

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
JUDICIAL REVIEW MISC. APPLICATION NO. E006 OF 2025

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION
ACT, 2015
AND
IN THE MATTER OF THE LAW REFORM ACT, CAP 26 OF THE
LAWS OF KENYA
AND
IN THE MATTER OF THE ESTATE OF ONDIEK OWUOR
(DECEASED)
BETWEEN**

**PHILIP OWUOR.....
APPLICANT
VERSUS**

**COLLINS OMONDI OTIENO.....
.....RESPONDENT
RULING**

[1] Philip Otieno Owuor (hereinafter, the applicant), filed this suit by way of an *ex parte* Chamber Summons dated 28th March 2025 seeking the judicial review order of Certiorari to quash a Gazette Notice No. 1772 dated 8th February, 2013. The application was premised on the ground that **Collins Omondi Otieno**, (the respondent in the substantive suit) identified himself in the succession proceedings as a son of the deceased, **Ondiek**

Owuor, while in actual fact he is a nephew to the deceased. It was therefore the contention of the applicant that the Gazette Notice is erroneous and therefore ought to be quashed.

[2] The respondent opposed the application, contending that it is *sub judice*; and that that particular issue of the relationship between him and the deceased, Ondiek Owuor, is *res judicata*. To that end the respondent filed the Notice of Motion dated 23th May 2025 seeking orders that:

[a] The application dated 28th March 2025 be dismissed as it offends the provisions of **Section 6** of the Civil Procedure Act;

[b] The Court be pleased to dismiss the present suit for the same offences the provisions of **Section 7** of the Civil Procedure Act;

[c] Costs of the application be provided for.

[3] The application was premised on the Supporting Affidavit sworn and filed by the respondent on 26th May 2025. He averred that he filed **Oyugis Succession Cause No. 15 of 2013** in which the applicant raised an Objection. He stated that the Objection was heard and determined on the merits; and that the issues raised herein concerning the Gazette Notice No. 1772 and the relationship between the respondent and the deceased were canvassed and resolved. The respondent also averred that the applicant has already lodged an appeal against the ruling of the magistrate's Court in **Oyugis Succession Cause No. 15 of**

2013, being **Homa Bay High Court Civil Appeal No. E064 of 2024** raising the same issues. Lastly, it was the contention of the respondent that, since the Grant issued in the Succession matter is yet to be confirmed, the subordinate court will still have an opportunity to resolve any outstanding issues pertaining to the Grant and the relationship between the applicant and the deceased.

[4] The applicant opposed the application vide his Replying Affidavit sworn on 30th May 2025. He averred that the relief sought herein is judicial review and therefore the substantive application cannot be said to be *res judicata* the previous cause, which was essentially a succession cause. He further averred that the respondent would not have applied for joinder of the interested parties if indeed the application was *sub judice*. Hence, the applicant urged for the dismissal of the application dated 23rd May 2025.

[5] The application was canvassed by way of written submissions pursuant to the directions given herein on 27th May 2025. In the respondent's written submissions dated 1st June 2025, he proposed the following issues for determination:

[a] Whether or not the present application is *Res Judicata* the Oyugis Succession Cause Number 15 of 2013.

[b] Whether or not the present application is *Sub Judice* the Homa Bay Civil Appeal Number E064 of 2024.

[c] Whether the present application is meritorious.

[d] Which party to bear costs.

[6] The respondent submitted that the issue as his relationship with the deceased was fully ventilated before the Oyugis SPM's Court and a final decision made by a court of competent jurisdiction. On that account, the respondent submitted that the issue is *res judicata* for purposes of **Section 7** of the Civil Procedure Act.

[7] It was also the submission of the respondent that the subject matter before the Oyugis court in **Succession Cause No 15 OF 2013** is the administration and eventual division of the assets comprising the Estate of the late **Ondiek Awuor**. It was therefore his argument that since the instant matter concerns the same estate, he has demonstrated that the parties are litigating under the same title. In his view, the efforts by the applicant to coin the heading and thereby diverting the matter to another division of the Court is just a ploy to multiply suits before the court yet the main issue for determination is the same.

[8] The respondent relied on **Bernard Mugo Ndegwa v James Nderitu Githae** and **Mombasa High Court Constitutional Petition No. E007 of 2022: Peter Mumira v Attorney General** for an explication of the rationale for the *res judicata* doctrine.

[9] The respondent also submitted that there is a pending appeal arising from the ruling of the court in the Oyugis matter, namely, **Homa Bay High Court Civil Appeal No. E064 of 2024**. He posited that the issue of the Gazette Notice is central to the appeal and therefore the instant suit is an affront to the sub-judice rule as contemplated under **Section 6** of the Civil Procedure Act. The respondent pointed out that one of the Grounds of Appeal (paragraph 6) states that:

“...the respondent filed succession documents which had errors as the respondent called himself a son of the deceased while the appellant filed an objection is when the respondent stated that he was a nephew hence the respondent violated section 76 of the laws of succession, the grant was fit to be revoked due to wrong representation and defective in nature.”

[10] The respondent submitted that the same ground has been raised by the applicant in his application under paragraphs (a) to (e) of his Statement of Facts which all touch on the Gazette Notice. Accordingly, the respondent contended that the substantive application is *sub judice* vis a vis **Homa Bay High Court Civil Appeal number E064 of 2024**. The respondent relied on **Kakamega ELRC Civil Suit No. E006 of 2023: Miller Chemonges Pktain & another v Cloud Factory Kenya Limited** and urged that the instant suit be struck out with costs or stayed for being *sub-judice*.

[11] The applicant filed written submissions dated 18th June 2025. He reiterated his position that the process of obtaining the grant by the respondent was marred with illegalities; and that to use the impugned Gazette Notice to give effect to the succession process would be to

commit an illegality. Accordingly, the applicant proposed the following issues for determination:

- [a] Whether the matter is *res judicata*.
- [b] Whether the matter is *sub judice*.
- [c] The nature of the judicial review application.

[12] The applicant relied on **Section 7** of the Civil Procedure Act and the case of **Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others** [2014] eKLR for the proposition that to constitute *res judicata*, there must be an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. In the applicant's submission, the Gazette Notice describing the respondent herein as a son instead of a nephew of the deceased was not an issue that was heard and determined in **Oyugis Succession Cause No. 15 of 2013**.

[13] The applicant further submitted that the **Succession Cause No. 15 of 2013** dealt, not with the legality of the Gazette Notice, but the distribution of the estate of the deceased. Hence, in his submission, the substantive application is not *res judicata*.

[14] On whether the suit is *sub-judice*, the applicant also relied on the decision of the Supreme Court in **Kenya National Commission on Human Rights** to support his argument that the doctrine can only be invoked where there is more than one suit over the same subject matter. He submitted that the

pending **Homa Bay High Court Civil Appeal No. E064 of 2024** challenges the lower court's decision in **Oyugis Succession Cause No. 15 of 2013** and not the legality of the Gazette Notice under public law. The applicant further submitted that what he seeks by these proceedings is to question the legality of the process under **Article 47** of the Constitution and **Section 7** of the **Fair Administrative Action Act**, but not the beneficiary; and that even if the facts overlap, the issues and reliefs sought are not identical.

[15] The applicant relied on **Commissioner of Lands v Kunste Hotel Ltd** in which it was held that the purposes of judicial review is to ensure that an individual receives fair treatment. Hence, according to the applicant, the respondent has not demonstrated any identifiable elements of *res judicata* or *sub judice* to warrant the issuance of the orders sought by him. He prayed that the application be dismissed with costs.

[16] I have given due consideration to the respondent's application dated 23rd May 2025, the averments set out in the parties' respective affidavits and the written submissions filed on their behalf by their counsel. The two key issues for determination are:

[a] Whether this suit for Judicial Review is *sub-judice*; if not,

[b] Whether it is *res-judicata*.

[c] What orders ought to be made on costs.

On res sub judice:

[17] It is a peremptory requirement of **Section 6** of the **Civil Procedure Rules** that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

[18] The underlying rationale for this provision is to prevent courts of concurrent jurisdiction from simultaneously hearing two parallel suits in respect of the same subject matter. In **Kenya National Commission of Human Rights** the Supreme Court pointed out that:

"[67]The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination. The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

[19] The existence of the previous suit before Oyugis SPM's Court is not in dispute. It is also not in dispute that the applicant has preferred an appeal from the decision of the magistrate's court in which his Objection was dismissed; and therefore the parties are the same. This is manifest from the documents annexed to the respondent's

Supporting Affidavit, notably a copy of the Memorandum of Appeal. That appeal is still pending before this Court and although the applicant endeavoured to distinguish the cause of action in this matter from what was before the Magistrates Court at Oyugis, the core issue is the same, namely, that the respondent misrepresented himself as a son of the deceased and yet he is a nephew. This is manifest in the averments made in support of the substantive judicial review application. There is therefore no dispute that the issue of the impugned Gazette Notice, sought to be quashed herein, is also a critical issue in the appeal.

[20] In **Kenya Airports Authority v Anthony Mutumbi Wachira** [2015] eKLR, the Court of Appeal took the following view:

"We think, as a matter of policy of the law that finds expression in Section 6 of the Civil Procedure Act for instance that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed. The sound object behind that policy is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits or proceedings in respect of the same subject matter in issue.

[21] it is therefore my finding that indeed, this Judicial Review application is untenable on the ground that it is *sub judice*. That finding alone is sufficient to dispose of the application. Accordingly, the respondent's application dated 23rd May 2025 is hereby allowed and orders granted as hereunder:

[a] The applicant's application dated 28th March 2025 be and is hereby struck out as it offends the provisions of **Section 6** of the Civil Procedure Act;

[b] As the parties are related, each party to bear own costs of this suit.

[c] Costs of the application be provided for.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY

THIS 6TH DAY OF FEBRUARY 2026

OLGA SEWE

JUDGE

ORIGINAL