REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 160 OF 2011

JEREMIAH KATAPA ……..…… 1ST PLAINTIFF
JOEL OLE LESHAO ……..…….…… 2ND PLAINTIFF
PAUL OLE NTIATI ……..…… 3RD PLAINTIFF
JOEL LESALE ODUPOI ……..…….. 4TH PLAINTIFF

VERSUS

JOSHUA KILELO KILITIA ……..…….…… 1ST DEFENDANT
SENCHUKA OLE MORINTAT ……..…… 2ND DEFENDANT
JOEL KUTATA OSENI ……..…….. 3RD DEFENDANT
OTUMA NTALAMIA ……..…….. 4TH DEFENDANT
NATIONAL CEMENT COMPANY ……..…… 5TH DEFENDANT
KAJIADO DISTRICT LAND REGISTRAR ……..…… 6TH DEFENDANT

RULING

Before me is an application by way of Notice of Motion dated 1st July 2011. The application was brought under Order 40 rules 1, 2, 4 (1), 10 (1) (a), Order 51 rule 1 of the Civil Procedure Rules as well as Section 3A, 1A and 63 (e) of the Civil Procedure Act (Cap 21).

The prayers in the application are six, one of which has been spent as follows:-

i) (spent)
ii) An order of the court injuncting the 5th Defendant from taking possession of, mining, exploring, alienating, leasing, charging or in any way undertaking any dealing with 1600 acres of the suit property (the leased land) pending the hearing and determination of this application and the main suit.
iii) An order of the court preserving the status of the suit property pending the hearing and determination of this application and the main suit and/or in the alternative an order of the court compelling the 1st, 2nd, 3rd, 4th and 5th Defendants to disclose the lease and the documents that have been signed in relation to the leasing of the suit land.
iv) An order of the court injuncting the Kajiado District Lands Registrar from registering the lease of 1600 acres of land of Mbirikani Group Ranch (part of Mbirikani 325) in favour of the 5th Defendant pending the hearing and determination of this application and the main suit.

v) An order of the court forbidding the Kajiado District Land Registrar, the 6th Defendant herein, from issuing a Certificate of Lease in respect of the leased land (1600 acres of Mbirikani Group Ranch) or effecting any dealing on the register of Mbirikani/325 in relation with the suit property and dealing with any mutation relating to the suit pending the hearing and determination of this application and the main suit.

vi) Costs.

The application has grounds on the face of the Notice of Motion. The grounds are that the Plaintiffs did not consent to the lease of the suit property; that the 1st, 2nd, 3rd and 4th Defendants acted irregularly and unlawfully in breach of the Group Ranch Constitution; the leasing was shrouded in secrecy and mystery and violated the tenets of the Group Ranch Constitution, and National Land Policy; that the leasing defied the provisions of key statute laws and the Constitution by ignoring the principles of public participation, transparency and equity; and that the land was likely to be excised, lease registered and certificate of lease issued to the detriment of the Plaintiffs and the group owners.

The application was filed with an affidavit sworn by Joel Ole Leshao the 2nd Plaintiff on 1st July 2011.

It was deponed in the said affidavit, that it was sworn on behalf of other Plaintiffs. It was deponed *inter alia* that the Plaintiffs were co-owners of Mbirikani/325 constituting of Mbirikani Group Ranch in Kajiado together with other 4538 members. That on or about 13th to 17th June 2011 the Defendants entered into an irregular lease without the consent of the members of the Group Ranch. That at no point did the deponent or other Plaintiffs or 60% of the members of the Group Ranch authorize the leasing of 1600 acres of the Group Ranch land to the 5th Defendant. That the terms of lease were unknown though it was rumoured that the land was leased at Kshs.4,000/= per acre for 99 years from June 2011. That an irregular meeting was held on 30th May 2011 purportedly to authorize or validate the leasing but the Plaintiffs protested, which opposition was even published in the Star Newspaper on 15th June 2011. That the minutes of the meeting were falsified to indicate that there was a quorum of 60% members' attendance. That most of the people who attended the meeting were not group ranch members. That the leasing contravened Article 10 of the Group Ranch Constitution which required at least 60% of members present at the meeting at which an agenda for such leasing would have been discussed. That only 623 members were said to have actually attended the meeting and authorized the agreement to be drawn and to be approved at the next Annual General Meeting at which 60% of members would be expected to approve the transaction. That the Defendants however colluded and signed a lease agreement. That the leasing of the 1600 acres to the 5th Defendant was irregular and unlawful and it was feared that unless the orders sought were granted the land would be irregularly alienated and exploited to the detriment of the Applicants.

The Applicants also filed a further affidavit sworn by the same deponent on 19th April 2011. It was deponed in the said further affidavit, *inter alia*, that it was false for the Defendants to allege that there were informal meetings held with members of the Group Ranch resulting in agreement to lease the 1600 acres to the 5th Defendant. That the law does not allow decisions on disposition of land to be made at informal meetings. That the Defendants had not produced anything in their affidavit evidencing the alleged informal meetings. That no resolution or agreement was reached by members authorizing payment of Group Ranch money to surveyors. That the purported notice for the meeting dated 5th May 2011 for a Special Annual General Meeting was not properly served. That it was not enough merely for the Defendants to allege in their affidavit that a meeting was held on 30th May 2011 with a requisite quorum of 60% without providing proof of a signed list of members present. That annextures **"JKK2"** and **"JKK4"** of the Defendant's replying affidavit were inconsistent and a slam. That most of the people who attended the alleged meeting of 30th May 2011 were not members of the Group Ranch but civil servants and politicians. That only Mr Kosei, Mr Likamba, Mr Ntoipo, Mr Saigulu and 3 officials namely the Chairman, Secretary and Treasurer of the Group Ranch attended. The land subject matter was part of Mbirikani Group Ranch land and affects every member and therefore it cannot be purported that a minimal number of 50 people authorized the lease by agreeing to relocate to other areas of the group ranch. That the said 50 members benefited from agreeing to move by being compensated and promised to

be built houses and moved to other part of the ranch which affected other members interests. That the lease dated 10th June 2011 and the LTK/Mbirikani/325 land sketch for 1600 acres annexed to the Defendant's replying affidavit was a nullity. That a registered environmental development organization – Ewang'an Community Development Association (ECODA) wrote to National Environment Management Authority (NEMA) who indicated that an environment impact assessment study had not been carried out. That the lease entered into on 10th June 2011 was irregular and a nullity as consent was obtained on 25th June 2011 after the lease was signed. That the lease document was concealed by the Defendants until the present proceedings were instituted.

The Plaintiffs filed a further supplementary affidavit sworn by the same deponent on 16th September 2011. It was deponed in the said affidavit *inter alia* that by a newspaper advertisement published in the People on 6th September 2011 it came to the Plaintiff's attention that the Defendants had submitted an Environment Impact Assessment Study. That the mining going on without an Environmental Impact Assessment Licence was illegal and contravened the law. That the Environment Impact Assessment Study Report excluded important negative impacts such as displacement of livestock, destruction of pastures and environmental degradation.

The Plaintiffs/Applicants through their counsel Koki Mbulu & Company Advocates filed written submissions on 20th September 2011. It was contended that at an appearance in court on 28th July 2011 the Applicants' Advocate had stated that they would only be pursuing prayers ii, iii and iv of the application. It was contended that the District Land Registrar had already issued a certificate of lease for the 1600 acres registered as LTK/Mbirikani/325 on 11th July 2011 immediately after filing of the suit.

Counsel contended that the Plaintiffs had filed suit seeking justice in order to stop the 1st – 4th Defendants, who were also the Group Ranch officials, from acting illegally and irregularly by allowing the 5th Defendant to engage in limestone mining and other activities on the 1600 acres. The Plaintiffs were members of the Group Ranch and were affected and prejudiced by the illegal acts of the Defendants and were therefore entitled to sue in their own right. Their contention was that the land was communally with along other 4,538 Group Ranch members. The subject land was part of title No. Mbirikani/325 situated in Kajiado District and constituting of the Mbirikani Group Ranch which was one of the group ranches in Kajiado District registered under the Land (Group Representatives) Act Chapter 287 of the Laws of Kenya and was held in the names of ten group ranch officials who held it in trust for the community.

It was contended that the Act had extensive provisions to be complied with by group ranches. The Defendants had breached the provisions of statutes such as the Registered Land Act (Cap 300), the Environmental Management and Coordination Act 1999, The Land Control Act (Cap 302), the Physical Planning Act 1996 as well as the Constitution and the National Land Policy Sessional Paper No. 3 of 2009.

The Applicants' counsel emphasized that the application was supported by an affidavit dated 1st July 2011, a supplementary affidavit dated 19th August 2011 and a further supplementary affidavit dated 16th September 2011. Counsel noted that no affidavit had been filed in response to the supplementary affidavits.

It was contended that the Constitution of the Group Ranch required that the alleged leasing should have been approved through the consent of at least 60% of the Group Ranch members. The minutes of a meeting allegedly held on 30th May 2011 purported to have realized 60% membership attendance. However the names of the members who constituted that 60% were not stated. In addition, the minutes of the said meeting contradicted the deliberations of a subsequent meeting of 4th June 2011 whose agenda was the drafting of the lease. One would wonder how the agenda for the meeting of 4th June 2011 would contain an item for drafting of the lease if the lease had been approved on 30th May 2011.

It was the contention that the Constitution and the Act allowed only Special General Meetings and Annual General Meetings to discuss the disposition of Group Ranch land. The meetings of 30th May 2011 and 4th June 2011 were not legally authorized to lease the land. A quorum for a special meeting was to be 60% of the members of the Group Ranch. No evidence had been tendered to show that such a quorum attended. The notice for the alleged meeting as stated in the replying affidavit dated 26th July 2011 was not properly served since the Constitution provided that **"notice of such a meeting shall be sent to members"**. The notice alleged herein was not sent to members but it was a notice sent to chiefs' barazas. In addition, paragraph 10 (d) of the Group Ranch Constitution provides that notice of a Special General Meeting be sent to all members and where practicable by press advertisement not less than 21 days before the meeting. No such notices were sent to members or press advertisements done. Therefore, the notice was improperly served. At the same time, if a meeting was ever held the attendance was only 623 members and it was agreed that a subsequent meeting would be held for the drawing and approving of the lease. However, the Defendants in contravention of the members' directives went ahead and entered into a lease without the required 60% consent of members. Moreover Section 26 (b) of the Group Representatives Act was also violated because the law required that notices be sent by either Registered Post or personal service on members. Counsel challenged the paying of monies directly to a surveyor as stated in the replying affidavit dated 26th July 2011. The contention was that the Group Ranch Constitution provided clearly that all monies and funds for the Ranch shall be received and paid by the Treasurer in the name of the Group Ranch. It was therefore, not clear why monies that were due and payable to the Group Ranch were being paid to a 3rd Party.

Counsel also raised the issue of consent of the Registrar of Group Representatives. The contention was that the prior consent of the Registrar was required under the Second Schedule of the Act before disposition of land could be done. No evidence had been provided that approval was granted. Counsel also contended that the provisions of Section 109(2) (b) (iii) of the Registered Land Act (Cap 300) were not complied with as no certificate of the Registrar of Group Representative had been produced as evidence that the execution of the lease was authorized by a resolution of the group ranch. It was also contended that the provisions of Section 6 (1) of the Land Control Act Cap 302 of the Laws of Kenya were not complied with. The section presupposed that consent for the transaction had to be given before the transaction was approved. The letter of consent from the Land Control Board was dated 25th June 2011. That was a Saturday and it was way after the lease had been signed on 10th June 2011. Therefore, it was clear that no consent had been obtained to subdivide the 1600 acres from the larger parcel of 125,893 acres. Though a sketch map was attached as part of the lease there was no evidence that the provisions of the Registered Land Act relating to mutations were complied with.

Another issue raised was that the Ranch was situated in close proximity to the Amboseli National Park. Therefore, the leasing was of environmental significance. Reliance was placed on Section 54 of the Environmental Management Coordination Act 1999 which mandated the protection of environmentally sensitive areas, mining projects such as the one being undertaken by the 5th Defendant could not proceed without an environmental impact assessment licence as provided for in section 58 (1) of the Act. Further the Environmental Impact Assessment Licence was to be made before the commencement of any project. In the present case, the 5th Defendant submitted the project report later to the National Environmental Management Authority (NEMA). NEMA only published a notice in the People Newspaper on 6th September 2011 for the public to submit comments on the Environmental Impact Assessment Study relating to the mining of limestone on the suit land. The Plaintiffs contended that the ongoing mining was central to the provisions of the Environmental Management and Coordination Act which specifically provided that the licence had to be issued before any mining activities commenced.

The lease was said to be shrouded in secrecy thus defeating the guiding values, objectives and land policy principles required by the National Land Policy as well as Article 60 (1) of the Constitution which requires that land be managed in a sustainable and transparent manner. It was their contention that sustainability included compliance with Environmental Impact Assessment Requirements. With regard to the National Land Policy it was contended that paragraph 3.1.3.1.2 of clause 66 provides that incase of pastoral communities the group representatives entrusted with the management of Group Ranch had in many cases disposed of group land irregularly and illegally without consulting members of the Group

Ranch. The Plaintiffs contended that this was what had happened in the present case.

It was also contended that the court will not be acting in vain as alleged in the replying affidavit sworn on 26th July 2011 because the courts have powers to halt through injunctive orders any illegalities and irregularities. It was also contended that Article 165 (3) (a) of the Constitution provided expressly that the High Court had unlimited jurisdiction. The pecuniary value of the subject matter was annual rent of Kshs.6,400,000 per year for the 1st two years of the lease. Therefore, this is the district court referred to under section 10 of Cap 287.

It was also contended that though the Defendants have stated that all the officials who executed the lease were not parties the Plaintiffs relied on Order 1 rule 6 of the Civil Procedure Rules which stated that the Plaintiff had an option to join people in suits who were jointly and severally liable on any one contract. Order 1 rule 8 provides that a suit will not be defeated on account of joinder or non-joinder of parties. The 1st and 4th Defendants had not been sued in their individual capacities but as officials who acted *ultra vires* as regards the suit property. Though upon incorporation the Group Ranch was issued with a certificate it was not the body corporate that acted illegally but its officials. The officials were to hold and manage the property for the collective benefit of members. Section 8 (2) of the Act also obliged the officials to fully and effectively consult members in the exercise of power and if they fail to do so they became liable to be sued in their official and not personal capacities.

The Plaintiffs contended that they had satisfied the criteria for the grant of temporary injunction as stated in the case of *Geilla vs Cassman Brown Limited 1973 E.A 358*. They contended that the lease to the 5th Defendant was a nullity. It was shrouded in secrecy and illegalities. Therefore, the Plaintiffs had established a prima facie case with probability of success. On the 2nd requirements in the case of *Geilla*, that the Plaintiffs have to show that he will suffer irreparable damage if the temporary injunction is not granted, the Plaintiffs maintain that land degradation due to the mining, displacement of people and destruction of pastures, loss of wildlife habitats and relocation of people for an accumulated lease period of three tranches of 99 years cannot be adequately compensated in damages. The Plaintiffs also contend that the balance of convenience is in their favour. It was their contention that there were substantive issues to be tried and that the Plaintiffs' rights alongside that of other members of the Group Ranch could only be safeguarded if an injunction was granted. They therefore urge the court to grant the temporary injunction or in the alternative to preserve the *status quo* of the suit land by stopping mining operations on the land pending full trial.

Counsel for the Plaintiff also on the hearing dates made verbal submissions to highlight the written submissions filed. Counsel emphasized that it was not necessary to sue all officials of the Group Ranch. The Civil Procedure Act (Cap 21) allowed the officials who defied the law to be brought to court.

The application is opposed. A replying affidavit was filed. It was sworn by Joshua Kilelo Kilitia. It was deponed inter alia that the Group Ranch was the registered proprietor of land known as Loitokitok/Mbirikani/325 measuring approximately 310,494 acres with a membership of over 4,500. That in 2010 an investor approached the Group Ranch with a purpose of exploring limestone at the Ranch and the committee and members held several meetings and agreed to lease about 1600 acres to the investor who is the 5th Defendant. That the committee was mandated to enter into negotiations with the investor and meetings were held with leaders, stakeholders, youth leaders and members leaving in the proposed limestone area and the entire Group Ranch and it was unanimously agreed to lease 1600 acres to the investor primarily to enable the Group Ranch raise funds for subdivision and other community projects. That by a notice dated 5th May 2011 the deponent invited all members of the Group Ranch to a Special General Meeting to be held on 30th May 2011. The said notice was also circulated through several meetings held by the chief and other leaders. That on 30th May 2011 a meeting was held attended by over 60% of the members of the Group Ranch who approved the lease of the 1600 acres to the 5th Defendant. That subsequent to the approval the elected group representatives in the presence of community leaders executed a lease as had been agreed which was registered and a Certificate of Lease issued to the 5th Defendant. That it was untrue for the Plaintiffs to state that members of the Group Ranch

were not involved or consulted. That members who live in the leased area and their families had agreed to move to other areas of the Group Ranch land. That the alleged members who have complained includes names of non-members as well as others who are illiterate. That the 5th Defendant complied with his obligations under the lease. That the laws of the country had been complied with and specifically the Land Group Representatives Act Cap 287. That the Plaintiffs had not demonstrated a *prima facie* case with probability of success.

The Defendants also filed another replying affidavit sworn by the same deponent on 19th September 2011. It was said to be an affidavit in response to the Applicant's supplementary affidavit. It was deponed *inter alia* that the consent from the Land Control Board reflected the outcome of the Annual General Meeting held on 30th May 2011. That the consent was lawful. That the allegations in the photographs annexed by the Plaintiffs was misleading as the 5th Defendant had taken possession of the leased area. That the Applicants had not met the requirements for the grant of a mandatory injunction.

Counsel for the 1st – 5th Defendants M/s Tobiko, Njoroge & Co. filed written submissions on 26th September 2011. It was contended that the Plaintiffs/Applicants did not meet the requirements for the establishment of a *prima facie* case with probability of a success. Firstly, the lease was properly entered into and registered. Secondly, they were seeking to restrain what had already been done and the court could not issue orders in vain. Thirdly, the application and the entire suit were fatally defective. It was contended that the replying affidavits had explained the way the lease was entered into. The facts given therein showed that the lease was legally entered into.

It was contended that the court cannot issue orders in vain. The prayers sought were seeking that the court supervises status of the suit property and injuncts the 6th Defendant from registering the lease, which has been overtaken by events.

It was also contended that the application and entire proceedings were incompetent. The parties to the lease are the Group Ranch and the 5th Defendant. This court cannot issue orders against parties to a contract who are not before it. Secondly, the lease was executed by all incorporated Group Ranch representatives who were not parties in this suit. Therefore, the application and entire proceedings are incompetent.

It was contended that in any event that the Applicants will not suffer damages if the orders sought are not granted. However, if they suffer any damage it can be adequately compensated in form of damages. On the other hand, the Applicants have no better or higher interests than the over 4000 members of the Group Ranch. If the orders sought are granted the Group Ranch is likely to suffer because it will be breaching its obligations under the lease.

It was contended lastly that the balance of convenience tilts in favour of the Defendants. The lease was made to earn the Group Ranch some income. Granting the orders sought will expose the Group Ranch to possible suit by the 5th Defendant and damages for breach of contract.

On the hearing date Counsel for the Respondents Mr Sankale, made submissions in opposition to the application. Counsel emphasized that 60% of members of the Group Ranch approved the lease. The law was also observed in entering into the lease, including the requirements under the Law on Environmental matters.

I have considered the application, documents filed and submissions both written and oral and the law. This is an application in which the Plaintiffs are seeking interlocutory orders in the main suit. At this preliminary stage this court cannot determine whether or not the whole suit is defective. In any case Article 159 of the Constitution 2010 requires that courts administer substantive justice as much as possible.

The question is whether the Applicants/Plaintiffs have met the requirements for the grant of interlocutory injunction as stated in the case of *Geilla vs Cassman Brown Ltd*. I have been told that the

Applicants/Plaintiffs have brought this application in the name of the wrong parties. That the Group Ranch is not a party to these proceedings. That some of the incorporated representatives of the Group Ranch have not been enjoined in these proceedings. Therefore, no orders should issue that will affect the Group Ranch which is not a party in these proceedings. In my view, that argument is not tenable. The 1st to 4th Defendants themselves claim that they are incorporated representatives. If they are, then the distinction between them and the Group Ranch is very thin. In my view, one can be substituted for the other and vice versa. These issues can be argued and determined substantively in the main suit. But for now, *prima facie* they can stand and answer for the Group Ranch. I dismiss that objection.

The Applicants claim to be members of the Group Ranch. The Defendants do not appear to be disputing that. Obviously if the Applicants are members of the Group Ranch they have an interest in the matter (land). From the arguments raised, there are several issues for determination in the suit. The land that belongs to the Group Ranch is not land in which every individual member has a separate piece. Therefore, in my view their interests and each of the member is on the whole ranch. They have, therefore, an interest in the 1600 acres which they are complaining about. Since there are arguable issues herein about the regularity of the meeting, the execution of the lease, consent of the Land Control Board, environmental requirements as well as interests of the Plaintiffs as members as against other members of the ranch, I find that there is a *prima facie* case with probability of success. The substantive hearing will determine which way the matter will go. However, for now with the facts placed before me I am of the view that the Plaintiffs have demonstrated *prima facie* case with probability of success. This satisfied the first consideration in *Geilla –vs- Cassman Brown Ltd.* (supra).

Will damages be adequate compensation? This is the second requirement to be considered as stated in the case of *Geilla vs Cassman Brown*. This being a case of land where the interests of each member are not particularly specific and quantifiable, I find that an award of damages will not be adequate compensation to the Plaintiffs.

The balance of convenience in my view, is relevant only when the above two parameters of *prima facie* case and adequacy of damages, or one of them is not clear. In the present case I am convinced that the Plaintiffs have established a *prima facie* case with a probability of success and that an award of damages will not be adequate compensation. I will not consider the issue of balance of convenience.

In the prayers, the Plaintiffs have asked that the District Land Registrar should not register the lease and also that he should not issue a Certificate of Lease. From the facts that have been placed before me these have already been done. They also ask for preservation of status quo or disclosure of lease document. Disclosure has been made. They also ask that the court issues orders preventing the 5th Defendant from taking possession. Possession has already taken place. It would be futile to grant those orders as courts should not act in vain. However, this court cannot be impotent as some of the prayers are relevant in order to protect the land from further adverse changes. I will therefore grant some aspects of prayer (ii). I specifically order as follows:-

I grant an injunction directed against the 5th Defendant that the said 5th Defendant is injuncted against mining, exploring, alienating, leasing, charging or in any other way dealing with the 1600 acres of the suit property (the leased land) pending the hearing and determination of the main suit. Costs will be in the cause.

Dated and delivered at Machakos this **27th** day of **October** 2011

GEORGE DULU
JUDGE
In the presence of:-