAINGI 4TH ADMINISTRATOR

AND

BENJAMIN WAMBUA NZIOKI 1ST CONTEMNOR

AGNES KAVENDI KISENGA 2ND CONTEMNOR

STEPHEN KYALO KAVENDI 3RD CONTEMNOR

RULING

1. This is a ruling on the Preliminary Objection (PO) filed by the 1st and 2nd Petitioners/Respondents. The PO raising the following issues;
 - a. That the High Court is *functus officio* having rendered a final Ruling in the main petition on 21/5/2024.
 - b. That the Applicant's subsequent application for review dated 28/5/2024 was equally dismissed by the High Court vide a Ruling on 28/11/2024.



- c. That this honorable court is *functus officio* and has no jurisdiction to hear and/or determine the Applicant's summons application dated 13/1/2025.
 - d. That the issues raised by the Applicant in the summons application dated 13/1/2025 are *res judicata* having already been heard and adjudicated upon by the High Court.
 - e. That the Applicant's summons application dated 13/1/2025 is filed in the wrong court and forum and is a backdoor attempt at appealing against the final Ruling of the High Court delivered by Hon. Lady Justice Margaret Muigai on 21/5/2024.
2. The facts leading to the filing of the PO are as follows; on 21/5/2024 the Court delivered a Ruling in which it held that;
 - a. Orders of 24/2/2023 shall continue in operation and bind the disputants, the administrators who allegedly received monies and did not share with beneficiaries, the beneficiaries and buyers/occupants of Nziani waster borehole CDF committee Makueni county and the community users of the borehole shall all use, share and have access to was and borehole pending hearing and determination of the dispute in ELC.
 - b. Any alleged sale of any part of the property shall be ventilated before ELC court by virtue of Section 13 of *Environment & Land Act* & Article 162 of the *constitution*.
 - c. Distribution of the estate of the deceased is as outlined above at paragraph 79 in partial confirmation of grant save for the hived off part of suit property 1696 where stands the community borehole and is the subject of dispute to be heard and determined by ELC court.
 - d. Any aggrieved party may apply to court in default; a partial confirmation of grant shall issue on the distribution highlighted above.
 3. Later on, 28/5/2024 the Applicant, herein moved to court seeking stay of execution of the "judgment" delivered on 21/5/2024 and that the succession proceedings be re-opened to allow taking of evidence of all parties.
 4. The court heard the application and on 28/11/2024 delivered a Ruling in which it dismissed the application dated 28/5/2024 on grounds that it was unmerited. The applicant was informed of his right to appeal.
 5. Thereafter on 14/1/2025 the 4th Administrator/Applicant herein moved this court by way of summons under certificate of urgency seeking;
 - a. That an order do issue citing the Gabriel Maingi, Benjamin Wambua Nzioki and Stephen Kyalo Kavendi for intermeddling and contempt of court for non-compliance with the order/decree issued on 21st May 2024.
 - b. That the court do issue a notice to show cause to the respondents/contemnors to show why they should not be committed to civil jail for non-compliance with the court orders.
 - c. That pending hearing and determination of this application there be stay of implementation of the survey and subdivision plans of Land parcels known as Kitaingo/Uvete 3551 and 1696.
 - d. That an order do issue barring the respondents from entering/occupying interfering, alienating and fencing off any parcel of land in use by the applicant.



- e. That an order do issue to agricultural extension officer Mutaa Sub County to access and compute damages caused by the respondents and/or their agents or servants on all parcels which were occupied by the applicants.
6. The Respondent upon being served with this application proceed to file this Preliminary Objection opposing the 4th Administrator's Summon application dated 13/1/2025. The PO was heard by way of the respective party's written submissions.
7. The 1st and 2nd Petitioners/Respondents filed their written submissions in support of the Preliminary Objection dated 6th February, 2025. They gave brief details of the proceedings and submitted that the Court delivered its Ruling on the petition for grant of letters of administration on 21/5/2024. In that Ruling the court ordered partial distribution of the estate. In compliance with the Ruling, they extracted the certificate of confirmation of grant issued on 5/7/2024 and order issued on 30/7/2024 so as to proceed with distribution as ordered by the court.
8. Further they urged that in the Ruling of 21/5/2024, the court gave the Applicant the right to appeal, which under Rule 77(2) of the Court of Appeal Rules should have been lodged within 14 days from 21/5/2024, but instead the Applicant opted to move the court by applying for a review of the decision. They further submitted that the review application was heard on its merit and dismissed vide a ruling delivered on 28/11/2024. That to-date the Applicant had not appealed against the said Ruling. They submitted that the Applicant has since the delivery of the Ruling dated 21/5/2024 filed 3 subsequent applications.
9. They submitted that since the court pronounced itself with finality on 21/5/2024 on distribution, and later on review application, the court has no jurisdiction to deal with the issues raised since the court is *functus officio*.
10. They also urged that the principle of *res judicata* prohibits the court from dealing with issues that have already been heard and substantially determined by the same court. Thus, they submitted that the Applicant having exhausted their right of review before this court, are only left with the avenue of pursuing an appeal before the Court of Appeal.
11. It was their submissions that the Applicant filed a Notice of Appeal and a Memorandum of Appeal which demonstrates that he understood the proper forum for him to ventilate the issues as the Court of Appeal and not the High Court.
12. They urged the Court to find that it was improper, irregular and prohibited by law and doctrine of *functus officio* for the Applicant to re-engage this Court with this dispute. To buttress their argument they made reference to the case of Sbollei v JSC and Another (Application 10 (E016) of 2022 (2023) KESC & KLR (17/2/2023) Ruling; *in Re Estate of Mangangi Obiski (deceased)* Succession cause 41 of 2016 (2023) KEHC 26933(KLR) John Gilbert Ouma v Kenya Ferry Services Limited (2021) eKLR and Asige Keverenge & Anyanzwa Advocate v KRA & Another (2021) eKLR.
13. They urged the Court to uphold the Preliminary Objections dated 22/1/2025 and 3/2/2025 respectively and award costs of the application to the Respondent.
14. The 4th Administrator/Applicant filed its submissions dated 12/2/2025 opposing the Preliminary Objection. They urged the Court to look at the decision of 21/5/2024 which indicated that it was partial meaning that the court is not *functus officio* until such a time that the full grant is issued and inventory of how distribution has been done is filed.



15. The Applicant set out 4 issues for determination namely; whether this Court is *functus officio* in determining summons dated 13/1/2025; whether this Court has jurisdiction to hear and determine summons dated 13/1/2025; whether issues raised in the summon are *res judicata* and whether the case has been conducted with finality.
16. On the 1st issue, it was submitted that after a decree is issued and execution ensues a party aggrieved by the execution process can approach the court for appropriate orders. That it is the court that sanctioned the execution process that has jurisdiction to facilitate the process. He contended that in the application before this Court, he is aggrieved by how the decree is being enforced. He urged that for as long as the process of distribution is not completed, the Court cannot be said to be *functus officio*. To support this argument, reference was made to the case of *Thunder Plumbing & construction ltd v Ravasm Development Co. & another* 2020 and *Bellevue Development Company limited v Vinayak Builders Limited & another* 2014 eKLR.
17. On the issue whether this case has been concluded with finality, the Applicant submitted that the judgment of 21/5/2024 did not conclude the matter with finality as it directed that a partial/grant to issue. A full grant is yet to issue thus matter not fully determined. They urged the Court to find that the application is not seeking any merit-based re-engagement but to perfect the judgment and ensure full compliance. They prayed the preliminary objection to be dismissed.

Analysis & Determination

18. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean;

“So far as I am aware, 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”.
19. Further Sir Charles Nebbold, JA stated that:-

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.
20. In *Oraro v Mbaja* [2005] eKLR, the court held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
21. In this instance the question for determination is whether the court is *functus officio* to hear and determine Applicant’s summons application dated 13/1/2025. It is imperative for this court to establish whether or not it has the jurisdiction to hear and determine this application. From the submissions of parties, it is not a dispute that this Court on 21/5/2024 delivered a ruling the findings of which have been set out in the earlier paragraphs of this ruling. It is also not in dispute that after



- the delivery of the said ruling, a summon application dated 28/5/2024 seeking stay of execution of the ruling delivered on 21/5/2024 and for the court to review, vary and set aside the said ruling was filed. That application was filed by the 4th Administrator, who is the same Applicant in the summon application dated 13/1/2025 pending determination before this Court.
22. It is also not in dispute that the application dated 28/5/2024 was heard and dismissed. The Court also stated that the Applicant (the 4th Administrator) could proceed to exercise his right of appeal.
 23. This Court notes that the 4th Administrator/Applicant in his applications has consistently made reference to a judgment delivered on 21/5/2024. This Court wished to correct that disposition since what was delivered was a Ruling and not a judgment. This can be derived from the title of the decision which is clearly stated as a Ruling.
 24. From reading the said Ruling, the following is deduced: that partial distribution was done at paragraph 79 and a partial confirmation of grant issued on the distribution; part of the hived off property No. 1969 where the community borehole is situated was subjected to determination by the ELC court and that any sale of part of the property was to be determined by the Environment and Land Court.
 25. This Court notes that the jurisdiction of this court with regard to administration of the estate of deceased persons is provided for under Section 47 of the Law of Succession Act, which gives the court powers to entertain any application and determine any dispute under the Act. In this instance, looking at the application before Court, the 4th Administrator/Applicant is seeking orders to the effect that there is noncompliance with the orders/decrees issued on 21st May 2024. He is also seeking that there be a stay of implementation of the survey and subdivision plans of land parcels Kitaingo Uvete No. 3551 and 1696 and that the Respondents be barred from entering/occupying, interfering, alienating and fencing off any parcel of land in use by the Applicant.
 26. The application is supported by grounds that the Applicant being dissatisfied with the Ruling of 21/5/2024 made an application to set aside the judgment as the same was delivered summarily before conclusion of hearing of all parties; the Court declined to set aside the judgment and marked the application by the Applicant dismissed; that the Respondents in cahoots with the county surveyor Makueni commenced the implementation of the partial grant; that the surveyor without verifying the court order and grant entered into parcels of land known as Kitaingo/Uvete 3551 and 1696 and caused sub-division; that the said sub-division was done in absentia of all the beneficiaries and in particular the Applicant and totally contrary to the disputed ruling of 21/5/2024; the subdivision was done without considering the developments of the Applicant and it has have cause destruction.
 27. A cursory look of the Applicant's application reveals that he is dissatisfied with the manner in which the subdivision is being carried out by the respondents therein. It is on the basis of that dissatisfaction that he seeks to have the 'contemnors' cited for disregarding and/or acting contrary to the court's decision of 21/5/2024. It is worth noting that in his grounds in support of the application, the Applicant is explicit that he is aggrieved by that decision of 21/5/2024.
 28. On their part, the Respondent argued that the court has no further jurisdiction over the matter and should refrain from reconsidering it. They contend that the court is *functus officio* meaning it had already fulfilled its duty and cannot reopen the issue. In support of their argument, they cited the case of Telkom Kenya limited v John Ochanda (suing his own behalf and on behalf of 996 former employees of Telkom Kenya limited) (2014), where the court upheld the principle of *functus officio*, which prevents a court from reopening a case once a final decision has been rendered. It is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.



- 29. Based on the above, this Court has thoroughly evaluated the law as regards what a preliminary objection, as elaborated above, and its import. On the face of it, the Applicant’s application appear to be an omnibus application that simultaneously seeks to review the decision issued on 21/5/2024 while also challenging its implementation. A party cannot both disavow and claim authority over the same decision. Since the crux of the decision issued on 21/5/2024 was partial distribution of property, which resulted in the issuance of a partial grant any challenge by the parties to that distribution can only be addressed through an appeal. To that extent that court will not entertain any motion and/or application that seeks a review and/or appeal of that decision.
- 30. Cognizant that a preliminary objection should be anchored on a pure point of law, where facts are not disputed, this Court finds that the five prayers sought in the application (a to e) as framed do not outrightly seek to appeal and/or review the decision of 21/5/2024. If indeed they do, then that is a matter well disposed of upon consideration of the factual matters to be presented and argued by parties.
- 31. More predominantly, the application challenges the implementation of the decision of 21/5/2024. In this regard, the only valid basis for the applicant’s claim is to demonstrate to the court that the administrators are acting contrary to the ruling of the court. It is apparent that there is some sub-division that has been undertaken which the Applicant alleges to be contrary to the court’s ruling of 21/5/2024. That, we find is a matter, properly before this court as it questions the manner in which the distribution is being carried out.
- 32. It is also worth noting that even where no Preliminary Objection is raised, a court of law will always satisfy itself first that the matters before it is rightfully before it and it has jurisdiction. It is trite law that jurisdiction is a legal issue and a court can even raise it suo motto. Consequently, am satisfied that even in the determination of the substantive application, this Court is well equipped to discern and determine only those issue that do not amount to appeal or review of the ruling of 21/5/2024.
- 33. However, as raised, the application does not outrightly seek to appeal and/or review the ruling of 21/5/2024, but challenges the manner of its implementation. On the face of it all the five orders sought are related and their propriety or otherwise can only be well determined upon listening to all parties. Consequently, I find the Preliminary Objection as raised does not met the threshold and the same is dismissed. No orders as to costs

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

In the presence of;

-Applicant
-Respondent
-Court Assistant

