



REPUBLIC OF KENYA



**In re Estate of Maina Gikuru alias Maina Kikuru (Deceased) (Succession Cause 142 of 2010) [2025] KEHC 4471 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4471 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 142 OF 2010  
DKN MAGARE, J  
APRIL 7, 2025**

**IN THE MATTER OF**

**BEATRICE NJOKI KARURI ..... 1<sup>ST</sup> APPLICANT  
ROSEMARY WANGARI NGENYE ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. The Applicants filed an application dated 10.11.2024, seeking to rectify the grant confirmed on 17.10.2024. They sought the following prayers:
  - i. By rectifying the mode of distribution of LR No LOC.15/Gakuyu/709 to be shared equally among Cyrus Irungu Mwangi and James Mwangi Muthoni as per the mediation agreement.
  - ii. Costs in the cause.
2. Before I proceed, I note that the matter was raised and dismissed earlier. The question is whether this court has jurisdiction to grant the orders. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively. *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011, the *Constitution* exhaustively provides for the jurisdiction of a court of law. The Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



3. The court will, therefore, assume jurisdiction where it has and eschew jurisdiction where none exists. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi JA posited as follows:

"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. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

4. What is the difference between what was sought and resulted in the orders of 17.10.2024 and this application? Surely, why would a party wish to regurgitate the same case over and over again? There is an appellate process that should be pursued. Rectification cannot be used to redistribute the estate. In the case of *Re Estate Josephat Kariuki Ngure (Deceased)* [2021] eKLR, A.O. Muchelule posited as follows:

"8. It does not matter the reasons that the applicant has for seeking the redistribution of the estate. The truth is that an application for rectification under section 74 and rule 43 is limited in scope. It can only deal with the correction of an error in names of persons or places, or the description of persons, things or places. It deals with the correction of errors regarding the time or place of death and, in case of a limited grant, the purpose for which the grant was made. In the instant case, the applicant is seeking, among other things, to introduce new beneficiaries and to rework the shares of the existing beneficiaries. Some of the existing beneficiaries in the certificate of confirmation will get more and others will get less than what the court had ordered. It is now trite that such introduction of new beneficiaries and redistribution of the estate of the deceased cannot be entertained through an application for rectification (*In Re Estate of Dishon Ondiek Mayabi (Deceased)* [2020] eKLR; *In Re Estate of Kwaria Marete (Deceased)* [2018] eKLR)."

5. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of *res judicata* in the following terms: -

"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 them 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.”

6. The *Civil Procedure Act* also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

- (1)— The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.
- (2)— For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
- (3)— The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

7. In the dicta *in re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the court stated as follows:

“The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- (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.”

8. In the case of *Attorney General & another ET v* [2012]eKLR it was held that;

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi s NBK & Others* [2001] EA 177 the court held that “parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit”.

In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v Wambugu and another* Nairobi HCC No 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of *res judicata*.....”.

9. In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been



determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson [1843-60] All E.R 378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

10. *Res judicata* applies to applications just like suits. In the case of Julia Muthoni Gitthinji v African Banking Corporation Limited [2020] eKLR the court stated thus:

14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was resjudicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

11. By comparing the two applications and the authorities on *res judicata*, it is clear to me that the issues being canvassed in the application are the same dismissed on 17.10.2024. The Applicants have sought that the land parcel number Loc 15/Gakuyu/709 be given to the two persons herein. The court did not agree with them and proceeded to direct that the land be given to the estate of their late father. The issue of a mediation agreement was raised.

12. It was again rejected since Lucy Wanjiku Mwangi did not sign. In other words, there was no mediation agreement. The applicants have redone the same application and now face the court again. If they were aggrieved by my decision, they ought to have appealed. In Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

By comparing the two applications and the authorities on *res judicata*, it is clear to me that the issues being canvassed in the application dated 11<sup>th</sup> January 2021 is *res judicata*. The issues in issue in that application were directly and substantially in issue in the application dated 13<sup>th</sup> September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

13. A mediation agreement must be signed by all protagonists. The purported document is not a mediation agreement. In Greenhouse Management Limited v Jericho Development Company Limited [2015] eKLR, E.K.O. Ogola posited as follows regarding a mediation agreement.

1. There is no doubt that the agreement and the leases herein contained arbitration and mediation processes which had to be exhausted before a party could move to court. Indeed Clause 6.13.1 allows for mediation. Now, one party contends that there was mediation, and now seeks to enforce the outcome of the alleged mediation, while the other party alleges that there was never



a mediation. As far as I know, however, mediation is a voluntary process which is conducted by a neutral person who commits to confidentiality. Before the parties go into mediation, there must be firstly, a mediation agreement binding the parties to mediation. After mediation, there is an agreement containing the terms of mediation. This agreement must be signed by all the parties to the mediation. In the agreement the parties agree that they were bound with the resolutions reached by the mediator. This final agreement is a document which can be tabled in court to show that one party is reneging from the agreed resolutions.

1. From the foregoing, it is clear that the alleged mediation which the Plaintiff now says took place was quite irregular or invalid for the following reasons: The alleged mediator being the Manager of the Plaintiff could not be a mediator since he was not a neutral person given to confidentiality. There was no agreement to go into mediation. This also means that the alleged mediation was not voluntary and freely entered into by the parties especially the Defendant. At least no agreement showing the parties agreed to mediation was attached to these proceedings. There was no agreement containing the resolution of mediation. The law requires that agreement to contain all the agreed terms and resolutions and the same must be executed by all the parties.
1. It is therefore clear to me that there was no mediation. If there was ever an attempt at mediation, the best outcome is that it failed. Mediation having failed the next cause of action was arbitration under Clause 6.13.2.
14. There is therefore, no mediation agreement. The purported unsigned agreement is rejected. The same has never been adopted as an order of the court. The application is thus rejected.
15. The court gets the definite impression that the application is meant to lock out other beneficiaries. Why will the two grandchildren of the deceased wish to inherit their father's estate to the exclusion of their mother and other siblings? Such conduct is not only despicable but also to be frowned upon.
16. The application is a mark of greed and a false sense of self entitlement. There is no basis for why beneficiaries cannot share their parents' estate equally. Pandering to the whims of the applicants make no sense, as, at the end of the day, this court cannot disinherit anyone. When a court of law had made a decision, parties have to find a way to live with it or appeal. It is not wise to continue recycling the same application.
17. In the circumstances, the application herein is struck out for being *res judicata*. The file is closed.

#### **Determination.**

18. The upshot of the foregoing is that I make the following orders:
  - a. The application dated 10.11.2024 is struck out for being *res judicata*.
  - b. Each party should bear their own costs.
  - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7TH DAY OF APRIL, 2025.**

**RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -



Applicants present

Court Assistant – Michael

**M. D. KIZITO, J.**

