



**In re Estate of Eliud Gichangi Gitabi alias Gichangi Gitabi Eliud  
(Deceased) (Miscellaneous Application Probate & Administration  
E002 of 2022) [2025] KEHC 11952 (KLR) (14 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION E002 OF 2022**

**EM MURIITHI, J**

**AUGUST 14, 2025**

**IN THE MATTER OF THE ESTATE OF ELIUD GICHANGI  
GITABI (ALIAS GICHANGI GITABI ELIUD (DECEASED))**

**BETWEEN**

**MICHAEL WACHIRA GITABI ..... 1<sup>ST</sup> APPLICANT**

**RACHEL WANJIKU GITABI ..... 2<sup>ND</sup> APPLICANT**

**JOSEPH GICHANGI MURIUKI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**CHARITY MUTHONI GITABI (DECEASED) ..... PETITIONER**

**AND**

**HANNAH WANJIKU GITABI ..... 1<sup>ST</sup> RESPONDENT**

**NANCY WANGECI WANGUHU ..... 2<sup>ND</sup> RESPONDENT**

**FAITH WAMBUI KINYANJUI ..... 3<sup>RD</sup> RESPONDENT**

**ROSE WANJIRU MURIITHI ..... 4<sup>TH</sup> RESPONDENT**

**SAMMY MWAURA KIURA ..... 5<sup>TH</sup> RESPONDENT**

**ANN WANJIKU NDUNGU ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before the Court is a Preliminary Objection taken by the 3-6 respondents with the support of the 2<sup>nd</sup> respondent on the principle of res judicata urging that the court lacks jurisdiction to entertain and



determine the application filed by the applicants herein dated 16<sup>th</sup> May 2022 seeking the revocation of Grant of Lettes of Administration issued to the respondent in Kerugoya Chief Magistrate's Court Succession Cause NO. 192 of 1991 on 24<sup>th</sup> November 2011.

2. The Grant of Letters of Administration followed the dismissal of an application for disqualification of the Counsel for the 3-6 Respondents filed after an unsuccessful appeal to the High Court at Nyeri from the Magistrate's Court order adopting the arbitration award of a panel of elders as an order of the Court by a ruling of the Court (Hon. W. N. Njage PM) dated 8/1/2022 as follows:

“Ruling

I have listened to the arguments raised by counsel for the applicant. I allow the application dated 31/10/2001 in its entirety. I award the costs of the application to applicants against the respondent. It is so ordered. Right of Appeal 30 days, explained.”

3. By its judgment of appeal, the High Court (Makhandia, J. as he then was) upheld the decision of the trial court as follows:

“It is not lost on me that the deceased died in 1963 and was polygamous. By virtue of Section 2(2) of the [Law of Succession Act](#), the distribution of his estate was subject to Kikuyu Customary Law. Under Kikuyu Customary Law according to Eugene Cotran, Restatement Of African Law,

"the general principle here is that the house (githaka) of each wife gets an equal share of the property, irrespective of the

number of children in each house. Land:

Each house gets an equal share of the land. The rules for distribution within the house are as in 1 fa) above .....

The Court of Appeal in the case of John Ndungu Mubea -v- Milka Nyambura Mubea, C.A. NO. 26 of 1990 (UR) reinforced that position. It held that inheritance under Kikuyu Customary Law is patrilineal and according to this pattern of inheritance, the house of each wife gets an equal share of the property irrespective of the number of children in each house. The award that was adopted by the lower Court as a judgment of the Court was in tandem with the above observations. It was thus correct in fact and law. In the premises it will be an act in futility in reopening up this matter by allowing this appeal. The facts and the law have not changed. Thus any Court properly applying the facts to the law will still come to the same conclusion as in the award.

It is for all the foregoing reasons that I find no merit in this appeal. It is accordingly dismissed with costs to 1st, 2nd and 4th respondents.

Dated and delivered at Nyeri this 29th day 0 January 2009.

S. A. Makhandia

Judge

Judgment Civil Appeal No. 19 of 2002”



4. In the subsequent application for disqualification of the Counsel for the respondents, the trial Magistrate's Court (H. N. Ndung'u SPM) by ruling of 29/9/2011 made the following observations as to the claims of the applicant herein:

“A perusal of the entire record shows that this is a matter that has been in the Courts for over then years. The matter was first referred for arbitration. An award was filed in Court which was adopted as a judgment of the Court. it then moved to the High Court and the High Court heard and dismissed the appeal. All that now remains in this file is execution. Surely it can't be in the interests of justice to reopen this matter all over against Counsel I.W. Muchiri is alleged to be an interested party on the basis that he was one among many purchasers of land parcel No. 239. It has however been shown that land parcel Inoi/Ndimi/239 was never part of the deceased state. Section 3 of the Law of Succession Act defines estate of a deceased as the free property of a deceased i.e. property which a person was legally competent to dispose off during his life time land parcel Inoi/Ndimi/239 was clearly never free property of the deceased as that was the property of his son and the deceased couldn't dispose of it during his life time. It would appear the issue of the deceased's' estate has been finalized and this application is an after thought as right from the inception of the suit and going by the affidavits filed even by the widows of the deceased parcel 239 has never been part of the deceased's estate. It had been given to the deceased's eldest son George Eliud Gichugi by the clan in 1960. Even in the applicant's affidavit in support of cross-petition the applicant spoke of his father's state as having been only 238 Surely it is too late in the day to seek to reopen this matter and now say that his father had 2 pieces of land Inoi/Ndimi/238 and 239. For over ten years when Mr. Muchiri acted for the applicant's adversary the issue of his disqualification never arose. I must put it on record that the right to legal representation is sacrosanct and generated in the constitution Article 50 (2) (g). Party cannot choose for the other his Advocate. Secondly an advocate like every other citizen has a right to buy property and unless it is shown it such advocate is likely to be called as a witness to testify a matter before court, then the court cannot ask the advocate in question to bow out of this matter. The matter is finalized and at execution stage and there is no likelihood at all that Mr. Muchiri is likely to be called in it as a witness nor is there any evidence on record that the land he bought was part of the deceased's state (State is defined in Section 3 of the Law of Succession Act Cap 160 Laws of Kenya). On the reasons afore mentioned this application must fail and I dismiss it with costs.

H.n. Ndung'u - S.p.m

29/9/2011”

5. In support of the application for revocation of grant, the applicants rely on facts set out in the Supporting Affidavit of the 1<sup>st</sup> applicant sworn on 16<sup>th</sup> May 2022 as follows:

“Supporting Affidavit

I Michael Wachira Gitabi, Of P.o. Box 2602, Embu, in the Republic of Kenya do hereby make oath and state as follows:-

1. That I am an adult male of sound mind and hence competent to swear this affidavit.
2. That I have authority from the 2<sup>nd</sup>& 3<sup>rd</sup> applicant to plead on their behalf in this matter.



3. That I am one of the sons of Eliud Gichangi Gitabi Alias Gichangi Gitabi Eliud (deceased)
4. That the said Eliud Gichangi Gitabi was endowed with two pieces of land i.e. LR Inoi/INdimi/239 AND Inoi/Ndimi/238.
5. That the said Eliud Gitabi Gichangi had two wives and each wife was living with his family in her land and the 1st wife Veronica Wanjiru Gitabi was living with her family in land parcel Inoi/INdimi/239 while the 2<sup>nd</sup> wife Miriam Wangari Gitabi was living with her family in LR NO. No. Inoi/Ndimi/238.
6. That after the death of our late father Eliud Gitabi Gichangi the elder son of the first wife George Gichangi Gitabi alias Charles Gichangi with intention of depriving the other member their interest in the Estate misrepresented to the Land Registrar that he was Gitabi whereas he was a son bearing the name Gichangi Gitabi and applied for the correction of name.
7. That through the newly corrected name he caused the Land Registrar to insert his name in the register as the Proprietor of land parcel no. Inoi/INdimi/239 (annexed and marked MWG-1 is a copy of the said green card with name changed)
8. That the alleged George Gichangi Gitabi alias Gichangi Gitabi was not the deceased proprietor Eliud Gichangi Gitabi as he is Charles Gichangi Gitabi (Annexed herein and marked MWG-2 is a copy of his Baptism Card issued by the Kerugoya Catholic Parish)
9. That after the said insertion of his name he proceeded to subdivide the land Inoi/Ndimi /239 and gave a portion to his mother and the rest he gave to his siblings.
10. That after the said parties obtained their title Deeds and proceeded to sell their portions to third parties.
11. That later on Charity Muthoni Gitabi after disposing off her portion and without the knowledge of the 2ndwife's family filed succession proceedings in regard to LR no. Inoi/Ndimi/238 obtained a grant and went on to sub divide the said land got the title processed in disregard of the Court Order issued by HIGH COURT AT EMBU on the 9<sup>th</sup> December 2011 stopping execution of the grant (Annexed herein and marked MWG-3 is a copy of the said Court Order).
12. That thereafter the court was notified that land parcel no. Inoi/Ndimi/239 had been sub -divided in disregard of its Orders it went ahead to issue further order staying Execution on the 14thFebruary 2012 (annexed herein and marked MWG -4 is a copy of the said order)
13. That I have lived with my siblings and family in land parcel no. Inoi/ Ndimi/238 even before the demise of my father with my family.
14. That despite the said orders the respondent went on and obtained title on the 28<sup>th</sup> of February 2012 as may be seen in the green cards.



15. That after obtaining the said titles and on the 8th August 2012 the respondent in an effort to burry one of their sisters in the disputed land the Applicant applied to Court under certificate of urgency to have the burial stopped and which orders were given(annexed herein and marked MWG-5 is copy of the said Order)
16. That later on the administrator proceeded to transfer the resultant subdivision to several respondents (annexed herein and marked MWG-6 a,b,c)
17. That the administrator has since passed on leaving the estate in dispute.
18. That I was not informed during the filing succession cause and we did not consent on the mode of distribution.
19. The petitioner failed to disclose to the court that their house had fraudulently transferred part of the estate comprised in InoijNdimi/239.
20. The petitioner and the respondent have never lived or utilized the estate comprised in Inoi/Ndimi/238 as it's my mother's house who have all through utilized the same.
21. The respondent are not entitled to LR. Inoi/Ndimi/ 238 at all.”

### **Preliminary objection**

6. The 3-6 respondents took a preliminary objection that the issue raised in the applicants' application were res judicata by virtue of the decision of the High Court in Nyeri HCCA No. 19 of 2002 the substance of which is set out above.
7. The 2<sup>nd</sup> Respondent supported the preliminary Objection and urged on her part that she was a bona fide purchaser for value protected under section 93 of the *Law of Succession Act*.

### **Plea of res judicata**

8. The Supreme Court of Kenya in the leading decision of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), while considering whether the principle of res judicata applied to constitutional litigations observed as follows on the nature of the plea:

“[83] However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the Danyluk Case from Canada the court cited the dissenting opinion of Jackson J.A., in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21 where he stated: “The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.”

(84) Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must



examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.

- (85) In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.”
9. In the leading case on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F, the Court of Appeal for East Africa held (per Law JA) that -
- “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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
- and at page 701 paragraph B-C (Sir Charles Newbold, P.) that -
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
10. The 3-6 Respondents in raising the plea of res judicata are relying on facts set out in Replying Affidavit of 6/9/2023 and supplementary affidavit of 24/7/2024 both complete with annexures attaching the previous decisions of courts which they set up as having previously and finally decided the issue of succession of the estate of the deceased, which is now raised in the application for revocation of grant. In determining the application for revocation and in the face of plea of res judicata the Court must examine the facts brought forth by the Respondents in answer to the applicants case to determine whether the matter has been previously decided on the merit in proceedings between the same partes or persons litigating under the same title as prescribed under section 7 of the *Civil Procedure Act*.
11. Even if, the plea of res judicata applied, the applicant is, on the authority of the Supreme Court in John Florens case, entitled to show exceptional circumstances for “give an exemption to the application of the doctrine of res judicata.” And as guided by the Court “before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.”
12. As pointed out in *Mukisa Biscuits* case, Preliminary Objection ought not be raised where a determination involves the exercise of a discretion.
13. The 7<sup>th</sup> Respondent in asserting the rights of a bona fide purchaser for value protected under section 93 of the *Law of Succession Act*, would require, if the application for revocation is not dismissed under the plea of res judicata to show a valid transfer under a confirmed grant of representation.
14. The case is clearly not suitable for an in limine determination by Preliminary Objection. The respondents do not accept as true the facts of fraudulent acquisition of the parcel of land No. 239 and therefore the invalidity of the succession proceedings herein by reason that the grant was “obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case [and] by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently”, as set out by the applicant.



15. Section 76 of the *Law of Succession Act* provides for an application for revocation of grant by a person interested in the estate of a deceased, and the court is not able to say at this preliminary stage that the applicants who are children and grandchild of the deceased have no interest in the estate of the deceased as to outrightly shut any of them from pursuing an application for revocation of Grant.
16. In addition, section 76 does not appear to limit the application for revocation only to assets which were included in the petition for grant. If some assets were left out or were contended to belong to the estate although registered in the names of beneficiaries or others, they may still be made subject of the application as relevant facts. See section 2 of the *Evidence Act*.
17. Section 76 of the *Law of Succession Act* is in specific terms as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
  - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - ii. to proceed diligently with the administration of the estate; or
  - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. that the grant has become useless and inoperative through subsequent circumstances.”

18. In the court’s view, the application for revocation should be heard on its merits and the Respondents’ objections based on the plea of res judicata and protection under section 93 of the *Law of Succession Act* shall be considered as responses to the application in usual course of hearing.



19. So as not to prejudice the merits of the case, the Court at this preliminary stage does not make detailed consideration of the disputed facts of the case, which must await the full hearing of the application for revocation.

### **Conclusion**

20. Even if, which this court has not decided, the principle of res judicata applied to this case, there is need to determine whether the case presented circumstances that would justify an exception to its application on ground of likely injustice as held in the leading case on res judicata where Supreme Court in John Florence Maritime Limited v. CS of Transport & 3 others (2021) eKLR.
21. In Mukisa Biscuits Co. Limited v. West End Bakery Limited (1969) E.A 696, 700-1 is clear that a Preliminary Objection is a point of law which is argued on the basis that the facts as presented by the applicant are correct, and it cannot be raised if any fact has to be ascertained.
22. In this case, however, several facts, including the existence of the previous suit and determination on the same facts, the estate assets and sale thereof with or without protection of section 93 of the *Law of Succession Act*, are to be established and the Respondents rely on their own set of facts which they detail in the respective Replying Affidavits and Supporting Affidavits.
23. Consequently, the Preliminary Objection in this application was not properly taken.  
Order accordingly.

### **Orders**

24. Accordingly, for the reasons set out above, the Court finds no merit in the Preliminary Objection and it is dismissed.
25. The matter shall on a date to be fixed in consultation with Counsel for the parties proceed to the hearing of the application for revocation of grant dated 22/5/2022 filed by the Applicant herein.
26. The costs of the Preliminary Objection to the application shall be costs in the cause.
27. Mention for directions as to hearing on 6/10/2025.

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF AUGUST 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. I. W. Muchiri for 3-6 Respondents.

Ms. Wandia for 2<sup>nd</sup> Respondent.

Mr. Mugambi Njeru for the Applicant.

