In re Estate Apasiana Saryaeli Murunga (Deceased) (Succession Cause 697 of 2009) [2026] KEHC 545 (KLR) (Family) (29 January 2026) (Ruling)

Neutral citation: [2026] KEHC 545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 697 OF 2009

HK CHEMITEI, J

JANUARY 29, 2026

BETWEEN

MICHAEL CHIVOLO MURUNGA ..... APPLICANT

AND

ALICE SHIUNDU ..... RESPONDENT

RULING

1. This ruling relates to the application dated 19th December, 2023 filed by the Applicant, Michael Chivolo Murunga; seeking for orders that:

    1. This honourable court be and is hereby pleased to review the orders in this matter made on 3rd November, 2010, which culminated in the issuance of the certificate of confirmation of grant dated the same date.

    2. This honourable court be and is hereby pleased to review its judgment in this matter dated 5th May, 2014 and any consequential orders there from.

    3. Pending the hearing and determination of the instant application, this honourable court be and is hereby pleased to issue stay orders, staying execution of this honourable court's orders issued on 3rd November, 2010, 5th May, 2014 and all consequential orders thereto and particularly on execution of the confirmed grant issued in respect of the deceased's estate L.R. No. Kisumu/Kogony/1827 and L R. No. MSA/MS/Block 1/ 742 or any other asset of the deceased herein.

    4. All the steps taken by the Petitioner/Respondent herein pursuant to the orders issued on 3rd November, 2010 and the subsequent judgment dated 5th May, 2014, in essence affirming the

grant issued in this matter and which may have changed assets of the estate subject of this application be declared a nullity in law.

5. As a consequence of prayers 1, 2, 3 and 4 above, this honourable court be and is hereby pleased to revoke the grant in this matter.

6. In the alternative, this honourable court be and is hereby pleased to grant leave for the Applicant to appeal against the judgment delivered on 5th May, 2014 and all consequential orders issued prior thereto.

2. The application is based on the grounds thereof and supported by affidavit sworn by Michael Chivolo Murunga on 19th December, 2023.

3. He avers inter alia that he is a step-son of the deceased, being the first-born son of Tom Masiache Murunga (deceased) from the second house, and that Tom Murunga was lawfully married to the deceased herein. He depones that he has authority from all the other beneficiaries, namely Irene Nangeni Murunga (co-wife), Flavian Khavakali Murunga, Adline Shitawa Murunga, Olivia Khakasa Murunga, Collins Nasongo Murunga, and Maxwell Mwinani Murunga to swear the affidavit on their behalf.

4. He acknowledges that his earlier application for revocation of grant was dismissed by a judgment delivered on 5th May 2014, but contends that the court acted on material factual errors which, had they been disclosed, could have led to a different outcome. He explains the delay in bringing the present application by stating that crucial facts related to his late father's estate were inaccessible to him at the time, as he was not an administrator in that estate.

5. He further avers that although the Respondent obtained a grant of letters of administration on 21st July, 2009, later confirmed on 3rd November, 2010, there existed an earlier and ongoing succession cause in respect of his father's estate. Succession Cause No. 609 of 2003 (Kisumu), during the lifetime of the deceased herein and throughout the pendency of these proceedings. In that earlier cause, there was an agreed mode of distribution to which the deceased was a party.

6. He argues that the court ought to have taken judicial notice of those proceedings, particularly because some of the properties considered in this cause formed part of his father's estate, thereby resulting in the improper issuance of two certificates of confirmation of grant over the same properties. Such duplication, he contends, is legally untenable and demonstrates that the proceedings were founded on a mistaken factual premise.

7. He maintains that the Respondent fraudulently concealed material facts by failing to disclose that the earlier succession cause was still pending and by presenting it as concluded, yet it was only finalized on 26th August, 2014.

8. He asserts that, as a step-son and beneficiary, his interests and those of other beneficiaries were deliberately excluded from the petition for letters of administration and the summons for confirmation of grant, rendering the proceedings defective in substance.

9. He contends that the judgment of 5th May, 2014 was therefore based on untrue allegations of essential facts, leading to unlawful disinheritance. Invoking Article 159 of the *Constitution*, Section 76 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, he urges the court to exercise its inherent powers to prevent abuse of process and to ensure substantive justice by safeguarding the rightful interests of all beneficiaries in the estates of Tom Masiache Murunga and the deceased herein.

10. The application is opposed vide notice of preliminary objection dated 25th November, 2024; which is based on the grounds that the application is fatally defective for breach of Order 9 Rule 9 and 10 of the Civil Procedure Rules and by virtue of being res judicata and the doctrine of laches.

11. The Applicant has filed written submissions dated 15th May, 2025 placing reliance on the following:

    a. Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 where it was stated as follows: "A preliminary objection consists of a point of law which has been placed or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

    b. Hassan Ali Joho & Another v Suleiman Said Shabal & 2 others SCK Petition No. 10 of 2013 [2014] eKLR where it was held as follows: "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."

    c. Omondi vs National Bank of Kenya Limited & Others [2001] KLR 579 [2001] 1 EA 177 where it was stated as follows: "In determining (preliminary objections) the court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters."

12. The Respondent has filed written submissions dated 14th May, 2025 placing reliance on the following:

    a. Owners of the Motor Vessel 'Lillan S" v Caltex Oil (Kenya) Ltd [1989] eKLR where it was stated as follows: "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

        a. Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 where it was said as follows: "... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings ad 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 court giving rise to the suit to refer the dispute to arbitration."

        b. Arthur vs Mariwa & another [2024] KEELC 1207 (KLR) where the court made the following finding: "In my considered view and as has been held in various court decisions, the intent of Order 9 Rule 9 and 10 of the Civil Procedure Rules is to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court to hear and determine the matter, I would not have hesitated but to uphold that once judgment has been rendered, leave has to be sought from the trial court."

Analysis and Determination

13. I have read the application before this court, the responses thereto and the rival submissions.

14. The issues for determination as crafted by the parties are as follows:

a. Whether the Respondent's notice of preliminary objection dated 25th November, 2024 is merited?

b. Who is entitled to costs?

c. Whether the application dated 19. 12. 2023 is res judicata and affected by the doctrine of laches?

d. Whether the Applicant is entitled to the reliefs sought?

15. The law on notices of preliminary objection was well discussed in the East African Court of Justice at Arusha First Instance Division: Reference No. 8 of 2017: Pontrilas Investments Limited Versus Central Bank Of Kenya & The Attorney General of the Republic of Kenya where it was stated as follows:

> 23. Having carefully considered the parties' submissions, it is the considered view of the court that prior to a substantive consideration of the said submissions at this stage, it is imperative that the court confirms that what is before it, is indeed a preliminary objection point of law that would be properly determined as a preliminary objection.
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> 24. whereas the matter under consideration was raised and argued by all the parties as a preliminary objection, the court is alive to the importance of proper procedure in the judicial process.
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> 25. In Attorney General of the Republic of Kenya vs Independent Medical Legal Unit (supra), the Appellate Division of this Court held:
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> > " The improper raising of points by way of preliminary objections does nothing on occasion confuse the issues. The court must therefore, insist on the adoption of the proper procedure for entertaining applications for Preliminary Objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will instead, treat as preliminary objections, only those points that are pure law; which are unstained by facts or evidence, especially disputed points of facts or evidence or such like."
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> 26. This point was underscored in The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa, Appeal No. 7 of 2015 where the court cited with approval the following exposition in Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited (1969) EA 696 (per Newbold), P):
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> > " A Preliminary Objection is in the nature of what used to be demurer. 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 what is sought is the exercise of judicial discretion."
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> 27. The question of what would constitute a proper preliminary objection was further addressed in Attorney General of Tanzania vs African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011, where the Appellate Division of this court held that a Preliminary Objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and facts, the production of evidence and assessment of testimony it 'should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross – examined, and a finding of fact then made by the Court."

16. The principle of res judicata was well articulated in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport And Infrastructure & 3 Others [2021] EKLR where the court stated:

> "(81) We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle 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.
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> (82) If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the *Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.
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> (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:
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> a) There is a former Judgment or order which was final;
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> b) The Judgment or order was on merit;
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> c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
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> d) There must be between the first and the second action identical parties, subject matter and cause of action."

17. In Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR, the court cited, with authority, Uhuru Highway Development Ltd – Vs – Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni where the court in an earlier Application, ruled that "...the Application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined "thrice by the High Court and twice by the Court of Appeal", it could not be resuscitated by another Application..."

The Court of Appeal further stated that:

> " That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much

as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for."

18. The application is framed as a "review" of the confirmation orders of 3rd November, 2010 and the judgment of 5th May, 2014, with consequential prayers for stay, nullification of steps already taken and ultimately revocation of grant, or leave to appeal out of time.

19. This court's primary corrective jurisdiction is revocation/annulment under Section 76 of the *Law of Succession Act* and the court's inherent power under Rule 73 of the Probate & Administration Rules, rather than "review" as understood under the Civil Procedure regime.

20. Substantively, the Applicant pleads the grounds for revocation of grant as provided for under Section 76 to wit alleged concealment of material facts/making of false statements, defective proceedings for want of notice/service to interested beneficiaries and the "double confirmation" problem where the same properties allegedly appear in two certificates of confirmation i.e. the deceased's herein estate and Tom Masiache Murunga's estate, suggesting either wrong estate identification or intermeddling/misdirection in transmission.

21. On the objection, reliance on Order 9 Rule 9 and 10 of the Civil Procedure Rules is often a technical attack relating to change of advocates after judgment. Succession proceedings however are principally governed by the *Law of Succession Act* and the Probate & Administration Rules; and while civil procedure principles may guide, they do not ordinarily override the probate court's duty to do substantive justice in administration of estates.

22. The stronger objection is the doctrine of res judicata whose genesis is the dismissal of the revocation attempt vide the judgment delivered on 5th May, 2014 and the doctrine of laches with regards to the instant application that refers to a judgment that was delivered about nine years prior.

23. Delay remains a serious discretionary factor wherein the Applicant must explain why the overlap, non-disclosure and service defects could not be addressed earlier and must show that reopening the matter is necessary to prevent unjust enrichment or illegal transmission

24. At page 4 of the judgment dated 5th May, 2014, it was stated as follows, "...It was common ground that after the death of Tom Masiache Murunga (deceased), the properties that comprised the estate of the deceased were distributed to the beneficiaries. It was not clear from the affidavit evidence whether the two properties that were jointly registered in the name of the deceased with her late husband were distributed to her. What is without doubt however is that the deceased was jointly registered with her late husband as the owner of the two properties. The presumption therefore is that when her husband died, those two properties reverted to the name of the deceased as the sole proprietor. The said properties had however not been transferred to the deceased at the time of her death..."

25. The two properties aforementioned are those that form the crux of the instant application i.e., Kisumu/Kogony/1827 and L.R. No. MSA/MS/Block 1/742.

26. The court in my view had clearly dealt with the same and the Applicant for whatever reasons failed to appeal against the decision. There is nothing evidenced by the Applicant indicative of his inability to appeal the decision.

27. Litigation must come to an end. Bringing this application almost twelve years later indicates laches on the part of the Applicant as clearly submitted by the Respondents.

28. The Applicants have had all the time to file and argue the application. It is possible that the beneficiaries pursuant to the confirmed grant might have dealt with their bequest in the manner they preferred.

Revoking the grant without any sufficient basis will cause great jeopardy to the parties and the entire estate.

29. There is no plausible reason why the Applicants did not file an appeal against the court's judgement.

30. In essence I find the preliminary objection meritorious and, in any event, I would have found the entire application unmerited.

31. The application is hereby dismissed with costs to the Respondents.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 29TH DAY OF JANUARY 2026.

H K CHEMITEI

JUDGE