

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO 278 OF 1987

IN THE MATTER OF THE LATE MAKOKHA KOLOMBANI OTSIMBO (DECEASED)

AND

SYLVESTER ODANGA MAKOKHA----- PETITIONER/
RESPONDENT

VERSUS

HELLEN MUTANDA CHISAKA }
JACKELYNE SARAH MAKOKHA }
JENIPHER ADHIAMBO MAKOKHA }
MARY MATSESHE CHISIRA }
APPLICANTS

JUDGMENT

1. The matter herein refers to the estate of Makokha Kolombani Otsiambo who died intestate on 15th June 1980. His son and petitioner Silvester Odango filed for letters of Administration intestate against his estate which comprised of S/WANGA/EKERO/408. The certificate of confirmation of grant was issued on 4th October 1989.
2. The Applicant herein filed a notice of motion application dated 17th June 2022 praying that the certificate of confirmation of the grant issued in the succession be annulled.
3. The applicant in their supporting affidavit states that they are daughters of the deceased and heirs/ beneficiaries to the estate while the petitioner is their brother.

4. They state that their mother Marsela Mona Makokha was now deceased and that their deceased father estate comprised of S/Wanga/Ekero /408 measuring 3.2 ha and that it was shared between the two Marcella Makokha receiving one acre and Silvester Odanga Makokha receiving the rest and that their interest was not considered in the mode of distribution to their detriment.
5. They pray that the certificate of confirmed grant be annulled and that a fresh one be issued to all the surviving beneficiaries.
6. The petitioner, Sylvester Odanga Makokha filed a replying affidavit dated 3rd June 2023 opposing the application for annulling the grant and avers that he had entered into a consent with the applicant's mother Marsela Makokha over 34 years ago on the mode of distribution and the estate was already distributed after a consent hence the application is res judicata as the application had already been brought to court by their late mother who had died on 29/01/2019 before the matter was prosecuted.
7. He states that the 3rd applicant Janepher Adhiambo Makokha applied to be substituted with the late mother in the proceedings dated 29/01/2019 and a ruling was issued in court and the attempt by the applicant to revive the application is a waste of the court's time as litigation must come to an end.
8. The Applicants filed a further affidavit dated 20th December 2023 in response to the respondents/ petitioners replying affidavit by stating

that the application dated 29/1/2019 was different from the current application dated 17/06/2022 as the earlier one was filed by their late mother while the current one was filled by themselves and that the two application sought different orders hence it cannot be *res judicata* and that the succession proceedings can only be finalized if the application dated 17/6/2022 is decided.

9. On 28th November 2024, the applicants filed their submissions in relation to their application dated 17/06/2022 where they sought for an annulment of the certificate of the confirmed grant where they state that the estate which comprised of S. Wanga/ Ekeru/408 measuring 8 acres was unfairly distributed as follows;

- 1) Silvester Odanga Makokha- 3 acres
- 2) Philip Makokha- 2.5 acres
- 3) Rosalia Makokha- 1.5 acres
- 4) Marcella Makokha- 1 acres

10. They submitted that the petitioner had excluded the other children belonging to Marcella Makokha and they were not given any share of the estate except their mother who was issued with only one acre of the land

11. They denied the allegation that the matter was *res judiacta* as the initial applicant was their mother. They aver that the petitioner had admitted that his mother and brother Rosalia Makokha and Philip Makokha had died and that the certificate of confirmed grant issued

on 4/10/1989 and since then the petitioner had not taken any step to have the grant implemented to its finality .

12. they pray that the grant confirmed be annulled and the estate be divide equally among the deceased beneficiaries Silvester Odanga Makokha, Hellen Mutanda Chisaka, Jackelyne Makokha, Jenipher Adhiambo Makokha and Mary Maseshe Chisira with each getting 1.6 acers.

Petitioner's submissions

13. The petitioner stated that the deceased was their biological father and before his demise he was survived by two wives being Rosalia Nelima Makokha 1st wife (2020 deceased) and Marcella Mona Makokha (2019) deceased.
14. He confirmed that the 1st wife were blessed with two sons himself Silvester Odanga Makokha (petitioner) and Philip Odhiambo Makokha(deceased) while the second house survived by five children Hellen Mutanda Chisika, Bernetta Maero Makokha(deceased) Jacelyne Adhiambo Makokha- 3rd applicant and Mary Mateshe Chisika (4th applicant).
15. He acknowledged that the deceased father had left behind one parcel of land L.R S. WANGA/EKERO /408 measuring 8 acres and confirmed that the succession proceedings began in 1987 while the two widows were still alive and finalized with a consent on distribution

of the two houses which was acceptable and the grant confirmed by the court on 4/10/1989.

16. According to the petitioner his brother Philip Makokha died on 25/10/1989 and he has been utilizing his late brother's portion of land.

17. He stated that the applicant's mother made an application on 29/10/2019 for a review of the consent judgment dated 04/10/1989 and she died on 07/10/2019 before the application was prosecuted. he claimed that the 3rd Applicant Janepher Adhiambo Makokha applied to be substituted with her mother in the succession proceedings and that she prosecuted the application which the court dismissed in a ruling dated 10/12/2021.

18. They aver that there is no appeal preferred on the ruling by Hon. Musyoka and now the applicant has come seeking an order similar to the application dated 29/01/2019 which they now claim is res judicata and should be dismissed but this court.

Analysis and determination

19. I have considered the Notice of Motion application 17th June 2022, the affidavits in support and against as well as the rival submissions by both parties.

20. The two main issue for determination is whether this court should annul the certificate of confirmation issued to the petitioner on 4th October 1989 and whether the said application by the applicant is *res judiacta*.
21. The Respondent raised the claim of *res judicata* stating that the issues raised by the Applicant had already been decided by this court. He avers that the Applicants' mother filed a similar notice of motion application dated 29th January 2019. The doctrine of *res judicata* is provided for under Section 7 of the Civil Procedure Act. The doctrine requires that the matter in issue is the same, between the same parties and has been finally determined by a court of competent jurisdiction.
22. I have perused the court record and note that the Applicant's mother Marsella Makokha filed a chamber summons application on 29th January 2019 seeking orders for a review and rectification of the estate of the deceased and the respective shares be reviewed and the same was dismissed in a ruling by justice Musyoka dated 10th December 2021. The court found that it lacked jurisdiction on the matter of reviewing the order but it did not deal with the issue of annulling of the confirmed grant.
23. In this instance, the Applicants came in as daughters of the deceased and beneficiaries to the estate. The question that arises is whether they are litigating under the same title as their late mother.

24. In **E.T v Attorney General & Another (2012)** the Court held that parties must be the same or litigating under the same title for *res judicata* to apply. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) (Civ)**, the court reiterated the rationale of *res judicata* as a bar against re-litigation on matters already decided with finality, grounded in the need for conclusiveness and avoidance of multiplicity of suits.
25. On the facts pleaded by the petitioner, the first application was brought by the Applicants' late mother, and later there was a substitution of the daughter to act on her behalf on succession cases and a ruling. However, the court is persuaded that the petitioner has not demonstrated that the present motion dated 17th June 2022 was identical in subject matter and cause as the earlier dismissed application.
26. The Applicants have deposed that the earlier application was made by their late mother who sought for review of the grant orders while the current application is by the applicants seeking annulment of the certificate of confirmation of grant and redistribution to all surviving beneficiaries.
27. In succession cases, the court has a mandate to ensure that the confirmed grant accurately reflects the correct beneficiaries and that the distribution complies with the law governing intestate estates.

Where beneficiaries allege omission or improper consideration, the dispute concerns the substrate of the distribution arising from the confirmation process.

28. The court therefore finds that the petitioner's reliance on *res judicata* is, in the circumstances, not sufficient to bar the present application, because:

the parties advancing the current claim are the applicants themselves and the application is on the annulment of the confirmed grant, which is a distinct and continuing issue affecting distribution outcomes to beneficiaries who assert they were not properly included.

29. I accordingly hold that the application is not *res judicata*.

30. On whether the certificate of confirmed grant should be annulled.

31. The law governing revocation or annulment of grants is Section 76 of the Law of Succession Act. A grant may be annulled where it was obtained fraudulently, by concealment of material facts, or where the proceedings were defective in substance.

32. The Applicants contend that they were excluded from the distribution of the estate.

33. The record shows that the grant was confirmed on 4th October 1989 based on a consent between the widows of the deceased. However, there is no evidence that the Applicants, who were

beneficiaries, were consulted or involved in the confirmation proceedings.

34. The failure to disclose all beneficiaries to the Court at the time of confirmation constitutes material non-disclosure. **In re Estate of Lerionka Ole Ntutu 2008 eKLR (Deceased)** the Court held that exclusion of beneficiaries is a sufficient ground for revocation of a grant.

35. Similarly, the Court of Appeal in **Mary Rono vs. Jane Rono and William Rono C.C.A. No.66 of 2002** emphasized that daughters are entitled to equal inheritance rights and should not be discriminated against.

36. I have had a look at the mode of distribution which effectively allocated the share of the second house to the widow of only one acre without regard to the deceased daughters who had been excluded the Applicants.

37. The fact that the grant was confirmed 34 years ago does not bar this Court from intervening. I am satisfied that the Applicants have demonstrated that the grant was confirmed without full disclosure of all beneficiaries and in a manner that prejudiced their rights.

38. This renders the proceedings defective and warrants the intervention of this Court. Where a confirmed grant is challenged on cogent grounds the court may intervene by annulling the certificate of

confirmation so that the estate is redistributed to reflect the correct beneficiaries.

39. The court notes that the applicants are alleging exclusion/omission in the mode of distribution. The petitioner's own confirmation of the family structure and the existence of beneficiaries of the two houses means the court must scrutinize whether the distribution captured the children of both houses as intended under intestacy principles.

40. Having considered the rival affidavits and submissions, and considering the seriousness of the allegation that some beneficiaries were not adequately considered in the confirmation process, the court is satisfied that the applicants have made out a basis for the annulment.

ORDERS

41. The Notice of Motion dated 17th June 2022 is allowed on the following terms:

- a) The certificate of confirmation of grant issued on 4th October 1989 is hereby annulled.
- b) The petitioner shall, within thirty (30) days from the date hereof, take steps to have a fresh certificate of confirmation issued for purposes of redistribution of the estate to include all entitled surviving beneficiaries.

- c) The fresh distribution be undertaken taking into account all deceased children and if one has died the share to go to the children of the deceased child/children.
- d) There shall be no orders as to cost as this is a family dispute.
- e) Mention 30.6.2026 for compliance and further orders.
- f) Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Angong'a/Velma

Mr. Mukavale J for the Protestors present.

Mr. Elung'ata for the Petitioner absent.

Petitioners present.