



In re Estate of Iddi Makokha Mwima (Deceased) (Succession Cause 661 of 2013) [2025] KEHC 6207 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 6207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 661 OF 2013**

S MBUNGI, J

APRIL 30, 2025

IN THE ESTATE OF IDDI MAKOKHA MWIMA- DECEASED

BETWEEN

ALI MAKOKHA WANGATIA 1ST APPLICANT

FLORA WERE AUMA(SUING AS THE LEGAL REPRESENTATION OF ESTATE OF PATRICK WERE CHESINO) 2ND APPLICANT

AND

ISMAIL MWIMA MAKOKHA RESPONDENT

RULING

1. The administrator herein raised a preliminary objection dated 3rd February 2025 based on the following grounds;
 - a. There is no new or important matter or evidence that, after due diligence, was not within the applicant's know ledge
 - b. All the documents that the applicant sought to be presented to the court were within the applicant's knowledge and possession and ought to have been produced by him at the time of confirmation of the Grant on 24th of November 2014.
 - c. There was no mistake or error apparent on the face of the record in the prosecution and confirmation of the grant.
 - d. No sufficient reason has been given for the court to interfere with the confirmed Grant
 - e. That a previous application for Revocation of Grant was dismissed by J.N. Njagi on 29th May 2020.



- f. That this application is Res Judicata a similar application for review having been determined by W.M Musyoka on 28th May 2021.
 - g. There has been an inordinate delay for over 11 years in bringing this application for Review of the orders for Confirmation of Grant
2. The application was canvassed by way of written submissions.

Applicant's submissions.

3. In their submission dated 5th March 2025, they admitted having filed an application dated 22nd October 2019 seeking revocation of the grant intestate, and the court declined to confirm the grant until the issues pending were addressed.
4. They stated that in an application dated 14th August 2020, they sought for a review of the ruling as they assumed that the court dealt with the issue of confirmation rather than revocation of the grant intestate. And in its ruling for review, the court confirmed that they application they dealt with was for application for revocation.
5. The applicant was of the view that the court in its previous ruling and review did not deal with revocation of the grant and claimed that they would consider the application for revocation of the grant if the existing issues were dealt with, and hence the case was not res judicata.
6. He relied on the provision of Order 45 and Rule 63 (1) of the Probate and Administration Rules on what would amount to a review and claimed that the pleadings were based on sufficient reason.
7. The respondent in their submission dated 17th February 2025 stated that the administrator petitioned for confirmation of the grant on 27th November 2014, while the Applicant applied for the revocation on 22nd October 2019 and on 29th May 2020, Justice J.N Ngaji dismissed the application for revocation.
8. According to the Respondent, the applicant seeks review of the confirmed grant dated 27th November 2014.
9. They hold that for a review to be admitted, the applicant must have a new evidence or material that was not within their knowledge at the time of the hearing which according to them is the Matungu Land a Dispute Tribunal Cause No.8 of 2005, Kakamega Chief Magistrates Award No 202 of 2005 were all within their possession at the time of confirmation of the grant on 27th November 2014 and the applicant had to wait 11 years after the decree to make the application.
10. They finally claimed that the matter was Res Judicata since it was dismissed by Hon. J. Njagi, as well as the previous decisions at the chief magistrate's court against the administrator, which had been dismissed.
11. They pray that the court dismisses the application for review since it is Res Judicata and that no new evidence has been raised by the applicant to merit a review.

Analysis And Determination

12. I have carefully considered this Preliminary Objection, as well as the written submissions filed by both parties. The Respondent raised a preliminary Objection to the application by Applicant holding that the matter is Res Judicata and further that the Applicant raised no new issue that was not within their knowledge at the time of the review and that the application for review of the court orders dated 14th August 2020 had already been heard and determined.



13. The definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696.

“So far as I’m aware, 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 of the suit.”

This was well set out the judgment of Sir Charles Newbold in the same case as follows:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

14. The first issue this court will address is whether the issues raised by the applicant were *Res Judicata*.
15. The court in *Re Estate of David Wang’ang’a Gichuhi* (deceased) [2020] eKLR held that a matter has to have been directly litigated and conclusively determined by a competent court on issues directly or similar to the issues under review.
16. Section 7 *Civil Procedure Act* states that:

“No court shall try any suit or issue in which the matter directly and substantively in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under 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 the court”

17. The Court of Appeal in the *Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others* [2017] e KLR rendered that:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectrum of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court.... The foundations of *res judicata* thus rest in the public interest for swift, sure, and certain justice.”

18. On perusal of the court records, I note that on 22nd October, 2019, the applicant filed for revocation of the grant issued on 27th November 2014. The respondent had filed several applications being *Mumias MCL&E No. 324 of 2017*, *Mumias MCL&E No. 127 of 2018* and *Kakamega MCL&E No. 646 of 2018* and on 29th May 2020, Hon. Justice J. Njagi dismissed the application for lack of Merit and refused to confirm the grant until the issues raised in the environmental court were addressed.
19. The applicant went further to seek for review of the orders dated 29th May 2020. In his ruling the Hon. J.M Musyoka looked into the orders seeking review, the court held that the court did not err in making its orders as to whether the application was seeking for revocation or confirmation of the grant and that the court dealt with the issues addressed by the applicant. Judge Musyoka opined that Judge Njagi’s reference to summons of confirmation instead of revocation in his ruling was a mere slip up and that the error alluded to by the applicant did not go to the core of the final orders.



20. The court dismissed the orders for review.
21. The applicant now seeks a review of the certificate of confirmation of grant but not the two rulings.
22. In the case of Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97 the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.

23. I do agree with the Applicant that the issues raised in this application for review has not addressed by this court.
24. On the issue of review of the judgment or orders, of a probate court, made under the *Law of Succession Act* and the Probate and Administration Rules is through Rule 63 of the Probate and Administration Rules. The *Law of Succession Act* has not made provision for review of orders made under the provisions of the Act. So review is introduced by Rule 63, which has adopted a number of the processes set out in the Civil Procedure Rules, which include the provisions relating to review of court orders and decrees. A probate court, therefore, gets to exercise the power to review its orders through Rule 63.
25. Review under the Civil Procedure Rules envisages three situations for which the court can exercise discretion. Firstly, there is an error apparent on the face of the record. Secondly, there has been discovery of new and important matter that goes to the core of the case, which the party applying for review would not have placed before the court as at the date of the order sought to be reviewed, as the material was not available. Finally, it would be in cases where there is some other sufficient reason.
26. Judge Njagi was very clear in his ruling of 28.5.2020 he could not deal with the issue of revocation until the issues pending before Environment and Land Court were resolved.
27. I have seen a decree of Chief Magistrates Court Kakamega award No. 39/2007 issued on 12.1.2010 issued after adopting the award of Matungu Land Dispute Tribunal Case No. 8/2005 Land Parcel No. North Wanga/Matungu/878 and 985.
28. I have also seen a court order dated 28.4.2006 issued in CMC Kakamega award No. 262 of 2005 adopting Matungu Land Disputes Tribunal Award read on 16.12. 2005.
29. I have not seen the final court decisions in Mumias MCL &E No. 324 of 2017 (b) Mumias MCL&E 127 OF 2018 (c). Kakamega MCL&E No. 646 of 2018 .
30. The Applicant says the cases have terminated , the court cannot proceed without seeing the determinations. I therefore pend this ruling for 14 days within which copies of the termination shall be availed to the court by the Applicant. Mention 15.5.2025.



**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF
APRIL, 2025**

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Albright Sunguti

Ms. Nafuye for the objector, present.

Ms. Mokaya for the Respondent

