



REPUBLIC OF KENYA



**In re Estate of Josephat Musau Mukuva (Deceased) (Succession Cause 733 of 2007) [2025] KEHC 18827 (KLR) (18 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18827 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 733 OF 2007  
EN MAINA, J  
DECEMBER 18, 2025**

**IN THE MATTER OF THE ESTATE OF JOSEPHAT MUSAU MUKUVA (DECEASED)**

**BETWEEN**

**REBECCA NTHAMO MAKAU ..... APPLICANT**

**AND**

**MARY MBAIKA THOMAS ..... 1<sup>ST</sup> RESPONDENT**

**MARY MUTHEU MUKUVA ..... 2<sup>ND</sup> RESPONDENT**

**EUNICE RHODA MBULA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. There were two pending applications before the court, The Application dated 14<sup>th</sup> January 2025 and one dated 9<sup>th</sup> June 2025. The later was withdrawn by counsel for the interested party on 16<sup>th</sup> September 2025 and what is for ruling is the Notice of Motion dated 14<sup>th</sup> January 2025 in which the Applicant seeks the following orders;
  - a. That this Honorable court do declare the court decree dated 22<sup>nd</sup> August 2023 in MELC/009/2023 arising from the judgment delivered on 23/05/2023 as null and void ab intio for contradicting the certificate of confirmation granted by the High Court Machakos on 26<sup>th</sup> July 2022.
  - b. That this Honourable court do declare MELC/009/2023 as res judicata, subjudice and an abuse of court process.
  - c. That my lord/ my lady, this Honourable court do declare the avail land sale agreements as null and void for defying section 3(3) of the Law of Contract Act by being signed by dead persons, conferring land illegally to late Patrick Makau



Musau, intermeddling with free property of late Josphat Musau Mukuva specifically 19<sup>th</sup> July 2008 contrary to Section 45 of the Law of Succession Act giving contradictory land allegedly purchased, lacking spousal consents.

- d. Declare any land transactions by the Patrick Makau Mukuva the alleged "administrator" null, void, voidable and criminal acts of intermeddling.
  - e. This Honourable court do proceed to order the 2<sup>nd</sup> Respondent herein to apologize in writing to the court and proceed to comply with orders of certificate of confirmation of grant dated 26<sup>th</sup> July 2022 and issued on 28<sup>th</sup> July 2022 within (7) seven days after service without fail and do amend the register of title deeds relating to land parcel Ndalani/ Ndalani Block 1/1129 measuring approximately 3.16 H. A by removing / deleting/ expunging/ replacing the name of Eunice Rhoda Mbula and in its place registering the name of Rebecca Nthamo Makau as per the unappealed against/unrevoked / unchallenged certificate of confirmation of grant dated 26<sup>th</sup> July 2022 and issued on 28<sup>th</sup> July 2022.
  - f. That this Honourable court do proceed to permanently injunct the 2<sup>nd</sup> Respondent from interfering in any way with proprietorship, occupation, use and peaceful enjoyment, of land parcel Ndalani / Ndalani Block 1/1129 measuring approximately 3.16 h.a by the applicant.
  - g. That this honourable court do order the Respondents to show cause why they should not be fined or convicted and or committed to civil jail for outright contempt of court and perjury.
  - h. Any other relief this court may find fair and just to grant.
  - i. Costs be in the cause in with section 27 of civil procedure code.”
2. In support of the application, the Applicant filed an affidavit sworn on 14<sup>th</sup> January 2025 and deposed that the 1<sup>st</sup> Respondent was an intermeddler; that she is the beneficial owner of LR No. Ndalani/ Ndalani Block 1/1129 but the title has been registered in the name of the 1<sup>st</sup> Respondent through a consent judgment fraudulently procured in Kithimani Magistrate MELC/009/2023 dated 26<sup>th</sup> August 2023; that the 2<sup>nd</sup> Respondent whom she refers to as fake administrator of her husband’s estate was recruited to disinherit her and that the case in Kithimani was filed as an afterthought and is subjudice, res judicata and an abuse of the court process.
3. The Interested Party/Respondent filed a Notice of Preliminary Objection in which she raised two issues;
- “a. The issues canvassed in support of the said application are res judicata under section 6 of the Civil Procedure Act as the same issue of the Plaintiff/ Applicant, subject matter in dispute herein is currently pending before Kithimani court vide ELC E009/2023.
  - b. That there is a pending suit/Application before this Honourable Court being ELC E009/2023 Eunice Rhoda Mbula Vs Rebecca Nthamo over the same subject matter relating to plot number 1129 Ndalani/Ndalani.



- c. That the Application and the suit herein filed by the Applicant/Plaintiff is frivolous, vexatious and an abuse of the court process and should be dismissed with costs.”
4. The Application and preliminary objection were canvassed by way of written submissions. The Applicant’s submissions are dated 27<sup>th</sup> May 2025 and undated further submissions in which she states that on 12<sup>th</sup> February 2024, the Respondent divided the suit property and upon realizing that the grant relating to this estate was confirmed on 26<sup>th</sup> July 2022 filed a suit ELC E009/2023 in Kithimani, which case she says was filed in bad faith and meant to jeopardize the certificate of grant. She contended that LR No. Ndalani/Ndalani/1129 no longer exists in the subdivision that was done and title number Ndalani/Ndalani/3968 & Ndalani/Ndalani/3969 were created and registered in the name of Eunice Rhoda Mbula. She submitted that this was done before the estate was distributed among the beneficiaries and did not follow the proper procedure and therefore should be nullified.
5. In the further submissions, the Applicant requested this court to allow her withdraw the application herein for it was drawn in bad faith and that as the contents were not explained to her and that the Kithimani ELC court lacked jurisdiction, and the orders therein contradict those of this court. She sought leave to file the correct document and revoke the illegally acquired titles which are null and void.
6. On their part, the Respondents jointly filed submissions dated 15<sup>th</sup> September 2025 in which their Counsel submitted that this court had no jurisdiction to make a finding on the application as the dispute is related to land. That the ELC case No E009 of 2023 was heard and determined in favour of the Interested Party vide a judgment delivered on 25/05/2025 and the Applicant’s application to set it aside was dismissed on 24/7/2025. Further that the pleadings in that matter were properly served and the Applicant filed a defence and a similar suit being ELC Case No E002 of 2023 which was dismissed for being subjudice. Lastly, Counsel submitted that setting aside the decree and judgment of the Kithimani court decision falls within the jurisdiction of the Environment and Land Court by way of appeal and not in this court. In support of the submissions, Counsel placed reliance on the case of Owners of the Motor Vehicle “Lilian S” VS Caltex Oil (Kenya) Limited [1989] e KLR.

### **Analysis and Determination**

7. I have noted that in the submissions the Applicant has requested to withdraw the application but that is not the correct procedure. I have therefore considered the application and the preliminary objection, the submissions of the parties, the cases cited and the law. The issues for determination are;
  - a. Whether the order of this court dated 26<sup>th</sup> July 2022 was violated.
  - b. Whether this court has jurisdiction to set aside the order of the Kithimani court in MELC E009/2023.
  - c. Whether the application has merit.
8. On 26<sup>th</sup> July 2022 while issuing the Certificate of Confirmation of Grant Muigai J made an order that LR. No. Ndalani/Ndalani/1129 was to be registered in the name of Rebecca Nthamo Makau who will transfer the Plot upon the owners proofing (sic) purchase.
9. From the search document dated 21<sup>st</sup> February 2017 annexed to the present application, the title of the suit property was registered in the name of the deceased herein on 30<sup>th</sup> November 1992 and a restriction placed on 22<sup>nd</sup> March 2011. However, the search document dated 10<sup>th</sup> January 2025 indicates that the subject property was on 12<sup>th</sup> February 2024 registered in the name of Eunice Rhoda Mbula. This is following a judgment delivered on 23<sup>rd</sup> May 2025 by Kithimani Court in ELMC E009 of 2023. There



is no indication that the parcel of land was ever registered in the name of the applicant as directed by the court in certificate of Confirmation of grant. Therefore the order of the court Muigai J was violated. The property was to remain in the applicant's name until there was proof of ownership by the Respondents either in this court or in the ELC (meaning the ELC in Machakos). Muigai J, order read:

“That any property claim as indicated in ELC Kithimani matter, the same shall be presented to this court to hear and determine or refer to ELC”

The Kithimani court did not therefore have any jurisdiction to hear and determine the case filed before it in regard to the disputed parcel of land.

10. The Respondents opine that this court has no jurisdiction to hear this application as it is a land dispute. I do not agree with that submissions. This being a succession cause, this court is seized with jurisdiction to hear and determine the case. The Respondents have, in any event invited this court to deal with the dispute for going to the Kithimani court in clear contempt of the order of this court made on 22<sup>nd</sup> July 2022. Had they gone to the Environment and Land Court their argument would have a basis but going to the lower court when the Judge was clear in her orders, they cannot be heard to dispute the jurisdiction of this court. The decision of the Kithimani court is a nullity in view of Muigai J's orders.
11. This court very well understood the extent of its jurisdiction hence the order that the dispute be filed in the Environment and Land Court. As stated in the case of *Re Estate of GKK (Deceased)* [2017] eKLR the court observed that'

“The primary functions of a Probate Court is distribution of the estate of a dead person.”

12. That remains the duty of this court. The certificate of confirmed grant is a court order that must be complied with. As the order was not appealed and the interested party has not been lawfully declared the owner of the disputed property, then it must be transferred to the Applicant as per the order of this court. She will proceed to transfer the same to the interested party should she be lawfully declared to be the owner by the proper forum. The jurisdiction of this court in such a dispute flows from Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules and Section 47 of the *Law of Succession Act* provides:-

“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.”

13. Similarly Rule 73 of the Probate and Administration Rules provides that:

“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.”

14. I therefore direct that the orders of this court be complied with as directed. All actions that have been done contrary are declared null and void.

15. As regards the issue of res judicata, section 7 of the *Civil Procedure Act* provides as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

16. The elements of Res judicata were espoused by the Supreme Court in the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR as follows: -
- “(a) The suit or issue was directly and substantially in issue in the former suit.
  - (b) That former suit was between the same parties or parties under whom they or any of them claim.
  - (c) Those parties were litigating under the same title.
  - (d) The issue was heard and finally determined in the former suit.
  - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
17. This application is neither res judicata nor subjudice as the Kithimani court being subordinate to this court and the ELC had no jurisdiction to hear the dispute. The argument cannot therefore hold.
18. In the end, the application dated 14<sup>th</sup> January 2025 is merited and it is hereby ordered that:-
- a. The title deed issued to the Respondent herein pursuant to the judgment in Kithimani ELC No.E009 of 2023 be and is hereby cancelled.
  - b. That the land Registrar shall register the LR No. Ndalani/Ndalani/1129 in the name of the Applicant pending proof of ownership by the Respondents in the right court.
  - c. Parties to bear their own costs.
  - d. Each party shall bear its own costs.

Orders accordingly.

**RULING SIGNED, DATED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DECEMBER, 2025.**

**E. N. MAINA**

**JUDGE**

In The Presence Of:

Rebecca Nthamo Makau – Applicant

Mr. Mutua for Respondent

Geoffrey – Court Assistant/Interpreter

