



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 302 OF 2016**

**CHARLES RATEMO NYAMBATI** (Suing as the legal representative of the estate of Samson Nyambati Nyamwenya).....**PLAINTIFF**

**VERSUS**

**JACKTON OCHARO**.....**1<sup>ST</sup> DEFENDANT**  
**CHARLES RATEMO NYAMWEYA**.....**2<sup>ND</sup> DEFENDANT**  
**ALICE KERUBO NYAMBATI**.....**3<sup>RD</sup> DEFENDANT**  
**KEFA NAMI NYANGITO**.....**4<sup>TH</sup> DEFENDANT**  
**LAND REGISTRAR, KISII COUNTY**.....**5<sup>TH</sup> DEFENDANT**  
**ATTORNEY GENERAL**.....**6<sup>TH</sup> DEFENDANT**  
**ALICE KWAMBOKA NAMI...INTENDED**.....**7<sup>TH</sup> DEFENDANT**  
**VINCENT OGEMBO NAMI..INTENDED**.....**8<sup>TH</sup> DEFENDANT**

**RULING**

***(Application for joinder and injunction; property initially registered in the name of 4th defendant at the time of commencement of suit; property transferred to the intended additional defendants; necessary to have the intended defendants in the suit as they are the current registered proprietors; also necessary to preserve the subject matter of litigation; application allowed)***

1. The application before me is that dated 9 November 2016 filed by the plaintiff pursuant inter alia to the provisions of Order 1 Rule 10 and Order 40 Rules 1, 2, 3 and 10 of the Civil Procedure Rules. The application seeks the following two principal orders which are prayers 3 and 4 in the said application :-

*(a) That Alice Kwamboka Nami and Vincent Ogembo Nami be enjoined herein as the 7th and 8th defendants.*

*(b) That the said Alice Kwamboka Nami and Vincent Ogembo Nami be restrained by themselves, their agents or servants from alienating, subdividing, selling, mortgaging, charging or dealing in whatsoever manner with LR No. Kisii Town/Block III/ 139 or any portion of the same until further orders of this Honourable Court.*

2. The application is opposed by some of the defendants and the parties sought to be enjoined, and before I go to the gist of the same, I think it is prudent that I give a little background to this suit, and why it was deemed necessary to file this application.

3. The suit itself was commenced on 14 April 2016 by way of a plaint. The plaint, as filed, was against 6 defendants, that is Jackton Ocharo, Charles Ratemo Nyamweya, Alice Kerubo Nyambati, Kefa Nami Nyangito, the Land Registrar Kisii County and the Attorney General, respectively being the 1st to 6th defendants. It was pleaded that the plaintiff is the duly appointed executor of the will of one Samson Nyambati Nyamweya (deceased) made on 15 November 1996. The said testator died on 30 September 2013. It is averred that the deceased, together with the 1st and the 2nd defendants, co-owned, as tenants in common in equal shares, the land parcel Kisii Town/Block III/139

(hereinafter referred to as "the suit property") which is developed with a commercial building. The said property is said to have been purchased in the year 1972 by the deceased, the 1st defendant, and one Hon. James Nyamweya (now deceased) who is father to the 2nd defendant. The 3rd defendant is the second wife of Samson Nyambati Nyamweya (deceased, also referred to herein as Mr. Nyambati). It is pleaded that sometimes in the years 2005 and 2006, Mr. Nyambati lost the ability to manage his affairs and the 3rd defendant was appointed his guardian ad litem under the Mental Health Act, and remained so until the demise of Mr. Nyambati on 30 September 2013. It is pleaded that under Section 27 of the Mental Health Act, the property of a person of unsound mind can only be disposed off through a Court order. It is averred that on 12 August 2013, a sale agreement was entered into through which the suit property was sold to the 4th defendant. It is the contention of the plaintiff that the said sale agreement is fraudulent, inter alia because, Mr. Nyambati lacked capacity to enter into a contract, and the 3rd defendant, who was his guardian ad litem, had not obtained a court order to sell the property. It is the case of the plaintiff that the said sale agreement is fraudulent and hence null and void.

4. It is pleaded that on 15 October 2013, after Mr. Nyambati had died, but before he was buried on 1 November 2013, a transfer was executed, transferring the suit property to the 4th defendant. It is the position of the plaintiff that this transfer was also fraudulent. It is pleaded that in the will of Mr. Nyambati, the suit property was bequeathed to the house of his late first wife, Peris Nyaondo Nyambati, of whom the plaintiff is son. In the suit, the plaintiff has sought orders inter alia that the sale agreement and subsequent transfer of the suit property to the 4th defendant, be declared null and void, and for a declaration that the plaintiff is owner of 1/3rd share of the suit property.

5. What has prompted the application to enjoin Alice Kwamboka Nami and Vincent Ogembo Nami, is that on 11 October 2016, the suit property was transferred to the two persons, and they are now the current registered proprietors of the suit property.

6. The intended defendants have opposed their joinder to the suit through an affidavit sworn by Alice Kwamboka Nami. She has inter alia deposed that the process leading to them being registered as proprietors was legitimate. She has also averred that the plaintiff has no capacity in the matter to sue on behalf of his late father or mother. She has stated that they are innocent transferees of the property and that their joinder to the suit will not bolster the plaintiff's case.

7. I have taken note of the other replying affidavits filed and the submissions of counsel on record for the applicant and the respondents. I take the following view of the matter.

8. What is before me is an application to enjoin additional parties to this suit. Order 1 Rule 10 therefore applies and it provides as follows :-

**10. Substitution and addition of parties [Order 1, rule 10.]**

*(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.*

*(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.*

*(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.*

*(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.*

9. It will be seen from the above, particularly, sub-rule 2, that a court can order a person to be enjoined to a suit, if the presence of such person is necessary in order to completely adjudicate the questions involved in the suit. I do note that when the case was filed, the suit property had not been transferred to the intended defendants and that the transfer was effected during the pendency of the suit. The plaintiff could not therefore have had any reason to sue the two intended additional defendants as they had no known interest in the suit property. At that time it is the 4th defendant who was the registered proprietor.

10. I observe that what the plaintiff wants in the suit, is to have part of the property declared to be owned by himself and/or the house of his late mother. The plaintiff cannot pursue his claim without having the current registered proprietors enjoined in the suit so that they may be given an opportunity to be heard as to why the prayers sought by the plaintiff should not be granted. Indeed, the matter cannot properly proceed without the current registered proprietors being parties to the suit and being given a hearing because what is at stake is property that is registered in their names. In my view, the presence of the intended additional defendants is necessary in order to fully adjudicate the questions before this court.

11. I do note that the respondents who opposed the motion raised the issue that the plaintiff lacks capacity to pursue this suit. To me that is an issue that can be addressed later, and I do not see how it should affect the joinder of the current registered proprietors to the case.

12. Taking all factors into consideration, it is my view that the application is merited and the same is hereby allowed. I allow the plaintiff to enjoin Alice Kwamboka Nami and Vincent Ogembo Nami as defendants in this suit. I further direct the plaintiff to effect amendment to his plaint to reflect the said joinder. The amended plaint should be filed within 14 days and be served in the usual manner.

13. There is also a prayer for an interlocutory injunction, seeking to restrain the current proprietors from any dealings with the suit property. In my view, it is necessary to preserve the subject matter of litigation. If further dealings are entered into, the subject matter may very well be lost or transferred to other parties which will only complicate and delay this litigation. I therefore issue an order restraining Alice Kwamboka Nami and Vincent Ogembo Nami by themselves, and/or their agents or servants from alienating, subdividing, selling, mortgaging, charging or dealing in whatsoever manner with LR No. Kisii Town/Block III/ 139 or any portion of the same until this case is determined, or until further orders of this Honourable Court. To fortify this order, I do issue an order of inhibition, restricting the registration of any disposition in the register of the said land parcel Kisii Town/Block III/139, until this case is heard and determined, or until further orders of this court.

14. On costs, the same shall be costs in the cause.

15. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 16<sup>th</sup> day of November 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr. Ndungu present holding brief for Dr. Kamau Kuria for the plaintiff/applicant.

Mr. Nyamwange holding brief for Mr. Nyambega Mose for 1<sup>st</sup> defendant and proposed 7<sup>th</sup> and 8<sup>th</sup> defendants and for

Mr. Onyinkwa for 2<sup>nd</sup> defendant, and for Mr. Nyangito and Mr. Nyamu, jointly appearing for the 3<sup>rd</sup> and 4<sup>th</sup> defendants.

No appearance for the State Law Office for 5<sup>th</sup> and 6<sup>th</sup> defendants.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**