

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 261 of 2009

1. HENRY MUTISO

2. NDAMBUKI MWANGANGI IVILI (SUNGAS LEGAL

REPRESENTATIVE AND ADMINISTRATORS OF THE ESTATE OF MWANGANGI IVILI

(DECEASED).....PLAINTIFFS

VERSUS

PROF. DAVID N. NZOMO (SUED AS REPRESENTATIVE OF

THE ESTATE OF JULIANA WAVINYA).....RESPONDENT

RULING

1. The Application dated 31.8.2009 seeks temporary orders of injunction to restrain the Defendant from entering into, encroaching in or in any other manner interfering with L.R. No. 12175/158(I.R.No. 44712) pending the hearing of the suit herein.
2. I have read the Supporting Affidavit sworn on 28.8.2009 by one Henry Mutiso and the grounds of Opposition filed on 19.9.2009 by the Defendant. I gather that the land in dispute was initially registered in the name of Syokimau Farm Ltd who are not parties to this suit. On 30.6.1992, the land was transferred to Juliana Wavinya who is said to be deceased. The Defendant has denied being the legal representative of the estate of the said Juliana Wavinya and there is no evidence on record that he was properly sued as such. In fact in the Plaintiff dated 31.8.2009 at paragraph 5 thereof, It is averred that the Defendant was a Director of Syokimau Farm Ltd and he registered the land in the names of Juliana Wavinya by fraudulent means.
3. To my mind the Application is beyond redemption for the very same reasons;
4. Firstly, that the Defendant is wrongly sued cannot be in doubt and I agree with the decision in Njoroge vs Mbiti [1980] KLR 519 where Gachuhi, J.A states as follows;

“... There can never be any proceedings against a dead person. A personal representative should have been brought in the suit...”

5. Once there is no evidence that the Defendant was properly sued on behalf of the estate of Juliana Wavinya then the Application is doomed. It is the Applicants who ought to have provided evidence to attest to that fact and they have failed to do so.
6. Secondly, the Applicants ought to establish a prima facie case that they have a legitimate interest in the suit land. They have failed to do so and their claim through Mwangangi Ivili (*deceased*) is shaky. I say so because whereas there is only one piece of evidence tendered to show the claim by Mwangangi aforesaid (a *letter (undated)* to the Commissioner of Lands by Syokimau Farm Ltd), that letter states that Mwangangi was allocated title no. 12715/158 but that the title deed was not issued for “*reasons not known to the current Board of Directors.*” Surely, Syokimau Farm Ltd as the original proprietor of the land should also have been sued to explain the process by which the deceased, Juliana Wavinya, obtained title and the Commissioner of Lands to explain how that title was issued to Wavinya. As for the Applicants, they have failed to show that they are in fact the personal representatives of Mwangangi. No letters of administration allegedly issued by this court were exhibited and to state so in the affidavit without back-up is improper.
7. In the end, the Application before me and dated 31.8.2009 is incompetent and is dismissed with costs to the Defendant.
8. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **12th** day of **March 2010**.

H.P.G. WAWERU

JUDGE