



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL NO. 180 OF 2012

JOHN LEMARPE TAMEI & 416 OTHERS.....APPELLANTS

VERSUS

MAIMPI KAIYIE & 10 OTHERS.....RESPONDENTS

RULING

Introduction

There are two Notices of Motion before the court for determination. The first one dated 14th November 2012 is brought by the Appellants and is seeking three orders:

1. The Respondents by themselves, their agents, servants and or any other person claiming to act on their behalf howsoever be restrained from convening, or causing to be convened an Annual General Meeting scheduled for the 20th November, 2012 or another date pending the hearing and determination of this application.
2. That Respondents either by themselves, their agents, servants and or any other person claiming to act on their behalf howsoever be restrained from subdividing, allocating, transferring or in any other manner disposing of the Group Land known as Kajiado/Torosei/11 or any parts thereof and from interfering with the Appellants use, occupation or enjoying of the Group Land pending the hearing and final determination of the Appeal.
3. The orders issued by this Honourable Court be served upon the OCPD Kajiado and the District Land Adjudication and Settlement Officer Kajiado for enforcement and compliance.

The second Notice of Motion dated 16th November 2012 is filed by the Respondents and is seeking the following orders:

1. That this Honourable Court be pleased to dismiss and or otherwise strike out the appeal herein for being incurably defective on account of law.
2. The Honourable Court be pleased to order that the Appellants desist from filing frivolous, waste of time applications or otherwise frustrating the work of the Respondents appointed under the group ranch representative laws.
3. In the alternative this Court be pleased to impose against the Appellants a deposit for security of costs and damages in this court for the prosecution of the appeal herein or any other applications which the Appellants may bring to this court.

The Notice of Motion by the Appellants

The grounds for the Appellants Notice of Motion are that the Kajiado Magistrate's Court dismissed the

Appellants' application dated 6th August, 2012, which sought to restrain the Respondents from subdividing, allocating or transferring the Group Ranch known as Kajiado/Torosei/11 before the issue of registration of the Appellants as members of the Group Ranch has been determined. Further, that the Appellants have appealed against the Magistrate's Courts dismissal to this Court.

It is further averred that upon the dismissal of the Appellants' said application, the Respondents proceeded to call an Annual General Meeting scheduled for the 20th November 2012, and intend to subdivide the said Group Ranch and issue title deeds to individual members before the issue of the Appellants' membership has been determined. The Appellants aver that unless the injunction herein is granted, the Respondents will be finally dissolved and thereby to exist as a corporate entity, and the Group Ranch will be completely dissipated. The Appellants thus stand to suffer great and irreparable loss and damage which will also render the Appeal herein nugatory.

These grounds are attested to in a supporting affidavit sworn by the 1st Appellant on behalf of the Appellants, who in addition stated that the Appellants were born, brought up, initiated into adulthood and educated within Torosei Group Ranch which is the 11th Respondent, and have lived and still live in the said Group Ranch with their families, wives and children and own sizeable herds of cattle and other properties within the Group Ranch.

Further, that Group Ranch was and is the registered proprietor of the parcel of land known as Kajiado/Torosei/11, and that that on diverse dates between 2007 and 2011 the Appellants applied both orally and in writing to be Respondents to be admitted as members of the Torosei Group Ranch but that their applications, petitions and requests were all rejected and turned down by the Respondents on flimsy and unsuitable grounds and without any due lawful cause. They annexed in this respect a copy of a letter from their Advocate dated 3rd May 2011 sent to the Respondents.

The Appellant's counsel in submissions dated 19th April 2013 argued that the land known as Kajiado/Torosei/11 is community land as envisaged under Article 63 of the Constitution, and that the Appellants have equal rights to the said land both under the applicable law which is the Land (Group Representatives) Act (Cap 287 of the Laws of Kenya) and Maasai customary laws. The counsel relied on various judicial decisions to argue that the Appellants will suffer irreparable loss which cannot be compensated by way of damages if the sub-division exercise was to proceed as they would be rendered landless and face eviction by new title holders. Further, that their quest to be registered as members would be rendered futile and their appeal rendered nugatory. The counsel further submitted that section 28 of the Land (Group Representatives) Act empowers magistrates to determine disputes concerning membership of a Group Ranch, and that the learned Magistrate erred in stating that it is only the High Court that has jurisdiction to do so.

The 9th Respondent, Simintei Kelo, a registered member of Torosei Group Ranch and also a member of the Group representatives swore an affidavit on 10th December 2012 in favour of the Appellants application. He stated that the Appellants are residents of Torosei, were born and brought up within the Group Ranch Land and also reside within the Ranch, and that he did not understand how they were left out as members yet most of their age mates have been registered as members of the Group Ranch. He averred that there is need to address the issue of membership before the subdivision of the land, so that when the land is finally subdivided, there will be fairness and equitable distribution.

The Appellants Notice of Motion was opposed in a replying affidavit sworn on 28th November 2012 by Maimpi Kayie, the Chairman of the Torosei Group Ranch, who had the authority of the other Respondents to swear the affidavit. He gave a detailed history of the proceedings concerning the Group ranch in Machakos High Court Civil Case No. 197 of 2008, leading to a consent that the parties hold an Annual General Meeting to resolve their disputes, and he stated that this was one of the reasons why the Principal Magistrate's Court in Kajiado in PMCC 236 of 2011 dismissed the Appellant's application. The deponent further stated that only members of the Group Ranch can determine the issue of membership through an Annual General Meeting, following the lawful procedure.

The deponent also denied the allegations that once the Annual General Meeting is held the corporate entity of the 11th Respondent will end, as the 11th Respondents will have to form committees to take care of the subdivision matters and other arising matters. The deponent attached the various pleadings and court orders given regarding the dispute herein, the Respondent's notice for the Annual General meeting dated 26th October 2012 and the register of members of the group ranch.

The Respondents' counsel in submissions dated 28th May 2013 gave a detailed history of the Torosei Group Ranch and argued that the issue of membership of the group ranch will require the decision of the members of the Group Ranch, and not just the Group Representatives as stated in section 28 of the Land (Group Representatives) Act. Further, that the Group Representatives can only issue membership certificates when mandated to do so by the members. The counsel also submitted that the 9th Respondent did not have the authority of the Group Ranch or Group Representatives and could not speak on behalf of the Group Ranch which is a body corporate. Lastly, the counsel submitted that the process of sub-division of a group ranch requires a sub-committee to be set up, and takes a long time after approval is given at an Annual General Meeting, and any persons who are aggrieved by the process have the opportunity to seek redress.

The Notice of Motion by the Respondents

The grounds for the Notice of Motion by the Respondents are that the suit herein is an abuse of the Court process as the matters raised in the Appeal were matters raised in the High Court Machakos HCCC No. 197 of 2008, and that the main elements in this Appeal is that the Torosei Group Ranch and the Respondents herein be stopped from convening a General Meeting until the Respondents are declared members of the Group Ranch, whereas it is the Annual General Meeting which can determine that position.

The said Notice of Motion is supported by an affidavit sworn on 15th November 2012 by Maimpi Kayie, a member of the Torosei Group Ranch, who had the authority of the other Respondents to swear the affidavit. He reiterated the facts that he had deposed to in response to the Appellants' Notice of Motion. The Respondents' counsel did not submit on the law that is applicable to the Notice of motion in his submissions dated 28th May 2013.

The Appellants opposed the Notice of Motion in Grounds of Opposition dated 25th February 2013 on the grounds that the said application had been overtaken by events, is incompetent, misconceived and bad in law, and that the applicants had not met or satisfied the conditions for grant of the orders sought or otherwise demonstrated that the Court should exercise its discretion in their favour. The Appellants' counsel in submissions dated 19th April 2013 argued that the Respondents' Notice of Motion does not state the provisions under which it is made, nor does it invoke any provisions of the Civil Procedure Rules and is therefore defective and untenable. Further, that no written authority was given by the other Respondents to Maimpi Kaiye to swear the supporting affidavit, in contravention of Order 1 Rule 13 of the Civil Procedure Rules.

The Determination

I will commence with a determination of the Respondents' Notice of Motion dated 16th November 2012 as it has the potential of determining the appeal filed herein with finality. The main issue in the said Notice of Motion is whether the Appeal herein should be dismissed or struck out. I note that the Respondents have not cited the law they have relied on in bringing the application, neither have they illustrated how such law if any applies to their application. This court cannot speculate on which law applies to the application and the grounds thereof, and is therefore not in a position to make any definitive findings on the same. The said application is dismissed for these reasons, and the Respondents shall meet the costs of the Notice of Motion.

I will consequently proceed to determine the Appellants' Notice of Motion dated 14th November 2012. The issues therein are whether this court should temporarily injunct the Respondents from holding their

Annual General Meeting; from sub-dividing, allocating, transferring or in any other manner disposing of the Group Land known as Kajiado/Torosei/11 or any parts thereof; and lastly from interfering with the Appellants' use, occupation or enjoyment of the said Group Land pending the hearing and final determination of the Appeal.

The principles that apply in an application for the grant of a temporary injunction are well known and stated in the decision in ***Giella vs Cassman Brown & Co Ltd, (1973) EA 358***. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

It is the Appellants' case that they reside in the group ranch known as Torosei Group Ranch, and have applied for membership of the group ranch, which membership is yet to be determined. They base their claim on the constitutional provisions on community land and also on Maasai customary law. Article 63 (1) and (2) of the Constitution in this regard provides as follows:

“ (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament;”

It is not disputed that the parcel of land known as Kajiado/Torosei/11 is registered in the name of Torosei Group Ranch under the Land (Group Representatives) Act. It is therefore community land. The Respondents' counsel in his submissions also gave a detailed account of how entitlement to a group ranch is determined under Maasai customary law. The Land (Group Representatives) Act on the other hand provides on the issue of membership of a Group Ranch under section 28 as follows:

“Where a question arises whether a particular person is a member of a group, a certificate signed by a majority of the group representatives shall be conclusive of the question:

Provided that a person who is aggrieved by the issue of such a certificate may apply to a District Magistrate's Court having jurisdiction in the area to determine the question, and in such a case the determination of the court shall be conclusive.”

In addition, the Second Schedule to the Act, which contains provisions that are deemed to be in the constitution of every group ranch, provides as follows with regard to applications for membership:

“All persons who are recorded in the said adjudication register as having an interest in the group land shall be entitled to become members of the group. If he is not recorded in the said adjudication register as a member of the group, no person shall be admitted to membership of the group unless

(a) that person has inherited an interest from a person who was recorded on that register; or

(b) (i) the group representatives all agree; and

(ii) the representatives' decision is confirmed at an annual general meeting of the group; or

(c) a court so orders.”

I do find that to the extent that the Torosei Group ranch is community land and the Appellants have stated that they reside thereon, a legal basis exists for their application for membership. However, the applicable law cited in the foregoing is clear on the procedures to be followed by the Appellants in canvassing their claim including the need to have the decision confirmed at an Annual General meeting.

I have perused the letter by the Appellant's Advocate dated 3rd May 2011 seeking the certificate of membership from the Group Representatives and giving 7-days' notice for compliance. The Respondents have also brought evidence of the consent orders dated 18th May 2011 given in Machakos High Court Civil Case No 197 of 2008 requiring them to comply with the law in this respect, and the request by the Kajiado District Land Adjudication and Settlement Officer in a letter dated 7th November 2011 on the interpretation of the said order, as she intended to call for an annual general meeting of the Torosei Group Ranch.

The Respondents have in addition brought evidence of a letter written by the Appellants' Advocate who was also representing the Plaintiffs in Machakos High Court Civil Case No 197 of 2008 dated 1st August 2011 asking that the Respondents to rescind the notice of an Annual General meeting dated 15th July 2011. The Respondents were thereafter subsequently restrained from holding an Annual General Meeting upon the application by the Appellants in Kajiado PMCC No.236 of 2011 and in the appeal filed herein.

It is thus my finding that the Respondents have been prevented by the various court cases from following the laid down legal procedure needed to address the Appellants' claim for membership, and that the Appellants must bear their part of blame in this respect. I will therefore decide the Appellants' Notice of Motion on the basis of a balance of convenience, and hereby accordingly order as follows:

1. The Respondents are hereby allowed to duly convene and hold an Annual General Meeting and to follow the laid down requirements and procedures provided in the Land (Group Representatives) Act in this regard .
2. The Appellants shall not in any manner interfere with, or prevent the Respondents from proceeding with the said duly convened Annual General Meeting
3. The Respondents are restrained from subdividing, allocating, transferring or in any other manner disposing of the Group Ranch known as Kajiado/Torosei/11 or any parts thereof, and from interfering with the Appellants use and occupation of the said Group Ranch pending the hearing and final determination of the Appeal herein, or until further orders.
4. The Appellants shall serve the County Police Commanding Officer, Kajiado County and the Kajiado County Land Adjudication and Settlement Officer or equivalent offices with the orders issued herein for purposes of enforcement and compliance.
5. The costs of the Appellants' Notice of Motion dated 14th November 2012 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___29th___ day of ___November___, 2013.

P. NYAMWEYA

JUDGE