



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 3135 OF 2001
IN THE MATTER THE ESTATE OF PAUL MBUGUA KAGUCIA
(DECEASED)

LILIAN WAMBUI MURIRA 1ST

APPLICANT/ADMINISTRATOR

PAUL MBUGUA MURIRA 2ND

APPLICANT/ADMINISTRATOR

VERSUS

LUCY NJERI KAGWIMA

RESPONDENT/OBJECTOR

RULING

1. This ruling relates to the applications dated **28th September, 2020** filed by the Applicants, Lilian Wambui Murira and Paul Mbugua Murira; seeking for **ORDERS THAT:**

1. **THAT the confirmed grant intestate made to the said LILIAN WAMBUI MURIRA and PAUL MBUGUA MURIRA in this matter on the 28th day of February 2005 be revoked for the following reasons: -**

a) There was non-disclosure of material facts by reason that an asset which was supposed to be part of the Estate of the Deceased was left out during the distribution of the Estate.

b) The asset being KABETE/NYATHUNA T.162 ought to be taken into consideration during the distribution of the Estate of the Deceased.

c) Costs of this application shall be provided for.

2. The application is based on the grounds on its face and supported by affidavit sworn by Paul Mbugua Murira and Eliud Mburu Kamau on **22nd September, 2020**. They aver *inter alia* that the Applicant seeks revocation of the confirmed grant issued on **28th February, 2005** to the respondents on the ground of material non-disclosure, contending that a key asset forming part of the deceased's estate was omitted during distribution. It is specifically averred that the property known as **KABETE/NYATHUNA/T.162** was excluded from the schedule of assets and ought to be considered in any lawful distribution of the estate. The Applicant maintains that such omission amounts to concealment of material facts, thereby rendering the grant defective and liable to revocation.

3. The application is opposed vide preliminary objection dated **17th September, 2021** and replying affidavit sworn by Lucy Njeri Kagwima on **17th September, 2021**.
4. The preliminary objection is based on the grounds that the application is *Res Judicata*, the court having heard and determined a similar application is *functus officio* and the court lacks jurisdiction to hear and determine the application.
5. In the replying affidavit, she avers *inter alia* that the application is *res judicata*, the court having previously heard and conclusively determined a similar application, thereby rendering the present court *functus officio* and devoid of jurisdiction to re-open the matter.
6. The issue of the suit property and its distribution was litigated and determined in earlier proceedings, culminating in a ruling delivered on **26th June, 2008** and a subsequent ruling on **21st June, 2010**, which dismissed an application for review.
7. She contends that the Applicant had full knowledge of the material facts at the time, including the status and subdivision of the original parcel number **Kabete/Nyathuna/601** and that any alleged omission or error was neither new nor undiscoverable with due diligence.
8. She further avers that the Applicant unsuccessfully pursued appellate remedies, including filing a notice of

appeal and is now improperly seeking to re-litigate settled issues under the guise of revocation.

9. In support of the application, the Applicants have filed written submissions dated **31st October, 2024**.
10. In opposition to the application, the respondent has filed written submissions dated **15th November, 2021**.

ANALYSIS AND DETERMINATION

11. I have read the application before this court, the responses thereto and the rival submissions.
12. The preliminary objection raises the issues of *res judicata*, *functus officio* and jurisdiction, which are pure points of law.
13. 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.

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.

25. In Attorney General of the Republic of Kenya vs Independent Medical Legal Unit (supra), the Appellate Division of this Court held:

“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.”

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):

“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.”

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.”

14. In **Kennedy Mokuia 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.

15. **In re Estate of Joshua Githiari Kibui (Deceased) [2021] eKLR** the court stated as follows:

“18. For avoidance of doubt, Section 76 of the Law of Succession Act states as follows:

a. “76. Revocation or annulment of Grant

b. 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—

20. Further, In the Matter of the Estate of L A K - (Deceased) [2014] eKLR the court held that;

(a) Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.

32. The court in the case of Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows:-

a. “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.”

33. In the case of Matheka and Another vs Matheka [2005] 2KLR 455 the Court of Appeal laid down the following guiding principles as to revocation of grants.

(a) “i. A grant may be revoked either by application by an interested party or by the court on its own motion.

(b) ii. Even when revocation is by the court upon its 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”

16. The annexed rulings and proceedings clearly demonstrate that the question of distribution of the estate, including the status of the suit property and its subdivisions, was substantively litigated and determined in earlier proceedings culminating in rulings delivered on **26th June, 2008** and **21st June, 2010**.

17. The subsequent application for review, where the issue of omission of parcel number **Kabete/Nyathuna/T.162** was expressly raised, was dismissed on the basis that the matter did not constitute new evidence and was within the knowledge of the Applicant. These determinations were final and were not successfully overturned on appeal.
18. Consequently, the present application, which is premised on the same factual matrix and seeks substantially similar relief, falls squarely within the ambit of *res judicata*, as it seeks to re-open issues conclusively determined by a court of competent jurisdiction.
19. On the merits of the application for revocation under **Section 76** of the Law of Succession Act, the Applicant bears the burden of demonstrating concealment of material facts, fraud or defect in the proceedings leading to the grant. While the annexures relied upon, particularly the land register extracts, suggest the existence of the parcel in question and raise a *prima facie* issue of possible omission, they do not conclusively establish that the property formed part of the deceased's free estate at the time of confirmation of the grant.
20. More significantly, the replying affidavit annexures, including prior rulings, proceedings and historical title documents, demonstrate that the issue of subdivision and ownership of the land was known, litigated and judicially addressed.

21. The evidentiary material, therefore, does not meet the statutory threshold under **Section 76**, as the alleged new matter is neither novel nor previously undiscoverable with due diligence, but rather a reiteration of issues already canvassed and determined.
22. In the circumstances, I find that this court lacks jurisdiction to re-adjudicate the matter, having become *functus officio* upon rendering its earlier decisions. To entertain the present application would offend the principles of finality in litigation and amount to an abuse of the court process.
23. **Accordingly, the preliminary objection dated 17th September, 2021 is merited and the application dated 28th September, 2020 is dismissed for lack of merit.**
24. **Each party to bear its own costs.**
**Dated signed and delivered at Nairobi via video link
this 16th day of April 2026.**

H K CHEMITEI
JUDGE