



**Nzioka & 2 others (Administrators of the Estate of David Mutisya Makumbi) v Mutisya & 6 others (Environment & Land Miscellaneous Case E026 of 2024) [2025] KEELC 632 (KLR) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 632 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND MISCELLANEOUS CASE E026 OF 2024**  
**AY KOROSS, J**  
**FEBRUARY 18, 2025**

**BETWEEN**

**STELLAMARIS NDINDA NZIOKA ..... 1<sup>ST</sup> APPLICANT**  
**LYDIA N. WAMBUA ..... 2<sup>ND</sup> APPLICANT**  
**EUNICE NZILANI MUTISYA ..... 3<sup>RD</sup> APPLICANT**  
**ADMINISTRATORS OF THE ESTATE OF DAVID MUTISYA MAKUMBI**

**AND**

**ALICE MWIKALI MUTISYA ..... 1<sup>ST</sup> RESPONDENT**  
**DANIEL MUTUKU MUTISYA ..... 2<sup>ND</sup> RESPONDENT**  
**COUNTY GOVERNMENT OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**  
**MACHAKOS COUNTY GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**  
**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**  
**KENYA REVENUE AUTHORITY ..... 6<sup>TH</sup> RESPONDENT**  
**THE HON.ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

**Applicant's case**

1. This ruling seeks to determine the notice of motion that has been moved under several provisions of law and it is dated 12/06/2024. It seeks numerous reliefs from this court some of which are spent and the residual prayers for determination are: -



- a. The Hon. court does direct the 3<sup>rd</sup> and 4<sup>th</sup> respondents to provide the applicants and the court copies of land rates clearance certificates for land parcel nos. 36/VII/260 (original no.36/VII/63/8- located in Kamukunji sub-county in Nairobi county) and, 27153/30, 27253/14, 27253/64, 27253/59, 27253/42, 27253/43, 27253/66, 27253/31, 27253/21, 27253/61, 27253/48, 27253/44, 7149/130, 7149/146, 7149/147, 7149/148, 7149/149 and 7149/150 - located in Mavoko sub-county in Machakos county),
  - b. The Hon. Court does direct the 5<sup>th</sup> respondent to provide the applicants and the court with copies of the register of land parcel nos.36/VII/260 (original no.36/VII/63/8- located in Kamukunji sub-county in Nairobi county) and, 27153/30, 27253/14, 27253/64, 27253/59, 27253/42, 27253/43, 27253/66, 27253/31, 27253/21, 27253/61, 27253/48, 27253/44, 7149/130, 7149/146, 7149/147, 7149/148, 7149/149 and 7149/150 - located in Mavoko sub-county in Machakos county),
  - c. The Hon. Court does direct the 6<sup>th</sup> respondent to provide the applicants and the court with copies of the register of land parcel nos.36/VII/260 (original no.36/VII/63/8- located in Kamukunji sub-county in Nairobi county) and, 27153/30, 27253/14, 27253/64, 27253/59, 27253/42, 27253/43, 27253/66, 27253/31, 27253/21, 27253/61, 27253/48, 27253/44, 7149/130, 7149/146, 7149/147, 7149/148, 7149/149 and 7149/150 - located in Mavoko sub-county in Machakos county),
  - d. Costs of the application be provided for.
2. The motion is supported by the grounds set out on the body thereof and the supporting affidavit sworn by Stellamaris Ndinda Nzioka on 14/06/2024.
  3. In a summary of the grounds and depositions, she states she is an administratrix of the estate of David Mutisya s/o Makumbi (deceased) nonetheless, the grant had not been confirmed. Further, the 1<sup>st</sup> respondent is one of the deceased's widows and the 2<sup>nd</sup> respondent is a beneficiary of the deceased's estate.
  4. She states in conducting her duties as such, she discovered there was intermeddling of the deceased's estate and several properties had been fraudulently transferred, registered and developed either by strangers or some of the deceased's beneficiaries including the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  5. Thus, according to her, she had been heavily burdened with paying land rates arrears on these properties that were occupied by strangers and beneficiaries. She asserts the persons culpable of the fraud were the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.
  6. She contends despite several efforts, it had been practically impossible to procure documents over the suit properties from the 3<sup>rd</sup>-6<sup>th</sup> respondents. She states the orders herein will assist her in administering the deceased's estate.

### **Respondents' case**

7. By the law firm of M/s. S.M. Keyonzo Advocates, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition dated 30/07/2024 in which they raised the following grounds: -
  - a. The motion is incompetent and ill-conceived.
  - b. No suit had been filed hence the suit is incompetent.



8. Though Mr. Kuria acts for the 5<sup>th</sup> and 7<sup>th</sup> respondents, he did not file any documents in opposition. Significantly, the other respondents did not participate in the proceedings.

### **Parties' submissions**

9. Despite directions being issued by the court on 30/09/2024 which included amongst others, the filing of submissions, none of the parties complied.
10. Noteworthy, on the scheduled mention date on 20/1/2025, none of the parties attended court and the matter was reserved for ruling today.

### **Issues for determination.**

11. I have carefully considered the motion, its grounds, affidavit and 1<sup>st</sup> and 2<sup>nd</sup> respondent's grounds of opposition. In cognition, the following issues arise for determination: -
- a. Whether the motion is incompetent.
  - b. What orders should this court issue including an order as to costs?

### **Analysis and Determination**

12. These two issues shall be handled together as the outcome of issue (b) flows from the findings of issue (a).
13. Section 19 of the Civil Procedure Rules provides as follows;
- “ Every suit shall be instituted in such manner as may be prescribed by rules.”
14. The significance of this provision of law is that a suit must be instituted within the stipulated provisions of law. Ordinarily, a suit is instituted by a plaint (See Order 3 Rule 1 (1) of the Civil Procedure Rules).
15. In instances of special circumstances such as a constitutional petition, *the Constitution* of Kenya Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013 governs it or in other special circumstances, one institutes suit by way of an originating summons (See Order 37 of the Civil Procedure Rules).
16. Further, in exceptional cases, a suit can be commenced by a notice motion as the applicants did on condition that there is a particular statute governing the procedure of moving the court in such a manner (See Abdi Abdullahi Somo –vs- Ben Chikamai & 2 Others [2016] eKLR).
17. In addition, where a statute does not provide a procedure for a particular proceeding, the court can be moved by an originating motion (See Benoist Plantations Ltd vs Jean Emile Adrien Felix (*CA No 25 of 1954*)).
18. Thus, in considering the motion that is before the court, it is unquestionable there is no substantive originating suit such as a petition or an originating summons albeit moving the motion under several constitutional provisions and Order 37 Rules 1 and 2 of the Civil Procedure Rules.
19. Additionally, even if reliance was placed on the *Land Registration Act*, this Act merely mentions that this court has jurisdiction over land matters.



20. When faced with similar circumstances as this case, the Court of Appeal in Board of Governors, Nairobi School v Jackson Ileri Geta (1999) KLR cited with approval the decision of Fidelity Bank Limited v John Joel Kanyali (2014) eKLR which held as follows:

“...Similarly, as stated by the Court of Appeal, I say a notice of motion is not a manner prescribed for instituting a suit. It cannot be a pleading as defined in Cap 21 and its Rules. Accordingly, there is no suit before Court which suit can sustain the notice of Motion. I do therefore uphold the objections raised by the Respondent.”

21. In the end, and bound by the Court of Appeal decision, I must conclude and find that the notice of motion dated 12/06/2024 is incompetent and hereby strike it out. Since it is trite law costs follow the event, I award costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents.

Orders accordingly.

**DATED AT MACHAKOS THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HON A. Y. KOROSS**

**JUDGE**

**18/02/2025**

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In the presence of:

Mr. Keyonzo for 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

M/s Karongo holding brief for Mr. Gitau for applicant

