



REPUBLIC OF KENYA



KENYA LAW
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**Mwilu v Mutei (Environment & Land Case 2 of 2016)
[2023] KEELC 679 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 2 OF 2016
A NYUKURI, J
FEBRUARY 8, 2023**

BETWEEN

KASALU NZIOKA MWILU PLAINTIFF

AND

JOYCE NDUNGE MUTEI DEFENDANT

JUDGMENT

1. By a plaint dated 15th January 2016, the Plaintiff sought against the Defendant, the following orders;
 - a. An order for cancellation of title deed Parcel No Lukenya Block 3/638 in the names of the Defendant and then be registered in favour of the Plaintiff.
 - b. Costs of the suit.
2. The Plaintiff averred that the land known as Lukenya Ranch was initially registered in the names of Nzioka Mwilu – deceased, father of the Plaintiff. The same measures 60 acres. According to the Plaintiff, Nzioka Mwilu was married to three wives and that she is from the first house while the Defendant is married to Vincent Mutei Nzioka a son from the 2nd house. She averred further that the 60 acres were shared among the three houses by the clan on 30th August 2014, and each house was given 20 acres.
3. The Plaintiff further stated that the Plaintiff's house was given Plot Number 638 measuring 20 acres where she resided but in 2014, she learned that the Defendant was the registered proprietor of Plot Number 638, currently known as Lukenya Block 3/2592 and later was threatening to evict the Plaintiff.
4. By a statement of defence dated 2nd February 2016, the Defendant stated that she inherited Parcel Lukenya Block 3/2592 (the suit property) from her late husband Vincent Mutei Nzioka. The



Defendant stated that the Late Nzioka Mwilu himself shared his properties between his three houses but that the suit property was given by the deceased to her late husband Vincent Mutei Nzioka.

5. The Defendant stated that she was the registered owner of the suit property, the Plaintiff's occupation thereof was unlawful and violated the Plaintiff's property rights. She maintained that the Plaintiff had no capacity to file the suit.
6. By a preliminary objection dated 29th August 2016 and filed on 30th August 2016, the Defendant raised an objection to the Plaintiff's suit on the basis that the Plaintiff lacks capacity to bring this suit against the Defendant.

Plaintiff's Evidence

7. PW1, Kisalu Nzioka Mwilu, the Plaintiff in this matter adopted his witness statement dated 31st January 2021 as her evidence in chief. She testified that the Defendant was her sister in-law and that her father, the late Nzioka Mwilu died on 23rd January 1996. That her late father had three wives and had two parcels of land, one measuring 40 acres and another 20 acres. She stated that she was residing and entitled to 20 acres, which is the suit property. According to her, the Defendant who is from the second house, got registered as proprietor of the suit property and started threatening her with eviction. She claimed that the suit property belonged to her.
8. The witness further testified that in 2001 when the transfer of shares in respect of her father was alleged to have been signed, her father had already died in 1996 and that the transfer was not signed by the society.
9. PW1, produced documents attached on the list of documents dated 22nd March 2017 and supplementary list of documents dated 31st January 2020. She produced a search dated 9th March 2017 in respect of Mavoko Town Block 3/2592 as P-Exhibit 1, a search dated 10th February 2016 as P-Exhibit 2, Chief's letter as P-Exhibit 3, Minutes of the Clan dated 30th August 2014 in Kamba Language as P-Exhibit 4, transfer form dated 3rd February 2001 as P-Exhibit 5, Allotment letter as P-Exhibit 6, copy of ruling dated 27th January 2017 as P-Exhibit 7, Death Certificate of Nzioka Mwilu as P-Exhibit 8, Chief's letter dated 19th September 2014 as P-Exhibit 9, minutes of the clan dated 14th November 2015 as P-Exhibit 10, the English translation of the minutes dated 30th August 2014 as P-Exhibit 11 and the English translation of the minutes dated 14th November 2015 as P-Exhibit 12.
10. On cross examination, she stated that she was not aware that the suit property was given as a gift by her late father to her brother Vincent. She conceded that the transfer filed by the Defendant showed that her late father transferred his share being the suit property to Vincent and that the allotment letter shows that her late father's name was deleted and the name of Vincent inserted. She also confirmed that the same was signed by the Society's Chairman and Secretary.
11. PW1 further conceded that she was present in the clan meeting in 2014 and that she was the one who convened the meeting because her brother Nzioka died before distributing his property.
12. PW2, Nzioka Nthenya, adopted his witness statement filed on 3rd March 2017. She testified that she was the Plaintiff's step mother and that the Defendant was her daughter in-law. Her evidence was that the suit property measuring 20 acres belonged to her late husband Nzioka Mwilu, and that the deceased also had another parcel measuring 40 acres where she was residing. She stated that the Plaintiff was unmarried and that her husband had three wives namely Nthenya Nzioka, Sera Nzioka and Agnes Kalondu Nzioka. She stated that she was the third wife and that they agreed as a family and clan that each house gets 20 acres. That the 2nd and 3rd houses to share the 40 acres and the 1st house where the Plaintiff belongs to get the 20 acres being the suit property.



13. The witness further testified that the 40 acres were registered in her name and the name of Silvester Nzioka of the 2nd house and that since the Defendant belongs to the 2nd house, the suit property belonged to the Plaintiff who was from the first house.
14. On cross examination, PW2 stated that there was a meeting in 1993 by Nzioka Mwilu and his family but there was no distribution of his property. She also stated that she was not aware the suit property had been gifted to the Defendant's husband. According to her, they shared the family property after Nzioka Mwilu's death, and that at the time of sharing, she was not aware who was the registered owner of the suit property.
15. PW3, Stephen Ndunda Kaloki, adopted the contents of his witness statement jointly signed by Philip Masila, filed on 3rd March 2017 and a further statement filed on 2nd March 2022. He testified that he had been an official of Eombe Nthoka, Clan Association as Chairman between 2013 and 2019 and that both parties in the suit belonged to his clan. He also stated that in August 2014, the Plaintiff lodged a complaint before the clan, the clan summoned both parties on 22nd August 2014, both parties attended and the Defendant signed; that she agreed to the resolution of the clan and that the resolution of the clan was that 60 acres to be shared among the three wives equally so that each gets 20 acres. That when they wanted to visit the suit property, they were blocked by the Administration Police through the office of the Chief Ngelani and he confirmed that the suit property belonged to the Plaintiff.
16. It was PW3's further evidence that the dispute had been forwarded to them after it had been handled by the Divisional Officials on 30th August 2014.
17. On cross examination, PW3 stated that they held their meeting on 15th November 2015 after the late Nzioka Mwilu had passed on and that during the lifetime of the deceased, he never informed him that he intended to share his property. He stated that at the time they met, they were never informed that the suit property was registered in the Defendant's name. He stated that the Defendant did not attend their meeting but that as a clan, they had authority to share the deceased's property.
18. PW4, Silvester Nzioka, adopted the contents of his witness statements filed on 3rd March 2017 and 9th February 2022. He testified that the Plaintiff was his step-sister and that the Defendant was his sister-in-law. His testimony was that the suit property belongs to the Plaintiff being from the 1st house. He stated that he was from the 2nd house where the Defendant belongs. He confirmed that Nthenya Nzioka, the third wife of the late Nzioka Mwilu, and himself were the registered proprietors of the 40 acres where the Defendant has a share. That he witnessed his late father transferring the suit property to his late brother Vincent Nzioka.
19. On cross examination, he testified that he did not witness the transfer of the suit property to his late brother Vincent. He confirmed attending the meeting of 1993 where his father had a meeting. That marked the close of the Plaintiff's case.

Defendant's Evidence

20. DW1, Joyce Ndunge Mutei, the Defendant in this suit adopted the contents of her witness statement dated 16th December 2021 as her evidence in chief. It was her testimony that she was the absolute proprietor of all that land known as Mavoko Town Block 3/2592. According to her, her father-in-law, the late Nzioka Mwilu distributed his properties in 1993 and gifted the suit property to her and her late husband Vincent Mutei Nzioka as her husband had been the deceased's care giver.
21. DW1 further stated that the suit property having been previously owned by Lukenya Ranching and Farming Cooperative Society was lawfully transferred to her by the society and she was subsequently



- issued with a certificate of title to hold it in trust for her husband Vincent Mutei Nzioka. Further that her late father in-law gave them the discretion to gift the Plaintiff's mother, one Kalondu Nzioka who was the first wife, and that they agreed to give the said Kalondu Nzioka 3 acres around 2007.
22. According to DW1, in 2007, on her instructions, her son Moses Musomba Mutei, with her brother-in-law Silvester Muindi Nzioka and Kalondu Nzioka visited the suit property and a portion of 3 acres were identified, fenced and given to Kalondu Nzioka, whereof they have lived harmoniously thereon. She insisted that in 1993 when she was given the suit property by her father in-law, there was no objection raised by anyone. She maintained that Kalondu Nzioka has never sought to take the 17 acres that the Defendant occupies and that therefore the Plaintiff's claim was baseless and misplaced. That she was ready to hive off 3 acres to Kalondu Nzioka to hold it for herself and her family. She insisted that the suit property was not customary land. She sought for the suit to be dismissed.
 23. She produced documents attached to her list of documents dated 20th February 2016 in support of her case. She produced the application for transfer of shares as D-Exhibit 1, letter of allotment as D-Exhibit 2 and a certificate of official search as D-Exhibit 3.
 24. On cross examination, she conceded that the Plaintiff lives on the suit property with her family. She stated that she also lives on the suit property. She stated that she was not present when the share transfer form and the allotment letters were prepared. She stated that her husband died in 2005 and that she got title in 2016 which title she got from Lukenya Ranching Society. She also stated that although her husband was given the suit property in 1993, there was no written document to show the same, and that when the property was shared, the first house was not present. She conceded that the 1st house did not get any land from the 40 acres which were divided between the 2nd and 3rd houses. She stated that the Plaintiff lives on 3 acres and the Defendant's son lives on 17 acres of the suit property. She stated that the Plaintiff's mother got another land in the reserve at Ngelani.
 25. DW2, Rosalia Muthike, adopted the contents of her statement dated 16th December 2021 as her evidence in chief. She testified that she was the Defendant's sister in-law. According to her, in 1993, her father, the late Nzioka Mwilu distributed his properties and gave his late brother Vincent Mutei Nzioka and the Defendant 20 acres being the suit property, which property was transferred to the Defendant by the Lukenya Ranching Society. That her father gave the Defendant and her husband the latitude in giving Kalondu Nzioka the first wife, part of the land he had given them.
 26. The witness further stated that in 2007, the Defendant gave Kalondu Nzioka 3 acres, the same were demarcated and a fence planted thereon and that they have harmoniously lived with the Defendant. That later, the Defendant started encroaching on the Defendant's 17 acres. She stated that the suit property was not part of customary land as the same was given to her as a gift.
 27. On cross examination, she stated that she was from the 2nd house. According to her, the 2nd house got 20 acres from the bigger parcel with 40 acres but that the suit property was given to Vincent because he took care of his father. She further testified that the first house got ancestral land, but the suit property was land purchased by her father. She insisted that Kasalu Nzioka was not given any land by her father, and that it is Kalondu Nzioka the first wife who was given 3 acres. She confirmed that she was present in the 1993 meeting when her father shared his property and that although her father was a police officer, he never knew how to read and write.
 28. DW3, Nicholas Nzioka, adopted his witness statement dated 16th December 2021, as his testimony in chief. He stated that the Defendant was his sister in-law and was the registered proprietor of the suit property. He further testified that his father distributed his property in 1993 and gifted Vincent Mutei Nzioka and the Defendant with the suit property. That subsequently, the society transferred the property to the Defendant and issued the certificate of title in her favour in trust for her husband. That



- his father gave the Defendant and her husband the liberty to give Kalondu part of the suit property and that they mutually agreed that she would be given 3 acres, which she got in 2007 and the same is fenced where she is occupying. According to her, Kalondu has never occupied the Defendant's 17 acres. That it is only in 2014 that the Plaintiff began encroaching on the Defendant's land.
29. On cross examination, he stated that the suit property belonged to his late father but that in 1993 their late father gave Vincent Mutei the suit property. He confirmed that he was not present when his father transferred his land to the late Vincent Mutei or when the allotment letter was issued.
 30. DW4, Moses Musomba Mutei, adopted his witness statement dated 16th December 2021 as his evidence in chief. His testimony was that the Defendant who is his mother is the registered proprietor of the suit property and that when he was still in school, he used to cultivate the suit property during school holidays and that as of 2006, he started permanently residing on the suit property, where he stays with a farmhand in a permanent house which he constructed thereon. That in 2007, the Defendant informed her that she wished to give Kalondu Nzioka 3 acres from the suit property.
 31. He further testified that in the company of his uncle Silvester Muindi Nzioka, his mother Kalondu and other family members, they showed Kalondu Nzioka the three acres. That this was done in the presence of one Nicholas John Matheka who was also residing on the land. According to him, it was only in 2014 when the Plaintiff and her son one Dominic started encroaching on the 17 acres that PW4 occupies. He further stated that Kalondu Nzioka has never laid any claim on the Defendant's 17 acres.
 32. On cross examination, he stated that the suit property was gifted to his father in 1993. He stated that he was born on 20th August 1978 and that although in 1993 he was 14 years old, he attended the meeting where his grandfather gave his father the suit property. He stated that members of the 2nd and 3rd houses were present in the meeting.
 33. DW5, Nicholas John Matheka, stated that he relied on his witness statement dated 16th December 2021 as his evidence in chief. He testified that he was a pastor and a former farmhand and tenant of the Defendant. He further stated that in 2004, he approached the Defendant and sought to work on the suit property and reside thereon, which request was acceded to by the Defendant. That he lived on the suit property between 2004 and 2014 and left on account of the Plaintiff's threats. He testified further that in 2007, while he was on the suit property, the Plaintiff together with Kalondu Nzioka, Moses Musomba and other family members came on the suit property, and that Kalondu was given 3 acres which was fenced and she put up a home and occupied. That the Plaintiff's mother has never laid a claim on the 17 acres he was occupying although the Plaintiff began encroaching thereon in 2014.
 34. On cross examination, he stated that he was not present in 1993 when the property was distributed. His testimony was that in 2002, he was staying on the suit property. He stated that the house he lived in belonged to Vincent, and that in 2007 Moses and Silvester were present when 3 acres of the suit property was given to the Plaintiff. That marked the close of the Defendant's case.
 35. Parties filed written submissions in respect of their respective cases. On record are the Plaintiff's submissions filed on 6th May 2022 and further submissions filed on 2nd June 2022 and the Defendant's submissions filed on 2nd June 2022.

Submissions

36. Counsel for the Plaintiff submitted that it was not disputed that the Plaintiff was in possession of the suit property; the Defendant was registered as proprietor in 2014; that the suit property is ancestral land; that the land belonged to Nzioka Mwilu; that the Plaintiff is the daughter of Nzioka Mwilu while the Defendant as his daughter-in-law; that Nzioka Mwilu had 60 acres of land; that he also had 3 wives;



- that 40 acres at Muthwani was shared between the 2nd and 3rd houses; that the Defendant belongs to the 2nd house and that the 1st house never got a share at Muthwani.
37. The Plaintiff submitted that the only issue was whether the suit property belonged to the 1st house or was given as a gift to the Defendant. Counsel submitted that no official of Lukenya Ranching Society signed the application for transfer, that the allotment letter did not have Mr. Nzioka Mwilu's signature or identity card and that there was no evidence of how the defendant acquired the title deed of the suit property. According to the Plaintiff, the documents on record showed that the defendant obtained the title deed through misrepresentation hence the same was impeachable.
38. Counsel submitted that the transfer form of the deceased share was signed after the deceased had died and that there are no minutes to show the meeting of 1993 as alleged by the Defendant. Counsel submitted that the Defendant holds the suit property in trust for the 1st house and that the same should be registered in the names of the Plaintiff on behalf of the 1st house. Counsel relied on the cases of *Lucia Kanini Muamba v Chomba Mwamba* [2020] eKLR, *Re Estate of Nyacheo Osindi (Deceased)* [2019] eKLR, *Re Estate of Muchai Gachuika (Deceased)* [2019] eKLR, *Re Estate of Philis Muthoni M'inoti (Deceased)* [2019] eKLR, *Mugo Muigai & 4 others v Official Receiver & Personnel Liquidator & Capital Finance Limited & Pioneer & 2 others* [2019] eKLR and *Dickson Karaba v John Ngata Kariuki & another*.
39. On their part, counsel for the Defendant submitted that the Plaintiff had not met the threshold for cancellation of title. Counsel relied on Section 26(1) of the *Land Registration Act* and argued that a title can only be impeached if it was obtained on misrepresentation, illegality, fraud, lack of procedure or by a corrupt scheme. Reliance was placed on the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR, for the proposition that fraud must not only be pleaded but also proved on a higher standard than that required in ordinary civil cases. Further reliance on the issue of proof of fraud was placed on the cases of *Mellen Mbera v James Theuri Wambugu* [2020] eKLR and *Nyangate Guto alias Watson Mogere Mogoko v Maxwell Okemwa Mogoro & National Bank of Kenya Ltd.*
40. Counsel observed that Order 2 Rule 10 (2) of the *Civil Procedure Rules* require that every pleading must contain particulars of any fraud that the party intends to rely upon. Counsel therefore argued that the Plaintiff merely alleged fraud on the part of the Defendant but failed to indicate the particulars of fraud hence her allegations of fraud were neither properly pleaded nor proved. Counsel pointed out that there was no evidence from Lukenya Ranching Society to show that the title obtained by the Defendant was obtained illegally by fraud or through a corrupt scheme. Further, that the plaint does not raise any fraud against the Defendant or how the property was registered.
41. Counsel also argued that the late Nzioka Mwilu had purchased share Number 559 from Lukenya Ranching Society and therefore this was not ancestral land. Counsel submitted that the Plaintiff's claim is that she was not satisfied the way her late father had distributed the suit property during his lifetime and that therefore she relies on the clan deliberation of 30th August 2014, which according to counsel had no probative value.
42. It was submitted for the defendant that the clan chairman was called by a disgruntled daughter who felt that the mode of distribution was not equitable. Counsel argued that most witnesses stated that the 1st house got the deceased's ancestral land, and the 2nd and 3rd houses got the land from Lukenya Ranching Society. According to the defendant, PW4 acknowledged that he was present in the 1993 meeting when the defendant transferred the suit property to Vincent Mutei that is why he never complained before any authority that his signature was forged.



43. Counsel pointed out that while PW1, PW2, PW3 and PW4 claimed that the suit property belonged to the 1st house, they sought that it be registered in favour of the Plaintiff and not on behalf or in trust for the beneficiaries in the 1st house.
44. Counsel argued that Nzioka Mwilu's gift was valid and satisfied the requirements of a gift *inter vivos*. Counsel relied on the case of *Estate of M'raiji Kithiano (deceased)* Meru HC Succession Cause No 419 of 2006, where the court stated that a gift *inter vivos* should be complete to be valid; that a gift in land is effected through a written memoranda or transfer and that a gift cannot be based on a mere promise or in unfulfilled intention. Further, reliance on requirement for a gift *inter vivos* was placed on the case of *Estate of the late Gedion Manthi Nzioka (deceased)* [2015] eKLR.
45. Counsel stated that the Plaintiff did not sue Lukenya Ranching Society when it is the society that facilitated the issuance of title to the Defendant.

Analysis and Determination

46. I have considered the pleadings, the evidence and the submissions filed. It is clear that the Plaintiff's claim is that she is entitled to the suit property on account of the decision of her clan elders of 30th August 2014, and 15th November 2015, in which proceedings the Defendant did not take part. Therefore, the issue that arise for determination is whether the Plaintiff is entitled to the orders sought.
47. It is not in dispute that among the several properties held by the late Nzioka Mwilu, there were two parcels of land measuring 40 acres and 20 acres respectively, and that those two parcels have never been registered in the names of Nzioka Mwilu as the 40 acres are registered in the names of Nzioka Nthenya and Sylvester Nzioka while the suit property measuring 20 acres was registered in the Defendant's name, on account of her husband Vincent Mutei Nzioka. Witnesses on both sides confirmed a family meeting of 1993 convened by the late Nzioka Mwilu but the Plaintiff's witnesses did not state the agenda of the meeting.
48. A close look at the plaint shows that the Plaintiff's claim is anchored on the alleged clan distribution dated 30th August 2014, which according to her, the clan shared the 60 acres of Nzioka Mwilu equally to the three houses. The Plaintiff alleged that in 2014, she learnt that the Defendant was the registered proprietor of the suit property and has threatened to evict her. Therefore, the Plaintiff's prayer for cancellation is based on her alleged entitlement as allegedly distributed by the clan on 30th August 2014. In that regard, the Plaintiff's submissions on misrepresentation and fraud on the part of the Defendant are not supported by any pleadings, and therefore the same have no bearing in this matter.
49. I have considered the clan minutes dated 30th August 2014, the English translation thereof were produced as P-Exhibit 11. Those minutes show that the complainant was the Plaintiff herein and the Defendant was the Defendant in this case. The minutes also shows that the clan officials had only taken the statements of three witnesses, namely Kasalu Nzioka, Silvester Muindi Nzioka and Mutiso Nzioka, when two Administrative Police Officers appeared with a letter from the OCS which forced the meeting to stop. Therefore, there was no decision made on 30th August 2014. Even the minutes of 14th November 2015 which were produced as P-Exhibit 12, do not show any decision made by the clan Sub-County Committee as the same merely contains witness statements. Therefore, it is not true that the clan shared the land as alleged by the Plaintiff.
50. PW3, Stephen Ndunda testified that at the time they had the clan meeting of 30th August 2014, they were not aware that the suit land was registered in the name of the Defendant. He also confirmed that Defendant was not involved and did not take part in the proceedings before the clan.



51. Article 159 (2) (c) of the *Constitution* enjoins this court to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional resolution mechanisms as long as the latter do not contravene the Bill of Rights, is not repugnant to justice and morality or inconsistent with the *Constitution* or any written law. In that respect, alternative justice systems are not inferior to the court system; they are just other forms of dispute resolution mechanisms. Having considered the basis of the Plaintiff's claim which are the proceedings before the Divisional Officials of the Eombe Nthoka Katemi Clan dated 30th August 2014 and those of the Clan Sub-County Committee date 14th November 2015, it is clear that in both proceedings, the only thing the Clan Committees did was to take witness statements but no determinations were made. In my view therefore, there was no sharing of the property of the late Nzioka Mwilu on 30th August 2014 by the clan as alleged or at all. In any event, the 60 acres which were allegedly the subject of the proceedings before the clan, were not registered in the name of Nzioka Mwilu as at the time of the proceedings, the same having already been registered in the names of the 2nd and 3rd houses.
52. Section 26 of the *Land Registration Act* No 3 of 2012, provides that a certificate of title shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions endorsed in the certificate and the title shall not be subject to challenge except on grounds of fraud, misrepresentation, to which the proprietor is a party or where the title was acquired illegally, unprocedurally or through a corrupt scheme.
53. The Defendant herein was registered as proprietor of the suit property on 6th June 2014. The Plaintiff did not plead fraud, misrepresentation, illegality, lack of procedure or any form of corruption in the acquisition of the title by the Defendant. Parties are bound by their pleadings and evidence follow pleadings. In the premises therefore, the Plaintiff has not given any evidence that meets the threshold set out in Section 26 (1)(a) and (b) of the *Land Registration Act*, sufficient to warrant the cancellation of the Defendant's title. The burden of proof rests with the Plaintiff who is the one making a claim. It was for her to plead and prove her allegations that she deserves an order of cancellation of the Defendant's title. It is only after she has discharged her burden of proof under Section 26 (1) (a) and (b), that the evidentiary burden of proof shifts to the Defendant to show how she obtained her title. From the Plaintiff's submissions, she appears to demand from the defence to explain how the Defendant obtained the registration of the suit property, yet the Plaintiff has not even pleaded the grounds for impeachment of title as enshrined in Section 26(1) (a) and (b).
54. It is my considered view that having failed to plead and prove misrepresentation, fraud, illegality, want of procedure or corruption on the part of the Defendant, the Plaintiff cannot shift the burden of proof to the Defendant. A Defendant is in law expected to plead and prove in response to that which was been pleaded and proved against them and nothing more.
55. Even the Plaintiff's claim that the first house was entitled to the suit property cannot entitle her to the claim. First, she is not the first house as she states that the first house is the house of Kalondu Nzioka. She is merely from the first house. In addition, the Plaintiff seeks to recover land allegedly belonging to her late father Nzioka Mwilu deceased. It is trite law that for a person to claim on behalf of a deceased person, such person ought to have a grant of letters of administration. There was no evidence that the Plaintiff had obtained such grant of letters of administration to enable her file this suit. The issue of capacity was raised in the Notice of Preliminary Objection filed by the Defendant on 30th August 2016 and dated 29th August 2016. This suit was field by the Plaintiff in her own capacity and not as an administrator of the estate of her late father or on behalf of the members of the 1st house, as the



Plaintiff sought to be registered as the proprietor of the suit property in her own right. The pleadings and the evidence on record do not point to any right of the Plaintiff to get the suit property.

56. Court orders are not made in vain. The Plaintiff sought for cancellation of Parcel No Lukenya Block 3/638. The Plaintiff proceeded to produce P-Exhibit 1 which is a search in respect of Parcel Mavoko Town Block 3/2592 as at 16th February 2016. The search shows that the said parcel was in the name of Joyce Ndunge Mutei the Defendant herein. P-Exhibit 2 was a search obtained on 9th March 2017. The same shows that on 2nd January 2016, title No Mavoko Block 3/2592 was closed on subdivision to create new title numbers 49573 – 49576. This suit was filed on 18th January 2016. It therefore appears that as at the time of filing suit the suit property had already been subdivided on 2nd January 2016. In any event, the title sought to be cancelled is stated as Lukenya Block 3/638. That is not the same as Mavoko Town Block 3/2592. Even if the court were to grant the prayer sought by the Plaintiff, there is no proof that Land Parcel No Lukenya Block 3/638 exists and or belongs to the Defendant. In addition, title number Mavoko Town Block 3/2592 having been subdivided to create Number 49573 and 49576, is not available for cancellation, having been subdivided on 2nd January 2016. It would therefore serve no purpose to grant the orders sought in the plaint.

57. For the above reasons, it is this court's finding that the Plaintiff has failed to prove her case on the required standard and the same be and is hereby dismissed with costs to the Defendant.

58. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Tamata for the Plaintiff

Mr. Musyimi for the Defendant

Josephine – Court Assistant

