



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CIVIL CASE NO. 1B OF 2020

P & T EMPLOYEES HOUSING CO-OPERATIVE

SOCIETY

&

28

OTHERS.....

.....PLAINTIFFS

VERSUS

REGISTRAR OF LAND MACHAKOS.....1ST

DEFENDANT

JOYCE MUTHOKI KIOKO.....2ND

DEFENDANT

MARGARFT MWONGELI.....3RD

DEFENDANT

KIMEU IRENE NTHENYA NDUVA.....4TH

DEFENDANT

MWANGAGI MUTULA5TH

DEFENDANT

BENSON KYALO MUTULA.....6TH

DEFENDANT

DOROTHY MUENI.....7TH

DEFENDANT

RULING

1. This is a ruling concerning the unopposed notice of motion dated 4/02/2025 filed by the 6th defendant, in which he has moved the court under the provisions of **Sections 134 and 137** of the **Evidence Act**, **Section 48** of the **Civil Procedure Act**, and **Order 51** of the **Civil Procedure Rules**, where he prays for the following orders: -

a. Spent.

b. That the honourable court be pleased to set aside and vacate the interim orders issued on 22/7/2022 and its consequential orders.

c. That the plaintiff's application dated 8/7/2024 and suit dated 20/11/2020 be struck out as it constitutes a collateral attack on a decision and decree in succession cause No. 162/2000 and 368 of 2008 at Machakos made on 29/9/2017, hence contravenes Section 34 of the Civil Procedure Act.

2. The motion is supported by the grounds set out in the body thereof and the 6th defendant's affidavit sworn on the instant date, and chiefly, he avers that the court lacks jurisdiction as it cannot sit on an appeal over the judgment emanating from Machakos case nos. 162 of 2000 and 368 of 2008. According to him, the plaintiff's title to the property was cancelled on

29/09/2017, and the suit property was distributed to the beneficiaries of the deceased. He maintained that now, eight years later, the plaintiff is improperly attempting to challenge this previous decision through a new suit, which is not allowed. He maintained that any grievances must be addressed through an appeal or application within the original case, rather than filing a second suit.

3. On the hearing date, 29/05/2025, **Mr Tamata**, representing the 6th defendant, stated he would not be making any submissions. **Mr Muumbi**, representing the 4th to 7th defendants, indicated he supports the motion. **Mr Kuria**, also present for the 1st defendant, stated that he would not participate in the motion, whilst **Mr Maranga**, present for the plaintiff, did not make any submissions but sought for extension of time, which the court declined.
4. Having considered the motion, its grounds and affidavit, together with the relevant provisions of law and prevailing judicial precedents, the sole issue for determination is **whether this court possesses jurisdiction to entertain the suit.** Nonetheless, before proceeding further, it is essential for the court to address its mind on the prayer that seeks the court to set aside a purported order dated 22/7/2022. As a court of record, this court has examined its record and suffice it to say, no such record exists. Therefore, the relief sought is misplaced and cannot be granted.

Additionally, the Sections of the law that the 6th defendant relied upon have no relevance whatsoever.

5. Reverting to the core issue for determination, this court will consider the relevant law and prevailing jurisprudence. Regarding this, **Article 162(2)(b)** of the **Constitution** and pertinent statutes, including the **Environment and Land Court Act (“ELC Act”)**, bestow this court with the jurisdiction to hear disputes relating to use, occupation, and title to land and environment.
6. As for jurisprudence, it is now settled law, as established in the decision of **Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989)**, that once a court finds it does not have jurisdiction to hear and determine a dispute, it has no choice but to lay down its tools. This position was underscored by the Supreme Court of Kenya in the decision of **Republic v Karisa Chengo & 2 others [2017] eKLR**, which stated that:

*“John Beecroft Saunders in his treatise **Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:***

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated

before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

7. The recent Court of Appeal decision of **Diasproperty Limited & 5 others v Githae & 10 others [2024] KECA 318 (KLR)** expressed itself on the intersection between the probate court and this court in the following manner: -

“36. Under Article 165(5)(b) of the Constitution, the High Court shall not have any jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court. Under Article 162(2) of the Constitution and section 13 of the

Environment and Land Court Act, 2012, all matters relating to land, its ownership, use, tenure, boundaries, and so on, are reserved for the Environment and Land Court.

37.It is notable that under Rule 43(1) of the Probate and Administration Rules, made under the Law of Succession Act, where, in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, or there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate court. It is when such a determination is made that the succession court can confirm the grant, bearing in mind the determination. Of course, with the Constitution and the Environment and Land Court Act, such a dispute has to be referred to the Environment and Land Court for resolution.”

8. Respecting jurisdiction over matters related to intestate and testamentary succession, as well as the administration of estates of deceased persons and related issues, the probate courts, including the High Court and Magistrates Courts, have statutory jurisdiction to entertain such disputes as envisaged

by the **Law of Succession Act (“LSA”)**. When exercising such jurisdiction, the probate court deals with the free property of a deceased person, which is usually the property that the deceased was legally competent to dispose of freely during her lifetime, and in respect of which her death had not ended her interest. ***[See the definition from the interpretation section of the LSA.]***

9. Having established the legal framework of jurisdiction, we will now proceed to address the matter at hand. Having scrutinised the record, particularly the averments contained in the plaint, especially paragraphs 18, 19, 20, 21, and 22, and by them, the plaintiff avers that it purchased land parcel no. **L.R. Mavoko Town Block 2/170 (“suit property”)** from Serah Mune Mutula (deceased), who transferred it to it during her lifetime. To support these assertions, an alleged copy of the title deed issued on 17/07/2002 and a purported copy of the official search from the 1st defendant dated 30/12/2019 are in their list of documents. In essence, the plaintiff is stating that the suit property was never the free property of the deceased and should never have been the subject of distribution by the probate court to the deceased’s heirs.

10. According to it, the other defendants from the 2nd to the 6th made false representations to the 1st respondent that the probate court had issued orders for the cancellation of the suit property and that it was part of the deceased’s estate. It alleges that the 1st respondent acted on these

misrepresentations, in bad faith, negligently, and with malice, and cancelled its title deed over the suit property. The plaintiff references a purported court order from the court issued in **Machakos HCSC 268 of 2008**, and among the documents in the plaintiff's list of documents is an alleged order made by the probate court on 29/09/2017, which shows that upon revocation of the grant, the deceased's properties were to revert to her name.

11. A review of the alleged certificate of confirmation of grant in this list of documents, particularly the one of October 2008, reveals that the suit property was not listed among the assets subject to distribution. The partial certificate of confirmation of grant dated 6/07/2023 and submitted in support of the current motion also does not include it. However, from the copy of the title deed submitted in support of the motion, it is evident that the 4th and 7th defendants allegedly hold a title deed over the suit property alongside Josephine Mwelu Mutua. This particular title deed allegedly indicates that the suit property is to be sold, with the proceeds shared among the listed beneficiaries.
12. With this in mind, and considering that the plaintiff has pleaded and particularised fraud in paragraph 20 of the plaint, which challenges the defendant's title document for allegedly cancelling its title deed without an existing court order, it follows that this court has jurisdiction to entertain the suit by virtue of **Section 26** of the said **Act**, which reads;

“26 (1)The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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 contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a)on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b)where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

13. Furthermore, this court diverges from the view of the 6th defendant that the plaintiff should have sought a review of certain orders in the probate court. Foremost, he has not tendered any documentation indicating that the probate court issued orders against the suit property. Additionally, the plaintiff is a third party and not an heir to the deceased's estate, thereby excluding the dispute from the jurisdiction of the probate court. Guidance on this matter is derived from 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

14. As this court concludes, and of particular significance, as appropriately stated in the motion, this court lacks jurisdiction to set aside orders allegedly issued by the probate court, and because the matter is yet to be determined, the plaintiffs still have an opportunity to amend their pleadings.

15. Of importance too, as a co-registered owner of the suit property, it is crucial to include Josephine Mwelu Mutua in these proceedings since her presence before the court might

be necessary to enable the court to effectively and fully adjudicate all questions involved in the case. The court could have easily invoked **Order 10 Rule 10 (2)** of the **Civil Procedure Rules** to join her as a party, but due to uncertainties about her status or whereabouts, the court will reserve directions on such joinder for a later date.

16. Ultimately, this court finds that it has jurisdiction to hear the dispute and also finds that the notice of motion dated 4/02/2025 lacks merit. Costs shall be in the cause. In the end, this court hereby issues the following final orders:

a) That the notice of motion dated 4/02/2025 is hereby dismissed.

b) The orders issued on 22/07/2024 regarding the maintenance of the existing status quo on L.R. Mavoko Town Block 2/170 are hereby maintained.

c) That a mention date shall be given for purposes of the parties addressing the court on the whereabouts or status of Josephine Mwelu Mutua, and for fixing a hearing date on the plaintiff's application dated 8/07/2024.

It is so ordered.

**Delivered and Dated at Machakos this 8th day of
December, 2025.**

**HON. A. Y. KOROSS
JUDGE
8.12.2025**

**Ruling delivered virtually through Microsoft Teams Video
Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr Muumbi for 4th & 7th defendants.

Mr. Maranga holding brief for Mr. Momanyi for respondent.

Mr. Tamata for 6th defendant.