



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 12 OF 2013
IN THE MATTER OF THE ESTATE OF JAMES MURUGA
NJOROGE (DECEASED)

JUDGMENT

INTRODUCTION

1. The Application for determination is the application 28th March 2023 in which the applicants Salome Wamaitha and Kelvin Kariuki seek the revocation of the grant herein. The Application is presented under Sections 45, 47 and 76 of the Law of Succession Act and rules 27, 44(1), 49 and 73 of the probate and administration rules.
2. The applicants seek the revocation on the grounds that the administrators failed to include them as beneficiaries of the estate, yet they are children of the deceased. They have attached birth certificates to their application showing that Salome Wamaitha was born to James Muruga Njoroge (the deceased) and Margaret Wanjiru Maina on 25th December

1979. This birth was registered on 4th August 2022. Kelvin Kariuki is said to have been born to James Muruga Njoroge and Ann Wanjiku Kariuki on 26th September 1996, this birth was registered on 24th March 2011.

3. The respondent opposes the application and has filed a notice of preliminary objection dated 5th April 2023 and replying affidavit sworn on 5th April 2023. In his Preliminary objection and replying affidavit the 1st respondent avers that the matter is *res judicata* as the Court already pronounced on the claim by the applicants vide its judgment of 23rd February 2015. It is averred that no appeal has been preferred against that judgment.
4. In further affidavit sworn on 14th April 2023, the applicants deny that their application is *res judicata*.
5. The applicant was canvassed via written submissions. Only the respondent filed submissions dated 18th October 2025. He reiterates the averments in his replying affidavit and the Preliminary Objection

ANALYSIS AND DETERMINATION

6. Having considered the pleadings and submissions filed herein alongside the relevant law, I discern the issues for determination to be

- a. Whether the Summons for revocation filed herein is *res judicata*?
 - b. Whether if the answer to (a) above is in the negative, the grant herein should be revoked?
 - c. Who should pay costs?
7. Section 7 of the Civil procedure Rules provides-

7. Res judicata

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.

8. Kuloba J, in *Judicial Hints to Civil Procedure* states thus

... a thing or matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgement. In that expression is found the rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.

9. It is the respondent's submission that the claim by the applicant's was conclusively dealt with in a previous application presented by Mary Muthoni Njunge, Annah Wanjiku and Margaret Wanjiru Maina who unsuccessfully lodged a protest to the summons for confirmation of grant filed by the respondents herein.

10. It is submitted further that the applicants herein are the children of Annah Wanjiku and Margaret Wanjiru. In the judgment of Hon. Muigai J delivered on 23rd February 2015 she dismissed the protest finding that the claim by the protestors failed as they had not proved that they were wives to the deceased and that their children were children of the deceased. In particular the Court found that the birth certificates of the children were suspect as they were processed after the death of the deceased and found further that the letter of chief that was presented as proof of kinship was a forgery as the Chief who it was alleged authored it, attended Court and denied it.

11. The applicants herein do not deny that they are children of the applicants in the earlier application. Their summons for revocation is as in the earlier application hinged on their claim of being beneficiaries of the deceased. When the matter came before me, I gave them an opportunity to establish paternity by undertaking a DNA test. They failed to do so. The earlier judgment stated that the children of the applicants had

failed to establish paternity as the birth certificates relied on were procured after the death of the deceased.

12. The same obtains in the current application, the birth certificates were obtained on 4th August 2022 and 24th March 2011, yet the deceased died on 1st December 2009. No appeal was filed against the decision of 23rd February 2015.

13. I find that the preliminary objection meets the legal threshold as articulated in the celebrated decision of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1968] EA 697** where the Court stated-

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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion

14. Having found that the Preliminary objection is merited it follows that the summons for revocation is for dismissal.

15. On costs, in his reply the respondent contended that this summons was filed to obstruct him from transmitting the estate in accordance with the judgment of 23rd February 2015. The conduct of the applicants in this matter suggests that the application was filed only for its nuisance value and to delay the respondent's access to his rightful inheritance. This is a matter where they should pay costs. Accordingly, the application is dismissed with costs to the respondents assessed at Kshs 50000 and payable within 30 days.

16. Parties at liberty to appeal, party exercising their right to appeal to do so within 30 days

It is so ordered

DATED and DELIVERED VIRTUALLY at NAIROBI this 16th Day of January 2026.

**P.M. NYAUNDI
JUDGE**

In the presence of:
Fardosa Court Assistant
No Appearance by Parties