

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.19 OF 2014

DANIEL MULE MUSAU..... 1ST PLAINTIFF

PHILIP MUILU MUSAU (SUING AS ADMINISTRATORS

AD LITEM OF THE ESTATE OF MUSAU MUILU MWOVA) 2ND PLAINTIFF

VERSUS

TITUS NDAMBUKI DEFENDANT

SAMUEL KATELA MUSAU 1ST INTENDED DEFENDANT

SOSPETER MUTINDA MUSAU 2ND INTENDED DEFENDANT

PETER MUTIE MUSAU 3RD INTENDED DEFENDANT

R U L I N G

1. By a **Plaint** dated **11.3.2014**, the Plaintiff filed the instant suit on 11.3.2014 seeking an injunctive relief against the Defendant over Masii/Utithini/181. In his defence the Defendant averred that though the suit land in names of Musau Mwilu deceased 3 deceased beneficiaries sold to him part of their intended shares of estate pending the determination of the succession case on distribution.
2. On 29.9.2014 the above intended beneficiaries Samuel Katela Musau, Sospeter Mutinda Musau and Peter Mutie Musau filed a Motion dated 26.9.2014 seeking to be enjoined as parties in the suit and for the determination of distribution of estate to be done at the same time in the instant suit. The grounds for the said application are that the Applicant entered into a sale agreement with the Defendant to sell their interest. Samuel Katela Musau on their behalf has sworn an affidavit on 26.9.2014 narrating the background of sale transaction inter alia. The application is opposed by the Plaintiff and the 1st Plaintiff has sworn an affidavit on 14.11.2014 on his behalf and that of the 2nd Plaintiff.
3. The Plaintiff's case is that the Orders sought cannot be granted and application is incompetent. The prayer on distribution of estate can only be handled by a probate and administration court. ELC court cannot entertain such an issue. On enjoining the intended Defendants, the Plaintiff argues that they have no capacity to enter the suit to defend as they are not the administrators. In any event the suit is against the Defendant and there is no claim against them. Further it is argued that, sale of part of estate before distribution is a criminal act known as intermeddling with the property of a deceased person. The alleged agreement is illegal and unenforceable. The applicable rule in the circumstances of the case is Order 1 Rule 10(2) Civil Procedure Rules 2010. This rule empowers court to enjoin Defendant/Plaintiff whose presence in court may be necessary in order to enable court effectively and completely adjudicate upon and settle all questions involved in the suit.
4. The Applicant wish to be enjoined to come to justify aiding the intermeddling of the estate of a deceased person. There is no claim against them and their shares have not crystalized to enable them alienate them and even defend them. At this stage the best the applicants can be is the Defendant's witnesses to demonstrate under what law they purported to sell expected Shares from the deceased estate. In **ELLY ODHIAMBO ONYUKA -VS- AYUB ODHIAMBO**

MIGWELLA Civil Appeal 81/2012. The court held that a seller of a property of a deceased person while still registered in deceased person name lacks capacity to do so and is contrary to Section 45(1) of Cap.160. In any event where agreement like in this case is not blessed by a Land Board Consent, the same is null and void.

5. The court thus finds that the applicants will not add any value in the suit and their enjoining does not meet the threshold set by Order 1 Rule 10(2) Civil Procedure Rule 2010 and thus rejects the application herein. The court makes the following orders:

1. The application dated 26.9.2014 is dismissed.
2. Costs to the Plaintiffs.

Dated and Delivered at Machakos, this 20th day of February, 2015.

CHARLES KARIUKI

JUDGE