



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Succession Cause 148 of 1997

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

AND

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

AND

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

RULING

There is before me a summons dated 01.12.06 filed on behalf of the petitioners against the applicants Christopher Musyoka Musau, Charles Muinde Musau and Michael Munuve Musau who become respondents to the present summons. The summons seeks to set aside orders issued by Onyancha J at Machakos on 29.11.06.

The applicants in the summons now before me were represented at the ex-parte hearing today by learned counsel, Mr A.M. Mbindyo. The grounds upon which the summons is based are contained in the pleadings including affidavit and counsel's submissions but they may be summarized as under:-

- a) Misrepresentation by the 1st respondent Christopher Musyoka Musau that there was no common

family burial ground. Applicants herein deny this.

b) Lack of *locus standi* by the 1st respondent to obtain the orders in question. Applicants herein contend that the 1st respondent is not an administrator of the estate of the deceased and should not have brought the application leading to the orders staying the burial of Jacinta Wangechi Ndungi Musau which was to be held on 02.12.06.

c) Lack of authority by the 1st respondent from his co-applicants in the application which went before Onyancha J leading to issuance of the orders now sought to be set aside. The applicants in the present application contend that the 1st respondent had no authority from his co-applicants in the Machakos application. The applicants herein refer to affidavits of Charles Muinde Musau and David Muia Musau sworn on 01.12.06 who are said to have been the 1st respondent's co-applicants in the Machakos application.

d) Lack of good faith by the 1st respondent. Applicants herein contend that the 1st respondent filed the Machakos application in bad faith because in an application dated 10.05.06 he had sought to remove the current administrators of the deceased's estate and replace them with himself and his co-applicants who have denied giving him authority to obtain the orders now being questioned. The application of 10.05.06 is still pending.

It was the submission of counsel for the applicants herein that under Kamba customary law, the deceased Jacinta Wangechi Ndungi Musau should be buried at the site where the burial was to take place on 02.12.06 since her late husband was buried there.

Counsel urged this court to set aside the orders made by Onyancha J on 29.11.06 staying the deceased's burial pending *inter-partes* hearing on 18.12.06 of the 1st respondent's Machakos application, to facilitate early burial of the deceased. Counsel also asked for costs of the present application and of preparations for the abortive burial which should have taken place on 02.12.06. He said orders of Onyancha J should be set aside to save the deceased's family members mental anguish.

I have given due consideration to the application before me.

Burial disputes are highly emotive affairs. The matters alluded to by the applicants herein revolve around issues of fact. The evidence applicants seem to rely on in their *ex-parte* application seems to be from one group of people. It is possible that the 1st respondent may come up with his version of the matters in question. He may also present an opposing group to support his case on the matters in controversy. If that were to happen and the 1st respondent succeeds after Onyancha J's orders have been set aside and the deceased's body buried, the result would be exhumation of the deceased's body. To me that seems to be an even uglier scenario than preserving the body for now and burying it after results of the *inter-partes* hearing scheduled for 18.12.06 is known.

I am of the considered view that the choices available to this court are between two evils and that the lesser evil is to wait for the outcome of the *inter-partes* hearing fixed for 18.12.06. Accordingly, I decline to set aside the orders issued by Onyancha J on 29.11.06.

Orders accordingly.

Delivered at Nairobi this 5th day of December, 2006.

B.P. KUBO

JUDGE