



REPUBLIC OF KENYA



In re Estate of Kipkoske Ngetich alias Kipruto Ngetich (Deceased) (Succession Cause 117 of 2008) [2026] KEHC 4314 (KLR) (31 March 2026) (Ruling)

Neutral citation: [2026] KEHC 4314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 117 OF 2008**

JK SERGON, J

MARCH 31, 2026

**IN THE MATTER OF THE ESTATE OF THE LATE KIPKOSKE
NGETICH ALIAS KIPRUTO NGETICH (DECEASED)**

BETWEEN

GEOFFREY KIMUTAI LANGAT 1ST ADMINISTRATOR

ELIJAH KIPKORIR ROTICH 2ND ADMINISTRATOR

AND

JOEL TONUI OBJECTOR

RULING

1. Before this Court is the Notice of Preliminary Objection dated 16th September 2025 filed by the Respondent together with the application dated 22nd August 2025 seeking review and /or revocation of the grant issued in respect of the estate of the deceased .The court has also considered the replying affidavit filed in opposition to the said application.
2. Neither parties filed any written submissions in respect to the Notice of Preliminary Objection.
3. The Applicants filed in Court the Summons for Review of Grant dated 22nd August 2025. The Respondent opposed that application through the Replying Affidavit dated 19th September 2025.
4. Before the application could be heard, the Respondent filed the Notice of Preliminary Objection dated 16th September 2025 in which he argued that the Summons dated 22nd August 2025 was ‘Res Judicata’ and amounted to an abuse of court process.
5. I have carefully considered the Preliminary Objection as well as the court records.



6. The definition of what constitutes a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Company Ltd -vs- West End Distributors Ltd* [1969] E.A in which the court stated 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 the suit. Examples are an objection to the jurisdiction of the court, or a place of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....A Preliminary Objection is in the nature of what is used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is exercise of judicial discretion.”

7. In *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Limited & 3 Others* [2015] eKLR, the Supreme Court of Kenya stated that;

‘A Preliminary Objection may only be raised on a “pure question of law”

8. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record.”

9. Therefore in order for a Preliminary objection to succeed, the following tests must be satisfied;-

- (i) The Preliminary Objection should raise a pure point of law.
- (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
- (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.

10. Therefore a genuine and proper Preliminary Objection can only raise pure points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.

11. The main grounds on which this Preliminary Objection is based is that the summons for review of Grant dated 22nd August 2025 is ‘Res Judicata’. That the same issues were raised and determined as per the proceedings of 7th May 2025.

12. Section 7 of the *Civil Procedure Act* sets out the principle 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 under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relied claimed.”



13. The Court of Appeal expounded further on this principle in the case of *IEBC -vs- Maina Kiai & 5 Others* Civil Appeal No. 105 of 2017, where it was stated: -
- “Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:
- 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. In the same case the Court went on to state thus: - “The rule or doctrine of ‘res judicata’ serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for to obtain at last, outcomes favorable to themselves. Without it, there would no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
15. I have considered the application dated 9th February 2022, seeking revocation of the Grant issued on 21st September 2017 to the same Applicants.
16. I have equally considered the application dated 22nd August 2025 seeking review of the grant issued on 21st September 2017 and I have perused the courts proceedings for 7th May 2025. The matter was coming up for hearing of the application dated 9th February 2022. 17. The record shows that the Applicants filed an application for revocation of grant dated 9/2/2022 which was dismissed for want of prosecution on 7/5/2025 with costs. The critical question is whether dismissal for want of prosecution amounts to a matter “heard and finally determined.” A dismissal for want of prosecution is procedural in nature. It is premised on failure to prosecute and not on adjudication of the substantive merits of the issues raised. There is no evidence that the earlier application was heard, evidence taken, or that the Court made a determination on the validity or otherwise of the grant. For res judicata to apply, there must have been a conclusive determination of the issues in controversy. A procedural dismissal does not meet this threshold. Accordingly, the essential ingredient of a matter having been “heard and finally determined” has not been satisfied.
17. A look at the summons dated 22nd August 2025 reveals that the Applicants main grievance appears to be the mode of distribution of the estate which they term unfair. The replying affidavit filed by the applicant raises allegations of fraud, concealment of material facts and lack of consent of beneficiaries in the process leading to issuance of grant. These substantive issues which require determination on their merits and cannot be shut out at the threshold stage by way of a preliminary objection.



18. Having considered the Preliminary Objection and the application dated 22nd August 2025, this Court makes the following findings:

- a) The Preliminary Objection dated 16th September 2025 lacks merit and is hereby dismissed
- b) The application dated 22nd August 2025 together with the replying affidavit shall proceed to hearing on its merits.
- c). Each party to meet their own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 31ST DAY OF MARCH, 2026

.....

J. K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

No Appearance

