REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 1349 OF 2013

IN THE MATTER OF THE ESTATE OF EDWIN OKELO AGOT OKECH - DECEASED

AND

STEWART JALANG'O AGOT ..... 1ST APPLICANT

PHILIP JALANG'O ..... 2ND APPLICANT

VERSUS

GEORGE OKOTH ODONGO ..... ADMINISTRATOR

R U L I N G

1. **EDWIN OKELLO AGOT OKECH** ("the deceased"), passed on **9/4/2011.** Grant of Letters of Administration Intestate were issued to **Stewart Jalang'o Agot,** the 1st applicant on **30/4/2013** and confirmed on the **15/12/2014**.

2. Upon learning of the grant to have been issued to the 1st applicant, **GEORGE OKOTH ODONGO** ("the administrator") initiated revocation proceedings on the grounds that the grant was procured by way of false representations and concealment of material facts specifically that the administrator and others were children of the deceased.

3. In its judgment delivered on **4/4/2019**, this Court (Cherere J) agreed with the administrator and revoked the grant. In granted the administration jointly to the administrator and one **Beatrice Okelo** and cancelled the 1st applicant's registration as the proprietor of **LR No. North Sakwa/Maranda/1622**, the only asset of the deceased.

4. Being aggrieved by that judgment, the 1st applicant appealed to the Court of Appeal vide **Civil Appeal No. 234 of 2019**. Upon considering the same, the Court of Appeale upheld this court's decision of **4/4/2019** and dismissed the appeal in a judgment delivered on the **7/3/2025**.

5. Subsequently, on **1/7/2025,** this Court issued a Certificate of Confirmation of Grant to the Administrator herein and confirmed the distribution of land parcel **North Sakwa/Maranda/1622** (the deceased's only asset) wholly to him.

6. Vide an application brought under Certificate of Urgency dated **3/7/2025**, the 1st applicant sought to have the grant confirmed to the administrator on the **1/7/2025** revoked and/or annulled and the deceased's estate re-distributed *de novo.*

7. While the aforesaid Summons for revocation was pending, the applicants lodged a Summons dated **6/10/2025** seeking exhumation of the deceased's body and extraction of DNA samples from the administrators of the

deceased's estate and his other children so as to establish their paternity in relation to the deceased.

8. The applicants did not cite the provisions under which they were moving the Court. However, the Summons was anchored on the grounds set out on the face thereof as well as the supporting affidavit of **Stewart Jalang'o Agot** sworn on the **6/10/2025**.

9. It was contended that having carried out due diligence, the applicants established that the administrator had two birth certificates showing his father as the deceased and one **Walter Odongo Oloo**. That the administrator was registered in his identity card with the surname **Odongo**, the name of his real father thus there was need for his identity to be established.

10. That consequently, the Certificate of Grant issued to the Administrator on the **1/7/2025** was obtained through fraudulent information of the administrator's parentage.

11. In response, the administrator relied on the replying affidavit sworn on the **11/7/2025** which was in response to the applicants' Summons for Revocation dated **3/7/2025**. The said replying affidavit did not address any issue raised in the summons subject of this ruling. However, in his submissions dated **7/11/2025**, the administrator submitted the issues raised by the applicants

had already been considered by this Court as well as the Court of Appeal and thus the instant application was devoid of merit.

12. I have considered the submissions filed herein and the record entirely. The applicants' summons was anchored on the issue of the administrator's paternity. This is an issue that was at the core of the administrator's successful summons for revocation of grant originally issued to the 1st applicant as well the 1st applicants appeal in Kisumu **Civil Appeal No. 234 of 2019** where the Court of Appeal interrogated the issue of the Administrator's paternity in relation to the deceased and found the same to have been positively proved.

13. The applicants are now urging this Court that, after their due diligence (sic), to exercise its discretion and find that there is need to establish the administrator's paternity through DNA examination in comparison to the exhumed body of the deceased. The administrator posited that the matters had already been determined and should not be revisited.

14. The doctrine of *res-judicata* is a principle of general application that is to be found in ***Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya***. It 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."

15. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-4 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.

iv) Explanation (4)---Any matter which might and ought to have been made a ground of defence or attack in the former suit

shall be deemed to have been a matter directly and substantially in issue in such suit".

16. In my view, the provisions of the ***Civil Procedure Act, Cap 21 Laws of Kenya,*** being an Act of Parliament to make procedure in civil courts, where necessary are applicable in family proceedings to the extent that they do not contradict the substantive provisions of the ***Law of Succession Act Cap 160 of the Laws of Kenya.*** In this regard, I hold and find that the doctrine of *res-judicata* is as applicable in succession matters as it does in all other civil matters.

17. **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."

18. 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 merit 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."

19. In the present case, the issue of the paternity of the respondent and the requirement for DNA was considered by the Court of Appeal in its judgment of **5/3/2025** thus: -

"26. From the evidence tendered in court, we are satisfied just like the trial court that the respondent proved that indeed he was the son of the deceased and equally had other siblings. If the appellant was contesting the same, <u>the noble thing he would have done was to make an application for the DNA testing that counsel for the appellant has now belatedly raised in his submissions.</u> In the case of <u>BAY vs. ABG & Another</u> (Civil Appeal E019 of 2021)[2013] KEHC 25995, this Court reiterated that issues regarding the admissibility of evidence, including the need for DNA testing, should be addressed at the trial. The failure to apply for a DNA test in the trial court was

deemed a significant oversight that could not be rectified on appeal".

20. Clearly, the issue of the administrator's paternity as raised in the instant Summons was considered by both this court and the Court of Appeal. It was found in favour of the Administrator. The matter cannot be re-hearsed again. *Explanation 4* of ***section 7 of the Civil Procedure Act*** sought to cure and address such instances. The avenue for DNA testing was closed the moment the applicants failed to call for it at the trial. There can be no litigation by instalment. Litigation must come to an end at some point.

21. Accordingly, I hold that the issues being raised in the Summons dated **3/7/2025** and **6/10/2025** have previously been dealt with by this Court and the Court of Appeal. They are *res-judicata.* This Court lacks jurisdiction to re-hear and determine them. The two Summons are therefore stuck out with costs.

It is hereby so ordered.

DATED and **DELIVERED** at Kisumu this **24th** day of **April**, **2026**.

A. MABEYA, FCI Arb

JUDGE