



REPUBLIC OF KENYA



KENYA LAW
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**Nzioka v Ndambuki & 2 others (Land Case E036 of 2023)
[2025] KEELC 6141 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND CASE E036 OF 2023
AY KOROSS, J
SEPTEMBER 23, 2025**

BETWEEN

AGNES MUTINDI NZIOKA PLAINTIFF

AND

ROSEPELA NDINDA NDAMBUKI 1ST DEFENDANT

REGINA KAVESU NDAMBUKI 2ND DEFENDANT

MACHAKOS COUNTY LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. This suit was instituted by a plaint dated 4/10/2023 by the plaintiff against the defendants. Interestingly, the 1st defendant is the mother of both the plaintiff and the 2nd defendant. Central to the case are land parcels Nos. Mavoko Town Block 3/2516 and Mavoko Town Block 3/286 (referred to as the “suit properties”). These properties are believed to belong to or have belonged to John Ndambuki Mweu (deceased), who was the 1st defendant’s husband and the father of both the plaintiff and the 2nd defendant.
2. She stated that the parties initiated probate proceedings over the deceased’s estate in Machakos HC Succession Cause No. 551 of 2012 (“probate case 2”), but it was abandoned before confirmation of the grant. Nonetheless, the 1st and 2nd defendants, in collusion with the 3rd defendant, fraudulently and unlawfully caused the subdivision of the suit properties into several portions and had them transferred to themselves with the intent of selling them to 3rd parties.
3. According to her, despite a request to establish the status of these properties, the 3rd defendant has failed to provide her with documents, and she has sought the following reliefs from this court: -
 - a. A declaration that the subdivision of Mavoko Town Block 3/2516 and Mavoko Town Block 3/286 are unlawful and the subsequent titles emanating therefrom, to wit: Mavoko Town



Block 3/83190, 90127-90187, 93685-93699, 104347-104362, 99509-99516, 99469-99476 and 88850-88889 are a nullity and be revoked.

- b. An order directing the 3rd defendant to rectify the register to reflect the name of John Ndambuki Mweu as the registered owner of Mavoko Town Block 3/2516 and Mavoko Town Block 3/286.
 - c. Costs of the suit and interest.
4. In response to the claim brought against them, the 1st and 2nd defendants filed a defence dated 10/11/2023, in which they mostly denied the allegations contained in the plaint and challenged the plaintiff to provide strict proof. They also maintained that the deceased died intestate on 12/10/2007. Subsequently, and without their knowledge, the plaintiff, on or around 25/02/2008, filed Machakos HC Succession Cause No. 83 of 2008 (“probate case 1”), where she listed Mavoko Town Block 1/250 as the sole property of the deceased and had it registered in her name, omitting Patrick Muunda Ndambuki and Justus Mutunga Ndambuki, who were also beneficiaries of the deceased’s estate. According to them, the plaintiff obtained a certificate of confirmation of grant on 10/03/2009.
 5. They argued that, since they were not privy to probate case 1, they filed probate case 2. However, when the court became aware of probate case 1, the court refused to confirm the grant in the latter case. They stated that, in any event, the suit properties were registered in the 1st defendant’s name, who then transferred them to the 2nd defendant, and as it stands, the 2nd defendant has subsequently transferred them to third parties. They urged this court to dismiss the case with costs.
 6. Significantly, despite the 3rd defendant filing a notice of appointment through Principal State Counsel Lydia Lung’u dated 17/10/2023, it did not submit a defence.

Hearing and evidence

7. The matter eventually proceeded for a hearing on 6/02/2025, during which the plaintiff testified as PW1 and reliance was placed on her witness statement, oral testimony, and several produced documents, which were marked as PExh. 1-9.
8. In her testimony, she reiterated the contents of the plaint. She informed the court that, apart from the 2nd defendant, the deceased left behind children named Winfred Nzilani, Pauline Mueni Mutuku, Scholastica Muthike Ndambuki, Patrick Muunda Ndambuki, and Justus Mutunga Ndambuki. To her, the 2nd defendant interfered with the deceased’s estate by subdividing the suit properties.
9. When she was asked about the location of the documents supporting her allegations, she told the court she had only submitted Pex.5, which is a title deed for Mavoko Town Block 3/88878 bearing the name of Peris Ndinda Ndambuki; Pex.7, a title deed for Mavoko Town Block 3/83193 in the 2nd defendant’s name; and Pex.8, an official search for Mavoko Town Block 3/93688, which includes the names Benjamin Kyalo Muli, Cyrus Sila Musau, and James Kitonga Mwinzi (as trustees of the 7 smart investors group).
10. When she was questioned about probate case 1, she stated that a grant was issued in her favour on 10/03/2009 and land parcel no. Athi River/Athi River block 1/1501 (1501) was allocated to her, which she claimed had been gifted to her during the deceased’s lifetime. She also informed the court that other properties of the deceased had been subdivided and registered in the names of the 1st and 2nd defendants. Moreover, she testified that she did not have a mutation form to prove that such a subdivision had taken place.



11. She testified that during probate case 1, she omitted the names of Patrick and Justus, who were her siblings, because her parents had adopted them. She informed the court that during the probate proceedings, the court advised them to resolve their differences and reconcile, primarily since a parcel of land had reportedly been sold to a third party called Geoffrey, and 10 acres had also been sold to the 1st defendant. She insisted that the parties (except 3rd defendant) had disputes over the deceased's properties in the probate cases.
12. Upon the conclusion of the plaintiff's case, the defence hearing commenced, and the 2nd defendant testified as DWI. She relied on her witness statement, oral testimony, and documents produced as Dex. 1-2, which included pleadings from probate case 1 and a power of attorney from the 1st defendant to her, authorising her to testify.
13. In her testimony, she maintained that they were aware of probate case 1 and even signed documents in support of it, but they did not understand the purpose of the signing. However, just as in the plaintiff's testimony, she told the court that in probate case 2, the court asked them to reach an agreement on how to distribute the deceased's assets, which included parcels of land within their home, but they have never returned to court. According to her, each of them knew which parcels of land they occupied, and once an agreement is made, they will go back to the probate court.

Submissions

14. When the matter was concluded on 5/02/2025, Mr. Kamanda, for the plaintiff, requested 21 days for submitting written arguments, and Miss Okumu sought similar leave on service, which the court granted, but this was not complied with by either party. At Mr Kamanda's request, who appeared before the court on 6/05/2025, an extension of time was granted; however, as of the writing of this judgment, none have been filed.

Issues for determination, analysis and determination

15. Having carefully reviewed the pleadings filed, and considering the documentary and oral evidence of the witnesses who testified, together with relevant legal frameworks and the prevailing jurisprudence, the following issues merit determination: -
 - a. Whether this court can exercise jurisdiction over probate proceedings.
 - b. Whether fraud was specifically pleaded and proved.
And they are hereby addressed sequentially.
 - a. Whether this court can exercise jurisdiction over probate proceedings.
16. It is also well-established law that jurisdiction is everything, and without it, a court must go no step further than to put down its tools. Thus, it is relevant for this court to address this issue first, as the outcome of this matter influences the second issue.
16. The jurisdiction of the High Court and this court is respectively established under Articles 165 and 162(2)(b) of *the Constitution* of Kenya. Under these legal provisions, the jurisdiction of the High Court is very broad, and Article 165(5) explicitly states the limitations to its jurisdiction as follows:

“The High Court shall not have jurisdiction in respect of matters—

- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or



b. falling within the jurisdiction of the courts contemplated in Article 162(2).”

16. Regarding Article 162(2)(b), the parliament established this court, which is a court of equal status to the High Court, with jurisdiction to hear and determine disputes related to the environment and the use, occupation, and title to land.

17. When these two provisions of *the Constitution* are read together, it indicates that the High Court has no jurisdiction whatsoever over matters that fall within the jurisdiction of the Environment and Land Court (ELC), or vice versa, as each has exclusive jurisdiction over the matters for which those courts have been established.

18. Regarding the dispute before this court, it suffices to state that although the plaintiff pleaded fraud, a significant portion of the particulars thereof—such as subdividing the suit properties without a confirmed grant, transferring parcels of land without a confirmed grant, and dealing with the suit properties without the deceased’s consent—are all allegations that contravene the provisions of Section 45 (1) of the Succession Act, Laws of Kenya, which provides as follows: -

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

19. The certificates of official searches or certified copies of green cards for the suit properties were not presented to this court to verify if they were the deceased’s free assets. Nevertheless, the main issue in dispute is whether the estate of the deceased was interfered with by his wife and daughter, and the matter of fraud is merely an ancillary issue. It seems that the filing of this suit was cunningly orchestrated, as she is aware that the probate court has jurisdiction over the matter, as she testified as follows: -

“We had disputes over my father’s land. We have been to court here in Machakos. We had sold land to Geoffrey and court is the one that told us to go and reconcile.”

20. The second defendant also corroborated this line of evidence by stating exactly: -

“I recall, we were told to go and reach an agreement on how to distribute our father’s assets but we never came back to court...We will go to succession court once we reach an agreement...”

21. It follows that all the parties herein, except the 3rd defendant, are alive, and that the High Court—pursuant to Section 47 of the *Law of Succession Act*—has been vested with jurisdiction to deal with matters arising from the Act, and that the High Court has been conducting probate proceedings over the deceased’s estate. It is worth noting that the main issue in dispute here is between the beneficiaries or administrators of the deceased’s estate. Had the primary issue been between these family members and third parties, this court would undoubtedly have exercised jurisdiction as envisaged by the provisions of Rule 41(3) of the Probate and Administration Rules, which states:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide



the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

See also Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR

22. Consequently, after considering the pleadings, evidence, law, and precedent, this court determines that it lacks jurisdiction to hear the dispute. Therefore, there is no need to address the second issue. As the parties have notified this court that they will revert to the probate court, they should do so without unnecessary proceedings in other courts.
23. In conclusion and for the reasons and findings stated above, this suit is hereby struck out. Considering the special circumstances of this case, where most parties are family members, each shall bear their own costs of the suit. The final disposal orders are issued as follows:
 - a. The suit herein is hereby struck out.
 - b. Parties shall bear their respective costs of the suit.

Judgment accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 23RD DAY OF SEPTEMBER, 2025.

HON. A. Y. KOROSS

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Kamanda for plaintiff.

M/s Okumu for defendant.

Ms Kanja- Court Assistant.

