

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO 130 OF 1985

IN THE MATTER OF THE ESTATE OF ASHUMA ANJAWA- DECEASED

BETWEEN

WYCLIFFE MUKABANA ASHUMA----- PETITIONER

AND

JOHNSTONE ANDATI ORITO-----1ST
OBJECTOR/APPLICANT

DANIEL MAKWATA-----2ND
OBJECTOR/APPLICANT

FRANCIS ANJAWA KEYA-----3RD
OBJECTOR/APPLICANT

NASHON UBULEMIRE ANDATI-----4TH
OBJECTOR/APPLICANT

AND

JASON MILIMO MUKABANA-----1ST
RESPONDENT

PETER MILIMO OBULEMIRE-----2ND
RESPONDENT

SIMON ASHUMA MUKABANA-----3RD
RESPONDENT

JUDGMENT

1. This matter refers to the estate of Ashuma Anjawa, who died intestate on 25/08/1965. He was survived by 5 sons who were

- a) Nashon Obulemire
- b) Jared Orito Washuma
- c) Wilfred Keya Ashuma
- d) Fitalis Andati Ashuma
- e) Wycliffe Mukabana Ashuma

2. The applicants herein filed a summons for revocation and or annulment of the grant dated 5th March 2024, seeking the following orders;

- a) *THAT pending the hearing and determination of the objection proceedings, there be an order preserving the estate herein and that "STATUS QUO ANTE" subsisting on the original land parcel L.R MARAMA/ SHIRO TSA/304 now subdivided into two to create L.R MARAMA/SHIRO TSA/2635 and 2636 be maintained.*
- b) *THAT pending the hearing and determination of the objection proceedings herein, the court be pleased to order the Land Registrar to place a restriction on the above land parcel L.R MARAMA/SHIRO TSA/2635 and 2636, the subject matter of the succession proceedings herein.*
- c) *THAT the Letters of Administration Intestate issued to the petitioner herein on 20/07/1993 and confirmed on 27/06/1994 be revoked and or annulled.*
- d) *THAT the Honourable court be pleased to order the file BUTERE SPMC SUCCESSION CAUSE No. 221 of 2019 ESTATE OF WYCLIFFE MUKABANE ASHUMA transferred to the High Court for consolidation with the file herein.*
- e) *THAT the objectors herein and all other beneficiaries who were left out of the succession proceedings herein be brought on board and included in the succession proceedings herein.*

f) THAT upon inclusion of all rightful beneficiaries, the grant herein be confirmed fresh with the interests of all other beneficiaries taken care of.

g) THAT the costs of this application be provided for.

3. The summons were supported by grounds which were highlighted in the supporting affidavit by Johnstone Andati Orito, with the consent of the 2nd, 3rd, and 4th applicants. According to the applicant, the deceased was their paternal grandfather to all the applicants, while the petitioner, who is deceased, was their paternal uncle. They aver that the deceased left behind 5 sons who are now all deceased, and they have filed the case as the legal representatives of the estate on behalf of their fathers.
4. They assert that the only land for distribution is L.R. MARAMA/SHIRO TSA/304, measuring 1.2 hectares, where all the sons were settled with their shares defined. He avers that the deceased son, Jared Orito Ashuma, initiated the succession process, and on 20/06/1986, the initial grant was issued. When Jared Orito Ashuma fell ill and died on 24/05/1990, before the grant was confirmed and his brother Wycliffe, the petitioner, took over the succession process.
5. According to the applicant, the substituted petitioner, Wycliffe, removed the initial chief's letter from the records that indicated the bona fide beneficiaries and indicated himself as the sole beneficiary to the estate and a fresh grant was issued to him on 20/06/1986 and confirmed on 27/06/1994, excluding the other beneficiaries.

6. He avers that the petitioner registered the land parcel no. L.R. MURAMA /SHIRO TSA/3034 as the sole proprietor, and when he died on 20/08/2017, the land was in his name, and his son Jason Milimo initiated the succession process for his father's estate in Butere Senior Principal Magistrate's court succession cause no. 221 of 2019, without consulting the beneficiaries of their grandfather's estate, who are the families of his uncle, who were settled in the deceased grandfather's land and were entitled to a share of the land.
7. According to the applicant, the 1st respondent caused the land parcel. L.R. MURAMA/ SHIRO TSA/304 to be subdivided into two land parcels, being L.R. MURAMA/SHIRO TSA/2635 and L.R. MARAMA/SHIRO TSA/2636, and went further to sell the land parcel L.R. MURAMA/SHIRO TSA/2635 to Peter Milimo Obulemere and the second parcel, being L.R. MARAMA/SHIRO TSA/2636, to Simon Ashuma.
8. They claimed that they only got to know of the illegality and fraud of the petitioner when the 2nd and the 3rd respondent came to fence off the land, leaving them destitute.
9. They had initially filed an objection to proceedings in Butere senior principal magistrate court succession cause no.21 of 2019, which was dismissed at the lower court. They aver that they were now left with no option but to file an objection to the estate of the deceased and pray that this court intervenes against the grant in the original succession proceedings and that the original land parcel L.R

MARAMA/SHIRO TSA/304 be maintained pending the hearing of the objection proceedings.

10. They pray that the grant issued on 20/07/1993 and confirmed on 27/06/1994 be revoked and or annulled, and the succession proceedings be revisited in the interest of the beneficiaries, and that the applicants be allowed to institute the objection proceedings on behalf of the estate of their deceased fathers.
11. The 2nd respondent filed a response to the application vide a replying affidavit dated 19th February 2025 on behalf of the 3rd respondent, stating that it lacked merit and avers that it is *Res Judicata* as the same matter was determined in Butere Senior Principal Magistrate Court Succession Cause No. 28 of 2022, and the matter was already dismissed.
12. He avers that the chief's letter stated that Jared Orito was the deceased's eldest son; however, it did not disclose who survived him, and the alleged beneficiaries were not mentioned in the chief's letter, hence their relationship cannot be ascertained.
13. They aver that the petitioner followed the rightful procedure to have the estate transmitted to him.
14. According to the respondent, the objectors had separate parcels which they inherited from their representative parents, and they should not mislead the court that they have no other home. They aver that they purchased land from the 1st respondent after conducting due diligence and that the same was already determined by the court in Butere Magistrate's court, which has jurisdiction and

aver that the summons for revocation is an appeal which is disguised as an application for revocation of the grant which was already determined at the lower court.

15. They pray that the application for revocation of the grant be dismissed with costs.

ANALYSIS AND DETERMINATION

16. I have gone through the summons for revocation and or annulment of the grant dated 5th March 2024, as well as the replying affidavit by the respondents.

17. The main issue for determination is whether the court should revoke the grant that was confirmed on 27th June 1994 and subsequently order that the original land LR MARAMA/SHIRO TSA/304, which had been subdivided, be restored to its original title.

18. I have perused the court record and note that the succession cause filed was about the estate of Ashuma Anjawa, who died on 25th August 1965. The initial letters of administration were filed by one Jared Orito Washuma on 23rd May 1985 for the estate, which comprised LR MARAMA/SHIRO TSA/304 measuring 1.2 Hectares. Upon the demise of Jared Orito Washuma on 24th May 1990, his brother Wycliffe Mukabana Ashuma applied to be substituted as the administrator to the estate and indicated that he was the surviving beneficiary of his deceased father.

19. He applied for confirmation of the grant, which was issued on 27th June 1994, and Wycliffe Mukabane Ashuma was named as the

sole beneficiary of the estate of the deceased land parcel MARAMA/SHIRO TSA/304.

20. I note from the court records that there is a ruling dated 5th August 2021 delivered at Butere Principal magistrates' court for the estate of Wycliffe Mukabane Ashuma, who is the son of the deceased. The applicants had filed an affidavit of protest against the mode of distribution for the land parcel, claiming that the deceased had held it in trust for his brothers.

21. The trial court dismissed the protest and confirmed the letters of administration that were issued to Jason Milimo Mukabana.

22. The summons for revocation before this court, however, is about the estate of Ashuma Anjawa and not the deceased son, Wycliffe Mukabana Ashuma.

23. From the record, it is evident that upon substitution, the petitioner represented to the Court that he was the only surviving beneficiary. This representation was material, as it formed the basis upon which the grant was confirmed in his favour on 27th June 1994. If indeed other sons of the deceased were alive at the time, or their families were in occupation and entitled to inherit, then such omission would amount to concealment of material facts within the meaning of section 76(b) and (c) of the Act.

24. The Court of Appeal in **Mwathi v Mwathi & Another [1995-1998] 1 EA 229 held that a grant obtained by concealment of beneficiaries is liable to revocation, regardless of how much time has passed. Likewise, in in re Estate of Gathungu**

(Deceased) [2020] eKLR, the Court reiterated that the limitation of time does not apply to revocation proceedings where fraud or concealment is alleged.

25. The respondents have raised the defence of res judicata, arguing that the issues were conclusively determined in Butere Senior Principal Magistrate's Court Succession Cause No. 221 of 2019 and related proceedings. The doctrine of res judicata is enshrined in Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya, and 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.

26. *In In* **Re Estate Of Josphat Njoka Mbiriai (Deceased) [2018] eKLR**, the High Court held that the doctrine of res judicata is applicable in succession causes, as it is a universal principle aimed at bringing litigation to an end and preventing abuse of the court process. The court emphasised that for res judicata to apply, there must be: (i) a previous suit in which the matter was in issue; (ii) the same parties or parties litigating under the same title; (iii) a final decision by a competent court; and (iv) the same issue raised afresh. However, the court cautioned that the doctrine must be

applied judiciously, ensuring that the issues and parties are identical and that there has been a final determination on the merits.

27. Applying these principles to the instant case, I find that the doctrine of *res judicata* does not bar the current application. The proceedings in Butere Senior Principal Magistrate's Court Succession Cause No. 221 of 2019 concerned the estate of Wycliffe Mukabana Ashuma (the deceased petitioner herein), where the applicants filed a protest alleging that Wycliffe held L.R. Marama/Shirotsa/304 in trust for his brothers' families. The lower court dismissed the protest on 5th August 2021, holding that no trust was established and confirming the grant to Jason Milimo Mukabana (1st respondent). That decision addressed the mode of distribution in Wycliffe's estate, not the validity of the grant in the estate of Ashuma Anjawa.

28. The present summons of revocation of the grant, however, challenges the grant in Succession Cause No. 130 of 1985, which is the estate of Ashuma Anjawa, on grounds of fraud and non-disclosure in the original proceedings. While the parties overlap, which includes the applicants in this application are grandchildren of Ashuma, the deceased, and the 1st respondent is Wycliffe's son, the causes are quite distinct that as one of the causes pertains to the grandfather's estate, and the other to the uncle's, that is, the 1st respondent's father. The issues are not identical. The lower court did not adjudicate on whether the 1993/1994 grant was fraudulently obtained; it merely dealt with the estate of Wycliffe's succession. As held in In **re Estate of Gerald Muturi Maina (Deceased) [2025]**

KEHC 9514 (KLR), res judicata is based on finality, but it does not extend to related but separate estates where the core validity of an upstream grant is unchallenged. Accordingly, this court has jurisdiction to determine the application on its merits, and the plea of res judicata is dismissed.

29. I am satisfied that the applicants have proven, on a balance of probabilities, the grounds under Section 76(a) and (b) of the Act. The proceedings were defective due to non-disclosure, and the grant was obtained fraudulently by concealment. Time lapse, which is over 30 years, does not bar revocation of a grant, as the Act imposes no limitation period for fraud.

30. In exercising discretion, I consider the interests of justice and all beneficiaries. Revocation is necessary to include the omitted families and ensure equitable distribution. The subdivided parcels shall be cancelled, reverting to the original title in the deceased's name, pending fresh proceedings.

31. Accordingly, I make the following determinations and orders:

- a. The Letters of Administration Intestate issued to Wycliffe Mukabana Ashuma on 20th July 1993 and confirmed on 27th June 1994 are hereby revoked and annulled.
- b. The registrations of L.R. Marama/Shirotsa/2635 and 2636 are cancelled, and the Land Registrar is directed to restore the original parcel L.R. Marama/Shirotsa/304 in the name of the deceased, Ashuma Anjawa.

- c. Pending hearing and determination of confirmation of proceedings, the status quo ante on L.R. Marama/Shirotsa/304 is maintained, and the Land Registrar shall place a restriction on the title prohibiting any dealings.
- d. Costs of this application shall be in the cause.
- e. It is so ordered.
- f. I do appoint the 1st Applicant and 1st Respondent as co-administrators of the Estate of Ashuma Anjawa. Each to represent the rivaling parties.
- g. The Administrators are given 60 days to file summons for confirmation, which shall include all the beneficiaries.
- h. Costs of the Application shall be in cause.
- i. Right of Appeal 30 Days.
- j. Mention on 8th July, 2026 for further directions.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA
THIS 19TH DAY OF JANUARY, 2026.**

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr. Elungata for the Applicant.