



REPUBLIC OF KENYA



**In re Estate of Stephen Kirubi Gatu (Deceased) (Succession Cause
930 of 2007) [2025] KEHC 6434 (KLR) (Family) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 930 OF 2007

PM NYAUNDI, J

MAY 23, 2025

RULING

1. The Application subject of this ruling is the Summons for revocation of grant dated 20th November 2023 and presented under Section 76 of the *Law of Succession Act* and Rule 44 (1) of the *Probate and Administration Rules*. The Applicant seeks a myriad of orders all emanating from the allegation that the grant herein was obtained fraudulently as the signatures (specifically his), on the consents in support of the Petition, Summons for confirmation of grant and summons for rectification dated 10th July 2023 of grant, were forgeries.
2. He avers that the proceedings herein were conducted secretly and that he therefore has not had an opportunity to challenge the consents.
3. The respondents oppose the application and have filed a preliminary objection and grounds of opposition dated 5th April 2024 and sworn affidavit by the 1st Respondent in opposition. In summary it is argued that the application herein is res judicata as the applicant presented a similar application dated 28th January 2020 and the Court conclusively determined the same issues that are being raised herein Vide ruling dated 29th July 2020 by Hon. Muchelule J (as he then was).
4. The Application was canvassed via written submissions. The Applicants submissions are dated 8th January 2025 and frames the following issues for determination
 1. Whether the grant should be revoked?
 2. Whether the Objector has satisfied the condition for grant of an order of injunction?
5. On the 1st issue, it is submitted that the grant ought to be revoked as the signature of the applicant was forged on the consent in support of the Petition, the summons for confirmation and the revocation of grant. Reference is made to the decision in *Re Estate of Prisca Ong'ayo Nande* [2020] eKLR and *Re Estate of Gathuku Gathuna* [2020] eKLR.



6. He submits further that the grant was obtained by fraud as the Chief who purportedly issued the letter with the list of beneficiaries has since denied authoring the letter.
7. On the 2nd issue, it is submitted that the application satisfies the conditions laid down in *Giella vs Cassman Brown & Company Limited* [1976] EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR on the principles that will guide a Court in considering an application for injunctive relief. Reference is made to the decisions in *Mrao Limited v First American Bank Ltd & 2 Others* [2003] KLR 125 and *Estate of Simon Kimendero [Deceased]* [2020] eKLR.
8. The Applicant further submits that the respondents are intermeddling with the estate of the deceased mother and reliance is placed on the decision in *Re Estate of John Gakunga Njoroge* [2015] eKLR and *Re Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR. He submits further that the Balance of Convenience tilts in favour of the injunctive relief being granted and relies on the decision in *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Limited & 2 Others* [2014] eKLR.
9. He concludes that unless the orders sought are granted he stands the risk of being evicted from LR No. 6727/3 and LR No. 6727/8 Thika.
10. The 1st Respondents submissions are dated 17th April 2025 and frames the following as the issues for determination
 1. Whether the instant application is res judicata
 2. Whether the grant was fraudulently obtained and ought to be revoked
 3. Whether the applicant is entitled to the injunctive reliefs sought?
11. On the 1st issue reference is made to the decision in *Re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR on the test to be applied in determining whether a given case is *res judicata*. It is submitted that in the earlier application at issue was the propriety of the proceedings leading to the confirmation of the grant and the first court had made a finding on that issue.
12. On whether or not the grant ought to be revoked, the respondent also cites the decision in *Re Estate of Prisca Ong'ayo Nande (Supra)*. It is submitted that although the applicant alleges fraud he has not met the threshold for proving fraud as established by judicial precedent in the cases of *Vijay Marjoria v Nansingh Madu Singh Darbar & Another* [2000] eKLR; *Ndolo v Ndolo* [2008] 1KLR (G&F) 742; *Christopher Naru Kagina v Esther Mbandi Kagina & Anor* [2016] eKLR; *Central Bank of Kenya Limited v Trust Bank Limited & 4Others* [1996] eKLR; *Moses Parantai & Peris Wanjiku Mukuru* [2020] KECA 232 (KLR)
13. On whether or not an injunction should issue, the respondent submit that the application does not meet the threshold spelt out in the *Giella Case (Supra)* and *American Cyanamid Co. V Ethicon Limited* (19750 All ER 504. It is submitted that the applicant does not live on the subject parcels of land and in any event pursuant to the certificate of confirmation of grant the properties were transmitted to the entitled beneficiaries who have since disposed of the land to 3rd parties.
14. The 2nd respondents submissions are dated 21st March 2025, they are in consonance with those of the 1st Respondent, emphasizing that the applicant has not approached with clean hands as he has not disputed the fact that he took possession of the properties that were assigned to him in the certificate of confirmation of grant and urges that as was stated in, *Justine Masolo Nyakundi v Attorney General & Another* [2022] eKLR, litigation must come to an end.



15. A preliminary objection having been raised on the basis that this application is res judicata, it is mandatory that I dispose of the preliminary objection before proceeding to consider the merits of the application. As stated in the Court of Appeal decision in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] KECA 477 (KLR)-

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit. That much was stated by this Court in *Ngugi v. Kinyanjui & 3 Others* [1989] KLR 146 when it held (at p147) that;

Section 7 was a mandatory bar from (sic) any fresh trial of a concluded issue and a Judge cannot competently get round that bar by obtaining the consent of the parties to an arbitration of a concluded issue.

16. Further in *Independent Electoral and Boundaries Commission v Jane Cheperenger and others* (2015) eKLR, the Supreme Court stated;

(21) ...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection- against the 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.

17. The law on res judicata is Section 7 of the *Civil Procedure Act* which states-

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.

Explanation — (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.

Explanation — (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.

Explanation -(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.

Explanation — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”



18. It is submitted that this application is res judicata as the summons dated 23rd January 2020 was presented under Section 76 of the [Law of Succession Act](#) and rule 44 of the [probate and administration rules](#), as has been the present application under consideration.
19. The grounds upon which the revocation of the grant was sought were that-
1. The grant was obtained fraudulently by the making of a false statement, or by concealment from the court of something material to the case
 2. That the person to whom the grant was made has failed, after due notice and without reasonable cause to proceed diligently with the administration of the estate, and
 3. The grant has become useless and inoperative through subsequent circumstances.
20. At paragraph 4 of the ruling delivered by Hon. Muchelule J (as he then was) on 29th July 2020 the Court found that I have indicated in the foregoing that the petition for the grant and the application for the confirmation of the grant were consented to by all the children of the deceased, the applicant included. It follows that the claims that the grant was obtained fraudulently by the making of a false statement or that there was concealment from the court of something material to the case are without basis.
21. The recourse available to the applicant if aggrieved by this decision was to have appealed. He opted not to and instead has presented the current application. Is the application therefore res judicata? In [John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others](#) (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) the Supreme Court stated:
- We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a. There is a former judgment or order which was final;
 - b. The judgment or order was on merit;
 - c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identical parties, subject matter and cause of action.
22. In [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) (*Supra*), the Supreme Court added-
- The elements set out above are to be conjunctive rather than disjunctive before a suit or an issue is to be deemed res judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and have identical parties, subject and cause of action.
23. In line with the decisions cited above, I have no hesitation in finding that the current application in so far as it seeks to revoke the grant herein is res judicata; as in the previous application, the applicant seeks to revoke the grant on the basis that it was fraudulently obtained. His assertion that in the previous application the issue of forging of signatures was not canvassed will not be available in this instance as in the earlier application he alleged that he had been disenfranchised by the respondents herein. He



proceeded to attach proceedings to demonstrate this. The Court after considering the application on its merit found that he had participated in the proceedings leading to the confirmation of the grant.

24. As has been stated the doctrine of res judicata allows for there to be finality in litigation. In the ruling of 29th July 2020, the Court found that the respondent did not have an interest in Thika No. 6727/3; LR No. 6727/ 8 Thika and Shares of the deceased in Hotel Mercury. This ruling was not appealed from. Prayer 7 of the current application must fail on this ground.
25. The applicant further challenges the rectification of the grant pursuant to the Summons dated 10th July 2023. He contends that he was not involved in the application and his signature is forged. I have taken the time to look at the Court record.
26. On 31st July 2023 the matter was heard before Hon. M. Odero LJ. The following were present in Court;
John Gatu Kirubi
Anthony Maina Kirubi
Catherine Kirubi
Fredrick Kirugu Kirubi
Julius Mwaniki Kirubi
Kevin Macharia Kirubi
27. The Court recorded each of them as having ‘no objection’ to the rectification and then proceeded to allow the summons for rectification in terms of prayers 1 and 2.
28. The applicant is aggrieved by what he refers to intermeddling in the estate of their mother. If that is the case, issues related to the estate of his mother will not be handled in this cause but rather succession cause relating to her estate. I therefore decline to deal with issues relating to the management of the estate of Margaret Wangari Kirubi.
29. For the reasons stated above, the preliminary objection is upheld and the application dated 20th November 2023 dismissed in its entirety.
30. There shall be no order as to costs.
It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 23rd DAY OF MAY, 2025.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Fardosa Court Assistant

Wachira for Applicant

Weche for 1st Respondent (Administrator)

