



**In re Estate of Mudogo Mafwana (Deceased) (Succession Cause
262 of 2010) [2025] KEHC 7508 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 262 OF 2010**

REA OUGO, J

MAY 29, 2025

IN THE MATTER OF THE ESTATE OF MUDOGO MAFWANA (DECEASED)

BETWEEN

ELPHAS JUMA PETITIONER

AND

FLORENCE A. NANZUSHI OBJECTOR

RULING

1. The objecting applicant filed an application dated 27 November 2023, seeking to revoke the grant issued to the petitioner/respondent. She had a prior application dated 3 April 2014, seeking the same orders. This application was dismissed on the 3rd of July 2019 for want of prosecution. The respondent filed a replying affidavit dated 22.10.2024, in which he depones why he is opposing the application to revoke.
2. The respondent has filed a preliminary objection dated 18.10.2024, seeking to have the application dated 27.11.2023 dismissed on the following grounds: that the application is *res judicata*, as the application dated 3.4.2014 was dismissed by Justice Riechi on 15.7.2019, and that the subject matter of this application renders it *sub judice* in Kisumu Court of Appeal Case Number E273 of 2023 arising from Kakamega ELCC No. 62 of 2018, whose execution was stayed two years ago from 8.11.2023 pending determination of the appeal.
3. The petitioner relies on the contents of his affidavits dated 22.10.2024 and 20.11.2024 to support his preliminary objection. He did not file any submissions. The objector filed very detailed written submissions. I have read and considered the petitioner's affidavits and the objector's submissions.
4. The petitioner avers as follows: after the death of his father, he moved to court and obtained letters of administration and a certificate of confirmation of the grant on 12.3.2012. The asset belonging to the estate of the deceased is Land Parcel number Butso/ Esumeiyia/ 112. After the grant was confirmed,



he moved to the Kakamega Land Registry to have the land registered in his name. The objector placed a caution on the said land. Thereafter, she filed an application dated 3rd April 2014 seeking to revoke the grant. The objector abandoned the application,, and it was dismissed on 15 July 2019. The objector thereafter moved to the ELC court and filed suit number 62 of 2018 over the same subject matter in an attempt to compel him to transfer land, which she alleged her husband bought from his late father, claiming adverse possession. The case was dismissed, and she filed an appeal in the Court of Appeal, which appeal is still in progress. She is now back in this court seeking to revive an application filed on November 27th , 2023, which has never been prosecuted.

5. The objector’s submissions are quite detailed. The issues addressed in the said submissions are as follows; whether the application is *res judicata*. Reliance is made on the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distribution Limited* (1969) EA 696, Section 7 of the [Civil Procedure Act](#) (CPA); various authorities were cited and relied upon to demonstrate that the matter is not *res judicata*. The next issue raised is whether the instant application is *sub judice*. The objector relies on the provisions of section 6 of the [Civil Procedure Act](#) and argues that the cause of action herein and the relief sought are substantially different from those in Kisumu Court of Appeal Case Number E273 of 2023 arising from Kakamega ELCC No. 62 of 2018. It was further submitted that for section 6 of the [CPA](#) to apply, there must be two or more suits or proceedings that are alive. It is submitted that the two courts are handling matters relating to the same subject, namely the same parcel, although the issues presented to the individual courts and the applicable laws are distinct. Section 6 relates to the stay of the subsequent suit and not otherwise.
6. I have considered the petitioner’s affidavits along with the objector’s submissions and the issues raised in the preliminary objection. A preliminary objection consists of a point of law that has been pleaded or which arises by clear implication from the pleadings, and which, if argued as a preliminary point, may dispose of the suit (see the case of *Mukisa Biscuit Manufacturer Co. Ltd v West End Distributors Limited*) (*supra*).
7. The first issue raised is that the application dated 27.11.2023 is *res judicata*. Order 7 of the [Civil Procedure Act](#) (the CPA) states as follows:

“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.”
8. The application dated 3rd April 2014 was not heard; it was dismissed for want of prosecution. The petitioner has been misled into believing that it was heard on its merits and determined. It was neither heard nor a determination made. The objector chose not to reinstate the said application but to file another seeking the same orders. The application dated 27th November 2023 is not *res judicata*. Therefore, the principle of *res judicata* does not apply. The court in ELC No. 37 of 2020 [Moses Mbatia, George Wakaba v Joseph Kibara](#) held as follows:

“A suit that was dismissed or struck out for non-attendance or want of prosecution in my view is not synonymous with a suit that has been heard and determined.”

I associate myself with this decision. There is no merit on this ground.
9. The next issue is whether the instant application renders the subject matter *sub judice*. The doctrine of *sub judice* prevents a court from proceeding with the trial of a suit in which the matter in issue is directly



and substantially the same as the previously instituted suit between the same parties, pending before the same or another court with jurisdiction to determine it. Section 6 of the [CPA](#) provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

10. The main issue between the parties is the ownership of 14 acres in parcel number 112, which the objector is claiming from the estate of the deceased. There is no dispute that the parties have been before the ELC Court in Kakamega, where the objector was the plaintiff and the petitioner the 1st defendant. The subject matter of the said suit was the 14 acres of land in Land Parcel number Butso/Esumeiyia/112. A succession court will distribute the deceased's property that is free for distribution. Where ownership has been challenged, as is the case in the objector's application dated 27.11.2023, the court with proper jurisdiction to determine ownership is the ELC Court. The subject matter of the ELC suit in Kakamega is the portion claimed by the objector from the deceased's estate. An appeal is pending before the Court of Appeal regarding the same matter. The objector moved to the Court of Appeal after the ELC Court declined to grant her prayers for adverse possession. In my view, the decision made by the Court of Appeal will impact whether she is entitled to the 14 acres. If the Court of Appeal decides in her favour, she can return to the Probate Court to seek the portion she claims belongs to her family from the deceased's estate. The claims may be in different courts, but they relate to the same subject matter: the 14 acres in the suit land. The holding of Justice Mativo, as he then was, in the case of [Republic v Paul Kihara Kariuki Attorney General & 2 Others EX Parte Law Society of Kenya](#) [2020] eKLR applies in this matter; the court held as follows:

“There exists the concept of *sub judice* which is latin means under judgment” . It denotes that a matter is being considered by a court or Judge. The concept of *sub judice* is that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying the issue so long as the first suit goes on. In such a situation, order is paused by the subsequent court to stay proceeding and such order can be made at any stage.”

11. The objector's application dated 27th November 2023 is pending. The appropriate course of action is to suspend the said application until the hearing and determination of the appeal in the Court of Appeal. The respondent has demonstrated the necessity of preventing a situation that could result in conflicting orders from two courts regarding the ownership of 14 acres of the suit property. I find that an order of dismissal is not suitable, considering that the Court of Appeal has yet to adjudicate on the objector's appeal. I decline to strike out the application dated 27.11.2023. No orders on costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 29TH DAY OF MAY 2025.

R.E.OUGO

JUDGE

In the presence of:

Petitioner - Absent

For the Objector - Absent

Wilkister - C/A

