



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 236 OF 2009

IN THE MATTER OF THE ESTATE OF KIOKO MUSYA (DECEASED)

BETWEEN

NELSON MAKAU YUMBU

MULEI YUMBUPETITIONERS

VERSUS

DAVID MWANIA

BONIFACE ISAAC MUTINDA KITETA.....OBJECTORS

RULING

1. By a ruling dated 14th January, 2019, this Court (**Nyamweya, J**) ordered that land parcel **Mwala/Kyawango/336** be distributed equally between the children of **Musya Kyai**, as it was held in trust for the said children by **Kioko Musya** and **Kithembe Musya** and that the survivors of all the children of **Musya Kyai** do within 90 days of the date of the said ruling file in Court and serve affidavits indicating the names of all the beneficiaries of each child of **Musya Kyai** for final orders of confirmation.
2. **Musya Kyai** was the grandfather to the petitioners and the objectors herein while **Kioko Musya**, the deceased herein, was a brother to **Yumbu Musya**, fathers of the Petitioners and **Mutuku Musya** and **Kiteta Musya**, the respective fathers of the Objectors herein.
3. By a ruling dated 14th January, 2019, this Court confirmed the grant the subject of this case and direct that the said property being Land Parcel Number **Mwala/Kyawango/336** be registered jointly in the names of the Petitioners and the Objectors herein, **Nelson Makau Yumbu, Mulei Yumbu, David Mwanja** and **Boniface Kiteta** for themselves and in trust for all the beneficiaries of the estate of **Musya Kyai** who are **Kilove Musya, Musyoki Kioko, Mutisya Kioko, Mwanzia Kioko, Maswili Mutunga, Munywoki Mutunga, Matheka Mutunga, David Musya Mutunga, Bonface Isaac Kiteta, Ruth Mwalwa, Lucy Wangari, Grace Kavindu, Kinyele Yumbu, Mutua Yumbu, Joseph Muli, Nelson Makau Yumbu, Manga Mutuku, Monicah Nini Mutuku, David Mwanja Mutuku, Sila Matheka Mutuku, James Muli Mutuku, Sarah Kavuli Mutuku, Jane Mutungu, Eunice Nduge, Ndeti Mutuku, Mbuvi Mutuku, Muinde Mutuku, Nzioka Mutuku, Mutisya Munyao, Muia Nzioka, Matata Nzioka** and **Edward Nzioka Kinyungu**.
4. However, on 19th March, 2019, **Nelson Makau Yumbu**, by Summons dated 25th February, 2019 sought for orders that the resultant Certificate of Confirmation of Grant be revoked and that ruling delivered on 9th October, 2017 by **Nyamweya, J** (as she then was) be set aside and that the said Applicant be accorded an opportunity of being heard.
5. On 29th July, 2019, the 1st Objector herein, **David Mwanja Musya**, intimated that he also wished to call witnesses and was not objecting to the said summons, the same was allowed and it was directed that the matter be heard *de novo*. As a result, the parties were directed to file their statements and documents and that the matter be disposed of by way of viva voce evidence.
6. On 21st September, 2020, this Court directed that the order made on 4th November, 2011 consolidating Succession Causes No. 235 of 2009 and 236 of 2009 be set aside and that the testimony be taken in Succession Cause No. 236 of 2009 and that the said testimony would apply to Succession Cause No. 235 of 2009.
7. The 2nd Objector, **Boniface Issac Mutinda Kiteta**, who was the 1st Objector's cousin passed away during the pendency of these proceedings. The 2nd Petitioner is similarly deceased. The only asset in both succession causes is the land parcel **Mwala/Kyawango/336**,

which was held by the Deceased herein, **Kioko Musya** and **Kithemba Musya** another brother to the deceased herein whose succession cause is the subject matter of the related Succession Cause No. 235 of 2019 as proprietors in common in equal shares (hereinafter referred to as “the suit property”).

8. After a grant of letters of administration was issued to the Petitioners on 15th June, 2009, they filed a summons for confirmation of grant on 24th March, 2011, in which they proposed that the suit property be registered in their joint names. The Petitioners contended that although the property was registered in the joint names of their uncles **Kioko Musya** and **Kithembe Musya**, the same was held in trust for them by virtue of their relationship. They relied on two letters, one from the Euanie clan dated 24th March 1973, and the other of a family meeting held on 5th April 1980, by which they claimed they were given the said land by the said clan and the Objectors’ fathers.

9. The Objectors thereupon filed an affidavit of protest sworn by the 1st Objector on 9th August 2011, contending that the Petitioners had concealed material facts from the court and failed to disclose all the beneficiaries of the said land, and in particular that the two Deceased Persons had other nephews surviving them.

The Objectors’ Case

10. The Objectors’ case as presented by the 1st Objector was that his official names on his ID Card are **David Mwanja Musya**. He confirmed that the petitioners are his paternal cousins since their father is the fourth born son of **Mwikali Musya** while his father is the fifth born son of **Mwikali Musya**.

11. According to him, at the time of the commencement of the land adjudication in August, 1969, **Mulei Yumbu** was an old man with a wife and three children while **Nelson Makau Yumbu** was a school teacher married with one child. They therefore had the opportunity during the said exercise to claim their rights hence their claim that their uncles, **Kioko Musya** and **Kithembe Musya** registered land parcel No. Mwala/Kyawango/336 in their favour due to their young age is not true. It was averred that **Kioko** and **Kithembe** removed registration of the three mothers for their own benefit to hold it for the whole family and not for the benefit of **Nelson Makau** and **Mulei Yumbu**.

12. In the process of the adjudication, the larger **Musya** parcel of land was first subdivided into two equal parts, one for the children of **Mwikali Musya** and the other for **Kivalwa Musya** under the supervision of **Nelson Makau**. The division into only two parts as opposed to three was due to the fact that the first wife had given birth to only daughters, who were all married. However, the portion assigned to the sons of **Mwikali** was to be subdivided into four equal parts. **Kioko’s** portion was already given two separate parcels of land which he sold to **Mutuku Mbuvi** and moved to Kithyoko in Masinga. **Kiteta’s** land is still owned by his children while **Mutuku’s** is shared amongst his three wives since their children were young at the time. **Yumbu’s** was registered in the name of **Mumbua Yumbu** who is deceased and is registered as Mwala/Kyawango/385. It was therefore the Objectors’ position that **Nelson Yumbu** is not being truthful by contending that his father never got a share in the larger **Musya Kyai** ancestral land yet the title was issued in the name of **Mumbua Yumbu**.

13. According to the Objectors, land parcel No. Mwala/Kyawango/336 used to be a temporary grazing area during drought but was abandoned when **Mutunga Musya** moved to Masinga. The Objectors asserted that **Kioko** and **Kithembe** never cared for the land till the 1st Objector’s father retired from the Colonial Police Force in 1957 when he found that the land had been grabbed by **Sila Katumo** and **Kavivya Nzenge** and he claimed it back after giving each of them a goat being *mbui ya vuu*. When the 1st Objector’s mother got married to **Mutuku Musya**, she noticed that the larger **Musya** land was congested and with the first wife of **Mutuku**, they went and cleared the bush (shown as Zone C) and proceeded to cultivate it and that no other wife of **Musya’s** sons cultivated it.

14. It was averred that the 1st Objector’s father started clearing the bush so that grass could grow but all of a sudden **Kitisya Munywoki** who owned Zone A, stopped him from doing so claiming that the land was father’s. The issue was however resolved after the 1st Objector’s father gave him two goats and refunded him his family’s transport expenses to the land he had acquired in Shimba Hills. From then henceforth, the 1st Objector’s father used the said land for the period from 1957 till 1973 when it was under the care of **Mutuku’s** family till the time the Euanie Clan ordered **Mulei Yumbu** to move into the said land. **Mulei** was shown the land that belonged to **Musya Kyai** and he settled in zone B while **Mutuku’s** family continued utilizing Zone A.

15. According to the Objectors, during those days, **Kitisya Munywoki’s** home was on the right hand shown as Zone A while **Mutunga Musya** had a home for his cows and those of **Mutuku Musya**. However, none of the other sons of **Musya** used to take their animals there.

16. When **Nelson Makau Yumbu** was transferred from Machakos Town to Kyawango Primary School, he visited his brother and found the 1st Objector’s late brother herding cattle in Zone A and ordered him never to return there. According to the 1st Objector, there was a disagreement between him and **Makau** over Mwala/Kyawango/336 necessitating the 1st Objector to place a caution. Apart from that he further lodged a complaint before Kangundo District Officer who was then acting as 3rd class magistrate. The 1st Objector therefore challenged the petitioners’ contention that they had been in undisturbed occupation of the land for 40 years.

17. According to the Objectors, the property of **Musya Kyai** was shared among his sons and it did not matter how many wives each of his sons had since it was permissible to allocate ancestral land to the wives.

18. It was the Objectors’ case that their grandfather had several pieces of land. The parcel at Kwa Mulae and Kwa Mai was given to **Kioko** and was sold by the late **Kioko Musya** who migrated to Kithyoko where he acquired land. As regards the large **Musya** land, where **Musya** dwelt with his three wives, one of his three wives, **Mumbua Musya**, had only three daughters, **Maluki**, **Kaluu** and **Mutune** who were all married at the time of the land adjudication and were never given land based on Kamba Customary Law. However, **Mumbua** had a concubine known as **Mbula** who had a son known as **Munguta Musya**. The said concubine was however chased away by **Kioko** and **Kithembe** and she got married to **Musuke** who refunded the dowry to **Kioko** and **Kithembe**. The second wife of **Musya**, **Mwikali**, bore him 5 boys and one girl, namely, **Kioko**, **Mutunga**, **Kiteta**, **Yumbu**, **Mutuku**, **Katumbi Musya** and the daughter, **Katumbi**, who having got married was similarly not entitled to any land. The third wife had two sons and two daughters, **Kithembe**, **Nzioka**, **Kaindi** and **Nthyoma**.

19. According to the Objectors, the larger **Musya** land in Kyawango was sub-divided into two parts, one for the sons of **Mwikali** and the other for the sons of **Kivalwa**

20. It was averred that Mutunga's 6 acres were sold to **Mary Kaswii Mutuku** which land is now owned by **Manga Mutuku** though the land retained its original LR No. Mwala/Kyawango/78. **Kiteta's** land was registered in his wife's name, **Kavuli** as LR No. Mwala/Kyawango/317 while **Yumbu's** land was registered in the name of **Mumbua Yumbu** as LR No. Mwala/Kyawango/385. The said land was to be shared amongst the sons of **Yumbu** namely, **Kinyele Yumbu**, **Julius Mutua Yumbu**, **Mulei Yumbu** and **Nelson Makau Yumbu**. The Objector's father on the other hand had 10 sons. He however got equal share as those of **Yumbu**, **Kiteta** and **Mutunga** and his 10 sons had no complaint.

21. According to the Objector, under the Kamba Customary Law, if a woman dies without having given birth to a son, all her property is divide amongst the other sons of her husband. However, since **Makau** had sworn an affidavit in which he stated that he was the son of the second wife of **Yumbu Musya**, he should claim his share from **Kinyele Yumbu**.

22. It was stated that LR No. Mwala/Kyawango/336 was not **Musya's** place of resident but was a temporary grazing area during drought and only **Mutunga** used to stay there with his cattle and those of his father, **Mutuku**. According to the Objectors the land was adjacent to the one of **Kitisya Munywoki** and **Mutuku's** family used to manage it as far back as 1939 and even the 1st Objector's mother had a *shamba* there. However, **Mutuku's** mother migrated to Kithyoko.

23. The 1st Objector referred to the burial programme of **Mulei Yumbu**, **Makau Yumbu's** brother, in which it was disclosed that **Mulei** was the son of **Yumbu Musya**, **Tabitha Meli** and **Rael Mumbua** and was brother to **Nelson Yumbu**, **Grace Malia**, **Gideon Kinyele** and **Julius Mutua**. According to the 1st Objector, this is a clear confirmation that **Yumbu Musya** had two wives. The 1st Objector also referred to a sketch map of LR No. Mwala/Kyawango/336 in which according to him, parts A and C were given to him because they belonged to his late father, **Mutuku Musya** while part B was to be subdivided to the interested survivors of **Musya Kyai**.

24. While referring to the letters dated 24th March, 1973 and 5th April, 1980, the 1st Objector stated that since the handwriting in both are identical, it means they were authored by the same person, **Nelson Makau** and though some names were inserted therein, there were no ID Card Nos and signature hence are of no value.

25. On cross-examination by **Mr Ngolya**, learned counsel for the petitioners, the 1st Objector insisted that though his ID Card bore the name **David Mwanja Musya**, his name was **David Mwanja Mutuku** and that his father was **Mutuku Musya**. He explained that his father's name was not appearing as part of his name in the ID Card but explained that his grandfather was called **Musya Kyai** who had three wives and he was from the 2nd wife's house which was the house of **Mwikali Musya**. He stated that the first wife was **Mumbua Musya**. Referred to the name **Syomotune Musya**, he said that he only heard of that name but stated that the third wife was called **Kivalwa Musya**. According to him **Kioko Musya** was from the 2nd House from where his father came from while **Kithembe Musya** was from the 3rd House, **Kivalwa's**. The petitioners, **Nelson Makau** and **Mulei** are however from **Mwikali's** House and not from **Mumbua's** House.

26. Referred to a lady called **Meme**, he denied that she was a concubine (*iweto*). He however agreed that they hail from Euani Clan and that his grandfather had properties one of which was land in Kyawango in Mwala but also had grazing land in Kamuthambya Area which was initially known as Plot No. 336 part of which belonged to **Musya Kyai** while the other part belonged to **Kitisya Munywoki**. According to him, the elders did not distribute the property but were only called to resolve a case.

27. The Objector stated that it was wrongful for the children of **Meme** to be allocated plot no. 336 since **Meme** was not **Musya's** wife. He stated that **Kioko** and **Kithembe** were registered as proprietors later and are currently the registered proprietors thereof. Ladies however could not be registered. The Objector stated that he was not from **Kioko's** or **Kithembe's** House. He however denied that the families of the deceased recognise **Nelson** as the owner. He explained that he is objecting on behalf of his father's house and denied that the families of **Kioko** and **Kithembe** confirmed **Nelson** as the proprietors. Referred to the letter dated 24th March, 1973, he stated that while the same referred to land parcel no. 336, the same was invalid. He however agreed that Mwala/Kyawango/336 is related to Kamuthambya/336 but denied having attended the clan meeting despite the indication that he was present as he was not aware of the same. Also referred to the letter dated 5th April, 1980, he stated that he did not attend despite his name having been inserted therein as **David Mutuku**. He disclosed that he knew two ladies called **Mumbua** and that **Syomotune** was an *alias* and was not aware that her house was allocated the plot though he heard about it.

28. The 1st Objected stated that his family was residing in Kyawango though on different plots. He insisted that every child of **Musya Kyai** inherited **Musya Kyai's** land and that he was staying on his father's land and not that of **Musya**. He however admitted that **Mulei**, **Nelson's** brother had children one of whom was **Muli Mulei** who was staying on plot 336. The 1st objector however stated that he was staying between **Nelson** and **Muli** while **Nelson** was staying on the land he purchased. He however was not aware if he had land in plot 336. He could not however bar him from staying there if he was authorised by the clan to stay there since he was not in the meeting but was told that he was allocated. According to the 1st Objector he has many brothers and they support him since he represents all of them but admitted that he had no written authority from them. It was his evidence that part of the land was **Kitisya's** which his father bought and his family surrendered and left. He however had no problem with **Nelson** and **Mulei** being on the same land belonging to **Musya** since he was only seeking part thereof belonging to his father.

The Petitioners' Case

29. According to the 1st Petitioner, their grandfather, **Musya Kyai**, owned several pieces of ancestral lands in Kyawango Location and another parcel of land near Athi River near Mwala Sub-County. He stated that their said grandfather had three wives, namely, **Syomotune**, **Mwikali** and **Kivalwa** who constituted the tree houses of their said grandfather names as **Syomotune**, **Mwikali** and **Kivalwa** Houses respectively. According to the said Petitioner, the Houses of **Mwikali** and **Kivalwa** inherited the parcels in Kyawango while **Syomotune**

House was given the land near Athi River, known as Mwala/Kyawango/336. He disclosed that on 24th March, 1973, Euani Clan convened a meeting where they confirmed that the said land parcel was the property of **Syomotune** House from which both Petitioners hailed. A similar confirmation was made during a family meeting attended by among others, the 1st Objector herein on 5th April, 1980. It was averred that though the deceased herein and the deceased in Cause No. 235 of 2019 had been registered as proprietors of the suit property, they were holding the same in trust for **Syomotune** House and had been waiting for the opportune moment to surrender the same to the representatives of the said House. According to the 1st Petitioner, the Petitioners have been in peaceful, open and transparent use, occupation and possession of the suit property for several decades and that all the members of the other houses of their late grandfather are well aware and respect the fact that the House of **Syomotune** inherited the said parcel.

30. It was therefore stated that the 1st Objector is simply out to poison and fracture that peaceful and harmonious co-existence in the greater **Musya Kyai** family yet he belongs to another House that inherited a huge piece of land in Kyawango. According to the 1st Petitioner, by petitioning for letters of administration in the said related causes, the petitioners intended to have the suit land ultimately transmitted to them since the deceased persons held the same in trust for **Syomotune** House. However, as the 2nd Petitioner is also deceased, the 1st Petitioner sought that the said land be distributed to himself and **Joseph Mulei**, the son of the 2nd Petitioner, **Mulei Yumbu**.

31. According to the 1st Petitioner, the suit parcel was inherited by himself and his late brother and that the 1st Objector had no interest therein since it was allocated to them as their share of the ancestral land.

32. In cross-examination by the Objector, the 1st Petitioner stated that their grandfather had two parcels of land and that he belonged to the house of **Syomotune** who was also known as **Mumbua Musya**, the first wife of **Musya**. He stated that prior to settling in Kyawango, he did not know where **Musya** hailed from but heard that he came from **Kiteta** with his two wives, **Mumbua** and **Mwikali**. He was however unaware of the fact that **Musya's** first built a house for **Mumbua** but admitted that he was not from Mwikali's House. He agreed that **Yumbu** moved to Kithyoko with **Melli** but he insisted that they all returned to Mwala and denied that he was brought back by the 1st Objector's father. According to the 1st Petitioner, though **Yumbu** is the name of his father, he is not his real father. He denied saying that his mother was the second wife of **Yumbu Musya**. He denied any knowledge of returning upon the request by the 1st Objector's father or that **Mulei** came later but insisted that **Yumbu** was not his father despite being known as **Yumbu** as the clan confirmed that he came from **Musya's** family. He was however unaware that he was taken care of by the 1st Objector's father as his brother's son. He denied stating that **Yumbu** never got a share of the land and stated that the clan meeting was convened around **Mutuku's** home. In his evidence the clan decided to give the land to **Makau** and **Mulei Yumbu** and they were told to move into the bushy land and stay there as he was told it belonged to **Musya**. It was then that the 1st Objector laid claim to the land and divided it into two parcels. According to him, other people such as **Kioko** and **Mutunga** also moved to Kithyoko.

33. According to the 1st Petitioner **Syomotune** was given land in Athi when there was nobody there but he was unaware that the land was possessed by other people.

34. In re-examination, he explained that **Syomotune** is the same as **Mumbua** and that he belonged to that house while the 1st Objector belongs to **Mwikali** House and they have their own parcels of land. He insisted that the 1st Objector attended the clan meeting of 1973 as confirmed from the clan deliberations in which he is indicated was **Mwania Mutuku**. The meeting was chaired by **Paul Manthi**. There was another meeting in 1980 and the agenda was the settlement of the 1st petitioner and his brother and they were settled on the land of **Musya's** first wife, **Syomotune** on plot 336 which is along Athi River. According to him, they went there after it was agreed that it was **Syomotune's** share and they have been living there. It was his evidence that he is not interested in the share for **Mwikali's** House or **Musya's** House which is a big family since there are other survivor of the said Houses.

Determination

35. I have considered the evidence placed before this Court by the respective parties. This is a succession cause and not a land dispute. Accordingly, as the deceased's property in dispute is identified and agreed as being Mwala/Kyawango/336, the only issues for determination are who are the beneficiaries entitled to inherit from the Deceased's estate and their respective shares in the said estate. According to the Petitioners the suit property Mwala/Kyawango/336, was registered in the names of **Kioko Musya** and **Kithembe Musya** in trust for them while the Objectors contend that the said property was the property of **Mutuku** and was wrongly registered in the names of the said **Kioko Musya** and **Kithembe Musya**.

36. It is agreed by the parties herein that both the Petitioners and the Objectors are cousins and that their fathers were brothers and the sons of **Musya Kyai**. In the present Succession Cause the person whose estate is in issue is that of **Kioko Musya**. The suit property is registered in common in the names of **Kioko Musya** and **Kithembe Musya** who are both deceased. If any of them had left children the matter probably would not have given rise to a dispute or the dispute would have taken a different angle.

37. The Objector's case is that **Musya Kyai** had three wives. The first wife was **Mumbua Musya** who never had a son. The 2nd wife was **Mwikali Musya**, the mother of **Kioko Musya**, **Yumbu Musya**, **Mutuku Musya** and **Kiteta Musya**. The third wife was **Kivalwa Musya**, the mother of **Kithembe Musya**. While the Objector denies that he knew **Syomotune**, the Petitioners' case is that **Syomotune** is the same person as **Mumbua Musya** and that it is this **Syomotune** who was their mother. According to the evidence presented in Court by the 1st Petitioner, he is the son of **Musya Kyai** by **Syomotune Musya** alias **Mumbua Musya**.

38. However, from the documentary evidence forming part of this record, including some sworn affidavits by the 1st Petitioner himself, it is expressly disclosed that the first Petitioner is the son of **Yumbu Musya**. It is only when he testified that he denied being the son of **Yumbu**. One wonders why in nearly all his documents, some on oath he would assert that he was a son of **Yumbu** when he was in fact the son of **Musya Kyai**.

39. On my part I have reviewed the evidence on record and I find that the 1st Petitioner's evidence that he was a son of **Musya Kyai** cannot be believed in light of the contradictory averments made in the affidavits sworn by him. It would seem that he adopted this line of evidence in order to claim a superior right over the suit property on the basis that he is a son to **Musya Kyai** and therefore is entitled to inherit the said land as their house was not given any land. From the evidence on record it is clear that the properties of **Musya Kyai** were divided amongst the Houses and that each House was to divide the same in accordance with the number of the children in that House. One of his properties was the suit land. Both the Petitioner and the Objectors agree that the registration of the suit land in the names of **Kioko Musya** and **Kithembe Musya** was not for their own benefit but in trust.

40. Though the 1st Objector contends that the suit property ought to be given to their House, I find no satisfactory evidence that this is the case. Neither the Petitioners nor the Objectors called any evidence to support their respective cases. The Petitioners did not call any witness to support the fact that two meetings were called at which it was resolved that the suit properties be given to them as the said documents were not even signed. On the other hand, the Objectors did not call any other witness to corroborate their claim to the suit land.

41. In the absence of evidence in support of either the petitioners' case or the objectors' case, the suit land remains the property of **Kioko** and **Kithembe** registered in their names as trustees. Since there is no claimant from either of the said persons and since it is agreed that the suit property was originally the property of **Musya Kyai**, I find that since there was evidence that **Musya Kyai**'s children had benefited from the sharing of his ancestral land, the land held in trust by the Deceased's Persons herein, **Kioko Musya** and **Kithembe Musya** being land parcel Mwala/Kyawango/336 ought to be shared equally among all the beneficiaries of **Musya Kyai**.

42. Accordingly, I direct that.

1. Land Parcel Number Mwala/Kyawango/336 be registered jointly in the names of the 1st Petitioner and the 1st Objector herein, Nelson Makau Yumbu and David Mwanja for themselves and in trust for all the beneficiaries of the estate of Musya Kyai.

2. The land parcel Mwala/Kyawango/336 shall be distributed equally between the children of Musya Kyai, who left behind beneficiaries.

3. Each of the said Houses shall then determine their mode of distribution of their respective shares and in the absence of such agreement shall be distributed equally amongst them.

4. Let the 1st Petitioner and the 1st Objector herein, Nelson Makau Yumbu and David Mwanja identify the said the children of Musya Kyai, who left behind beneficiaries and file the same within 45 days for further orders.

5. For the purposes of that exercise the Petitioners herein shall be deemed as being the sons of Yumbu Musya.

43. There will be no order as to costs.

44. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 25th day of November, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngolya for the 1st Administrator

2nd Administrator present in person

CA Susan