



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 2167 OF 2000
IN THE MATTER OF THE ESTATE OF NDUNG’U MARINE
WANG’OMBE (DECEASED)

MARTIN NDUNGU MUTERO
APPLICANT

VERSUS

LEAH WAMBUI NDUNGU
.....RESPONDENT

RULING

1. Before this Court for determination is Summons dated **12th March 2025** by which the Applicant, **MARTIN NDUNGU MUTERO** seeks the following orders:-

- a) **THAT the Honourable Court be pleased to recall all the titles in the names of LEAH WAMBUI NDUNGU’S children and revert them to the estate of the deceased for redistribution.**
- b) **THAT Leah Wambui Ndung’u , the original administrator be cited for contempt of court for failure to obey the court order issued on 19th October 2023.**
- c) **THAT costs of this application be provided for.**

2. The Application was premised upon **Section 97 of the Law of Succession Act Cap 160 of the laws of Kenya, Rules 49 and 73 of the Probate and Administration Rules, Articles 159 of the Constitution of Kenya 2010 and all other enabling provisions of the Law.** The Application was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent, **LEAH WAMBUI NDUNGU** opposed the application through her replying affidavit dated **21st May 2025.**
4. The application was canvassed by way of written submissions. The applicant filed written submissions dated **12th August 2025.** The Respondent did not her submissions.

APPLICANT'S CASE.

5. The applicant avers that, on 12th June 2019, Honourable Justice J.N Onyiego gave orders that the respondent, Leah Wambui Ndungu shall render an account to the court and all beneficiaries on proceeds of sale that she undertook with regard to the deceased's estate and how the amounts were

expended and what is available to the other beneficiaries within 90 days. The court also gave orders that the two administrators do render a valuation of the remaining part of the estate through a jointly agreed valuer to enable the court to determine the extent to which the already benefited beneficiaries are entitled to the remaining part of the estate. He argues that the Respondent has ignored, refused and or failed to obey the court order. He stated that she has sold 7.048 acres of land intended for the protected purchasers and distributed some land to her children. He asked the court to recall all the titles in the name of Leah Wambui Ndungu's children and revert them to the estate for redistribution. He stated that he has rendered a valuation report. The beneficiaries he is representing have not benefited from the deceased's estate.

RESPONDENT'S CASE.

6. The Respondent argues that this court lacks jurisdiction to recall titles because they have been long transmitted to the beneficiaries who have since sold them to third parties. The

transfers happened before the applicant filed an application for revocation of the grant. She averred that she was not aware of the orders of 19th October 2023. Her former advocate Mr. Robert Gichimu Githinji did not communicate to her the orders of 19th October 2023. He did not also appeal on the orders of 12th May 2019. He went into politics in 2017 and attempts to reach him were futile. She only changed her advocates in 2024 who informed her that her former advocates did not file an appeal. She states that the applicant's family took half of LR. No. Nyeri/ Island Farms /139 and subdivided it into Nyeri Island Farms /2192, 2197,2210 and 2221. She accused the applicant of being unco-operative and uncommunicative and has not assisted in implementation of the orders of 19th October 2023. On 2nd July 2024, the applicant went to her home in the company of some strangers, the area chief and officers from Naromoru Police Station without informing her of the purpose of the visit. She avers that the applicant should have communicated to her about the existing order. She states that she is 93 years old and is unable to do much without assistance.

APPLICANT'S SUBMISSIONS.

7. The applicant identified the following as issues to be determined by this court;
- i. Whether this Honourable Court has jurisdiction to grant the orders prayed for.
 - ii. Whether the titles in the names of LEAH WAMBUI NDUNG'U'S children should be recalled and reverted to the estate of the deceased for redistribution.
 - iii. Whether the original administrator, Leah Wambui Ndung'u is in contempt of Court.
8. On the first issue, he argues that this court has the jurisdiction to recall the titles and revert them to the deceased's name. He relied on the decision of **Munyasya Mulili & 3 Others v Sammy Muteti Mulili [2017] eKLR**
9. On the second issue, the applicant submitted that when the grant was revoked, the court protected the interests of the purchasers and the beneficiaries of the estate by issuing orders for account by the respondent. However, the respondent disposed off the properties to her children and therefore, there is need to recall the titles for redistribution to the beneficiaries and the purchasers.
10. On the third issue, the applicant sought to rely on the decision of **Kioni & 3 others v National Disciplinary**

Committee of the Jubilee Party & 2 others; Chege (Contemnor) (Civil Appeal E630 of 2023) and argued that he had proved that the respondent was in contempt of the court orders of 19th October 2023. He argued that the orders were issued in the presence of the respondent's advocate. That the argument that she lost touch with her advocates is untenable. He argued that as a litigant, she should have followed up on her case instead of blaming her advocates. He relied on the decisions of **Lucy Bosire v Nyankoni Manga Robi, ELC NO. 211 OF 2009** and **Josphat Nderitu Kariuki v Pine Breeze Hospital Ltd (2006] eKLR** where the courts held that an applicant cannot blame his advocates for failing to attend court. In this case, the respondent should own up her mistake and stop blaming her former advocate for not informing her of the orders of 19th October 2023 or appealing against the orders of 12th May 2019.

ANALYSIS AND DETERMINATION.

11. I have considered the application, response thereto, submissions by the applicant's counsel and the decisions cited. The issues for determination are;

- i. Whether the Respondent is in contempt of the court orders issued on 19th October 2023.**
- ii. If yes, what orders should issue?**
- iii. Whether the court has jurisdiction to cancel titles in the names of the respondents children.**

Whether the respondent is in contempt of the court orders issued on 19th October 2023

12. The Applicant's case is that the Respondent violated this court's orders issued on 19th October 2023 directing the Respondent to file accounts on proceeds of sale that she undertook with regard to the deceased's estate and how the amounts were expended and what is available to the other beneficiaries within 90 days. The court also gave orders that the two administrators do render a valuation of the remaining part of the estate through a jointly agreed valuer to enable the court to determine the extent to which the already benefited beneficiaries are entitled to the remaining part of the estate. The Applicant argues that the Respondent was aware of the court orders and has deliberately refused to comply with those orders.

13. The Respondent has denied violating the court order as alleged. She stated that her former advocates did not inform

her of the court orders. She argued that she lost touch with her former advocates who went into politics.

14. The jurisdiction of this Court to punish for contempt is found in **Section 5 of the Judicature Act** which provides

(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court."

15. Thus, in **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] KLR 828**, the obligation to obey court orders was well explicated thus:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to

obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void."

16. In the premises, the elements that the Applicant herein needed to prove are:

- a) that the Order of **19th October 2023** was clear, unambiguous and binding on the respondent;
 - b) that the respondent had proper notice or knowledge of the terms of that Order;
 - c) that the Respondent has deliberately failed to obey the terms of the Order;
- (see **Katsuri Limited v Kapurchand Depar**

Shah [2016] eKLR)

17. The applicable standard of proof, is above a balance of probabilities, given the criminal connotations of contempt proceedings. In **Gatharia K. Mutikika v Baharini Farm Ltd [1985] KLR 227** the Court of Appeal made this clear thus:

"...In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi- criminal in nature."

18. In the light of the gravity of the personal consequences that would ordinarily flow from a finding of contempt, the law

requires proof that the order in question was brought to the attention of the alleged contemnor as proof that he/she had personal knowledge of said order.

19. In **Oilfield Movers Ltd v Zahara Oil & Gas Limited** [2020]eKLR the court stated -

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”

20. I have perused the file. The orders that the applicant seeks to execute were actually issued on 12th June 2019. The record shows that Counsel for the respondent was not in Court on the said date but must have learnt of the ruling soon after as he proceeded to lodge Notice of Appeal dated 27th June 2019 on 1st July 2019. The applicant is therefore deemed to be aware of those orders. But the contempt proceedings are not in respect of the orders issued on 12th June 2019, they refer to orders that were issued on 19th October 2023.

21. There appears to have been a lull between 12th June 2019 and 19th October 2023, this is partly explained by the death of

the original applicant JOSEPH MUTERO NDUNGU on 15th April 2020. The current applicant substituted him as administrator on 24th April 2023.

22. Strictly speaking the respondent is right when she states that she is not aware of Orders issued on 19th October 2023. What the applicant is seeking is the enforcement of the orders of 12th June 2019. For an application for contempt of court to be successful, of necessity it must be presented as soon as possible after the alleged contemptuous act. A party cannot sit on an order for close to 6 years and then claim that the other party is in contempt. In the absence of an explanation of the delay in presenting the application, I decline to issue the orders and dismiss the application on that limb.

Whether the court has jurisdiction to cancel titles in the names of the respondents children.

23. As regards this Court's jurisdiction as a succession court to revoke title, this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court

process by parties under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. Section 47 of the Law of Succession Act provides as follows:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient (Emphasis mine)

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice

24. Rule 73 of the Probate and Administration Rules provides as follows:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

25. In **Succession Cause 265/2004 Munyasya Mulili vs Sammy Muteti Mulili**; the court cancelled titles after revoking the grant. The court in the above case relied on the

decision of J. Musyoka in Re Estate of Alice Mumbua Mutua (deceased) (2017) eKLR where the Judge considered when a case can be heard as a succession cause or when it can be heard in other courts with concurrent jurisdiction - like the ELC. The Judge said;

The Law of Succession Act, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

26. All this goes to show that the Court does have the power to revoke the titles but the applicant has the duty to prove his case. In this case the Summons does not set out the particular titles that the Court should cancel. I cannot assume that I should proceed to cancel all the titles whose searches are attached to the application. In any event failure to particularise the titles means that the respondent is prejudiced as she is not clear what she is defending.

27. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: - “

[11].It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -“.....it is now trite principle in law that parties are bound by their pleadings and that any

evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Peadings" published in [1960] Current Legal Problems. At p. 174 the learned author posited that: -As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadingsfor the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of

justice....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

28. For this reason, I also decline to grant the prayer seeking to recall the titles.
29. What then are the appropriate orders in this case.
 - a. In compliance with the orders of 12th June 2019, the respondent (Leah Wambui) shall render an account to Court and all the beneficiaries on proceeds of sale that she

undertook with regard to the deceased's estate and what is available to the other beneficiaries within 30 days.

- b. The applicant (Martin Ndungu Mutero) will file and serve his proposed mode of distribution within 14 days of the applicant filing the accounts.
- c. The respondent shall file her response to the proposed mode of distribution within 14 days of service
- d. The matter will be mentioned on 24th February 2026 to confirm compliance and take further directions.
- e. This being a family matter each party will bear their own costs
- f. Leave is granted to appeal, any party exercising their right of appeal to do so within 30 days.

It is so ordered

DATED AND DELIVERED VIRTUALLY at NAIROBI this 27th Day of NOVEMBER 2025.

**P. M. NYAUNDI
JUDGE**

In the presence of:

Fardosa Court Assistant

Makura for Applicant

John Muu for Respondent