

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**PROBATE AND ADMINISTRATION CAUSE NO. 65 OF 1987**

**IN THE MATTER OF THE ESTATE OF NJAMA WERU**

**(DECEASED)**

**RULING**

1. Before this Court is the Notice of Preliminary Objection dated **22<sup>nd</sup> April 2025** filed by the Respondent **CHARLES MWANGI NDEGWA**.
2. The Applicants opposed the Preliminary Objection through the Replying Affidavit dated **15<sup>th</sup> July 2025** sworn by **JOSEPH KANYINGI NJAMA** (the 3<sup>rd</sup> Applicant).
3. The matter was canvassed by way of written submissions. The Respondent filed the written submissions dated **26<sup>th</sup> September 2025** whilst the Applicants relied upon their written submissions dated **14<sup>th</sup> October 2025**.

**BACKGROUND**

4. This is a cause that was filed way back in the year **1987** and which has

generated much litigation. The matter relates to the estate of the late

**NJAMA WERU** (hereinafter '**the Deceased**') who died on **16<sup>th</sup> May 1987**.

5. By way of the Summons dated **28<sup>th</sup> February 2025** the Applicants pray that the will dated **12<sup>th</sup> June 1985** be declared invalid. It is against this application that this Notice of Preliminary Objection has been filed. The Preliminary Objection was premised upon the following grounds:-

**“(a) The summons General dated 28<sup>th</sup> February 2025 is Res Judicata vide the ruling of this Honourable Court dated 22<sup>nd</sup> September 2022.**

**(b) The Summons General dated 28<sup>th</sup> February 2025 is therefore misconceived and incompetent.”**

### **ANALYSIS AND DETERMINATION**

6. I have considered this Notice of Preliminary Objection, the reply filed thereto as well as the written submissions filed by both parties.

7. The definition of a Preliminary Objection was given in the case of

**MUKHISA BISCUITS MANUFACUTIRNG COMPANY LTD - VS- WEST END DISTRIBUTORS LTD [1969] E.A** as follows:-

**“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 submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

8. In the same case **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, no occasion, confuse the issue. The improper practice should stop.”

9. In **AVIATION & ALLIED WORKERS UNION KENYA -VS- KENYA AIRWAYS LIMITED & 3 Others [2015] eKLR** the Supreme Court of Kenya stated as follows:-

“a Preliminary Objection may only be raised on a “pure question of law” To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record.”

10. Therefore in order for a preliminary objection to succeed the following must be satisfied:-

**(i) The Preliminary Objection should raise a pure point of law.**

**(ii) The Preliminary Objection must be argued on the**

**assumption that all the facts pleaded are correct.**

**(iii) The Preliminary Objection cannot be raised if any facts is to be ascertained or if what is being sought is the exercise of judicial discretion.**

**(iv) A valid Preliminary Objection ought if successful dispose of the entire suit.”**

11. The Respondent has raised a challenge to the application dated **28<sup>th</sup> February 2025** seeking to have the same struck out on grounds that the said application is ‘**Res Judicata.**’

12. **Halsbury’s Laws of England, Volume 12A, 5<sup>th</sup> Edition, 2015** in discussing the doctrine of Resjudicata provides as follows:

**(2) Res judicata**

***The Doctrine of Res judicata***

***1603. Basis for doctrine of res judicata***

**The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of actions being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving different cause of action to which the same issue is relevant, one of the parties seeks to reopen**

that issue. For this reason, *res judicata* has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the courts have endeavoured to impose some coherent scheme only in relatively recent times.

.....

The purpose of the principle of *res judicata* is to support the good administration of justice in the interests of the public and the parties by preventing abuse and duplicative litigation and its twin principles are often expressed as being the public interest that the courts should not be clogged by re-determinations on the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter.”

13. The substantive law on *Res Judicata* is found in **Section 7** of the **Civil Procedure Act Cap 21 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.”**

14. The Court of Appeal in **Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others [2017] eKLR** stated as follows:-

**“That rule or doctrine of res judicata serves the solitary aim to bring finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and wounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection**

against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders keeping 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.”

[Own emphasis]

15. In **JOHN FLORENCE MARITIME SERVICES LIMITED -VS- CABINET SECRETARY FOR TRANSPORT and INFRASTRUCTURE & 3 Others [2021] eKLR** the **Supreme Court** of Kenya stated thus

“81 We reaffirm our position as in the **Muri Caffee** case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principles of finality is one of the pillars upon which our Judicial

**System is founded and the doctrine of res Judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party and liability for another party conclusively.....**

**(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 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.”**

16. The application dated **28<sup>th</sup> February 2025** sought to have the written will dated **12<sup>th</sup> June 1985** declared invalid. The Respondents contend that the question of the validity or otherwise of the said will was conclusively determined by this court in the Judgment delivered on **22<sup>nd</sup> September 2022**.
17. I have perused the judgment delivered by **Hon. Lady Justice Florence Muchemi** on **22<sup>nd</sup> September 2022**. That judgment related to an application dated **23<sup>rd</sup> November 2009** seeking revocation/Annulment of the Grant issued on **18<sup>th</sup> May 2009** and confirmed on **24<sup>th</sup> July 2009**.
18. The grounds upon which the Applicants sought to have the Grant revoked was that the same was obtained fraudulently by the making of a false statement or by the concealment of a material fact. In the Affidavit in support of the application the deponent challenged the will left behind by the

Deceased on grounds that the same made no mention of the properties existing at the time of the demise of the Deceased. Thus it is quite evident that the validity of the will was being challenged in this application.

19. In her ruling the Honourable Judge at **Paragraph 29** noted that the

1<sup>st</sup> Applicant had filed a protest challenging the will.

However that

Protest which was never prosecuted was eventually dismissed.

20. Further at **Paragraph 32** of the said judgement the Judge in finding that the will in question was valid stated that:-

**“It is imperative to note that the mere inclusion of the land reference number of the mother title LR Aguthi/Muruguri/382 in the will and in the certificate of confirmation of grant does not invalidate the will or the grant as argued by the applicants.” [Own emphasis]**

21. Accordingly I do find that the question of the validity of the will dated **12<sup>th</sup> June 1985** was determined by the

Honourable Judge and as such is now Res Judicata. The Applicants cannot raise the same issue in a different application. I find that this Preliminary Objection has merit. Accordingly the summons dated **28<sup>th</sup> February 2025** is struck out. This being a family matter each party will bear their own costs.

**Dated in Nyeri this 19<sup>th</sup> December 2025**

.....  
**MAUREEN A. ODERO**  
**JUDGE**