



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 104 OF 2010

EZEKIEL KIRWA

MZEE ARAP KITUR (*ON THEIR*

***OWN BEHALF AND ON BEHALF OF 13 OTHERS.....*PLAINTIFFS**

VERSUS

MICHAEL KIPRUTO MOSO

NIXON KIPSANG

JONATHAN SERONEI

JOSEA KAPTICH KIRWA

JOSEPH CHERUIYOT KUTUNY

NOAH BARNG'ETUNY.....DEFENDANTS

R U L I N G

1. The fifteen applicants brought a notice of motion dated 18/5/2015 in which they seek an order of injunction restraining the respondents from carrying on subdivision of three properties described as **LR. No. 6431, 5713 and 8416** until this suit is heard and determined. They also seek an order compelling the respondents to deposit in court the titles to the three properties.

2. The applicants contend that they are shareholders of the three properties. In 1989 they applied for consent of the land control board to subdivide the land parcels. Consent of the land control board was given in which the three parcels were to be subdivided into **198 portions** ranging from **0.5 acres to 50 acres**. When the survey plan was forwarded to the survey department, the same was not allowed on the ground that the same had not been done properly. The rejection of the initial subdivision plan was in 2005.

3. The applicants contend that the respondents have now come up with a subdivision plan in which they want the three parcels subdivided into **583 portions**. The applicants argue that the respondents want to sneak in non members who will get the land which the respondents will then claim later on.

4. The respondents have opposed the applicants' application through a replying affidavit sworn by

Michael Kipruto Misoi on 22/9/2015. The respondents contend that the application by the applicant is misconceived and bad in law. The respondents contend that the acreage entitlements of the applicants has not been reduced and that they will therefore not be prejudiced by the subdivision. The respondents further contend that the fifteen applicants are seeking to stop an exercise which will affect the majority.

5. The respondents further contend that the second applicant is seeking to go round a decree which had been issued by a court where some persons were claiming land they bought from him and which decree has never been appealed against.

6. I have gone through the applicants' application together with the annexures thereto and the opposition to the same by the respondents. I must say from the beginning that this is one of the unfortunate cases where delay in subdividing and processing titles for members of groups or partnership end up complicating the whole issue. This is because members of such groups as in this case keep on selling their undetermined portions to third parties or sharing it out to their family members which in turn makes the final subdivision to be met with a number of challenges.

7. In the present case, the partners or shareholders had obtained consent to subdivide the parcels into 198 portions. This was in 1990. Twenty six years later, no subdivision has been carried out. The subdivision of the three parcels into 198 portions was rejected in 2005, a period of sixteen years after the consent to subdivide had been given. The reasons for the rejection of the said subdivision plan included among others encroachment onto another property known as LR. No. 5714 which did not belong to the shareholders. The District Surveyor was asked to address the issues raised by the survey department Nairobi. It is not known if the issues raised in the letter of 2/6/2005 were addressed.

What is however clear is that there are some plans to subdivide the three parcels into 583 portions. This is clear from the list annexed to the applicants' application. The applicants are contending that the respondents are trying to use the rejected subdivision plans to effect new subdivisions. The applicants are not clear on their contention because it is not logical that a subdivision scheme which had been rejected can again be allowed to go on unless the anomalies in it as pointed out by the survey department were corrected.

8. The applicants are contending that in the new list, there are names of persons which have been repeated and that the respondents intend to sneak in non members to be allocated land which will later revert to the respondents. These are mere allegations by the applicants which are not substantiated. The applicants did not point out the repeated names or even give any evidence of non members who are being sneaked in. The applicants are fifteen in number. None of them is alleging that he/she has been given less acreage that he/she is entitled to.

9. The respondents have demonstrated that one of the applicant's entitlement in the original list as in the later list is the same. There is one applicant who had issues with people who bought land from him. The court settled the dispute. If the subdivision was to be done according to the 1990 list, then these persons will be left out. This will open another round of legal battles between those left out and those who would have been given the land in their names without taking into account the purchasers.

10. The principles for grant of temporary injunction are now clear. The same were set out in the famous case of *Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358*. The applicants have not demonstrated that they have a prima facie case with probability of success. They have not demonstrated that they will suffer loss which will not be compensated in damages. Even the balance of convenience does not favour them. To grant an injunction will affect over five hundred people who should have their individual titles. Any more delay of this subdivision of the three parcels will only cause more complications. I therefore find that, the applicants' application cannot be allowed. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this **21st** day of **October, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Magut for Applicants and Mr. Kiarie for Respondents.

Court Assistant – Winnie.

E. OBAGA

JUDGE

21/10/15