

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**SUCCESSION CAUSE NO. 691 OF 2012**

**IN THE MATTER OF THE ESTATE OF NYAGA MAMITHI**  
**(DECEASED)**

**JOSEPH WACHIRA WAIMERA.....**  
**APPLICANT**

**VERSUS**

**WILLIAM** **NYAGA**  
**MAMITHI.....RESPONDENT**

**RULING**

1. This ruling is in respect of the Summons for Revocation of Grant dated 11.6.2021 and filed by the Applicant.
2. The application alleges that the proceedings to obtain the grant, which were confirmed on 13.3.2020, were defective in substance and the grant was obtained fraudulently by making a false allegation and material non-disclosure of crucial facts.
3. It was deposed in substance that the property described as LR No. Kirimukuyu/Mbogoini/247 was registered in the name of the deceased to hold in trust for himself, Kariuki Mamithi and the Applicant's late father, one Murumbo Mamithi.

4. The Respondent filed a Replying Affidavit dated 9.12.2021 in which it was deposed that the application was res judicata as the Applicant had filed a protest against the Summons for Confirmation of Grant raising the same issues and which had been determined and dismissed vide the judgment of this court.

### Submissions

5. The Applicant filed submissions on 12.1.2024. It was submitted that the Applicant had proved that he was one of the beneficiaries of the deceased but was not informed when the proceedings were taken out.

6. It was submitted in this regard that the proceedings in the succession were fraudulent as the Petitioner failed to reveal the existence of the Applicant and other beneficiaries. On his part, the Respondent did not file submissions.

### Analysis

7. On 13.3.2020, this Court, Ngaah J, heard the Applicant's protest and rendered its Judgment by which it dismissed the protest and directed that Title No. Kirimukuyu/Mbogoini/247 shall be shared equally between William Nyaga Mamithi and Muthoni Wachira.

8. The court dismissed that protest on the ground that there was evidence of a trust as alleged by the protestor. I note that the

Applicant has yet to make an attempt to review the Judgment dated 13.3.2020, which Muchemi J dismissed on the ground of failure to formally seek review by an application, rather than by letter.

9. Based on the above observation, which I clearly consider in line with the instant application and the pathway through which the Applicant perceives to get justice, the justice path is not laden with opportunities to settle scores or knock until some door opens or someone gives way. Justice must not be viewed through the thin lenses of what someone conceives and conveys as their meaning of justice. Justice has standards of application. To put it in perspective, justice, in my view, depicts Sir. Owen Dixon's postulation in his Book, *Jesting Pilate and Other Papers and Addresses (William Hein & Co Inc, 2<sup>nd</sup> ed, 1997) page 160* as follows:

**“[I]f it is believed that the technique of the common law cannot meet the demands which changing conceptions of justice and convenience make. The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice. Impatience at the pace with which legal developments proceed must be restrained because of graver issues. For if the alternative to the judicial administration of the law according to a**

**received technique and by the use of the logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor chart. The courts would come to exercise an unregulated authority over the fate of men and their affairs which would leave our system undistinguishable from the systems which we least admire.”**

10. This court, while rendering the said judgment, posited that the protestor had no horse to run in the race pertaining to succession affairs of the deceased, without propounding a trust. It is the same guidelines that the court granted that the Applicant now seeks to scuttle by making a second bite at the cherry. Unfortunately, the question is whether the rules that guide this court will come to the Applicant's rescue. The Respondent deposed that the matters had already been determined and should not be revisited, as they were res judicata.

11. In this regard, Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

*“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.”*

12. The Civil Procedure Act also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms: i. “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.

ii. 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.

iii. 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.”

13. All the above elements of *res judicata* must be satisfied conjunctively. 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."

14. This court has a duty to guard against the tendency to evade the doctrine of res judicata. 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*.....”.**

15. 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.”

16. 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.**

17. Clearly, the issues in the Applicant's protest dated 28.4.2014 were directly and substantially in issue in the Applicant's summons for revocation of grant dated 11.6.2021. Following the determination vide the judgment of this court delivered on 13.3.2020 relating to the same issues, the current summons is res judicata. 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 11<sup>th</sup> January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13<sup>th</sup> 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.

18. Therefore, it is the finding of this Court that whereas the Applicant appears to suggest that the Respondent obtained the confirmed grant fraudulently through nondisclosure of all beneficiaries, the interest that the Applicant seeks in the estate of the deceased is based on the existence or otherwise

of a trust, and which disposition this court already rendered in its judgment.

19. Therefore, the application is devoid of any merit and must fail. I dismiss it.

Determination

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

- a) The Summons for Revocation of Grant dated 11.6.2021 is not merited and is dismissed *in limine*.
- b) Due to his incessant passion to litigate, the Applicant shall pay to the Respondent the costs of these proceedings assessed at Kshs. 55,000/= within 30 days in default of which execution do issue.

**DELIVERED, DATED** and **SIGNED** at **NYERI** on this **9<sup>th</sup>** day of **February, 2026**. Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of: -**

Ng'ang'a Munene for the Applicant absent

Mr. Kamwenji for the Respondent

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