



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 249 OF 2013

PETER TOMITO KORINKO.....1ST PLAINTIFF

JOSEPH S. KETERE.....2ND PLAINTIFF

MICHAEL O. KIRUSUA.....3RD PLAINTIFF

VERSUS

KORINKO N. NKOLIAI1ST DEFENDANT

JONATHAN K. KETERE2ND DEFENDANT

BENARD KETERE3RD DEFENDANT

STEPHEN M. OLOLTULET4TH DEFENDANT

DAVID KIRIONKI 5TH DEFENDANT

SAMSON LIMPAI6TH DEFENDANT

OLE NANYUKIE KITIAPI7TH DEFENDANT

LESHAN KUKUU8TH DEFENDANT

SAMSON KALAMAYO9TH DEFENDANT

OLOELEBOI KAIKAI10TH DEFENDANT

OLOMISMIS GROUP RANCH11TH DEFENDANT

THE DISTRICT LAND REGISTRAR, TRANSMARA12TH DEFENDANT

THE NATIONAL LAND COMMISSION13TH DEFENDANT

RULING

1. The 11th defendant is a group that was incorporated on 19th May 1975 under the Land (Group Representatives) Act Cap 287 Laws of Kenya. The plaintiffs and the 1st to 10th defendants are members of the 11th defendant. The plaintiffs have brought this suit on their own behalf and on behalf of other 102 members of the 11th defendant. The 1st, 2nd and 3rd defendants are Chairman, Secretary and Treasurer respectively of the 11th defendant while the 4th to 10th defendants are representatives and/or ordinary officials of the 11th defendant. As at the date of its incorporation, the 11th defendant had 358 members. The number of members of the 11th defendant has grown over the years. At all material times, the 11th defendant was registered as the proprietor of all that parcel of land known as **LR No. Narok/Transmara/Olomisimis/1** which measured 9,640.00 hectares (hereinafter referred to as “**the suit property**”). The 11th defendant held the suit property on behalf of its members. At all material times the affairs of the 11th defendant was and is still being managed and/or superintended by the 1st to 10th defendants. The plaintiffs brought this suit against the defendants on 6th June 2013 complaining about the manner in which the 1st to 10th defendants have carried out the sub-division and allocation of the suit property to the members of the 11th defendant. The plaintiffs have claimed that the members of the 11th defendant held an Annual General Meeting on 18th October 2008 and resolved to dissolve the 11th defendant and divide the suit property among the 11th defendant’s members and other persons who were agreed upon at the said meeting. The plaintiffs have claimed that at the said meeting, the members of the 11th defendant resolved that:
 - i. Each member of the 11th defendant was to be allocated equal portion of the suit property.
 - ii. Each of the original members of the 11th defendant was to be allocated one (1) commercial plot measuring 50 feet by 100 feet.
 - iii. Sons of the members of the 11th defendant numbering 78 who were in the same age group as at 2008 were to be allocated 10 acres each of the suit property.
 - iv. Ten (10) people who were residing on the suit property but who were not members of the 11th defendant were to be admitted as members and allocated 10 acres each of the suit property.
 - v. The 1st to 10th defendants were to brief the members from time to time on the implementation of the foregoing resolutions.
2. The plaintiffs have complained that contrary to the terms of the resolutions made by the members of the 11th defendant on 18th October 2008 aforesaid, the 1st to 10th defendants have not been open, transparent and fair in their handling of the sub-division of the suit property and the allocation of portions thereof to the members of the 11th defendant and other persons in accordance with the resolutions aforesaid. The plaintiffs have accused the 1st to 10th defendants of the following misdeeds:
 - i. Allocating portions of the suit property to persons who are not members of the 11th defendant without the approval of the members of the 11th defendant.
 - ii. Allocating commercial plots to non-members of the 11th defendant without the approval of the members of the 11th defendant.
 - iii. Allocating to some members of the 11th defendant land measuring more than the 60 acres that was supposed to be allocated to each member while some of the members have been allocated less than the said 60 acres.
 - iv. Allocating to some of the sons of the members of the 11th defendant land measuring more than 10 acres that had been agreed upon while other sons of the members of the 11th defendant have been allocated land measuring less than 10 acres without any explanation.

The plaintiffs have claimed that their attempts to obtain explanation from the 1st to 11th defendants

for the foregoing discrepancies in the sub-division and allocation of the suit property to the members of the 11th defendant have not borne any fruit. The plaintiffs have claimed that they were left with no alternative but to bring this suit against the 1st to 13th defendants. In their plaint dated 31st May, 2013, the plaintiffs have sought the following reliefs;

- a. **A permanent injunction restraining the 1st to the 13th defendants either by themselves, their agents and/or servants from managing, running and or interfering with the affairs of the 11th defendant, namely Olomismis Group Ranch, and more specifically from proceeding with any survey, subdivision, allocation and/or alienation of part of any parts of all that land known or formerly known as Narok/Transmara/Olomisimis/1 and/or any resultant titles.**
- b. **A permanent injunction restraining the 12th and/or the 13th defendant from proceeding with any processing and or issuing of any titles resulting from the unfair, illegal and flawed survey, subdivision and allocation of all that land known as Narok/Transmara/ Olomisimis/1 and/or any resultant titles.**
- c. **A declaration that any survey, subdivision, allocation and/or alienation processing and issuance of titles being carried out or already carried out by the 1st to the 11th defendants and/or their agents and/or servants is illegal, flawed, unfair and/or unlawful and is therefore null and void and that the same ought to be voided and fresh adjudication survey, subdivision, allocation and issuance of titles ought to be carried out on the 11th defendants land in a transparent, fair, legal and open manner.**
- d. **A mandatory injunction do issue compelling the 12th and/or the 13th defendants to reverse the effecting of any subdivision carried out on all that land formerly known as Narok/Transmara/Olomisimis/1 and to cancel any resultant titles.**
- e. **An order that fresh adjudication, survey, subdivision and allocation be carried out on all that land known or formerly known as Narok/Transmara/Olomisimis/1, in a transparent, legal, fair and open manner and in any and in any case in accordance with the resolution and/or agreement of the bonafide members and/or bonafide beneficiaries of members of 11th defendant.**
- f. **An order that all that land known as or formerly known as, Narok/Transmara/Olomisimis/1 be freshly surveyed and subdivided between registered members of the 11th defendant who were numbering 365, as at 18th October 2008, (and if deceased their legal representatives and/or bonafide beneficiaries), and as per the resolution and/or agreement of the members at the General Meeting of 18th October, 2008.**
- g. **In the alternative and without prejudice to the foregoing, an order that the 13th defendant do hold an inquiry into the adjudication of 11th defendant's land and it do monitor any subsequent survey, subdivision, adjudication and allocation and subsequent issuance of titles and do ensure equitable and/or fair subdivision and allocation of all that land known as/or formerly known as Narok/Transmara/Olomisimis/1 to the bonafide members of 11th defendant and/or their legal representatives and/or beneficiaries.**
- h. **An order that the 1st to 10th defendants be compelled to personally meet the cost of any fresh adjudication, survey and subdivision.**
- i. **An order that a General Meeting of 11th defendant and elections be compelled to personally meet the cost of any fresh adjudication, survey and subdivision.**
- j. **An order that a general meeting of 11th defendant and elections be conducted and the 1st to 11th defendants be compelled to release all documentations and information of the 11th defendant to the newly elected group representatives.**
- k. **Costs of this suit and interest.**
- l. **Any other or further reliefs this honorable court deems fit to grant.**

Together with the plaint the plaintiffs also filed an application by way of Notice of Motion dated 31st May 2013 seeking the following main prayers:-

- I. **That the matter be certified urgent and service of the application be dispensed with in the**

- first instance.**
- II. That the plaintiffs do have leave to give notice of the institution of this suit to all persons on whose behalf and for whose benefit they have instituted the suit by public advertisement in one of the local daily newspapers.**
 - III. That this Honorable Court be pleased to issue a temporary injunction restraining the Defendants/Respondents or any of them, by themselves, their servants, agent or otherwise howsoever from completing and/or proceeding with any survey and/or subdivision and/or transferring and/or processing and/or issuance of titles on parcels arising from effecting the subdivision of all that land known as, or formerly known as Transmara/Olomisimis/1, and/or any resultant titles, pending the hearing and determination of the application inter partes.**
 - IV. That this Honorable Court be pleased to issue an injunction restraining the defendants/respondents or any of them, by themselves, their servants, agent or otherwise howsoever from proceeding and/or completing any survey and/or subdivision and/or transfer and/or processing and/or issuance of titles on parcels arising from effecting the subdivision of all that land known as/or formerly known as Transmara/Olomisimis/1, or any resultant titles, pending the hearing and determination of the suit filed herewith.**
 - V. That costs of the application be borne by the defendants.**

3. This is the application which is the subject of this ruling. I certified the said application as urgent on 6th June 2013 and granted prayers 2 and 3 on an interim basis. The application was supported by the affidavit and two (2) further affidavits sworn by Peter T. Korinko, the 1st plaintiff on 31st May 2013, 1st July 2013 and 19th July, 2013 respectively. In his affidavit sworn on 31st May, 2013 in support of the application, the 1st plaintiff reiterated the contents of the plaint which I have highlighted hereinabove at the beginning of this ruling. In summary, the 1st plaintiff deposed that; the plaintiffs and the persons on whose behalf the plaintiffs have brought this suit are members of the 11th defendant while the 1st to 10th defendants are both officials and members of the 11th defendant. The members of the 11th defendant reached an agreement to dissolve the 11th defendant, sub-divide the suit property which is registered in the name of the 11th defendant and allocate the same to the members. The manner in which the sub-division and allocation was to be carried out was agreed upon by the members of the 11th defendant. The agreement referred to hereinabove was reached on 18th October 2008 and the 1st to 10th defendants were to keep the members of the 11th defendant (hereinafter referred to only as “**members**”) informed of the progress of the implementation of the said resolutions. Sometimes in April, 2013, the plaintiffs discovered that the land surveyor who had been engaged by the 1st to 10th defendants had proceeded to sub-divide and allocate the suit property contrary to the said resolutions and/or agreement that had been reached by the members. The 1st to 10th defendants had allocated portions of the suit property to non-members while some members had been allocated more than the 60 acres of land that each member was supposed to receive. Some of the members also got less than the agreed acreage of 60 acres. The same applied to the sons of the members. Some of them got more than the 10 acres of land that each was to receive while others got less. The 1st plaintiff claimed further that some of the members of the 11th defendant got no land allocation at all while some persons who are not members but who were accepted as members by the members of the 11th defendant got more than the 10 acres of land that was to be allocated to persons in this category.
4. The 1st plaintiff annexed to his said affidavit as exhibits; a copy of the minutes of the annual general meeting of the members that was held on 18th October 2008, a list of the names of the persons to whom the suit property was allocated and the size of the land allocated to each, a list of the names of non-members who were allocated the suit property, a list of the names of non-members who were allocated commercial plots, a list of the names of the members who got more than 60 acres of land and those who got less than 60 acres, a list containing the names of the sons of the members who were allocated more than 10 acres and those who were allocated less, a list containing the names of the members who were not allocated any land at all, a list containing the

names of the persons who were accepted as members of the 11th defendant and who were allocated more than 10 acres of land and those who were allocated less than 10 acres and, a copy of the application for caution that the plaintiffs intended to register against the title of the suit property and which was rejected by the 12th defendant on the ground that the suit property is nonexistent the same having been subdivided and title thereof closed. The 1st plaintiff contended that the 1st to 11th defendants failed completely to give explanation for the anomalies noted above even after being asked to do so by the plaintiffs and their advocates on record. The 1st plaintiff contended that in view of the aforesaid anomalies, the sub-division of the suit property and the allocation of portions thereof to various parties were illegal and the plaintiffs are apprehensive that unless the orders sought are granted, the defendants would proceed to issue title deeds to the allottee of the subdivided portions of the suit property on the basis of the said flawed process. The 1st plaintiff contended that the plaintiffs stand to suffer irreparable loss and damage unless the orders sought are granted. As I have mentioned herein above, the plaintiffs filed two further affidavits. Since the said affidavits were filed in reply to the averments that were contained in the defendants' affidavits in opposition to the application herein, I will refer to the said affidavits later in this ruling after considering the defendants' response.

5. The plaintiffs' application was opposed by the defendants. The 1st to 11th defendants filed statement of grounds of opposition dated 17th June 2013, a replying affidavit and further replying affidavit sworn by the 1st defendant on 17th June 2013 and 20th August 2013 respectively in opposition of the application. On their part, the 12th and 13th defendants filed a replying affidavit sworn by one, Stephen Waithaka Githinji, the land registrar, Trans-Mara District on 27th June 2013. In his affidavit sworn on 17th June 2013, the 1st defendant denied all the allegations contained in the 1st plaintiff's affidavit sworn on 31st May, 2013 in support of the application herein. The 1st defendant stated that the 1st to 10th defendants were tasked with the responsibility of managing the affairs of the 11th defendant. He stated that on 20th November 1992, the members of the 11th defendant (**"members"**) resolved to dissolve the 11th defendant and to sub-divide and transfer to the members the suit property which was held in the name of the 11th defendant. The members' resolution to dissolve the 11th defendant was approved by the director of land adjudication and settlement on 19th October 1993. After receiving consent to dissolve the 11th defendant, the 1st to 10th defendants obtained the requisite consents to sub-divide the suit property and engaged a private surveyor to undertake the task in accordance with the resolutions that had been passed by the members. The private surveyor aforesaid subdivided the suit property and assigned the sub-divisions LR. Nos. Transmara/ Olomisimis/10-1699 respectively. The mutation for the said sub-division was duly registered by the 12th defendant and separate registers opened for the sub-divided parcels of land. The 1st to 10th defendants thereafter transferred the subdivided parcels of land to the beneficiaries. The 1st defendant contended that the suit property does not exist, the same having been sub-divided as aforesaid. The 1st defendant contended further that the sub-division of the suit property was carried out in accordance with the resolutions of the members and that each member was entitled to a portion of the suit property measuring 60 acres. The 1st defendant admitted that the sons of the members who were on the same age group were to be allocated 10 acres of the suit property each. The 1st defendant stated that some members of the 11th defendant had sold their share of the suit property to other members and third parties and such members had instructed the 1st to 10th defendants to cause the said portions to be surveyed and transferred to the beneficiaries. The 1st defendant stated that this explains why some members were allocated less land while others got more. It also explains the presence of non-members among the allottees of the suit property. The 1st defendant contended that the plaintiffs were aware of these transactions but decided to conceal the same from the court.
6. The 1st defendant contended that this suit has been brought in bad faith and for ulterior motives. The 1st defendant contended further that some of the persons who are purported to have given the plaintiffs authority to file this suit are deceased while others have denied ever giving such authority. The 1st defendant contended that the plaintiffs are guilty of material non-disclosure and

that the plaintiffs have not established a prima facie case that would warrant the granting of the orders sought. The 1st defendant annexed to his affidavit as exhibits among others; a copy of certificate of incorporation of the 11th defendant, a copy of the minutes of the annual general meeting of the members of the 11th defendant held on 20th November 1992, a copy of a letter of consent to dissolve the 11th defendant that was issued by the director of land and adjudication on 19th October 1993, a copy of the consent to sub-divide the suit property, a copy of the agreement that was entered into with the surveyor, a copy of the mutation form for the sub-division of the suit property, a copy of the register for the suit property, a list containing the names of the sons of the members of the 11th defendant who were allocated portions of the suit property, copies of agreements for sale of land entered into by some of the members and, a copy of a detailed response to the complaints raised by the plaintiffs. In response to this affidavit by the 1st defendant, the 1st plaintiff swore a further affidavit on 1st July, 2013 which I have mentioned herein above in which he denied most of the allegations contained in the 1st defendant's affidavit and contested the explanations given by the 1st defendant as to why some members got more land and others got less and the reason for the allocation of the suit property to non-members.

7. In their grounds of opposition, the 1st to 11th defendants raised several issues on points of law. The 1st to 11th defendants contested the jurisdiction of this court to entertain this suit. The 1st to 11th defendants also contended that this suit cannot be sustained because the suit property has been sub-divided and sub-divisions registered in the names of third parties who have not been joined in this suit as parties. The 1st to 11th defendants claimed further that this suit is time barred and that the plaintiffs have not satisfied the conditions for granting temporary injunction. In his replying affidavit sworn on 21st June, 2013, Stephen Waithaka Githinji (hereinafter referred to only as "the 12th defendant") confirmed that the suit property was subdivided by the 11th defendant which sub-division gave rise to LR. Nos. Trans-Mara/Olomisimis/10-1699. He stated that after registering the mutation for the sub-division of the suit property, he proceeded to open a register for each sub-division. The 12th defendant contended that the caution that was presented to him for registration could not be acted upon because the title for the suit property on which the plaintiffs wanted to lodge the said caution had been closed on sub-division by the time the caution aforesaid was presented for registration. The 12th defendant contended that by the time the 12th defendant was served with the interim orders of temporary injunction that were issued herein, the 12th defendant had already issued 240 title deeds for the sub-divided parcels of land which originated from the suit property. The 12th defendant contended further that this court has no jurisdiction to entertain this suit. The 12th defendant annexed to his affidavit as exhibits among others; copies of the registers in respect of LR Nos. Trans-Mara/Olomisimis/10-1699, a copy of the register for the suit property and a copy of the mutation form for the subdivision of the suit property. The 1st plaintiff filed a further affidavit sworn on 19th July, 2013 in response to the 12th defendant's affidavit. The 1st plaintiff contended that the 12th and 13th defendants failed in their duty to safeguard the interests of the plaintiffs in the suit property. The 1st plaintiff also commented at length on the exhibits that were produced by the 12th defendant.
8. When the application came up for hearing on 4th November 2013, Mr. Chenge advocate appeared for the plaintiffs, Mr. Oguttu advocate appeared for the 1st, 2nd, 3rd, 4th, 5th, 6th, 9th and 11th defendants, while Mr. Nyauma State Counsel appeared for the 12th and 13th defendants. There was no appearance for the 7th, 8th and 10th defendants. It is not clear to me why Mr. Oguttu who had entered appearance for the 1st to 11th defendants indicated at the hearing of the application herein that he was not acting for the 7th, 8th and 10th defendants. In his submission in support of the application, Mr. Chenge relied on the affidavits filed herein by the 1st plaintiff. Mr. Chenge submitted further that contrary to the contention by the defendants, this court has jurisdiction to hear and determine this suit. Mr. Chenge submitted that under **section 10 of the Land (Group Representatives) Act, Cap 287, Laws of Kenya** the only disputes which are supposed to be referred to the District Magistrate's court for determination are those concerning the question as to the lawful officials of the group. He submitted that the dispute the subject of this suit does not

concern the issue as to who are the lawful officials of the 11th defendant. This court therefore has jurisdiction to hear and determine this suit. On the issue as to whether the plaintiffs have the *locus standi* to maintain this suit, the plaintiffs' advocate submitted that as members of the 11th defendant who are aggrieved by the manner in which the 1st to 11th defendants have dealt with the suit property, they have every right to maintain this suit on their own behalf and on behalf of the other members of the 11th defendant who have authorized them also to bring this suit on their behalf. In support of this submission, the plaintiffs advocate cited the case of, **Mathiu & 3 Others vs. Gareth & 6 Others [2001] KLR 325** in which it was held by Otieno J. (as he then was) that a plaintiff does not require leave of the court to file a suit on his own behalf and on behalf of others and that the only thing required of a plaintiff instituting a suit on his own behalf and on behalf of others (a representative suit) is to give notice to all interested parties of such a suit so that such parties may apply to be made parties to the suit. The plaintiffs advocate submitted that the plaintiffs have complied with this requirement. On the defendant's contention that some of the parties who are alleged to have authorized the plaintiffs to bring this suit did not do so, the plaintiffs advocate submitted that even if that contention was correct that fact cannot divest the plaintiffs of the *locus standi* to maintain this suit. He submitted that under Order 1 rule 9 of the Civil Procedure Rules non joinder or misjoinder of a party cannot defeat a suit. On the defendants' contention that some of the persons purported to have given the plaintiffs authority to bring this suit are deceased, the plaintiffs' advocate submitted that the authorization by such persons were given by their legal representatives or heirs. The plaintiffs' advocate submitted that under **section 32 of the Law of Succession Act, Cap 160 Laws of Kenya**, the law of intestacy is not applicable to some districts such as Narok where the suit property is situated as concerns agricultural land and livestock. He argued that when one dies intestate in Narok, the applicable law as far as inheritance of agricultural land is concerned is customary law. The plaintiffs' advocate submitted that the effect of this law as far as the 11th defendant and the suit property were concerned was that when a member of the 11th defendant died, he/she was replaced by his/her heir without going through the process of administering estates of deceased persons under the Law of Succession Act, Cap 160 Laws of Kenya aforesaid.

9. On the issue as to whether the suit property is still in existence, the plaintiffs' advocate submitted that as far as the plaintiffs' are concerned, the suit property is still in existence. The plaintiffs' advocate submitted that the dissolution of the 11th defendant and the sub-division of the suit property were to go hand in hand and since the sub-division of the suit property and the allocation of sub-divisions thereof to members have not been completed, the 11th defendant cannot be dissolved. The plaintiffs' advocate submitted further that the provisions of **section 13 of the Land (Group Representatives) Act, Cap 287** on the dissolution of groups has not been complied with. The plaintiffs' advocate argued that there is no way the 1st to 10th defendants would have entered into an agreement for the survey of the suit property on 15th September 2009 if the 11th defendant had been dissolved prior to that date as claimed by the defendants. Counsel argued that a dissolved group cannot enter into a contract. The plaintiffs' advocate submitted that the purported subdivision of the suit property that was carried out by the 1st to 11th defendants was irregular and cannot stand in law. The plaintiffs' advocate submitted that even if it is true that the suit property does not exist; the application herein extends beyond the suit property to the said irregular sub-divisions of the suit property. The plaintiffs' advocate submitted that this suit would be rendered nugatory if the orders of injunction sought are not granted. The plaintiffs advocate submitted that the plaintiffs have satisfied the conditions for granting interlocutory injunction. Counsel submitted that the plaintiffs have demonstrated that the subdivision of the suit property was not done properly. The same applies to the allocation of the sub-divided plots to the members. Counsel argued that the plaintiffs have established a prima facie case with a probability of success against the defendants and urged the court to confirm the interim orders of injunction that the court had granted on 6th June, 2013.
10. In his submission on behalf of the 1st to 11th defendants, Mr. Oguttu relied on the affidavit and further affidavit sworn by the 1st defendant on 17th June 2013 and 20th August 2013 respectively. In addition, he also relied on the 1st to 11th defendants grounds of opposition dated 17th June 2013. In his submission in opposition to the plaintiffs' application, Mr. Oguttu raised several issues. The

first issue was on the jurisdiction of this court to entertain this suit and the application herein. Mr. Oguttu (hereinafter referred to only as “**the defendants’ advocate**”) submitted that one of the complaints raised herein by the plaintiffs is that the 1st to 11th defendants have allocated portions of the suit property to non- members. He argued that in view of that complaint one of the issues which this court will have to determine is whether some of the people who have been allocated the suit property are members of the 11th defendant or not. That is an issue which according to the defendants’ advocate this court has no jurisdiction to determine. The defendants’ advocate argued that under **section 10 of the Land (Group Representatives) Act, Cap 287, Laws of Kenya**, the jurisdiction to determine that issue is bestowed exclusively upon the District Magistrate’s court.

11. The second issue that was raised by the defendants’ advocate concerned the competency of this suit as against the 12th and 13th defendants. The defendants’ advocate argued that the 12th and 13th defendants can only be sued through the Attorney General and that prior to the institution of such suit, appropriate notice must be served upon the Attorney General. In support of that submission, the defendants’ advocate cited the provisions of **section 13 and 13A of the Government Proceedings Act, Cap 40 Laws of Kenya**. The defendants’ advocate submitted that the plaintiffs have not demonstrated that they indeed served the Attorney General with a notice of intention to sue before filing this suit against the 12th and 13th defendants. The defendants’ advocate submitted that failure by the plaintiffs to serve the notice as aforesaid divests this court of the jurisdiction to entertain this suit as against the 12th and 13th defendants. The third issue that was raised by the defendants’ advocate concerned what he termed as “*fraud that has been perpetrated by the plaintiffs*”. Under this head, the defendants’ advocate argued that several persons whose names have been set out in a list attached to the plaintiffs’ application to have authorized the plaintiffs to bring this suit on their behalf have denied giving such authority. He submitted further that some of the people in that list are also deceased and could not have given authority as claimed by the plaintiffs. The defendants’ advocate argued that by coming up with forged and concocted signatures, the plaintiffs are guilty of fraud and as such are not deserving of the equitable remedy of injunction. The defendants’ advocate also took issue with another list which is attached to the plaint which the plaintiffs claim to be of persons who have authorized them to file this suit on their behalf. The defendants’ advocate submitted that this particular list is not signed by the people whose names are set out therein and as such the same is of no significance or use.
12. The other issue raised by the defendants’ advocate concerned the existence of the 11th defendant. The defendants’ advocate submitted that the 11th defendant was dissolved on 19th December 1993 and as such is not capable of suing or being sued. The defendants’ advocate submitted that pursuant to the provisions of **section 13 of the Land (Group representatives) Act, Cap 287 Laws of Kenya**, the 1st to 10 defendants only remained in office for the purposes of executing documents. Similarly, the defendants’ advocate submitted that the suit property does not exist. The defendants’ advocate submitted that the suit property has already been sub-divided and its title closed. The defendants’ advocate argued that, no orders can issue in the circumstances with regard to a nonexistent property. The other issue that was raised by the defendants’ advocate concerned non joinder of persons who shall be affected by orders that may be issued herein. The defendants’ advocate argued that the suit property has been sub-divided and some of the portions thereof allocated to persons who are not members of the 11th defendant and the plaintiffs have provided a list of the names of non-members of the 11th defendant who have been allocated portions of the suit property. The defendants’ advocate submitted that these non- members of the 11th defendant who have been allocated portions of the suit property have not been joined in this suit as parties. The defendants’ advocate submitted further that the 11th defendant has already issued title deeds to 240 people who will be directly affected by the orders sought herein. The defendants’ advocate submitted that it would be against the rules of natural justice for a court of law to condemn these people without giving them an opportunity to be heard. In support of this submission, counsel cited the Court of Appeal case of, **John W. Wepukhulu –vs- Secretary, Board of Governors Buruburu Secondary School, Court of Appeal Civil Appeal No. 310 of 2002** (unreported).
13. In conclusion, the defendants’ advocate submitted that the plaintiffs have not established a prima facie case that would warrant the granting of the orders sought. The defendants’ advocate submitted further that the plaintiffs have not demonstrated that they would suffer irreparable injury

unless the orders sought are granted. On behalf of the 12th and 13th defendants, Mr. Nyauma relied entirely on the affidavit of Stephen Waithaka Githinji sworn on 27th June 2013 together with the annexures thereto and urged the court to disallow the plaintiffs' application. He added that the Attorney General was not served with a notice of intention to sue before the institution of this suit. In response to the submissions by Mr. Oguttu and Mr. Nyauma, the Plaintiffs' advocate submitted that the plaintiffs served upon the Attorney General a notice of intention to sue prior to the filing of this suit. Mr. Chenge showed the court a copy of the said notice dated 26th April, 2013. Mr. Chenge submitted that the Attorney General had admitted the jurisdiction of the court and as such the argument that the court has no jurisdiction to entertain this suit as against the 12th and 13th defendants on account of failure to serve the said notice of intention to sue does not arise. In the alternative, counsel submitted that **sections 13 and 13A of the Government Proceedings Act, Cap 40 Laws of Kenya** has been declared to be unconstitutional.

14. On the contention by the defendants that some of the people whose names are set out in the list attached to the application did not give authority to the plaintiffs to bring this suit on their behalf, the plaintiffs' advocate submitted that such persons can be excused from participating in this case at the trial. On the defendants' contention that the 11th defendant has been dissolved, the plaintiffs' advocate submitted that most of the titles issued after the sub-division of the suit property are still in the name of the 11th defendant. He submitted that there is no way in which a non-existent entity would hold title to land. On the issue of non-members who have not been joined in this suit as parties, counsel submitted that according to copies of the registers supplied by the 12th defendant, only 240 titles are in the names of non-members of the 11th defendant and that the rest are in the names of members of the 11th defendant. In conclusion, the plaintiffs' advocate submitted that the prayers sought in the application are all encompassing and captures not only the suit property but also the subdivisions that arose therefrom. Counsel urged the court to allow the plaintiff' application and give the orders deemed appropriate.
15. I have considered the plaintiffs' application together with the affidavits filed in support thereof. I have also considered the affidavits and grounds of opposition filed by the defendants in opposition to the application. Finally, I have considered the oral submissions by the advocates for the parties and the case law cited. The law on interlocutory injunctions is now well settled. As was stated in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for interlocutory injunction must demonstrate that he has a prima facie case with a probability of success against the respondent and that unless the injunction sought is granted, he will suffer irreparable harm. If the court is in doubt as to the foregoing, the court would determine the application on a balance of convenience. In the case of, **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** – that was cited by the defendants, it was held by the Court of Appeal that; “**a prima facie case in a civil application includes but is not confined to “a genuine and arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to the call for an explanation or rebuttal from the latter**”. What I need to determine in the application before me therefore is whether the plaintiffs have demonstrated that the defendants have violated their rights and that they will suffer irreparable harm unless the orders sought are granted. In this endeavor the court is not supposed to delve deep into the issues in controversy between the parties or to make any conclusive findings. It is not in dispute that the plaintiffs are members of the 11th defendant. It is also not in dispute that at all material times, the suit property was registered in the name of the 11th defendant to hold for and on behalf of its members the plaintiffs included. It is also not disputed that the members of the 11th defendant passed a resolution to dissolve the 11th defendant and to have the suit property sub-divided and allocated to the members of the 11th defendant. Having gone through the affidavits filed by the plaintiffs and the defendants herein, I have come to the conclusion that there are no significant differences between the parties as to how the suit property was to be divided among the members of the 11th defendant. What is disputed is whether 1st to 10th defendants who were managing the dissolution of the 11th defendant and the sub-division of the suit property and allocation of portions thereof to the members of the 11th defendant carried out that exercise lawfully and in accordance with the resolutions that were passed by the members of the 11th

defendant. Whereas the plaintiffs have contended that the exercise was carried out contrary to the resolutions that were passed by the members of the 11th defendant and in a manner that is prejudicial to the interest of the plaintiffs, the defendants have maintained that their conduct was above board and that the exercise was carried out in accordance with the resolutions of the members of the 11th defendant.

16. The parties have placed before the court the minutes of the General Meetings of the 11th defendant that were held on 20th November 1992 and 18th October 2008 at which the issue of the dissolution of the 11th defendant and the sub-division and allocation of the suit property to the members were discussed and approved. The plaintiffs and the defendants are in agreement that the members of the 11th defendant had resolved that;

- i. The 11th defendant be dissolved.
- ii. The suit property which was registered in the name of the 11th defendant be sub-divided and allocated to members of the 11th defendant.
- iii. The original members of the 11th defendant be allocated 60 acres each of the suit property.
- iv. The sons of the members who were in the same age group namely, *Ilkambongi* age group be allocated 10 acres each of the suit property.
- v. Ten (10) people who were residing in the ranch who were accepted as members be allocated 10 acres each of the suit property.

17. In addition to the foregoing resolutions which are agreed upon by the parties to have been passed by the members of the 11th defendant, the plaintiffs also claimed that the members had resolved that the original members would each be allocated a commercial plot measuring 50 feet by 100 feet. The defendants did not deny or confirm this claim. On the other hand, the defendants also claimed that the members of the 11th defendant had agreed that ten (10) cultural leaders be allocated portions of the suit property measuring 10 acres each. This claim was vehemently denied by the plaintiffs.

18. The crux of the plaintiffs' claim against the defendants herein is that the defendants failed to carry out the exercise of sub-dividing and allocating the suit property to the members of the 11th defendant in accordance with the resolutions stated above. The plaintiff have claimed that upon perusing the allocation list that was prepared by the surveyor who had been engaged by the 1st to 11th defendants, they discovered that contrary to the resolutions that were passed by the members, the 1st to 11th defendants had;

- i. Allocated portions of the suit property to non-members of the 11th defendant and/or persons who have no beneficial interest in the 11th defendant.
- ii. Allocated commercial (town) plots to non-members of the 11th defendant.
- iii. Allocated less than 60 acres to some members of the 11th defendant.
- iv. Allocated more than 60 acres to some members of the 11th defendant.
- v. Allocated more than 10 acres of land to some of the sons of the member of the 11th defendant.
- vi. Allocated less than 10 acres of land to some of the sons of the members of the 11th defendant.
- vii. Failed to allocate land to some members of the 11th defendant.
- viii. Allocated more than 10 acres of land to some of the people who were accepted by the members of the 11th defendant.

19. The plaintiffs have claimed that at a personal level, instead of being allocated 60 acres as had been resolved by the members of the 11th defendant, the 1st, 2nd and the 3rd plaintiffs were allocated 53.45 acres, 53.04 acres and 59.45 acres respectively. To substantiate these claims, the plaintiffs placed before the court, a copy of the allocation list for the suit property, a list of names of the persons said to be non-members who were allocated agricultural and commercial plots, a list of names of members of the 11th defendant who were either allocated more than or less than 60 acres of land, a list of names of the sons of the members of the 11th defendant who were either allocated

more than or less than 10 acres of the suit property, a list of the names of the members of the 11th defendant who are said not to have been allocated any land and a list of the names of persons who were accepted by members of the 11th defendant and who are said to have been allocated more than 10 acres of land.

20. In response to the said allegations, the 1st to 11th defendants claimed that:-

- i. **Some of the people listed by the plaintiffs as non-members of the 11th defendant who had been allocated land were actually members of the 11th defendant.**
- ii. **Some of the non-members who were allocated land had purchased land from members and were allocated such parcels on instructions from members.**
- iii. **Some of the non-members who were allocated land were allocated land belonging to their parents who are members of the 11th defendant.**
- iv. **Non-members of the 11th defendant who were allocated town plots purchased such plots from members.**
- v. **Members who were allocated more than 60 acres of land acquired extra acreage through purchase from other members.**
- vi. **The persons who acquired more than 10 acres of land but were entitled only to 10 acres acquired extra acreage through purchase from members.**
- vii. **Members who are alleged not to have been allocated land sold their land to third parties.**
- viii. **Some people listed as members of the 11th defendant who were not allocated land are actually not members of the 11th defendant.**
- ix. **Some members said not to have been allocated land had actually been allocated land.**
- x. **Some of the members said to have been allocated less than 60 acres of land had sold portions of their rightful share of land to third parties while some had received the correct acreage.**
- xi. **It was agreed that members would first be allocated the land falling on the areas where they are residing and if the area is less they would be allocated the remainder elsewhere and if more, the excess would be allocated to another member.**
- xii. **It was agreed further that if the area resided by a member is not less than 58 acres the same would be rounded up to 60 acres and such member would be deemed to have received his/her full entitlement. On the other hand if the area resided by a member is found to be more than 60 acres but less than 65 acres the same would also be rounded off to 60 acres and such member would be deemed to have received his due entitlement.**

In a rejoinder to the defendants' response to their claims, the Plaintiffs claimed through a further affidavit sworn by the 1st plaintiff that:-

- i. **The 1st to 11th defendants failed to update the members of the 11th defendant on the progress of the sub-division exercise.**
- ii. **The 12th defendant failed in its duty to ensure that the sub-division of the suit property was approved by the members before he registered the mutation, opened registers, and allowed transfers and issuance of title deeds.**
- iii. **While conceding that some of the members who had been allocated more than 60 acres had bought extra land from members, the plaintiffs contended that in some cases the extra land allocated cannot be justified.**
- iv. **While conceding that some of the members of the 11th defendant had sold land to other members and non- members of the 11th defendant the plaintiffs contended that, in some cases, such sale could not justify the shortfall in the land that was allocated to the members who had entered into such arrangements.**
- v. **Some of the members who purchased land had been allocated more land than they had purchased.**
- vi. **Some of the people who are said to have purchased land from members of the 11th defendant did not purchase such land from the plaintiffs.**
- vii. **Members of the 11th defendant never passed any resolution allowing the 1st to 11th defendants to allocate land measuring 10 acres each to ten (10) cultural leaders.**

- viii. **It was never agreed that land measuring not less than 58 acres and not more than 65 acres would be rounded off to 60 acres.**
- ix. **Copies of the agreements exhibited by the defendants failed to prove that all non-members who were allocated land got the same through purchase from members.**
- x. **The justification given as to why some members were allocated less land is not convincing.**

21. It is clear from the foregoing that what I have before me are claims, counter claims and further claims. It is not possible to determine on the basis of the affidavits before me where the truth lies. This difficulty is compounded by the fact that some of the allegations made by the plaintiffs' concern people who are not parties to this suit and as such cannot defend themselves. The plaintiffs have accused the defendants of allocating the suit property to non-members. The defendants' response is that these non-members purchased land from members. Although the plaintiffs have provided names of the alleged non-members of the 11th defendant who have been allocated the suit property, they have not been joined in this suit as parties so that they can say how they came to be allocated the suit property. The plaintiffs have also accused the defendants of allocating more land to some of the members of the 11th defendant. Again, the defendants have responded that these members acquired extra land through purchase from members. These members who are said to have been allocated more land have also not been joined in this suit as parties so that they may be heard on how they ended up with extra land.

22. In all fairness, the 1st to 11th defendants can only defend themselves; they cannot be called upon to defend third parties. As concerns the members who are said to have been allocated less land, the defendants have explained that some of these members sold portions of land that was allocated to them to third parties. The plaintiffs conceded that some of the members had sold their plots to other members and non-members and this fact led to non-members of the 11th defendant being allocated the suit property and some members who purchased land from other members being allocated more than the 60 acres that was to be allocated to each member and those who had sold part of their share of the suit property being allocated less land. This information was well within the knowledge of the Plaintiffs because from the record, I have noted that the 2nd plaintiff sold several parcels of land while the 3rd plaintiff purchased over 70 acres of land. I am of the view that it was an act of bad faith for the plaintiffs to fail to disclose this fact to the court. I am of the view that the court was misled by the plaintiffs when they appeared before the court ex parte to believe that the defendants had proceeded to allocate the suit property to non-members of the 11th defendant without proper justification and that the defendants had also got out of their way to allocate to some members more than the acreage that had been agreed upon while others got less again without any basis. This act of concealment of material facts is enough to dispose of this application because once I have come to the conclusion that the Plaintiff's had obtained the ex parte injunction herein through misrepresentation and concealment of material facts, I am entitled to discharge the said orders and dismiss the application without considering the same on merit. However in view of the nature of the dispute, I would not wish to take that route. On the merit of the application, I must say that in my assessment, the defendants have given credible response to most of the complaints raised against them by the plaintiffs. It must be appreciated that this was a massive exercise. The 1st to 11th defendants were supposed to sub-divide land measuring 9640 hectares to over 450 people. The land was both agricultural and commercial. Due to the nature of their settlements, most these over 450 people had to be allocated several parcels of land in different locations so that each can get his/her full share or portion of the suit property. The 1st to 11th defendants had to provide for roads and also reserve some plots for public amenities. To complicate matters, some of the members sold their plots before the exercise was completed. Portions of the sold plots had to be carved out and allocated to the buyers. It was an exercise which could not be fault free and some margin of error must be allowed. The Plaintiffs have not satisfied me at this stage that the defendants carried out a totally flawed and illegal exercise. I am of the view that it would be unfair to stop this process which has cost the members of the 11th defendant huge sums of money and time at this stage due to minor faults and errors in the exercise which can be corrected. I am not satisfied therefore that the plaintiffs have established a prima facie case against the defendants with a probability of success.

23. The conclusion that I have arrived at herein above would have brought this matter to close.

However, the defendants had raised other grounds on the basis of which I was urged to disallow this application. In order to do justice to the advocates who appeared before me and submitted at length of those issues, I would for the completeness of this ruling consider the same. The defendants had raised a number of other issues to show that the plaintiffs' case herein has no chances at all of ever succeeding. One of the issues concerned the jurisdiction of this court. This argument was based on the interpretation of **section 10 of the Land (Group Representatives) Act, Cap 287 of Laws of Kenya**. I have considered **section 10 of the Land (Group Representatives) Act, Cap 287 of Laws of Kenya**. That section is clear that the only disputes in respect of which the District Magistrate has jurisdiction are those that concern the issue as to the lawful officials of a group incorporated under the said Act. Nothing therefore bars a member of the 11th defendant herein who has any other dispute with the 11th defendant or other members of the 11th defendant from coming to this court for the determination of such dispute. I hold therefore that this court has jurisdiction to determine this suit. The other issue concerned the existence or otherwise of the 11th defendant. On the material before me, I am satisfied that the 11th defendant is in existence. The 11th defendant would stand dissolved once the transfer of the suit property to the members of the 11th defendant is completed. As rightly argued by the plaintiffs' advocates, an entity which is nonexistent cannot have land registered in its name. The material placed before this court by the 12th defendant shows that save for 240 titles all the titles that arose from the subdivision of the suit property are registered in the name of the 11th defendant.

24. The other issue that was raised by the defendants concerned a service of notice of intention to sue upon the Attorney General. I am of the opinion that whether or not a notice before action was served upon the Attorney General before this suit was brought as against the 12th and 13th defendants is a matter of evidence that can only be determined at the trial. That is a matter that the court cannot determine on affidavit evidence. The last issue that was raised by the defendants was that the injunction sought herein is an equitable remedy and he who comes to equity must come with clean hands. The defendants argued that the plaintiffs who have been proved to have forged signatures of deceased persons and other persons who had not given them authority to bring this suit have approached the seat of justice with unclean hands. There is uncontroverted evidence that some of the people who are purported to have given the plaintiffs authority to bring this suit are deceased while some of the people who are purported to have authorized the plaintiffs to bring this suit have denied their purported authority on oath. The plaintiffs' response was that, for the deceased persons, authorization must have been given by their legal representatives and for those persons who have denied that they ever gave authority to the plaintiffs; they can be omitted from the suit at the trial.
25. I must say that I have found the plaintiffs response to this serious issue not convincing at all. The persons who are deceased and whose authorizations were given by next of kin are clearly indicated in the schedule containing a list of persons who had authorized the plaintiffs to bring this suit. The deceased persons mentioned by the defendants are indicated in the said schedule to have given authority in person and not through next of kin. The defendants' submission that the plaintiffs engaged in forgery and fraud to increase the numbers of the persons who had authorized them to bring this suit is not at all farfetched. This kind of conduct is detestable and would have no doubt denied the plaintiffs the injunction sought even if I had found that the plaintiffs have established a prima facie case.
26. As I have already held above, the plaintiffs have not convinced me that they have a prima facie case against the defendants with a probability of success. Having reached this conclusion, I am not obliged to consider whether or not the plaintiffs would suffer irreparable loss unless the orders sought are granted. The upshot of the foregoing is that the plaintiffs' application dated 31st May, 2013 is not for granting. The same is hereby dismissed with costs to the defendants.

Delivered, dated and signed at Kisii this 4th day of April 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Gitonga for the Plaintiffs

Mr. Ochwangi for the 1st- 11th Defendants

N/A for the 12th – 13th Defendants

Mobisa Court Clerk

S. OKONG'O

JUDGE