



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Matayo Dawas (Deceased) (Succession Cause
E002 of 2021) [2025] KEHC 14283 (KLR) (14 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
SUCCESSION CAUSE E002 OF 2021**

FR OLEL, J

OCTOBER 14, 2025

BETWEEN

RHODA MATAYO DAWAS APPLICANT

AND

ARARU MATAYO DAWAS RESPONDENT

RULING

Introduction

1. The application up for determination before this court is the Notice of motion dated 5th June 2025 filed pursuant to provisions of Section 1A & 1B of the [Civil Procedure Act](#), Order 40 rule 1 of the Civil Procedure Rules and Section 107 to 115 of the [Land Act](#) No 6 of 2012. Section 25 of the [Land Registration Act](#), 2012 and Section 45 of the laws of Succession Act, Cap 160 laws of Kenya. The applicant seeks for orders that;
 - a. Spent.
 - b. That the Succession cause E002 of 2021 Estate of Matayo Dawas (Deceased) be reinstated.
 - c. Spent.
 - d. That pending the hearing and determination of this petition, this Honorable court be pleased to issue an order of temporary injunction restraining the respondents, their agents, servants, officers and/or an other person acting on the authority of the respondent restraining them severally and jointly from entering into any sale agreement, selling, sub dividing, transferring, disposing off, pledging constructing or erecting any structures leasing charging or in any other manner howsoever alienating or dealing with all that portion of land known as Land parcel Marsabit /Mountain/338.
 - e. That costs of this application be provided for.



2. The application is supported by the ground stated on the face of the said application and the supporting affidavit of the applicant, who deponed that she is a daughter of the deceased herein, who died testate having left a will dated 25th November, 2019, where she was named as the sole executor to the said estate. The respondent too was a beneficiary of the said estate but in disregard of the deceased wishes had recently began to develop the estate property known as MARASABIT/MOUNTAIN/338 (hereinafter referred to as the suit property) before the probate was finalized to her detriment and those of other beneficiaries
3. It was her further contention that this court had previously issued an injunction stopping the respondent from interfering with the deceased estate but after considering the said matter, the court had closed this succession file. Subsequently other siblings had filed Marsabit SPM ELC No 21 of 2018, which was still pending for determination. The respondent therefore had no right to sub divided a portion the suit property and/or to erect a perimeter wall thereon, which act amounted to disinherit other beneficiaries. It was therefore imperative for the court to issue the orders sought to enable them preserve the estate before conclusion of the succession process.

B. The Response.

4. The respondent did oppose this application through his preliminary objection dated 18.07.2025 and replying affidavit dated 14.08.2025. He averred that the application filed was res judicata given that the applicant had previously filed a similar application dated 06.10.2021, which was heard on merit and dismissed vide a ruling delivered on 03.03.2022.
5. Secondly the applicant lacked locus to file this suit as she only held a grant of letters of administration ad litem dated 04.10.2021, which allowed her to file MCELC 21 OF 2018 and not to initiate other legal proceedings. Back to the issue at hand, probate proceedings herein were yet to commence, but be that as it may, he had commenced building his home within the suit parcel during the deceased lifetime, in 2011 and formally settled thereon with his family in 2016.
6. The respondent further admitted that he was only fencing off a portion of the suit property where he had built his residence, due to security reasons and not the entire suit parcel as alluded to by the applicant. Further their other sister Rose Matayo, too had built on the suit property in 2018, fenced off her portion and was in occupation thereof. He further denied selling off and/or disposing off the said property in any manner emphasizing that the said averments were unsubstantiated and devoid of any factual or legal basis.
7. The respondent reiterated that due to the raising cases of insecurity he had opted to fence off the portion of land where he had built and had not interfere with other portions of the said property. The applicant had therefore not demonstrated and irreparable loss or damage that would warrant the grant of the temporary injunction as sought and urged this court to dismiss the application under review.

B. Analysis and Determination

8. I have considered the Notice of motion application dated 5th June 2025, the affidavits made in support and in opposition to, and set out the issues for determination as follows;
 - a. Whether the notice of motion under consideration herein is Res judicata.
 - b. Whether the petitioner/applicant has satisfied the threshold for granting injunctive orders.
 - c. Who should bear the costs of this Application.



I. Whether the notice of motion under consideration herein is Res judicata.

9. The respondents averred that this application is res judicata to the previous application dated 6th October 2021, which sought similar prayers. The same was heard and dismissed by Justice J.N Njagi vide his ruling dated 3rd March 2022. Section 7 of the [Civil Procedure Act](#), 2010 provides as hereunder:

“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.”

10. It is now old hat that the said doctrine applies to both suits and applications as was held in *Abok James Odera vs. John Patrick Machira Civil Application No. Nai. 49 of 2001*. However, as was held in the said suit, to rely on the defence of res judicata there must be:

- (i). A previous suit in which the matter was in issue;
- (ii). The parties were the same or litigating under the same title;
- (iii). A competent court heard the matter in issue;
- (iv). The issue had been raised once again in a fresh suit.

11. As regards the rationale of the doctrine of res judicata, reliance was placed on the decision of the Court of Appeal in *Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR*.

“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 common-sensical 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 fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

12. The previous application dated 6th October, 2021 was filed by the applicant against the respondent, the issues raised therein revolved around injuncting the respondent from selling, sub dividing, transferring disposing off constructing or dealing with the suit property in any manner and after careful consideration of the said application the same was dismissed by Honorable Justice J.N Njagi vide his ruling dated 3rd March 2022. Similar orders have been sought under the current application dated 5th June 2025 and therefore, without doubt, this current application on all fours is res judicata and ripe for dismissal.

D. Disposition

13. The upshot is that the application dated 5th June 2025 lacks merit and the same is dismissed with costs to the respondent.

14. It so ordered.



JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 14TH DAY OF OCTOBER 2025.

FRANCIS RAYOLA OLEL

JUDGE

Read, signed and delivered virtually at MARSABIT on this 14th day of OCTOBER, 2025.

In the presence of:-

RespondentMr. Wamae

ApplicantMr. Behailu

Court assistantMr. Jarso

