



Ndeto & another v Ndeto (the Administrator of the Estate of Samson Ndeto Kimomo); Ochieng (Interested Party); Ndeto (Proposed Defendant) (Environment & Land Case E083 of 2021) [2022] KEELC 3630 (KLR) (13 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E083 OF 2021
CA OCHIENG, J
JUNE 13, 2022**

BETWEEN

ALICE MULIMI NDETO 1ST PLAINTIFF

SAMMY NDUU NDETO 2ND PLAINTIFF

AND

MARY SYOMBUA NDETO DEFENDANT

THE ADMINISTRATOR OF THE ESTATE OF SAMSON NDETO KIMOMO

AND

GEOFFREY ALALA OCHIENG INTERESTED PARTY

AND

CHARLES NZAU NDETO PROPOSED DEFENDANT

RULING

1. What is before court for determination is the plaintiffs’ notice of motion application dated the December 28, 2021 where they seek the following orders:
 1. Spent
 2. The Charles Nzau Ndeto being the second administrator of the estate of Samson Ndeto Kimomo be enjoined in ELC case no E083 of 2021 as the 2nd defendant.
 3. That this honourable court be pleased to order preservation of property known as LR No 2706/8/1R No 1807676 and indeed the entire parcels of land belonging to the estate of



Samson Ndeto Kimomo from being disposed off by the administrators pending the hearing and determination of this application *inter-parte*.

4. That this honourable court be pleased to order preservation of property known as LR No 2706/8/1R No 1807676 and indeed the entire parcels of land belonging to the estate of Samson Ndeto Kimomo from being disposed off by the administrators pending the hearing and determination of the main suit.
5. The cost of the application be in the cause.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Alice Mulimi Ndeto. She contends that Mary Syombua Ndeto and Charles Nzau Ndeto (proposed 2nd defendant) who are two administrators of the estate of Samson Ndeto Kimomo (deceased) having been confirmed by the court in Succession Cause No 26 of 2019 on July 3, 2019 have been disposing off the said estate without consulting the beneficiaries. Further, they have failed to account for proceeds of sale of land belonging to the deceased. She claims the said administrators have failed to take steps to ensure the distribution schedule is implemented but have clandestinely sold off pieces of land more specifically LR No 2706/8 /IR No 1807676, hereinafter referred to as the 'suit land', to third parties despite protests from the beneficiaries. Further, they have sold 50 acres to Airwave Properties Limited and 10 acres to Dhahabu Land Limited respectively.
3. In response to the instant application, the 1st defendant Mary Syombua Ndeto filed a replying affidavit where she confirms having no objection in having her co-administrator enjoined in this suit as a 2nd defendant. She denies any sale between her brother Nelson Muia and Dhahabu Land Limited. She is not sure why the plaintiffs are seeking for preservation orders and argues that their portion of the suit land is available and nobody has interfered with it. She confirms that they are proceeding with the subdivision process and the original title deed has already been surrendered to survey of Kenya. She states that she has no objection to any preservatory order so long as the same does not prevent them from doing their work as administrators.
4. The application was canvassed by way of written submissions but I note it is only the plaintiffs that filed theirs.

Analysis and Determination

5. Upon consideration of the notice of motion application dated the December 28, 2021 including the respective affidavits, annexures and plaintiffs' submissions, the following are the issues for determination: Whether the proposed 2nd defendant should be joined in this suit. Whether conservatory orders should issue to preserve the substratum of this suit.
6. The plaintiffs in their submissions reiterated their averments as per the supporting affidavit and insists the proposed 2nd defendant as a co-administrator should be enjoined in this suit. They contended that the conditions for issuance of an injunction had been met. To support their arguments, they relied on the following decisions: *R v Principal Secretary in Charge of Security Office of the President Ex Parte James Mwangi Nyambura* (2014) eKLR; *Giella v Cassman Brown* (1973) EA 358 and *Mrao v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125.
7. In respect to joinder of a party to proceedings already in court, Order 1 rule 10(2) of the *Civil Procedure Rules* stipulates *inter alia*:
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any



person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

8. On perusal of the pleadings including annexures herein, I note the defendant and the proposed 2nd defendant are administrators of the estate of Samson Ndeto Kimomo (deceased). Further, that a grant in respect to the said estate was confirmed on July 3, 2019 *vide* Machakos High Court Succession Cause No 26 of 2019. The defendant has no objection to joinder of the proposed 2nd defendant in the proceedings herein.
9. Based on the facts as presented and relying on the legal provisions I have quoted, it is my considered view that the proposed 2nd defendant has a stake in these proceedings and his involvement herein is necessary to enable the court effectually and completely adjudicate upon as well as settle all questions involved in the suit. Further, that he will be affected by any decision from the suit herein. I will hence proceed to join him as 2nd defendant in these proceedings, while the initial defendant will now be the 1st defendant.
10. As to whether conservatory orders should issue to preserve the substratum of this suit.
11. In line with the principles on injunction established in the case of *Giella v Cassman Brown* (1973) EA 358 and definition of a prima facie case as espoused in *Mrao v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125, I will proceed to decipher whether the plaintiffs are entitled to the orders as sought. It is not in dispute that the suit land herein belonged to the estate of Samson Ndeto Kimomo (deceased). Further, that the said suit land including other parcels of land were distributed to respective beneficiaries *vide* Machakos High Court Succession Cause No 26 of 2019 on July 3, 2019. The plaintiffs claim the 1st defendant and the proposed 2nd defendant have disposed of portions of the suit land to third parties without consent of the beneficiaries. I note the 1st defendant has not denied selling 50 acres from the suit land to Airwaves Properties Limited, although she denies knowledge that her brother sold another portion of 10 acres to Dhahabu Land Limited. The 1st defendant avers that they have surrendered the title of the suit land to survey of Kenya but does not object to issuance of conservatory orders. Based on the facts as presented while associating myself with the two decisions cited above, I find that it is pertinent to preserve the substratum of the suit pending determination of the dispute herein. In the circumstance, I find that the plaintiffs are indeed entitled to conservatory orders as sought.
12. It is against the foregoing that I find the notice of motion application dated the December 28, 2021 merited and will allow it. Costs will be in the cause.
13. I further grant the 2nd defendant leave of twenty one (21) days to file and serve his defence after which the plaintiffs including the 1st defendant have leave of fourteen (14) days to file as well as serve their reply to defence if need be.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF JUNE, 2022

CHRISTINE OCHIENG

JUDGE

