



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 148 OF 1997**

**IN THE ESTATE OF THE LATE MUSAU MWANIA ALIAS MOSES MUSAU MWANIA**  
**(DECEASED)**

**CHRISTOPHER MUSYOKA MUSAU .....APPLICANT**

**AND**

**1. BENSON WAMBUA MUSAU**

**2. RICHARD MWANIA MUSAU .....RESPONDENTS**

**3. KIOKO MUSAU**

**4. CHARLES MUINDE MUSAU**

**RULING OF THE COURT**

1. The Applicant herein Christopher Musyoka Musau filed three (3) applications dated 2/10/2009, 18/11/2011 and 22/08/2016 against the Respondents herein who were later joined in as interested parties.

2. The Application dated 2/10/2009 sought seven prayers but on the 1/11/2016 prayers 2 and 3 were allowed by consent thereby leaving out the following prayers to be canvassed:-

***(a) THAT land parcel number MAVOKO TOWN Block 3/7359 and MAVOKO TOWN Block 3/7360 which have been unlawfully registered in the names of Richard Mwanja Musau and Kioko Musau two of the Administrators herein be reverted to the deceased's estate.***

***(b) THAT this Honourable court do order that land parcel MAVOKO TOWN Block 3/1369 unlawfully registered in the name of Charles Muinde Musau in the year 2005 be reverted back to the deceased's estate.***

***(c) THAT this Honourable court do inquire into how the said properties of the deceased's estate were registered in the names of individuals, some of whom are administrators herein during the pendency of these proceedings.***

***(d) THAT pending hearing and determination of this application, titles to land parcels MAVOKO TOWN BLOCK 3/7359, MAVOKO TOWN Block 3/7360 and MAVOKO TOWN Block 3/1369 be restricted and/or preserved.***

***(e) THAT costs of this Application be paid to the Applicant.***

The application aforesaid is supported by the Affidavit of the applicant sworn on even date and which he deposed and gave a chronology of how the Respondents who are administrators fraudulently registered some of the lands belonging to the deceased before confirmation of grant and while this proceedings were ongoing and further purported to transfer to third parties some of whom have come forward herein as interested parties.

3. The second Application is dated 18/11/2011 and seeks for the following prayers against the Respondent namely Richard Mwanja Musau:-

***(a) THAT Richard Mwanja Musau one of the Administrators of the estate be ordered to immediately deposit into this Honourable Court a sum of Khss.60,000,000/= being the sale proceeds of the deceased parcel of land MAVOKO TOWN Block 3/7359.***

***(b) THAT title to land parcel MAVOKO TOWN BLOCK 3/7359 be restored to the deceased's estate.***

***(c) THAT RICHARD MWANIA MUSAU be ordered to file in this Honourable Court the sale agreement vide which he sold and transferred land parcel MAVOKO TOWN BLOCK 3/7359.***

***(d) THAT RICHARD MWANIA MUSAU do show cause why he should not be punished by this Honourable Court for selling parcel No. MAVOKO TOWN BLOCK 3/7359 against this court's orders dated 26/07/2010.***

***(e) THAT this Application be heard together with the summons for revocation of grant dated 2/10/2009.***

***(f) THAT the costs of this application be paid by the Respondent.***

The Application aforesaid is supported by the annexed affidavit of the Applicant sworn on even date and who gave a chronology of the misdeeds by the Respondent warranting this court's intervention as sought by him.

4. The third application is dated 22/08/2016 and seeks orders against two Respondents namely Robert Mutyango Musau and Manara Company limited as follows:-

***(a) Pending the hearing of this application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be restrained either by themselves, their agents, servants and/or contractors from intermeddling with the deceased's plot No. MACHAKOS TOWN BLOCK 1/276 by unlawfully demolishing the buildings thereon and unlawfully construction other buildings and/or structures thereon or in any other way intermeddling with the said plot.***

***(b) THAT pending the hearing of this application the 2<sup>nd</sup> Respondent its agents or servants, tenants or contractors be restrained from entering or remaining on the deceased's plot MACHAKOS TOWN BLOCK 1/276 from any reason and/or purposes whatsoever.***

***(c) THAT the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be restrained either by themselves their agents, servants and/or contractors from intermeddling with the deceased's plot No. MACHAKOS TOWN BLOCK 1/276 by unlawfully demolishing the buildings thereon and unlawfully constructing other buildings and/or in any other way intermeddling with the said plot.***

***(d) THAT the 2<sup>nd</sup> Respondent, its agents and/or servants tenants and or contractors be restrained from entering or remaining on the deceased's plot MACHAKOS TOWN BLOCK 1/276 for any reasons or purpose whatsoever.***

***(e) THAT the costs of the Application be paid by the Respondents.***

***(f) Any other order that this Honourable Court may deem fit and just to grant.***

The Applicant swore an affidavit on event date in which he wholly blamed both Respondents for intermeddling with the property of the deceased namely **MACHAKOS TOWN BLOCK 1/276** before the confirmation of the grant the Applicant maintains that the said Robert Mutyango Musau prior to being made one of the Administrators herein had no authority to purport to lease property belonging to the deceased to third parties namely the 2<sup>nd</sup> Respondent Manara Company Limited and therefore their actions were illegal and this should be restrained from interfering with the deceased's property namely plot Number **MACHAKOS TOWN BLOCK 1/276**.

5. The Applicant's application dated 2/10/2009 was strenuously opposed by the Respondents on the sole ground that the suit properties namely **MAVOKO TOWN BLOCK 3/7359, 3/7360** and **3/1369** had been bequeathed by the Respondents who were his sons and therefore the same comprised of gifts intervivos and which does not form part of the assets of the deceased for purposes of distribution amongst the beneficiaries. The Respondents annexed minutes of proceedings conducted by the Lukenya Ranching and Co-operative Society limited. The Respondents further contended that upon transfer of ownership of the subject properties, they sold and transferred to other third parties who have appeared herein as interested parties to protect their interests.

6. The Applicant's Application dated 18/11/2011 was also strenuously opposed by the Respondents on the ground that the suit properties had been bequeathed by the deceased to the Respondents prior to his death and therefore the properties did not form part of the deceased's properties for distribution. Further the Respondents contended that they legitimately sold their parcels of land to the interested parties and who should not be unduly harassed. The Respondents contend that the Applicant is actuated by malice in filing the said application.

7. The Applicant's Application dated 22/08/2016 was also strenuously opposed by the Respondents Robert Mutyango Musau and Manara Company limited. The 1<sup>st</sup> Respondent contended that the deceased's property **MACHAKOS TOWN BLOCK 1/276** was in derelict condition and decided in good faith to bring in the 2<sup>nd</sup> Respondent who was to renovate and occupy it and to pay rents therefrom. The 1<sup>st</sup> Respondent maintains that his sole aim was to improve the premises for the benefit of the beneficiaries rather than let it to go to waste and ruin.

8. Parties agreed to canvass the three applications by way of written submissions. I have carefully considered all the said submissions together with the authorities cited. It is not in dispute that this cause has been pending since 1997 to date and there is need for the same to be finalized. The members of the deceased's family are yet to finalize the process of confirmation of grant. The properties involved in this dispute comprises of **MAVOKO TOWN BLOCK 3/7359, MAVOKO TOWN BLOCK 3/7360, MAVOKO TOWN BLOCK 3/1369** and **MACHAKOS TOWN BLOCK 1/276**. The MAVOKO TOWN plots Block **3/7359, 3/7360** and **3/1369** are alleged to have been bequeathed to some of the beneficiaries herein by the deceased as gifts intervivos and which are reported to have changed hands and that the purchaser in one of them is an interested party in these proceedings. The **MACHAKOS TOWN PLOT BLOCK 1/276** is reported to have been leased by one of the beneficiaries to a third party who is an interested party in these proceedings. It is not in dispute that by dint of the provisions of Section 82 of the law of Succession Act, no immovable property of a deceased person shall be sold before confirmation of grant. It is also not in dispute that by dint of Section 45 of the Law of Succession Act no person shall take possession or dispose or otherwise intermeddle with any free property of a deceased person. After analyzing the three applications dated 2/10/2009, 18/11/2011 and 22/08/2016 and the submissions by learned Counsels, I find the following issues necessary for determination namely:-

***(1) Whether the above three properties are part of the assets of the deceased.***

***(2) Which remedies can this court grant in the circumstances.***

9. Starting with the two properties namely **MAVOKO TOWN BLOCK** plot numbers **Block 3/7359** and **3/7360** and **MAVOKO TOWN BLOCK 3/1369** the Respondents in the Applications dated 2/10/2009

and 18/11/2011 have staked a claim to the said properties and have claimed that the deceased had bequeathed the said properties to them before he died. The Respondents have presented minutes of Lukenya Ranching and Farming Co-operative Society limited to back their claim onto the said parcels of land. The Applicant maintains that no gift intervivos had been made by the deceased and that the purported minutes border on forgeries. Indeed none of the society officials swore an affidavit to confirm or deny the authenticity or otherwise of the said documents so as to leave no doubt as to the question whether or not the deceased had made any gift intervivos to the Respondents as contended by them. This then calls for viva voce evidence to be taken in that regard. It is necessary for the new administrators to proceed and file summons for confirmation of grant in which the three (3) properties are expected to feature so that they could file affidavits of protests if need be and thereafter evidence could be received and the issue of whether or not the said properties were gifts intervivos could then be established. Since some of the properties had been sold to purchasers who are interested parties herein, there is need to maintain the conservatory orders earlier issued by this court pending the determination of summons for confirmation of grant.

10. As regards the property namely **MACHAKOS TOWN BLOCK 1/276**, it is clear that one of the beneficiaries herein Robert Mutyango Musau has leased the same to Manara Company limited. At the time of the lease transaction, the said beneficiary had not been made an administrator of the estate. He has since been made one of the administrators. It must be pointed out that at the time the property had not been distributed among the beneficiaries and as such his actions and those of the lessee amounted to intermeddling in property of the deceased contrary to Section 45 of the Law of Succession Act. The said Robert Mutyango Musau has claimed that he was only trying to improve the property which was in derelict condition for the benefit of the beneficiaries of the estate. The lease agreement entered into by the said Robert Mutyango Musau and Manara Company limited is quite elaborate on the fact that he is indicated as a landlord and in fact received part of the rent proceeds. He had not forwarded any such proceeds to the Administrators but has kept it for himself. If indeed he had found the premises in derelict condition, he would have consulted with the Administrators over the same but he did not do so thereby implying that his sole aim was to solely enrich himself at the expense of the rest of the beneficiaries. There is no evidence whatsoever that he has handed over the rent proceeds to the Administrators to be kept for the benefit of the beneficiaries. He must be made answerable to the Administrators of the estate and to this end therefore he is obliged to release all monies received by him as rent from the lessee and hand the same to the Administrators which monies shall be deposited into an interest earning account to be opened by the Administrators for the benefit of the beneficiaries. The tenancy therefore must come to an end since the same did not have the blessings of the Administrators and therefore the tenant namely Manara company limited must vacate the premises **MACHAKOS TOWN BLOCK 1/276** and to give vacant possession the Administrators within the next sixty (60) days unless the Administrators allow it to enter into a new tenancy agreement with them. All and any outstanding rent is ordered to be paid into the interest earning account to be opened by the Administrators. Finally the said Robert Mutyango Musau is ordered to release to the Administrators all rent proceeds received by him from the alleged tenant which monies shall be paid into the interest earning account in the names of the Administrators for the benefit of the beneficiaries pending the confirmation of the grant. As regards the claims by the alleged tenant Manara company limited that it is a lessee without notice of a dispute on the property, I find the same is not plausible because it was expected to have conducted due diligence before entering into the alleged lease with the said Robert Mutyango Musau. In any event the alleged tenant still has recourse against him once eviction processes are commenced against it. Again there is no evidence that the said alleged tenant has ever approached the Administrators with a view to regularizing its status with them on the property. The alleged tenant has been occupying the premises all this time and has not bothered to deal directly with the Administrators despite knowing that they have been duly appointed by this court to manage the estate of the deceased.

11. In the result, it is the finding of the this court that the Applicant vide his three applications dated 2/10/2009, 18/11/2011 and 22/08/2016 has convinced this court to allow the same on the following terms namely:-

***(1) That the new Administrators shall forthwith and within the next ninety (90) days file fresh summons for confirmation of grant in which all the assets of the deceased are factored so as to***

*enable beneficiaries or interested parties to file affidavits of protest if need be.*

*(2) That titles to land parcels MAVOKO TOWN BLOCK 3/7359, MAVOKO TOWN BLOCK 3/7360 and MAVOKO TOWN BLOCK 3/1369 shall continue to be restricted and/or preserved as earlier ordered pending the confirmation of grant.*

*(3) Manara Company limited is hereby ordered to vacate from LR No. MACHAKOS TOWN BLOCK 1/276 within the next sixty (60) days unless it regularizes its tenancy status with the new Administrates of the estate and to hand vacant possession to the Administrators and further to pay any outstanding rent which should be paid into an interest earning account in the names of the Administrators within the next 45 days.*

*(4) Robert Mutyango Musau is hereby ordered to release all monies received by him as rent form Manara company limited and which is to be deposited into an interest earning account in names of the Administrators by the Administrators within the next 45 days.*

*(5) Each party to bear their own costs.*

It is so ordered.

Dated, Signed and Delivered at **MACHAKOS** this **19<sup>th</sup>** day of **October, 2017**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Mrs Nzei for the Applicant

Muumbi for F. M. Mulwa for 1<sup>st</sup> Respondent

No appearance for Mbindyo for the 2<sup>nd</sup> Respondent

No appearance for Charles Muinde the 4<sup>th</sup> Respondent

No appearance for Ochieng for Interested Party