



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Musau v Musau & 2 others (Succession Cause 368 of 2003)  
[2025] KEHC 14756 (KLR) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 368 OF 2003  
NIO ADAGI, J  
OCTOBER 15, 2025**

**BETWEEN**

**BENJAMIN MUSYOKI MUSAU ..... APPLICANT**

**AND**

**TIMOTHY MUTHIANI MUSAU ..... 1<sup>ST</sup> RESPONDENT**

**TIMOTHY MUIA KIMOLO ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR MACHAKOS COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is on the Notice of Motion application dated 5<sup>th</sup> April 2024. The application seeks for orders that:-
  - a. Spent
  - b. That pending hearing and determination of this application, this Honourable Court be pleased to issue temporary orders of injunction restraining the Respondents herein by themselves, their servants, agents, employee and/or any other person claiming under them from alienating, offering for sale, selling, charging, transferring, trespassing, cultivating, proceeding with any works and/ or in any manner whatsoever dealing with, interfering with the ownership, use and possession by the Applicant of the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204.
  - c. That pending hearing and determination of this suit, this Honourable Court be pleased to issue an order suspending the title issued to the 1<sup>st</sup> Respondent in respect of land Parcel number Kangundo/Kyevaluk1/2203 together with any other sub-divisions thereof being Kangundo/Kyevaluk1/2292 and Kangundo/Kyevaluk1/2295.



- d. That pending hearing and determination of this suit, this Honourable Court be pleased to issue temporary orders of injunction restraining the 2<sup>nd</sup> Respondent herein by themselves, their servants, agents, employee and/or any other person claiming under them from registering any transfer and/or issuing title deeds in reference to the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204, within Machakos county.
  - e. A declaration that the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204 belongs to the Applicant and the Applicant be registered as the absolute proprietor of the said portion.
  - f. An order compelling the Land Registrar Machakos County to cancel and revoke the title deed issued to the 1<sup>st</sup> Respondent in relation to the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204 herein together with any other sub-divisions thereof and issue the title in the name of the Applicant herein.
  - g. A Permanent order of injunction to issue restraining the 1st and 2nd Respondents herein, whether by themselves their servants, agents, employee and/or any other person claiming under them from alienating, offering for sale, selling, charging, transferring and/ or in any manner whatsoever interfering with the ownership, use and possession by the Applicant of the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204.
  - h. That the costs of this application be provided for.
2. The application is supported by the grounds on the face thereof and on the supporting affidavit of the Applicant Benjamin Musyoki Musau sworn on 5th April 2024.
  3. The application is opposed by the Respondents through the Replying affidavit of the 1st Respondent Timothy Muthiani Musau sworn on 16<sup>th</sup> July 2024.

### **Applicant's Case**

4. The Applicant's case is that he is a beneficiary and one of the Administrators of the Estate of the late Musau Kitavi (deceased) herein. The 1st Respondent is also an Administrator of the said Estate. That Letters of Administration of Grant Intestate were issued to the Applicant and 1<sup>st</sup> Respondent on 16<sup>th</sup> September 2005 and confirmed on 25<sup>th</sup> July 2011. During the confirmation of the Grant, the Applicant was allocated land parcel No. Kangundo/Kyevaluki 2204 whereas the 1<sup>st</sup> Respondent was allocated Kangundo/Kyevaluki 2203. However, there is a terrace that lies between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204 which was not distributed.  
  
Prior to the deceased's death, the deceased together with all the family members entered into a written agreement wherein the said terrace was allocated to the Applicant.
5. That the Applicant has now discovered that the 1<sup>st</sup> Respondent has included the said terrace in his parcel of land No. Kangundo/Kyevaluki 2203 and processed a title deed for the property which title was issued on 18<sup>th</sup> February 2011. The Applicant states that he has further learnt that the 1<sup>st</sup> Respondent has proceeded to subdivide land parcel No. Kangundo/Kyevaluki 2203, including the terrace belonging to the Applicant, into two new parcels being Kangundo/Kyevaluki 2292 and Kangundo/Kyevaluki 2295.
6. The Applicant further states that he has discovered that the 1<sup>st</sup> Respondent has since proceeded to unlawfully and illegally sell to the 2<sup>nd</sup> Respondent one of the subdivided portions which includes the terrace belonging to the Applicant.



That sometime in March 2024, the Applicant established that the 2<sup>nd</sup> Respondent brought a massive earthmover on the contested portion and has already commenced works. Reason wherefore the Applicant is apprehensive that the 2<sup>nd</sup> Respondent will proceed with works on the property thereby causing irreversible damage to the property.

That the actions of the 2<sup>nd</sup> Respondent pose a risk of causing wastage of the property in dispute.

7. The Applicant is also apprehensive that the Respondents will proceed to dispose and/or transfer land parcel number Kangundo/Kyevaluk1/2204 and/or the subdivisions thereof including the terrace belonging to the Applicant to a 3<sup>rd</sup> party thereby disinheriting the Applicant. It is therefore in the interest of justice that a permanent injunction be issued restraining the Respondents whether by themselves, their servants, agents, employees and/or any other person claiming under them from alienating, offering for sale, selling, charging, transferring, trespassing, cultivating, proceeding with any works and/ or in any manner whatsoever interfering with the ownership, use and possession by the Applicant of the terrace between land parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204. Thus, it is in the interest of justice that that this application be allowed and the orders sought be granted in order to preserve the suit property in the interest of the Applicant pending the determination of this application and the suit.
8. That the subject property stands the risk of being wasted owing to the activities of the 2<sup>nd</sup> Respondent consequently the Applicant stands to suffer irreparable loss if this application is not allowed. Further, if this application is not allowed the Respondents may transfer the property in dispute to a third party and/or dispose of the same thereby exposing the Applicant to irreparable loss.
9. That the balance of convenience tilts in favour of the Applicant.  
That it is in the interest of justice that this Honourable Court makes a declaration that the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204 belongs to the Applicant and cancels any title deed issued in respect of parcel in dispute and grants an order that the title be issued in the name of the Applicant herein.
10. That the Respondents will not suffer any prejudice if this application is allowed as they will have an opportunity to present their case.

### **Respondents' Case**

11. In the replying affidavit, it is expounded that the application is full of falsehoods, concealments and misrepresentation of facts. It is stated that the 1st Respondent and the Applicant herein were appointed as Co-Administrators of the Estate of Musau Kitavi (deceased) who is their father. From their father's Estate, the 1st Respondent was rightfully given the parcel of land No. Kangundo/Kyevaluki 2203 while No. Kangundo/Kyevaluki 2204 was allocated to the Applicant, his brother as confirmed during the confirmation of grant as consented to by all the beneficiaries. That the 1st Respondent then proceeded to register his portion of land into his name and later on sub-divided the same into Kangundo/Kyevaluki 2295 and Kangundo/Kyevaluki 2292 as is within his rights.
12. The land parcels Kangundo/Kyevaluki 2203 and Kangundo/Kyevaluki 2204 are adjacent to one another and there is no empty space between the two parcels of land as alleged by the Applicant. The 1st Respondent contends that there is no terrace and or piece of land without a parcel number between Kangundo/Kyevaluki 2203 and Kangundo/Kyevaluki 2204.



13. The Respondents argue that the declaration that the Applicant is seeking has no basis and can only be determined in the main suit. The Respondents pray the application be dismissed with costs to the 1st and 2nd Respondent.

### **Submissions**

14. The application was canvassed through written submissions and as reflected in the court record, the Applicant's submissions are dated 20th January 2025, whilst those of the Respondents are dated 19th February 2025. Those submissions replicate the summary above and I wish not to duplicate the same here.
15. The 3rd Respondent only filed a Notice of appointment of advocates in November 2024 but did not participate in the application.

### **Analysis and Determination:**

16. Having considered the instant application and the response thereof as well as the submissions of both parties, I find that the only issue for my determination is whether the Applicant has established a case for grant of the permanent injunction orders and a declaration as sought in the application dated 5<sup>th</sup> April 2024.
17. The following prayers (e), (f) and (g) in the application dated 5th April 2024, 2022 seek for final orders s follows:-
  - e. A declaration that the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204 belongs to the Applicant and the Applicant be registered as the absolute proprietor of the said portion.
  - e. An order compelling the Land Registrar Machakos County to cancel and revoke the title deed issued to the 1<sup>st</sup> Respondent in relation to the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204 herein together with any other sub-divisions thereof and issue the title in the name of the Applicant herein.
  - e. A Permanent order of injunction to issue restraining the 1st and 2nd Respondents herein, whether by themselves their servants, agents, employee and/or any other person claiming under them from alienating, offering for sale, selling, charging, transferring and/ or in any manner whatsoever interfering with the ownership, use and possession by the Applicant of the terrace between Land Parcel Nos. Kangundo/Kyevaluki 2203 & Kangundo/Kyevaluki 2204.
18. It has to be noted that a permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court while a permanent injunction has a perpetual character and is granted upon hearing the parties.
19. Further, it is my considered view that the declaration order and the order compelling the Land Registrar Machakos County to cancel the subject Title Deeds herein are final orders which can only be granted upon hearing the parties on merit in a suit.
20. I have thoroughly perused the court record as well as the CTS, but I have not come across a suit filed by the Applicant on which this instant application can stand. In addition, I have established that at the time of confirmation of the Grant herein, the Applicant fully participated and did not raise any issue on the alleged terrace which unfortunately the Applicant has failed to provide proof of its existence



even in the application which has been filed almost 10 years from when the Rectified Confirmed Grant was issued on 10th October 2016.

21. I further agree that the Applicant's application as filed in this Succession Cause is an attempt by the Applicant to revoke or annul the lawful grant through the back door.
22. Reliance is placed on the case of *Shepherd Homes Limited v Sandahm Homes Limited v Sandahm* [1971] 1 CH 34, Megarry, J stated:

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation”.
23. The above excerpt confirms that, while this court has power to grant permanent/mandatory injunction on interlocutory application, such permanent/mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate, pressing and is likely to cause extreme hardship.
24. As I have pointed out, courts do grant mandatory applications in very rare of circumstances where the justice of the case require that a mandatory injunction be granted. The gist is to avoid sacrificing the right of the parties to a fair and proper hearing of their dispute, which entails calling and cross-examination of witnesses by a summary hearing.
25. In this case, it is my view that the Applicant has not shown the clearest of cases and why a permanent injunction should be issued. What the Applicant is asking the court to do by seeking for the permanent injunction is that the court determines the rights to the proclaimed property in finality at this interlocutory stage. I have not seen any evidence or grounds adduced to demonstrate the clearest of cases to warrant the grant of permanent injunction sought and this prayer is declined.
26. In the end, this court finds the Applicant's application dated 5th April 2024 to be without merit and the same is dismiss in its entirety.
27. This being a matter involving siblings, no order as to costs shall issue.
28. It is so ordered.

**RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 15<sup>TH</sup> OCTOBER 2025**

**NOEL I. ADAGI**

**JUDGE**

**DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 15<sup>TH</sup> OCTOBER 2025**

