REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Succession Cause 148 of 1997

In the Matter of the Estate of Musau Mwania alias MOSES MUSAU MWANIA-

(DECEASED)

BETWEEN

1. **BENSON WAMBUA MUSAU**
2. **RICHARD MWANIA MUSAU**
3. **KIOKO MUSAU……PETITIONERS**

AND

1. **CHRISTOPHER MUSYOKA MUSAU**
2. **CHARLES MUINDE MUSAU**
3. **MICHAEL MUNUVE MUSAU……APPLICANTS**

AND

1. **RUTH KALAU MUSAU**
2. **ERICK K. MUSAU**
3. **HARRISON MUTUA NDUNGI**
4. **ROBERT MUTYANGO MUSAU**
5. **PETER MUTUA MUSAU**
6. **DAVID MUIA MUSAU……INTERESTED PARTIES**

RULING OF THE COURT

1. The application before me is the Chamber Summons dated 28/11/2006. The same is expressed to be brought under the provisions of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. The applicant seeks the following orders:-

i. That this application be certified as urgent, and be heard as such.

ii. That the second and the third petitioners and the Interested parties herein above-named, their servants, relatives and/or agents be restrained from interring and/or burying the mortal remains of the late **JACINTA WANGECI NDUNGI MUSAU** on any of the deceased's properties, either those set out on form P&A 5 filed herein or any other, until members of the deceased's family and beneficiaries of his estate agree on either distribution of the deceased's estate or a common burial site /graveyard within the deceased's estate.

iii. That costs of this application be provided for.

2. Though there are no grounds on the face of the application, there is in support of the application the sworn affidavit of Christopher Musyoka Musau dated 28/11/2006. The said Chistopher Musyoka Musau has averred that he is duly authorized by the second and third applicants to swear the supporting affidavit on behalf of all the three applicants. It is however worth noting that the second and third applicants have distanced themselves from the application, thereby leaving the first applicant as the chief author and architect of this application.

3. The applicants' case is that the three of them, together with the petitioners and the second, fourth, fifth and sixth interested parties are all sons of the deceased, while the first interested party is a widow of the deceased whereas the third interested party is a grandson to the deceased Musau Mwania.

4. The first applicant has stated in his affidavit that the Grant of Letters of Administration was made to the Petitioners on 16/10/1997 and subsequently confirmed on 27/4/2001. The Petitioners and the Interested Parties are also in agreement with this averment. The applicants have complained that the administrators have failed to produce an account of administration as required by Section 83 (e) and (g) of Cap 160 Laws of Kenya. As a result of that failure, the applicants filed an application for revocation of grant dated 10/5/2006.

5. The applicants allege further that due to the administrators inactivity, the deceased's estate is wasting and that the Petitioners together with the Interested parties are not willing to agree on even the most mundane issues touching or affecting the deceased's estate.

6. It is also averred to by the deponent of the supporting affidavit that the deceased's estate still remains largely undistributed and that the deceased's beneficiaries/family members do not know what property of the deceased's estate shall go to them.

7. The applicants want the deceased's beneficiaries to agree on a common burial site/graveyard for burial of the departed members of the deceased's family, one of who is **JACINTA WANGECI NDUNGI MUSAU** whose remains have been lying at the mortuary since her death on 23/11/2006. According to annexture "**CMMB"** Jacinta Wangeci Ndungi Musau should have been buried at Tawa on Saturday, 02/12/2006 at 1.00 pm. Annexture "CMMC" is Form P&A 5 which sets out the names and relationships of the deceased's beneficiaries and twelve (12) of the properties belonging to the deceased.

8. The application is opposed through the sworn affidavits of Charles Muinde Musau dated 1/12/2006 and Richard Mwania Musau dated 11.12.2006. The following are the highlights of the grounds of opposition to the application. These highlights are common to the Petitioners and the Interested Parties:-

a) The application as filed is defective for want of form and for contravening the provisions of rules 58, 59 (5) and 70 of the Probate and Administration (P&A) Rules.

It is contended on behalf of the respondents that the application does not conform to Form 104 of the Probate and Administration Rules.

b) The affidavit sworn by Christopher Musyoka Musau and particularly paragraph 1, thereof is full of lies and constitutes perjury by the deponent for alleging that Charles Muinde Musau has authorized him

to swear the affidavit when the said Muinde has denied giving such authority as per annexture "**RMM'2(a)"**to the Replying Affidavit sworn by Richard Mwania Musau.

c) The applicants have no locus standi to bring the present application since they, and especially the first applicant, are not administrators of the deceased's estate. Further, that having failed to reply to the respondents' Replying Affidavits, then it is assumed that the averments contained therein are admitted by the applicants.

It is worth noting here that under Rule 63 of the Probate and Administration Rules the provisions of Order 6 of the 'Civil Procedure Rules are not applicable in applications under Cap 160 Laws of Kenya.

d) The applicant has not satisfied the conditions precedent for the granting of injunctions, namely that the applicants have not demonstrated that they will suffer irreparable loss if the orders sought are not granted and further that they have not shown that they have a prima-facie case with a probability of success against the respondents.

9. It is contended that the applicants are, by the very fact of filing this application inter meddling with the deceased's estate contrary to Section 45 of Cap 160. Subsection (1) of the Section provides as follows:-

"**45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."**

10. As to whether the principles applicable in applications for granting of injunctions are applicable herein, one has to fall back on the provisions of rule 63 of the P&A Rules. Order 39 of the Civil Procedure Rules is not one of those orders that are imported into Cap 160. What this means is that the application shall not be determined strictly on those principles that are applicable under the Civil Procedure Rules

11. The respondents also contend that contrary to the applicant's allegation there is an identifiable common burial ground where seven members of the deceased's family lie buried next to each other and that one Jackson Ndungi Musau the husband of Jacinta Wangeci Ndungi Musau is buried in that same graveyard. It is further contended by the respondents that two of the family members namely; **Benson Wambua Musau** and **Jackson Ndungi Musau** were buried on the common graveyard situated on Land Parcel **Mbooni/Kalawani/444** in 2002 and 2004 respectively.

12. The respondents also contend that there is an element of bad faith especially on the part of the 1st applicant in bringing this particular application to court. They argue that if indeed the applicants felt so aggrieved and so concerned about the alleged haphazard burials on the deceased's properties, then nothing would have stopped them from making their concerns known in the years 2002 and 2004 when Benson Wambua Musau and Jackson Ndungi Musau died and were buried on the deceased's property.

13. The applicant's application is also opposed on the ground that it contravenes the provisions of Order 50 Rule 7 of the Civil Procedure Rules in that the applicants have not stated in general terms the grounds upon which the application being made.

Regarding this point, it is instructive to note that the provisions of Order 50 of the Civil Procedure Rules are not imported into the Law of Succession Act, Cap 160 by the provisions of Rule 63 of the Probate and Adminstration Rules..

14. The final point of opposition by the respondents is that the first applicant's conduct which has caused the delay of the burial of Jacinta Wangeci Ndungi Musau is an affront to Kamba Customary law which requires that a deceased wife should be buried next to her husband's grave. It is contended that since Jacinta's husband, Jackson Ndungi Musau is buried in the common graveyard in Mbooni/Kalawani/444, it follows that Jacinta should also be buried in the same place next to her husbands grave. The second interested party, Ruth Kalau Musau has deponed in her affidavit that Jacinta's grave has already been

prepared next to her husband's grave.

15. Though the parties herein referred to Kamba Customary Law as it relates to burial, no authority was cited to the court in support of the allegation that Jacinta Wangeci Ndungi Musau ought to be next laid to rest next to her husbands grave in the common graveyard on Land Parcel Mbooni / Kalawani/ 444. I am of the view however that this is an important issue which can only be determined after I have determined other pertinent issues of the application.

16. Since all parties are in agreement that the deceased's estate is yet to be distributed, the main issue for determination by the court is whether the applicants have demonstrated to this court that Jacinta Wangeci Ndungi Musau's remains ought not be buried on any of the deceased's properties until either the distribution is carried out or until such a time that the parties agree on a common burial ground. On this issue, the respondents contend that there already exists a common burial ground where other departed members of the deceased's family are buried the last of whom was Jacinta's husband Jackson Ndungi Musau who was buried in the year 2004. On the other hand, the applicants contend that there is not only no such common burial round but that the allegation by the respondent's that Jacinta's husband is buried where he is alleged to have been buried is not true.

17. In determining the above issue the court needs to consider what prejudice if any the applicants shall suffer if the orders sought are not granted.

18. I have agonised over the whole of this application. I have also considered the submissions made to me by counsel on both sides of the divide. After all the consideration I have reached the conclusion that the applicants have not demonstrated to me that the remains of Jacinta Wangeci Ndungi Musau ought not to be buried on any of the deceased's properties. Further the applicants have also not demonstrated to this court that they will suffer any peculiar prejudice that will not be suffered by other beneficiaries of the deceased's estate.

19. I have accepted as true the evidence adduced through the affidavits of Ruth Kalau Musau and Richard Mwania Musau that seven members of the deceased's family are now departed and that two of those members departed after the deceased died and after the grant of Letters of Administration to the deceased's estate were issued and subsequently confirmed on 27/4/2001. I do find and hold that Ruth Kalau Musau, the surviving spouse of the deceased stands in the shoes of the deceased person herein. She has stated that Jacinta Wangeci Ndungi Musau has her grave already prepared next to her husband. In that capacity therefore, Ruth Kalau Musau has the authority and the power to guide and if need be, to dictate to the rest of the deceased's family members on many issues, among them the burial place of departed family members.

20. I have also accepted as true, the respondents evidence that all the seven departed persons of the deceased's had their remains interred on a portion of Land Parcel No.Mbooni/Kalawani/444 and that the said portion of Land Parcel No. Mbooni/Kalawani/444 is the common graveyard for the departed members of the deceased's family. In that regard, I have rejected the first applicant's contention that no such graveyard exists and that no evidence of the same has been given. The affidavits by Richard Mwania Musau and Ruth Kalau Musau are clear on the issue not only alleging the existence of the common graveyard but also specifying the land parcel upon which the said graveyard is located.

21. Having found as I have that a common family graveyard for the deceased's family exists, I further find and hold that Jacinta's husband, Jackson Ndungi Musau is buried in the said graveyard. I am persuaded therefore that having allowed the bodies of the other departed family members of the deceased to be buried on the common burial ground without a hitch, this present application is motivated by factors that have not been fully disclosed by the applicants.

22. In the circumstances of this case, I find, that the applicants will suffer no prejudice if the orders they seek are not granted. In any event, the portion of the deceased's property upon which the common graveyard stands is so small that neither the applicants nor any other beneficiary would be prejudiced by having the remains of Jacinta's buried thereon.

23. It does appear to me from the contents of paragraph 5 of the Supporting Affidavit sworn by Christopher Musyoka Musau that the first applicant's main complaint is that the Petitioners have not produced to the court either within the prescribed period or at all an account of administration as required by the provisions of Section 83 (e) and (f) of Cap 160. If that be the case, the applicants have already filed an application seeking to revoke the grant of Letters of Administration. That is the proper route to take and not to say that Jacinta and other members of the deceased's family who may die hereafter are not to be buried on any of the deceased's property until the distribution is done or the family agrees on a common graveyard. In my view allowing such a situation to happen is to be insensitive to the pain and suffering of the rest of the Musau family.

24. I have therefore concluded that the applicants' application has been motivated by meanness on the part of the first applicant. It has not been demonstrated that Land Parcel Mbooni/ Kalawani/444 was given to any of the applicants by the deceased, and therefore that the presence of a graveyard thereon would interfere with the future plans that the applicants may have for the said land parcel.

25. On the basis of the evidence before me, I find that there is no haphazard burying of the departed members of the deceased's family as alleged in the application.. I find that from that evidence, there is a considerable degree of orderliness in the way the departed members of the deceased's family have been and are to be buried.

26. The other technical issues raised either for or against the application are of no real consequence to the two issues I have dealt with. I will say no more about them.

27. In the result I find that the applicant's application as filed lacks merit. This court shall not issue any order of restraint against either the second and third petitioners or the interested parties herein from interring and/or burying the remains of Jacinta Wangeci Ndungi Musau on any of the deceased's properties. The deceased's family shall bury Jacinta wherever they have chosen to bury her.

28. The application is therefore dismissed with costs to the respondents in the application dated 28/11/2006. The interim orders granted to the applicants on 29/11/2006 be and are hereby discharged.

Orders accordingly.

Dated and delivered at Machakos this **20th** day of **December,** 2006.

R.N. SITATI

JUDGE