REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 53 OF 2021

CHEPARWASI IBRAHIM.....1ST APPLICANT/PLAINTIFF

EUNICE CHEPKORKOR IBRAHIM.....2ND APPLICANT/PLAINTIFF

AND 7 OTHERS.....3RD-9TH APPLICANTS/PLAINITFFS

VERSUS

CHRISTOPHER LAPTIA.....1ST RESPONDENT/DEFENDANT

JULIUS R. CHEMERII.....2ND RESPONDENT/DEFENDANT

RULING

(On whether to grant temporary preservatory orders against defendants)

THE APPLICATION

1. The Plaintiffs brought the instant Application by way of Notice of Motion. It was dated **5/11/2021** and filled the same date. They brought it under **Sections 3** and **13(7)(a)** of the **Environment and Land (ELC) Act**, and **Section 63(e)** of the **Civil Procedure Act**. They sought the following specific orders:-

> **a) …spent**
>
> **b) …spent (That is, "THAT while pending the hearing and determination of this application an order be made preserving the properties comprised in title Nos. West Pokot/Chebon/1381 and 1382 as well as West Pokot/Tapach/156 by ordering the respondents/defendants not to sell, charge, lease or otherwise part with the possession thereof").**
>
> **c) THAT upon *inter partes* hearing, the preservation order be confirmed while pending the hearing and determination of the suit.**
>
> **d) THAT costs be provided for.**

2. I have repeated the prayer that has already been spent so that by the end of this ruling it will be clear as to why this Court shall make the specific orders at the tall end thereof. The Application was premised on ten grounds. It was supported by two affidavits, one dated **5/11/2021** and a further one **21/12/2021**. The grounds were repeated in the supporting affidavit. I will summarize them as they appear both in the Applicants' affidavits and the grounds in support thereof, as hereunder:-

The Supporting Affidavit

3. One **CHEPARWASI IBRAHIM** swore the affidavit on **5/11/2021** and filed it the same date. She swore it on her own behalf and that of her co-applicants. She deponed that she and her late husband, **KWALOI SOMBOL** who died on **4/8/1998**, were the biological parents to the 1st Respondent and 2nd to 9th Applicants. Further, she swore that the Respondent and the 2nd-9th Applicants were all raised in the land previously comprised of title number **West Pokot/Chebon/324**. She again deposed that the parcel had since been subdivided by the 1st Respondent into parcel numbers **West Pokot/Chebon/1381** and **1382**. The latter parcel had been sold and transferred by the 1st Respondent to 2nd Respondent. She annexed copies of Green Cards for the three parcels of land and marked them as **"CI-1(a)**, **(b)** and **(c)"**. She deponed

further that by the time her husband died, the registration of the land parcels he held had not been perfected.

4. She stated that after the death of her husband, the 1st Respondent registered the land in his name, without involving her and the co-applicants notice. The parcels of land he registered in his sole name were **West Pokot/Chebon/324** and **West Pokot/Tapach/156** which belonged to her late husband. She annexed to her Affidavit and marked as **"CI-2"** a copy of the Green Card for parcel number **West Pokot/Tapach/156**. It was her contention that the parcels of land were registered in the name of the 1st Respondent in trust for all the Applicants.

5. She explained that she occupied part of the land in number **West Pokot/Chebon/1381**. She annexed to the Affidavit photocopies photographs of their homesteads and marked them as **"CI-3 (a)** and **(b)"** respectively. She furthers contended that the **2nd** to **9th** Applicants had lived on the land previously comprised of **West Pokot/Chebon/324** until they got married. She stated that they still visit the land. According to her, the 1st Respondent wants to exclude her and his sisters from the ownership.

6. She insisted that unless preservation orders were made for the three parcels of land, the Defendant could charge or sell them to defeat this suit. She had put cautions on the suit lands but the 1st Respondent was determined to remove the caution. She annexed to her Affidavit a copy of the caution and restriction in respect to parcel No. **West Pokot/Chebon/1381** and **1382** and a notice of intention to remove them. She stated that no prejudice would be occasioned to the Respondents and then prayed that her application be allowed.

The Further Supporting Affidavit

7. The 1st Applicant swore a further Affidavit on **21/12/2021** and filed on the even date It was in response to the respondents' replying one filed on **8/12/2021**. Her response was that by 1996 she was a resident of Chebon Location in West Pokot County. She annexed her identity card and marked it as **"CI-1" as** proof thereof. She stated that she got married to her late husband in **1960** by which time her husband had long settled on the land parcel number **West Pokot/Chebon/324**. She specified that she was married as a third wife and that her two co-wives were also living in Chebon Location and each of them had their parcels of land. She denied the claims in **paragraph 7** of the replying affidavit where the respondent deponed that his father had land in Muino where his sisters were born and raised and on which his mother, the 1st Applicant, had a matrimonial home. She stated that she had never lived in **Muino.** She added that she bore all her children in the land number **West Pokot/Chebon/324** where they all attended primary schools in Chebon. She annexed copies of birth certificates, school living certificates and Kenya Certificate of Primary Education (KCPE) certificates for the 2nd Applicant and marked them as **"CI-2(a)(b)** and **(c)"**. She further annexed a copy school living certificate and **KCPE** certificate for the 6th Applicant and marked them as **"CI 3(a)** and **(b)"** and copies of the birth certificate and KCPE certificate for the 7th Applicant and marked them as **"CI-4 (a)** and **(b)"**. She annexed copies of the school leaving certificate and KCPE Certificate for the 9th Applicant and marked them as **"CI-5 (a)** and **(b)"**.

8. She emphasized that the 1st Respondent only registered himself as the owner of parcels numbers **West Pokot/Chebon/324** and **West Pokot/Tapach/156** in the year **2002** because he was the only son and he was registered on behalf of the family since the land was not his. Further she deponed that the 1st Respondent had sold part of the land in **2019** and **2020** and that he was likely to sell more land to the detriment of the family. The 1st Applicant stated that she lives on part of the parcel number **West Pokot/Chebon/1381** and that the other applicants frequently visit her.

The Response

9. The **1st** Respondent filed a replying affidavit on **8/12/2021** in opposition to the Application. His response was that he was the registered owner of land parcel Nos. **West Pokot/Tapach/156** and **West Pokot/Tapach/1381** being a first registration. He attached a copy of title of land Reg. No. **1381** and marked it as **CL1**.That the said parcels of land were demarcated to him by the Land Committee which comprised of Lotukee Pulian, the late Asekou Yotomuk and Francis Lopariwo in the year **2002** and was issued with title deeds. He claimed that from **2015** when he was issued with the title deeds, the applicants had never raised any complaint.

10. Rebutting the claims that the applicants were in possession of the land, he stated that his father had land in Muino where his sisters were born and raised and that his mother had been in occupation of that land and which is her matrimonial home. He insisted that his sisters were married and each one of them had their matrimonial home and that they have not been in occupation of the suit lands.

11. It was his contention that by virtue of being the first-born son, he took his aging mother to stay with him on his land parcel No. **West Pokot/Chebon/1381**. His other reasons were that he did so due to insecurity in Muino area and his mother's frail health. He deponed that after his father died in **1990,** he took over the responsibility of taking care of his sisters' educational needs. Since he was unemployed and he had to sell his cows to raise school fees for them. After he exhausted selling the cows, he resort to sell a portion of Land No. **West Pokot/Chebon/1381** measuring **2** acres to NGORIS PILAT to pay his son's and the **9th** Applicant's school fees. Further, he stated that upon selling the portion, none of the applicants complained. He stated further that in the year **2019,** he sold part of that suit land to one Samuel Loshatukei Kakurumon to enable him raise school fees for his children. The said Samuel Loshatukei Kakurumon sold his land to the 2nd Plaintiff/Applicant *(sic).* He attached copies of the agreements of sale and marked them as **CL 2 (a)** and **(b)** respectively. He then deponed that he had transferred the **3** acres part of parcel **No. 324** to the **2nd** Defendant. He annexed a copy of title deed of land **No. West Pokot/Chebon/1382** and marked it as **CL3.**

12. He repeated that he was the owner of the suit parcels of land by first registration and therefore should be left to enjoy their quiet possession, without disturbance from the plaintiffs who have their homes elsewhere. He rejected claims that he held the suit land parcels in trust of the applicants and that he did not require the consent of the applicants to sell his land. He stated that the suit lands are occupied by his three wives, and the 1st and 2nd wives were in occupation of **West Pokot/Chebon/1381** whereas his third occupied parcel **No. West Pokot/Chebon/156**. He swore that he did not have any other place to call home. He urged the court to disallow the application as it would be detrimental to him and his family.

13. He claimed that the application did not satisfy the conditions of grant of injunction as set out in the case of ***Giella vs Cassman Brown***. According to the Respondents, the application had been made in bad faith, was bad in law, misconceived, incompetent, frivolous and scandalous and a waste of the courts' time.

Submissions

14. Parties were directed to dispose the application by way of written submissions which they filed.

Analysis, Issues, Determination

15. I have carefully considered the application, the grounds contained therein, the rival affidavits in support and opposition to the Application, the rival submissions of the parties together with both the law and case law cited and I find that the following to be the issues for determination:-

1. ***Whether the applicants have made a case for preservatory orders in their favour***

2. ***What orders to issue and who to bear the costs of the Application***

16. I analyze each of the issues one by one, below:

a) Whether the applicants have made a case for preservatory orders in their favour

17. From the outset it is proper for me to state that there is a difference between preservatory orders and orders of injunction or even inhibition orders. These should not be confused. I am aware that a few of my brother and sister judges have expressed themselves before about the same and some have held that they are similar. I beg to differ. I will not refer to the previous decisions on the synonymous meanings of the phrases but they are not.

18. To be clear, on the one hand, preservatory orders relate to or are ordinarily directed to properties of a historical nature a natural habit that need to be maintained in the state they are until the end of the case or at the *inter partes* stage. ***Brian A. Garner, in Black's Law Dictionary, 11 Edition Thompson Reuters, St. Paul MN, 2019 p. 1434*** defines a preservatory order as follows, "An order prohibiting a property owner from taking action that would alter a historic building or natural habits before the Court makes a final order." It appears that such an order is rarely sought in our jurisdiction. Perhaps our brothers and sisters - litigants and property owners - rarely care about historical buildings and habitats. Actually, this Court often seeing historical sites being destroyed every other day. What history do we give our future generations? That is a question to ponder about. The **2010** Constitution has entrenched sustainable use and development of our environment. Our people ought to seize the moment and preserve the historical sites and habits for the future.

19. That said, an injunction on the other hand is that which we all know: it is an order issued by a Court designed to or commanding or preventing an action. Of course, it comes in many shades: Affirmative/mandatory, prohibitive, Mareva, Anton Pillar, special, reparative, and so on.

20. Therefore, in regard to the prayers that the Applicants sought, in my understanding and from the material they set before me, they did not intend that the Court issues preservatory orders because nowhere in their pleadings and affidavits did they state that the Respondents were about to destroy a historical building or natural habitat. All that they wanted was an order directed to the Respondents preventing them from selling, charging, leasing or otherwise parting with the possession of the specified parcels of land until the suit is heard and determined. Thus, if I understood them well, in one limb thereof they wanted an injunction and in the other an order of inhibition. That is why I reproduced the prayer which was made at the interlocutory stage of this Application and was spent by the time of this ruling. I now then consider whether the application was merited in terms of injunction and inhibition. I proceed to consider the application in line with these two likely prayers because as I understand my role, this Court has the sacred duty under **Sections 1B, 3, 3A** and **63(e)** of the **Civil Procedure Act** and **Article 159(2)(d)** of the **2010 Constitution** to do justice to all parties without regard to any technicalities.

21. I will not overemphasize that this Court has wide discretion to issue injunctive orders. However, the discretion must be exercised judiciously and without caprice. The case of ***Kahoho v Secretary General, EACJ Application No. 5 of 2012***, and ***Daniel Kipkemoi Siele v Kapsasian Primary School & 2 Others [2016] eKLR*** emphasized on the exercise of discretion as follows:

> ***"… the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously."***

22. The prayers sought herein are injunctive in nature. In a persuasive decision on an application of a similar nature as the one before me, that is to say, in ***Rose Njeri Ndegwa v Samuel Sobi J. Misingu [2019] eKLR,*** my sister learned Judge M.C. Oundo was of the view that, ***"preservatory orders are in essence similar to injunctive orders where an Applicant has to make out a prima case and show that s(he) will suffer irreparable loss if the order sought is not granted."*** I agree with the learned judge's sentiments in respect of establishing a prima facie case and demonstrating irreparable loss in such cases. However, since I have stated that the Applicants in this matter sought prayers of injunctive nature, I proceed to determine it on the basis of the principles of injunction in the ***Giella v Cassman Brown*** case (citation below) and related ones, that is to say, whether the applicants satisfied the conditions for granting injunction orders.

23. Whenever one alleges a fact, he/she bears the burden of proof to the required standard, unless the law expressly lays the burden on someone else. Thus, in the instant case, the Applicants were under the duty to satisfy the principles set out in the *locus classicus* case of ***Giella v Cassman Brown and Another (1973) EA 358.*** In it the Court held that for an injunction to be granted, there has to be established that:-

1. The applicant has a prima facie case with high probability of success

2. That the applicant cannot be adequately compensated by an award of damages and

3. In case the court is in doubt, the matter be decided on a balance of convenience.

24. As to whether the applicants established a prima facie case, this Court is guided further by the principles set out in the of ***MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS CIVIL APPEAL NO 39 OF 2002***, where the court stated as follows:

> ***"… in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

25. This Court now interrogates the facts placed material before to find out whether they demonstrate a prima facie case which deserves the issuance of a "temporary injunction." In the case of ***Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another[2019) eKLR*** the court stated:

> ***"circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; (emphasis mine-by underlining) the court is in such situation enjoined to a grant a temporary injunction to restrain such acts….."***

26. From the material presented before me, it is not in dispute that the Respondents are the registered owners of the suit properties. It follows therefore that by virtue of their registration, are entitled to protection by **Article 40 of the Constitution** which guarantees the right to own property. Their rights in respect to the said properties are also recognized under **Sections 24, 25** and **26** the **Land Registration Act (LRA) No. 3** of **2012**.

27. Section 26 of the **Act** provides that a Certificate of title is to be held as conclusive evidence of proprietorship. It stipulates thus:

> ***"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-***
>
> ***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***
>
> ***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."***

28. The exceptions enumerated in the **Section 26** can only be ascertained upon hearing the evidence to be presented by both parties at the trial. The respondents annexed to their Affidavits in response the copies of title deeds to prove as much. However, as I have indicated above, the issue as to whether the ownership was genuine or not is to be determined upon full hearing of the case. I will not dwell on it at the interim stage.

29. The rights conferred to a registered owner by **Sections 24** and **25** of the **LRA,** are absolute. However, **Section 28** of the of the Act enumerates a number of overriding interests in a registered title. Among them are trusts, including customary trusts.

30. The applicants pleaded that they were entitled to the land by virtue of it being family land. It is not in dispute that the 1st Applicant resides on the land: actually the 1st Respondent admits that she is on the land. As to whether or not she was there from when she and her late husband raised the family or upon invitation by the 1st Respondent as he stated, it is a matter of evidence to be interrogated at the full trial. The other Applicants being children of the 1st Applicant and siblings of the 1st Respondent all of whom also lay claim to the parcels of land in question thereby would qualify for entitlement to land if the court finds that the 1st respondent held it in trust for the family of the 1st applicant and her late husband. Since they too state that the parcels in dispute are family land, there is no better establishment of a ***prima facie*** case than of the present facts.

31. To be clear, I noted from the facts presented that the 1st Applicant averred that the land was cleared by her late husband in the 1960s. She gave a history of how they lived together with her husband on the suit lands and sired all her children including the 1st Respondent on the land. She contended that the 1st Respondent was the only son and thus she authorized him upon the death of her husband to be registered as the owner of the lands but to hold in trust for them. She was clear that the land belonged to the family whose members are entitled to a share. The 1st Respondent alleged that the land is his and that the Applicants have their family land Muino where they were born. On the contrary, the applicant has annexed birth certificates together with School documents which demonstrated that she bore and raised her children on the suit land which is near where they schooled. The 1st Respondent did not place any material before me convincing enough to controvert the evidence of the Applicants in regard to them living on the suit land.

32. The 1st Respondent is in possession and occupation of the suit land being No. **West Pokot/Chebon/1381**. The 2nd to 9th Applicants are daughters of the 1st Applicant, though are married.

33. The 1st Applicant complained of the 1st Respondent's actions of meddling and interfering with the properties by selling it off without involving her. She accused him of selling part of that land which was known as **West Pokot/Chebon/324** to the **2nd Respondent** and causing it to be registered in his name as **West Pokot/Chebon/1382** without her consent and that of the 2nd to 9th applicants. The 1st respondent on his part has acknowledged that he sold the land but stated that he did not need any consent from the applicants as the land belonged to him solely. But if it turns out that the suit lands were and are family land as stated by the Applicants, then I am convinced that the actions and any further actions of the 1st Respondent and other persons who may or have already acquired part of the land contrary to the consent and participation of the entire family would be and are capable of causing damage that may not be compensated by damages. Such actions as those complained of by the Applicants and which have been admitted, of selling or continuing to sell, transfer and or dealing with the parcels of land to their detriment are a likely precursor of occasion of irreparable damage.

34. In my considered view, since the applicants pleaded trust which is not contained in the title, and as a matter of reason, the major issue to be determined in trial is that of whether the 1st respondent holds or held the titles in trust for the applicants which may or may not be proved in trial, it is only prudent for the orders of injunction and inhibition do issue at this stage in for purposes of preserving the suit lands. I find that the applicants have established a prima facie case against the respondents.

35. As to whether the applicant cannot be adequately compensated by an award of damages, I have found as much. In any event, I am not in doubt that the balance of convenience tilts in favour of the Applicants.

36. For the case management of this case, parties are hereby ordered to comply with **Order 11** of the **Civil Procedure Act** and act accordingly within **thirty (30)** days of this order, and file indexed, paginated and cross-referenced trial bundles within the said period. This matter shall be mentioned in the open Court on **09/05/2022** at **9.30 am** in open Court in the presence of the parties (parties to attend), to confirm compliance and for further orders and directions.

37. The conclusion is that the application dated **5/11/2021** has merit and is allowed as follows:

a) That the orders that were issued on 8/11/2021 are hereby confirmed as follows, that there be and is hereby issued an injunction against the defendants, their servants and or agents from selling, charging, leasing or otherwise parting with the possession of the properties comprised in title Nos. West Pokot/Chebon/1381 and 1382 as well as West Pokot/Tapach/156 until the final determination of this suit.

b) That by the power conferred on this court by Section 68 of the Land Registration Act, Sections 1B, 3, 3A and 63(e) of the Civil Procedure Act and in the interest of justice, the Land Registrar West Pokot Land Registry is hereby ordered to register an inhibition on:

I) Land Registration Number West Pokot/Chebon/1381

II) Land Registration Number West Pokot/Chebon/1382, and

III) West Pokot/Tapach/156 till the final determination of this case.

c) Further, and in the interest of justice this court deems it fit to issue orders to the effect that the *status quo* prevailing as at the time of delivery of this ruling be maintained by the parties on the ground and in relation to any transaction or actions in respect to the suit land until this matter is fully heard and determined.

38. Ordinarily costs follow the event. But this being a dispute essentially between mother and child and siblings as between themselves, each party shall bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 16TH DAY OF MARCH, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE