



REPUBLIC OF KENYA



**Mukunzu v Nthenge & 5 others; Nduku (Respondent) (Environment & Land  
Case E095 of 2021) [2025] KEELC 4509 (KLR) (17 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4509 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E095 OF 2021**

**AY KOROSS, J**

**JUNE 17, 2025**

**BETWEEN**

**EMMA NZULA MUKUNZU ..... PLAINTIFF**

**AND**

**JANE KALEKYE NTHENGE ..... 1<sup>ST</sup> DEFENDANT**

**MARIETTA WAENI MUSAU ..... 2<sup>ND</sup> DEFENDANT**

**JOYCE MUTINDA ..... 3<sup>RD</sup> DEFENDANT**

**DAVID KYALO NDAMBUKI ..... 4<sup>TH</sup> DEFENDANT**

**BENECLIFF MUTHIANI ALIAS MUTHIANI NGALI ..... 5<sup>TH</sup> DEFENDANT**

**THOMAS CHANGAMU ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**MARGARET NDUKU ..... RESPONDENT**

**RULING**

1. This ruling seeks to determine the notice of motion dated 16/09/2024 filed by the plaintiff against the respondent, and she has sought the following reliefs from this court: -
  - a. The plaintiff be granted leave to substitute the 1<sup>st</sup> defendant, Jane Kalekye Nthenge, who is deceased, with the legal representative of her estate, Margaret Nduku, the respondent herein.
  - b. The honourable court be pleased to cite Margaret Nduku, the respondent, in contempt of the court's orders issued on 25/07/2024.
  - c. Consequent to the grant of prayer 2 above, the honourable court be pleased to order that the respondent be summoned to attend court on a date to be fixed by the court to show cause



why she should not be committed to civil jail for a term exceeding 6 months for disobeying the court's orders issued on 25/07/2024.

- d. The honourable court be pleased to order that the body of Jane Kalekye Nthenge (deceased) be exhumed from Mavoko Town Block 3/89456.
  - e. Public health officers from the Machakos County Government to supervise the exhumation exercise.
  - f. To maintain law and order, the officer commanding station (OCS), Kangundo police station, be directed to provide security during the exhumation exercise.
2. The motion is premised on the grounds listed on the face thereof and the plaintiff's supporting affidavit sworn on 16/09/2024. A summary of the grounds in support of the motion is:
- a) the 1<sup>st</sup> defendant died during the subsistence of the suit whereby the plaintiff had sued the defendants over her parcel of land known as Mavoko Town Block 3/89456 [suit property]; and
  - b) Upon the demise, she moved this court by an application dated 24/07/2024 in which she was granted orders on 25/07/2024 that stopped the interment of the 1<sup>st</sup> defendant in the suit property,
  - c) these orders were duly served upon the respondent who willingly disobeyed them and proceeded to bury the 1<sup>st</sup> defendant in the suit property; and lastly,
  - d) By Kangundo CM Succ Misc. Application No. E040 of 2024 Emma Nzula Mukunzu vs Margaret Nduku, a limited grant of letters of administration had been issued to the respondent to defend the instant suit.
3. The motion was unopposed, and this court directed that it be canvassed by way of written submissions. In compliance, the law firm of Ms. Stanley Nthiwa & Co. Advocates LLP for the plaintiff filed their well-argued written submissions dated 26/11/2024, and this court is appreciative of counsel in that regard.
4. Having carefully considered the motion, its grounds, affidavit, submissions, and the relevant legal and jurisprudential framework the following issues, which have also been captured in the plaintiff's submissions arise for analysis and determination:
- a) whether in these proceedings, the 1<sup>st</sup> defendant should be substituted by the respondent and
  - b) whether the relief for contempt of court has met the legal threshold. Shortly, these 2 issues shall be addressed consecutively.

**a. Whether in these proceedings, the 1<sup>st</sup> defendant should be substituted by the respondent**

6. As rightfully submitted by the plaintiff's counsel, the pertinent legal provision for substitution of a deceased defendant is found in Order 24 Rule 4 of the Civil Procedure Rules (CPR), which states: -

“(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.



- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

7. In this case, the subject matter is on land rights where the plaintiff has pleaded trespass and has sought several orders against the defendants, including eviction and mandatory injunction over the suit property. Therefore, it follows that the cause of action survived the death of the 1<sup>st</sup> defendant. As gleaned from the limited grant that was tendered to this court. The 1<sup>st</sup> defendant died on 15/07/2024, meaning the suit against her has not abated as the instant motion was filed within one year of her death.
8. Accordingly, and on application of the law, a deceased defendant can only be substituted by a legal representative of her estate. In this case, the limited grant issued in Kangundo CM Succ Misc. Application No. E040 of 2024 Emma Nzula Mukunzu vs Margaret Nduku illustrates that the respondent was on 27/08/2024 appointed as the legal administrator of the deceased’s estate. Suffice it to say that she can competently substitute the 1<sup>st</sup> defendant in these proceedings. Having met the legal threshold for substitution, this court finds the relief sought is merited.

#### **b. Whether the relief for contempt of court has met the legal threshold**

9. Now, on the reliefs of contempt, it must be noted that Section 5 of the *Judicature Act* is bereft of the procedure for instituting contempt proceedings, and consequently, this court has to seek recourse in the procedure applicable in the High Court of Justice in England and Wales particularly so Rule 81.4 of the England and Wales Civil Procedure Rules. These procedures were well considered in the Court of Appeal decision of Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR.
10. Regarding the authority of this court to entertain contempt proceedings, the same is derived from Section 29 of the *Environment and Land Court Act*. Further, as concerns the jurisprudence on contempt proceedings, the Supreme Court of Kenya decision of Republic v Ahmad Abolfathi Mohammed & Sayeed Mansour Mousavi [2018] KESC 51 (KLR) stated that contempt proceedings are quasi-criminal, they must be exercised with utmost care and only as a last resort and an applicant must establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order.
11. Moreover, as stated in the decision of Aaron Gitonga Ringera & 3 Others vs. P. K. Muite & Others, Nairobi HCCC No. 1330 of 1991, which was cited with approval and summarized in KAR v JR [2023] KEHC 18588 (KLR), in contempt proceedings the tests are inter alia, (a)there must be an existing court order capable of being disobeyed;(b)the alleged contemnor must have been made aware of the existence of the court order; and (c)there must be shown to be a breach (disobedience) of the said court order.
12. As held in Mutitika v. Baharini Farm Limited [1985] KLR 229, 234, which was cited with approval in Republic v Ahmad (Supra), the standard of proof in contempt proceedings is higher than proof on the balance of probabilities, almost but not exactly, beyond a reasonable doubt. Therefore, this is the measurement that will be meted against the instant motion.
13. In the circumstances of this case, this court 25/07/2024, barred the defendants, family members of the 1<sup>st</sup> defendant, the funeral welfare association and any other person involved in the burial from interring the remains of the 1<sup>st</sup> defendant in the suit property. This order was to stay in place for 14 days only. The 1<sup>st</sup> question that arises is whether the court order was served to the court’s satisfaction?



14. In contempt proceedings, the 1<sup>st</sup> step threshold that an applicant has to meet, as held in Aaron Gitonga Ringera (Supra), is that an applicant must prove to the satisfaction of the court that the contemnor was made aware of the existence of the court order. This knowledge of the order is also reiterated under Rule 81.4 (2) (c) and (d) of the England and Wales Civil Procedure Rules, which references service of the order upon the contemnor.
15. To demonstrate she had met this 1<sup>st</sup> hurdle, the plaintiff has availed the return of service deposed on 29/07/2024 by Andrew K. Mwanzia, a process server, whereby at paragraph 5 thereof, he states he served the defendants' 3 daughters with the court order.
16. About this affidavit, we are not told who amongst the 6 defendants these daughters belonged to, their names and/or their connection with the 1<sup>st</sup> defendant. Moreover, it is not disclosed if the respondent herein is one of the 3 daughters alluded to. Because of the vague description of who was served with the court order, this court finds the respondent was never served and also finds the legal threshold for contempt proceedings has not been met.
17. In the end and for the reasons stated above, this court hereby issues the following final disposal orders: -
  - a. That the deceased 1<sup>st</sup> defendant, Jane Kalekye Mukunzu, shall be substituted by Margaret Nduku.
  - b. This matter shall be mentioned for purposes of taking a hearing date.
  - c. These orders are to be personally served upon Margaret Nduku.
  - d. The costs of the motion shall be in the cause.

Orders accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 17<sup>TH</sup> DAY OF JUNE, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**17.06.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Wekesa holding brief for Mr. Nthiwa for plaintiff.

M/s Morara for 6<sup>th</sup> defendant

N/A for 1<sup>st</sup> – 5<sup>th</sup> defendants.

Ms Kanja- Court Assistant

Page 4 of 4

