



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 127 of 2011**

**ELIJAH AYUKU NGAIRA ..... 1<sup>ST</sup> PLAINTIFF**

**STETH LITIEMA ..... 2<sup>ND</sup> PLAINTIFF**

**V E R S U S**

**FESTO AYUKU NGAIRA ..... DEFENDANT**

**R U L I N G**

The application dated 26.9.2011 the two applicants are seeking an order of inhibition prohibiting the respondent from transferring parcels numbers **ISUKHA/VIRHEMBE/1612, 1613, 1614, 1647 and 15** pending the hearing and determination of this case. The application is supported by the affidavit of the 1<sup>st</sup> applicant sworn on the 26.9.2011. The defendant filed a replying affidavit sworn on the 17.10.2011. Parties agreed to file written submissions. Parties further filed further affidavits and further replying affidavits.

The pleadings show that the plaintiffs are the defendant's children. Their contention is that the suit land was inherited from their grandfather, the late **NGAIRA** and it is therefore land owned under customary traditions. This gives the plaintiffs a lawful claim and are entitled to inherit the land from the defendant. They live on the suit land with their families. They have constructed their homes and are apprehensive that the defendant will dispose of the land. The defendant started sub-dividing the land and he is about to sell a portion thereof.

On his part the defendant contends that the land is his and he is entitled to utilize it the way he wants. He is a sole registered proprietor of the suit land. He was forcefully marched to the chief's office where he was made to apply to the Land Control Board for consent to sub-divide the land and allocate it to his sons living him with nothing. He was willing to give part of his land to his children but their behavior of taking him through the provincial administration amounts to cross misconduct. In his written submissions counsel for the defendant, contend that customary rights cannot override the rights of a registered owner under the Registered Land Act as held in the case of **ESIROYO VS ESIROYO & ANOTHER [1973] E.A. 388**. It is also contended that the defendant is holding the land in trust for the plaintiffs and that allegation is denied by the defendant. The pleadings show that the original plot number **KAKAMEGA/VIRHEMBE/895** was registered in the names of the defendant in 1976. The plot measures 3.0 hectares. It appears that there was intention to sub-divide the land and it is possible that it is the plaintiffs who were pushing for the sub-division so that they could be given their share of the land during their father's lifetime. The main issue to be determined is whether the plaintiffs have a prima facie case with a probability of success against the defendant. Parties are agreeable that the defendant is the registered owner of the suit land. That fact in itself give the defendant the right to deal with his land as he so wishes. I do believe that the defendant is not mindful of the interests of his children. It has not been shown that the defendant is disposing of the entire suit property and therefore the issue of irreparable damage that might befall the plaintiffs does not arise. The defendant is at liberty to sell a portion of his land. The plaintiffs should exercise restraint in their greed to succeed their father who is still alive. There is no evidence that this was ancestral land and the plaintiffs do not have the right to inhibit their father's right to utilize his property.

In the end I do find that the plaintiffs have no prima facie case with a probability of success against the defendant. The application herein lacks merit and the same is dismissed. Since the plaintiffs have

exhibited extreme greed and would like to compel their father to give them part of his land I will condemn them to pay the costs of the application.

**Delivered, dated and signed at Kakamega this 7<sup>th</sup> day of February, 2013**

**SAID J. CHITEMBWE**

**J U D G E**