In re Estate of Reuben Stock Makona (Deceased) (Succession Cause 205 of 2007) [2023] KEHC 19828 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19828 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

SUCCESSION CAUSE 205 OF 2007

AC MRIMA, J

JULY 12, 2023

BETWEEN

JOSEPH MAKONA STOK ..... 1ST PETITIONER

JEREMIAH MAKONA ..... 2ND PETITIONER

MOSES MAMAI MAKONA ..... 3RD PETITIONER

AND

JOSEPH LUMBASI WEKANGA ..... OBJECTOR

RULING

Introduction:

1. This ruling relates to an objection raised by Joseph Lumbasi Wekanga vide a summons for revocation of grant dated November 18, 2019. It was filed by the firm of Messrs Okile & Company Advocates.

2. On further perusal of the record, this court has noted that there are two other parties who entered appearance, but essentially, they are objectors. They are Hadson Wanyama Lukorito and Peter Masibo Munialo. However, these two parties testified during the hearing of the objection.

3. The objection was heard on the backdrop of pending summons for confirmation of the grant and summons for revocation of the grant. The revocation was sought on the basis that the administrators were indolent and the estate was being wasted.

The Objection:

4. The summons for revocation dated November 18, 2019 sought the following reliefs: -

    a. There be a stay of confirmation of grant and/or distribution of the estate of the deceased herein pending the hearing and determination of this application inter partes;

b. That this honorable court be pleased to revoke and/or annul the grant issued to the petitioners in this matter;

c. That the costs of this application be provided for.

5. The application was premised on the grounds on its face and supported by the affidavit of the applicant, Joseph Lumbasi Wekanga, sworn on November 18, 2019.

6. The application was vehemently opposed by the petitioners/administrators.

7. On the directions of this court, Hon Kimaru, J (as he then was), the objection was heard by way of *viva voce* evidence. Three persons testified in favour of the objection. They were Joseph Lumbasi Wekanga (testified as PW1), Peter Masibo Munialo (testified as PW2) and Hadson Wanyama Lukorito (testified as PW3).

8. In opposition to the objection, Moses Mamai Makona testified as DW1 and Jeremiah Makona as DW2.

The Objector's Case:

9. PW1 narrated their family tree as follows: He was the son to the Late George Wekanga Munialo (who died in 1996) and grandson to Musangali Munialo. Reuben Munialo, who died in 2002, was the son to Zakaria Makona Munialo. The said Zakaria Makona Munialo and George Wekanga Munialo were the sons of Musangali Munialo. By virtue of that narration, PW1 and the late Reuben Munialo were cousins.

10. PW1 testified that he had at all material times to the suit resided on that parcel of land namely LR No 8998 and utilized 16.5 acres out of the 201 acres of that land. PW1 lived with his family where they farmed and set up structures on the land since 1963.

11. It was posited that the deceased herein, Reuben Stock Makona, had sold the said portion to PW1's father. Under the terms of engagement, PW1's father paid Kshs 3,300/= and 50 cows as consideration. That was in 1962.

12. Later in 1981, a dispute arose as to ownership of the suit land. Several complainants, including PW1's father, lodged a complaint before a sitting of the elders. In their sitting held on July 11, 1981, the elders found that PW1's father was entitled to twenty 23 acres of the deceased's property.

13. Dissatisfied with the outcome, the deceased lodged an appeal at the High Court at Eldoret in appeal No 124 of 1982 which was subsequently withdrawn.

14. For these reasons, PW1 testified that they were not entitled to 2 acres but 23 as stated by the elders.

15. The evidence of PW2 mainly replicated that of PW1. PW2 was a brother to PW1.

16. PW3 was a son of one Zechariah Lukorito who has since died. He stated that his father was a cousin to the deceased in this case.

17. According to PW3, his father gave the deceased Kshs 100/= together with cattle which the deceased used to purchase the suit land. As a result, the deceased gave his father part of the land where he built his home in 1970.

18. That in 1970, his father moved to Mt Elgon and left one of his sons, Joseph Mabachwa, behind. When his father died in 1975, the deceased herein chased away the said Joseph Mabachwa and torched the houses thereon. He contended that the dispute was heard and determined by elders and produced

proceedings of July 11, 1981 to that end. He prayed for 15 acres of the suit land on behalf of the family of the Late Zechariah Lukorito.

The Petitioners' Case:

19. DW1 testified on how the deceased acquired the suit land from a white settler one Emma West on January 29, 1963 through a purchase. An agreement was produced which showed the transfer to the deceased. It was contended that the deceased did not hold the land in trust of any one. That, the deceased raised the purchase price alone through a loan from AFC as evidenced buy a charge on the property.

20. It was DW1's testimony that the objectors invaded the land in the 1980s and the deceased took them to court. That was vide High Court of Kenya at Eldoret civil case No 39 of 1984. The matter was referred to the Elders for determination and the panel was headed by a District Officer (DO). The panel established that the land solely belonged to the deceased and, on humanitarian basis, apportioned 2 acres each to the families of George Wekanga Munialo and Daniel Naiguma.

21. It was posited that the award of the panel of elders was adopted by the court and judgment was entered as per the award, and that, the judgment was neither appealed against nor set-aside.

22. To that end, the petitioners contended that the objections were *res judicata* and ought to be dismissed.

23. DW2 mainly reiterated the evidence of DW1 in urging this court to dismiss the objections.

24. At the close of the respective cases, the parties filed written submissions.

Analysis:

25. On consideration of the record, the two following issues arise for determination: -

    a. Whether the objection is *res judicata*;

    b. If the answer to (a) above is in the negative, whether the objectors or any of them are entitled to the estate of the deceased.

26. The court will deal with the issues in seriatim.

    a. Whether the objection is *res judicata*:

27. That being the case, there is need to consider the doctrine of *res judicata*.

28. The doctrine of res judicata is not novel. Its genesis is in section 7 of the *Civil Procedure Act*, cap 21 of the Laws of Kenya which provides that: -

> 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.

29. The Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2021] eKLR comprehensively dealt with the different facets making up the doctrine of *res judicata*.

30. In the first instance, the apex court framed the issues for determination as follows: -

a) Did the High Court procedurally consider the plea of *res judicata*?

b) Did the finding by the High Court on res judicata infringe on the petitioner's right to fair hearing condemning them unheard?

c) Were the learned judges of the Court of Appeal justified in holding that the doctrine of *res judicata* applied to the current case; was the Paluku case the same as the appellants' herein?

d) Is this doctrine of *res judicata* applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?

e) If the doctrine of *res judicata* is applicable to constitutional matters with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases, on whom lies the burden of proving such rarest and clearest of cases?

f) What constitutes such "rarest and clearest" of cases?

g) Who bears the costs of the suit.

31. On the procedure for raising the plea of *res judicata*, the Supreme Court alluded to the position that the plea is anchored on evidential facts and that such facts ought to be properly raised in a matter. In that case, the plea of *res judicata* had been raised by way of grounds of opposition and in the replying affidavit.

32. The court, in dismissing the argument that the issue was improperly raised before court, stated as follows: -

(53) Instead, and contrary to the appellants submissions, the plea of *res judicata* was raised through both grounds of opposition and replying affidavits in response to the appellants application. It is also evident that through the replying affidavits of the 3rd and 4th respondents, evidence by way of the judgment of JR No 130 of 2011 was introduced through an affidavit to bolster the plea of *res judicata*.

(54) It is further evident that the appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the court accorded the appellants the two justiciable elements of fair hearing: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable.

(55) This ground of appeal must therefore fail.

33. The apex court went ahead and rendered itself on the threshold for proving the applicability of the doctrine. The court stated as follows: -

(86) 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

34. On the commonality of the parties, the court noted as follows: -

(93) The commonality is that the appellants herein and the applicants in JR 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, Feri & Cod. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.

35. In dealing with the contention as to whether the issues raised in the two suits therein were directly and substantially the same, the Supreme Court noted that the initial suit was instituted by way of a judicial review application whereas the subsequent suit was by way of a constitutional petition. The court also noted that the issues raised in the constitutional petition were more than those decided in the judicial review application.

36. The Supreme Court disagreed with the Court of Appeal and found that the doctrine was not applicable in the matter. The court held that: -

> (97) From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However, the appellants herein predicated their petition on *inter alia* grounds that the bilateral agreement should have been approved by Parliament in order to form party of Kenyan law and in failing to do so, the respondents contravened article 2. They further alleged that the respondents herein purported to usurp to the role of Parliament and in doing so contravened articles 94(5) and (6) of the *Constitution*. They further alleged that the Feri and Cod certificates threatened to infringe their right to property under articles 40(1)(a) and (2)(a) when the respondents threatened to arbitrarily deprive them of their property. The court sitting in determination of a judicial review application did not have jurisdiction to render itself on these issues. We therefore find that the principle of *res judicata* was wrongly invoked on this ground. (emphasis added).

37. On the competency of the court deciding the matters in issue, the Supreme Court noted the close relationship between the issue as to whether the current suit had been decided by a competent court and whether the matter in dispute in the former suit between the parties was directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

38. The apex court had a lengthy discussion on the matter. It referred to several decisions and, in the end, rendered itself as follows: -

> [108] 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. The Supreme Court also discussed two exceptions to the doctrine of *res judicata*. The court stated as follows: -

(84) Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of *res judicata*. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.

(85) In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception.

40. The Supreme Court had earlier expressed itself on the doctrine of *res judicata* in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where it delimited the operation of the doctrine of res-judicata in the following terms: -

(317) The concept of *res judicata* operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.

(318) This concept is incorporated in section 7 of the *Civil Procedure Act* (cap 21, Laws of Kenya) which prohibits a court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

> 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.

(319) There are conditions to the application of the doctrine of *res judicata*: (i) the issue in the first suit must have been decided by a competent court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia and another v The Attorney General and others*, [2005] 1 EA 83, 89.

[320] So, in the instant case, the argument concerning *res judicata* can only succeed when it is established that the issue brought before a court is essentially the same as another one already satisfactorily decided, before a competent court.

(333) We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the

1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route" (Workers' Compensation Board v Figliola [2011] 3 SCR 422, 438 (paragraph 28)).

(334) Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In *Omondi v National Bank of Kenya Ltd & 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."

(352) The Judicial Committee of the Privy Council, in *Thomas v The Attorney-General of Trinidad and Tobago*, [1991] LRC (Const) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, *Daryao & others v The State of UP & others*, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of *res judicata*. The Indian Court also rejected the notion that *res judicata* could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:

> But is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of res judicata...has no doubt some technical aspects...but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under article 32.

(353) Kenya's High Court recently pronounced itself on the issue of the applicability of res judicata in constitutional claims. In *Okiya Omtatah Okoiti & another v Attorney General & 6 others*, High Court Const. and Human Rights Division, Petition No 593 of 2013 [2014] eKLR, Lenaola J. (at paragraph 64) thus stated:

> Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the constitutional court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore

the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

(354) On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

(355) However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the *Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of the *Constitution*.

41. The Court of Appeal in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR (which decision was overturned by the Supreme Court) also, and so correctly, discussed the doctrine of *res judicata* at length. The court stated in part as follows: -

> The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under rule 3(8) of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.
>
> We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close

the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

i. The doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii. There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii. The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

42. From the foregoing, it is not strange to note that the above discussion mainly deals with the applicability of the doctrine of *res judicata* to constitutional petitions. That may be so, but of importance to the discussion at hand is that the legal principles on the doctrine equally apply to all other matters, hence their applicability in this matter as well.

43. Having endeavored an elaborate discussion on the doctrine of *res judicata*, this court will now apply the legal principles to the matter at hand.Whether there is a former judgment or order which was final:

44. This has to be answered in the affirmative. There is a judgment and a decree of the High Court at Eldoret in Civil Case No 39 of 1984 Reuben Stock v Kimungongi Boi Boi, Mukoyani Toli, Francis Wekanga, Mackenzie Boi Boi, Mabachwa Lukorito & Jackson Sirandula.

45. The judgment was entered pursuant to the award of the panel of elders as ordered by the High Court. The judgment was rendered on May 28, 1987. An attempt to set aside the award was, thereafter, declined. There were no further proceedings over the matter.

46. The above judgment, therefore, comes out as a final judgment and decree in High Court civil case No 39 of 1984.Whether the judgment was on merit:

47. The matter was a civil claim. From the proceedings before the panel of elders, it can be gathered that the issue at hand was that the plaintiff, Reuben Stock, contended that his suit land had been invaded by the defendants. On their part, the defendants contended that they were rightfully on the land since they had variously contributed as a clan and/or individuals towards Reuben Stock's purchase of the land.

48. That was the dispute that was decided upon by the panel of elders. The proceedings show that the hearing was by way of *viva voce* evidence. Several parties testified and were examined accordingly. In the end, the panel of elders rendered its findings.

49. The award and the resultant judgment can only, therefore, be on merit. This aspect is equally answered in the affirmative.Whether the judgment was rendered by a court having jurisdiction over the subject matter and the parties:

50. There can be no doubt that the then High Court had jurisdiction over the subject matter and the parties.

51. Under the *Repealed Constitution of Kenya*, the High Court of Kenya was *vide* section 60 thereof a superior court of record with unlimited original jurisdiction over civil and criminal matters. The court, therefore, had jurisdiction over the subject matter in High Court at Eldoret in civil case No 39 of 1984.

52. In the said case, the parties also submitted to the court meaning that the court had jurisdiction over the parties. No jurisdictional issue was then raised.Whether there was, between, the first and the second actions, identical parties, subject matter and cause of action:

53. This court will separately deal with each of the three limbs of this principle.

54. On the causes of action, in High Court at Eldoret in civil case No 39 of 1984 the issue was whether the subject land had been acquired by and on behalf the clan of the deceased herein and/or individuals on the basis of contributions and purchases and whether, if so, it should be sub-divided into 10 portions as proposed in page 3 of the proceedings before the panel of elders.

55. In the prevailing objection, PW1, Joseph Lumbasi Wekanga, claims 23 acres of the suit land which portion was equally claimed by one George Wekanga in the proceedings before the panel of elders. The basis of the claim by George Wekanga was based on allegation of contributions made towards the purchase of the suit land.

56. Peter Masibo Munialo who testified in this matter as PW2 also testified before the panel of elders. His position was that his father, the Late Joel Chenano, had also allegedly contributed towards the purchase of the suit land. The said Joel Chenano claimed 13 acres before the panel of elders.

57. It is, therefore, apparent that the cause of action in High Court at Eldoret in civil case No 39 of 1984 and the objection herein are similar. They are all founded on the contention that members of the objectors' clan and/or individuals contributed towards the purchase of the suit land; which land is part of the estate in this matter.

58. On the identity of the parties, PW1 testified that he was a son of George Wekanga. It is the said George Wekanga who testified before the panel of elders.

59. PW2 also testified before the panel of elders on behalf of his late father.

60. Lukorito Munialo testified before the panel of elders. He agreed with Jackson Sirandula that 10 clan members had contributed towards the purchase of the suit land.

61. Hadson Wanyama Lukorito testified as PW3 in the objection hearing. He said he was a son of Zechariah Munialo Lukorito. The testimony of Hadson Wanyama Lukorito before this court tallies with that of Lukorito Munialo before the panel of elders. PW3, is therefore, pressing on the same claim as fronted by Lukorito Munialo.

62. The objectors in this case are, hence, the children of the parties who participated in High Court at Eldoret in civil case No 39 of 1984 and whereof their parents testified before the panel of elders.

63. As such, this court finds that the parties in High Court at Eldoret in civil case No 39 of 1984 and the objectors are identical. The objectors are claiming or litigating under the same title: being children of their late parents who took part in the civil case No 39 of 1984.

64. This court is, hence, satisfied that the doctrine of *res judicata* applies in all four corners in this matter. The court, therefore, finds and hold that the objection, as laid, is a non-starter and suffer false start.

65. Having said so, this court must add that even if the court is wrong on the applicability of the doctrine of *res judicata* in this matter, (which is not), still the objection cannot stand as the claims have not yet crystalized as creditors to the estate of the deceased.

66. It has been admitted that none of the objectors are beneficiaries to the estate of the deceased herein. Their claims are based on alleged contributions made towards purchase of the suit land. The claims are squarely opposed by the beneficiaries. The objector has no court decree or order affirming his position. The objector is hence, indeed, litigating his case before this court.

67. In the absence of any court decree or order affirming the objector's position, his claim before this court, sitting as a succession court, is yet to crystalize. The objector has a long way to try and actualize his claim and, in the face of the doctrine of *res judicata*. To that extent, this court agrees with the holding in Re Estate of Joshua A. Visaho (deceased) (2019) eKLR.

68. In the end, this court finds and hold that the objection is not holding. However, this court hereby clarifies that any entitlement to the estate by the objector(s) herein, as the case may be, shall be in line with the judgment and decree in High Court at Eldoret in civil case No 39 of 1984 and that shall be dealt with during the hearing of the summons for confirmation of the grant.

Disposition:

69. As this court comes to the end of this ruling, it hereby renders an unreserved apology for the late delivery of this decision. The delay was attributed to the misplacement of the court file which took a considerable time to find. Once again, galore apologies to all the parties.

70. Deriving from the above analysis and discussion, this court hereby makes the following final orders: -

    a. The summons for revocation of grant dated November 18, 2019 is unsuccessful and is hereby dismissed with costs.

    b. The summons for confirmation dated January 16, 2018 alongside the summons for revocation dated January 25, 2018 shall be both fixed for directions on a date to issue.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 12TH DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Okile, Learned Counsel for Joseph Lumbasi Wekanga, the Objector/Applicant.

Dr. Nancy Baraza, Learned Counsel for Objector.

Mr. Teti, Learned Counsel for the 1st & 2nd Petitioners.

Mr. Nabasenge, Learned Counsel for the 3rd Petitioner.

Regina/Chemutai – Court Assistants.