



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION NO. 148 OF 1997

**IN THE MATTER OF THE ESTATE OF MUSAU MWANIA alias MOSES MUSAU
MWANIA..... (DECEASED)**

AND

CHRISTOPHER MUSYOKA MUSAU.....APPLICANT

VERSUS

RICHARD MWANIA MUSAU.....RESPONDENT

RULING

1). The preliminary objection/grounds of opposition dated 15-12-2011 seeks to have the chamber summons application dated 18-11-2011 dismissed on the following grounds:

1. That the application is bad in law and cannot lie in that the applicant seeks rectification of the register by cancellation and/or amendment of registration and thus revert and/or restore land titled number Mavoko Town Block 3/7359 to the estate of the deceased which is contrary to the laid down law in section 143 of the Registered Land Act, section 27 and 28 of the said act.

2. That said application is bad in law and cannot lie in that it is contrary to the provisions of order 2 Rule 4 of the Civil Procedure Rules considering that the applicant alleges fraud on the part of the respondent.

3. That the said application is bad in law in that it seeks to obtain adverse orders against a third party who is a bon fide purchaser for value without notice of any encumbrance at time of sale and further without being a party to the succession cause herein thus condemn the third party unheard.

4. That the said application and orders sought therein cannot issue and the honourable court cannot determine the issues raised therein through a chamber summons and the only avenue open to the applicants would be to file a suit.

5. That the said application lacks merit, is frivolous, vexatious and an abuse of the court process in that the same seeks to have the applicant cited and/or punished for perceived disobedience of court orders whilst it is evident that the orders the respondent is alleged to have disobeyed were extracted on 26th September 2011 while the same were given by the

court on 26th July 2010 and it is thus evident that the same were not served upon the respondent as by law required.

6. That the application is incompetent as it seeks orders in respect of land parcel number Mavoko Town Block 3/7359 which does not form part of the estate of the deceased.

7. That the application is bad in law in that it seeks to shift the burden of proof to the respondent while it is established law that the onus of proving fraud against another is upon the person who alleges the said fraud and/or wrong doing.

8. That the respondent and his advocate were not aware of the said order.

2). The Preliminary Objection was canvassed by way of written submissions which I have duly considered.

3). On 5-12-2011, the court gave directions that the application dated 18-11-2011 and the summons for revocations dated 2-10-2009 be heard simultaneously by way of *viva voce* evidence. The preliminary objection was subsequently filed on 16-12-2011.

4). As stated by the C.A in Mukisa Biscuits -VS- West End Distributors [1969] EA 69:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

5). I have considered the preliminary objection herein. The same raises both matter of fact and matters of law. The matters of fact raised are contested. Consequently, I dismiss the preliminary objection with costs.

Dated, signed and delivered at Machakos this 17th day of December, 2015.

B. THURANIRA JADEN

JUDGE