

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE NO. 126 OF 2002

IN THE MATTER OF THE ESTATE OF DOMINIC KIHURI
KIBIRA alias DOMENIKO KIHURI s/o KIBIRA alias KIHURI
s/o KIBIRA (DECEASED)

JOHN GITONGA KIHURI (DCD) represented by
LOISE WAMAHIGA GITONGA (widow) ... 1ST

APPLICANT/PROTESTOR

GEOFFREY MUGO KIHURI2ND

APPLICANT/PROTESTOR

JAMES MUTAHI KIHURI (DCD) represented by
MARGARET NJERI WANYIRI 3RD

APPLICANT/PROTESTOR

VERSUS

STEPHEN KIBIRA KIHURI KAGWANJA.....1ST

RESPONDENT

THERESA NJERI KIBIRA
Widow to STEPHEN KIBIRA KIHURI (DCD) 2ND

RESPONDENT

STEPHEN KIBIRA WAMBUI (Nephew) 3RD

RESPONDENT

RULING

1. By the summons for revocation of grant dated 18.5.2023, the Protestors sought for the following reliefs:

- a) Spent.
- b) That pending the hearing and determination of this application this Honourable Court be pleased to place an inhibition on Plot No. Othaya/Kihugiru/561/4 to prohibit any transfer, sale, charge, by the Respondents herein and or their servants and agents.
- c) That grant of letters of administration intestate to the estate of DOMINIC KIHURI KIBIRA alias DOMENIKO KIHURI s/o KIBIRA alias KIHURI s/o KIBIRA (DECEASED) to John Gitonga Kihuri (Dcd), Geoffrey Mugo Kihuri and Stephen Kibira Wambui issued therein and confirmed on 1st October 2020 be revoked.
- d) That upon grant of prayer 3 above this Honourable Court be pleased to issue an order directing the County Government of Nyeri, County Executive Committee Member, Department of Lands, Physical Planning, Housing and Urban Development to rectify the register by cancelling any subdivision and/or dealing on plot No. Othaya/Kihugiru/561/4 after death of the deceased and the title/ownership to revert to the deceased for purposes of distribution.

- e) That upon grant of prayer 3 and 4 above this Honourable Court be pleased to issue an Amended Certificate of Confirmation of Grant in terms of paragraph 25 of the Supporting affidavit annexed herein.
- f) That cost of this application be provided for.

2. The summons was supported by the Affidavit of Geoffrey Mugo Kihuri and was based on the following Grounds:

- (i) The grant was obtained fraudulently by making false statements.
- (ii) The 1st, 2nd and 3rd Protestors did not sign the consents and their signatures were obtained fraudulently.
- (iii) All the 9 siblings did not sign the partial mediation settlement dated 30.4.2019.
- (iv) The mediation settlement was fraudulent and should be set aside.
- (v) The mediation agreement was silent on how LR No. Othaya/Kiahugu/84 of 6.8 acres would be shared
- (vi) LR No. Othaya/Kihugiru/561/4 was to go to Geoffrey Mugo Kihuri and not James Mutahi Kihuri and not John Gitonga Kihuri and not Stephene Kibiru Kihuri.
- (vii) Theresa Bibiru's husband had already received her share in the Nyahururu Farmers Plot no. 1/241.

3. The Petitioner filed a Replying Affidavit dated 8.6.2023 by which it was deposed as follows:

- a) That the Grant arose from a mediation settlement and the Protestors needed leave to set it aside.
- b) The Protestors signed the mediation settlement agreement, having consented to it.
- c) All beneficiaries were served with mediation notices.
- d) The mediation agreement was clear and unambiguous.
- e) The alleged plots were not part of the mediation proceedings.
- f) The Applicants have other pending applications in court and are litigious.

Submissions

4. The Protestors filed submissions dated 3.11.2025. It was submitted that the Protestors had satisfied the grounds for revocation of the grant under section 76 of the Law of Succession Act, that the Protestors were not seeking to review the grant but to revoke it. They cited in *Re Estate of Prisca Ong'ayo Nande (2020) eKLR*.
5. The Protestors also cited Rules 47 and 73 of the Probate and Administration Rules and submitted that a fraudulent grant should be revoked and title revert to the deceased. Reliance was also placed inter alia on **Santuzza Billiot alia Mei Santuzza v Gian Carlo Falasconi (2014) eKLR**.
6. The Petitioner filed submissions dated 25.22.2025 by which it was submitted that the partial mediation agreement was

binding and should not be set aside. Reliance was placed on **Wahiu v Gachanja [2018] eKLR** and **National Bank of Kenya v Ndungu Njau [1997] eKLR**, where it was held that a party who appends his signature to a document is bound unless he pleads and proves *non est factum*, which requires proof that the document signed was radically different from what he believed he was signing. Mere regret is not enough.

7. It was further submitted that if protestors are dissatisfied with the equal division ordered by the court in 2020, the proper remedy was an appeal within time (14 days for succession causes).

Analysis

8. The Protestors questioned the Grant as confirmed. The grounds seeking to set aside the Grant as conformed relate to a false statement, fraudulent signatures, their absence of consent, and the unfair distribution of the estate. The issue for determination is whether the summons for revocation should be allowed, and the mode of distribution done by the Petitioner should be set aside.
9. Section 51 of the Law of Succession Act, requires a person seeking to administer the estate to comply with section 51(2) (g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules, which require disclosure of all the children of the deceased.

10. The Protestor's case was not that they were left out of the succession process. They were involved merely as a formality as decisions were made without their consent. They for instance alleged that they did not sign the partial mediation settlement agreement. However, there was no prayer or application to set aside the impugned partial mediation agreement, and I will not capitalize on this as ground for setting aside the Confirmed Grant.

11. This court has to establish a basis to revoke the grant and interfere with the mode of distribution proposed in the certificate of confirmation of grant as urged by the Protestors. The Grounds for revocation or annulment of grant of Letters of Administration are set out in Section 76 of the Law of Succession as follows:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c)that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d)That the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i)To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii)To proceed diligently with the administration of the estate; or

(iii)to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e)That the grant has become useless and inoperative through subsequent circumstances.

12. The Protestors alleged a false statement of material facts on the part of the Petitioner. The false statement that the Petitioner was said to have made was not stated. Instead, it was the Protestors' case that they did not consent to the

partial mediation settlement. Perhaps they meant that, having not consented and the Petitioner having presented the document showing their consent, this was a false statement. That may be, but consent here was about signing. The only way someone would be properly said to have consented was by signing the partial mediation settlement agreement.

13. The impugned partial mediation agreement is dated 30.4.2019. On the face of it, the Petitioner signed and the Protestors signed. This meant that if a party alleged a forged or fraudulent signature, they were expected to prove their allegation. This being an official court document, the presumption was that it was a valid document.

14. As earlier observed, the only reason the Protestors attacked the grant was that they did not consent to the partial mediation agreement, yet it depicted them as having signed it. The Petitioner's case that all beneficiaries were served and notified of the mediation was not controverted.

15. Therefore, in order to prove their protest, it was the duty of the Protestors to adduce evidence to prove their allegations. On this subject, Sections 107 -109 of the Evidence Act, Cap 80 Laws of Kenya provides that:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

16. The court was to be convinced on a balance of probabilities that the protest was merited. In **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another** [2005] 1 EA 334, the Court of Appeal held that:

"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

17. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **William Kabogo Gitau -vs- George Thuo & 2 Others** [2010] 1 KLE 526 stated that:

"In ordinary civil cases a case may be determined in favour of a party who persuades the court that

the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

18. In the case of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR** the court discussed circumstances when a grant can be revoked. The court observed:

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

19. The Protestors had to seek their relief on the basis of the law and not on their own aspiration of what the justice of the case would be. The Court of Appeal, in **Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat [2015] eKLR**, held that: -

...Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to adjust the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust.

20. The Protestors' case therefore fails since there is no evidence of fraud, concealment of material fact or misrepresentation of facts on the part of the Petitioner. A dispute on the signatures ought to have been supported by evidence that the signature as depicted was not signed by the protestors. An allegation that a signature was falsified was an allegation of forgery, and like fraud, the standard of proof was higher than a mere balance of probabilities. The Protestors did not demonstrate who could have procured the disputed signature and appeared only to insist that they did not consent.

21. The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in **Christopher Ndaru Kagina vs.**

Esther Mbandi Kagina & Another [2016] eKLR where the court stated that -

‘It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its

dishonest nature will not have been pleaded with sufficient clarity.”

In *Armitage v Nurse* [28] Millett L.J. having cited this passage continued:

“In order to allege fraud it is not sufficient to sprinkle a pleading with words like “willfully” and “recklessly” (but not “fraudulently” or “dishonestly”). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.”

22. I am thus unable to exercise discretion to revoke the grant based on the material placed before the court. In the case of **Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 of 2000**, the Court stated as follows:

“[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

23. It was the case of the Protestors that the wishes of the deceased were documented in the minutes of the meeting held

at the office of the DO Othaya on 25.8.1982. That the minutes proved that the deceased had already distributed the property. In Halsbury's Laws of England 4th Edition Volume 20 (1) at paragraph 67 as follows:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.

24. This court is unable to categorize the said wishes of the deceased as a will, for it does not fall anywhere within the four corners of a will under Sections 8 to 16 of the Law of Succession Act, let alone a valid will.
25. However, if the Protestor wanted to rely on the minutes, they should have advanced a case at the earliest including during the mediation on whether the Deceased had already settled his family from the gifts made during his life time. This was not the case of the Protestor. This is because under Section 42 of the Law of Succession Act:

Where -a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild, or house.

26. It is true that the mediation agreement may not have mentioned the land parcel number Othaya/Kiahugu/84. However, the same was part of the matters left for the court's decision on 1.10.2020. The decision was a judicial decision whose challenge can only be dealt with by appeal. There was no appeal. The question is therefore dealt with by a court of coordinate jurisdiction. This court cannot deal with a matter that was already decided by the ruling of 1.10.2020.

27. In the dicta in **In re Estate of Riungu Nkuuri (Deceased) [2021] eKLR** the court stated as follows:

The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the Civil Procedure Act. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that

all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

"(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

28. In the case of **Attorney General & another ET vs (2012) eKLR** it was held that;

"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".

In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC

No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”.

29. In essence, therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All E.R 378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly

belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

30. Res judicata applies to applications just like suits. In the case of **Julia Muthoni Githinji v African Banking Corporation Limited [2020]eKLR** the court stated thus:

14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was *resjudicata* and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

31. Further in **Maumbwa & 3 others v Kisemei** (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated

13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

32. The parties raised similar issues before the decision of 1.10.2020 was made. The parties must learn to live with the court's final decisions. The question of Othaya/Kihugiru/561/4 is therefore *res judicata*. The parties may need to peruse paragraph 19 of the decision of 1.10.2020.

33. The Protestors, instead, raised only the issue of the clan minutes in their submissions, not even in the Application for revocation of the Grant. As a consequence, the assertions were not pleaded and proved, and I find no ground upon which to revoke the confirmed grant. The same is a waste of judicial time.

34. The application lacks merit and is accordingly dismissed. This leaves the issue of costs, which are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat

being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

35. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this

Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

36. The parties may be family. However, they have wasted the court's time and that of the respondents. Under the circumstances, respondents are entitled to costs. A sum of 45,000/= will suffice.

Determination

37. In the upshot, I make the following orders:

- a) The Summons for Revocation of the Grant dated 18.5.2023 is dismissed with costs of Ksh. 45,000/= payable within 30 days failing which, execution do issue.
- b) Directions under section 83 of the Succession Act to be issued shortly.
- c) The estate be transmitted by 16.8.2026.
- d) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **17th** day of **February, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Mr. Karanja for the Applicants

Mr. Muchangi for the Respondent

Court Assistant - Michael

ORIGINAL