



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 112 OF 2018

(Formerly Nairobi ELC No. 380 of 2016)

1. MPOYIO OLE YIARO LISINKO
2. MELUBO LEMITEI SAIDIMU
3. SIOKONKAI OLE LEYIAN SUYIANKA
4. CHARLES MARRAO TUMPEI
5. KIPANUA OLE LESIAMON NCHIKERE
6. SIMON KASEKE KIPIRR NCHIKERE
7. EDWARD T. KORINKO AS THE PERSONAL
REPRESENTATIVE OF MUSA KOR INKO
8. MAINA OLE NKOIRISHISHE
9. ELIJAH PARENO SORORONYI
10. LOBOLO MEDUKENYA
11. ENE LAMLON SENTALE
12. ENE LEMALON KATETO
13. ENE LEMALON MATOREPLAINTIFFS

VERSUS

1. IMARORO /MASHUURU GROUP RANCH
2. LEPERIN NKAIRABALI
3. DAVID SINTILA
4. JAMES SHELEL
5. BACKSON PARSITAU
6. NKIRRIMPA KEPEPETE
7. KELEMPU MEDUKENYA
8. SUYIANGOI MOSHOOKIA

9. JOHN SINGUA PARSINTI

10. SAIDIMU MATAYIA

11. KAPUARE LOISA

12. KAJIADO DISTRICT LAND REGISTRAR

13. KAJIADO DISTRICT SURVEYOR

14. KAJIADO LAND ADJUDICATION OFFICER..... DEFENDANTS

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 13th July, 2016 brought pursuant to Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules wherein the Plaintiffs' seek orders of injunction as against the Defendants in respect to land parcel number Kajiado/ Kaputiei Central/ 5. The application is premised on the grounds on the face of it and the supporting affidavit of CHARLES MARRAO TUMPEI where he confirms that together with the other Plaintiffs, they are members of the 1st Defendant which is a Group Ranch incorporated under Section 7 of the Land (Group Representatives) Act. Further, that the 2nd and 3rd Defendants are members of the Committee tasked with managing the affairs of the 1st Defendant. He explains that on 25th January, 1997, members of the 1st Defendant resolved to subdivide all that land known as Kajiado/ Kaputiei Central/ 5 registered in favour of the 1st Defendant. He claims the 2nd to 11th Defendants sought for members of the 1st Defendant to contribute certain amounts towards the subdivision exercise but failed to render accounts. Further, the subdivision exercise resulted in unequal portions of land for the members. He insists the said subdivision was fraudulent as the area on the ground was smaller than the one indicated in the area map as well as survey map. He avers that the 2nd to the 11th Defendants tampered with the register of members of the 1st Defendant. He contends that the 2nd to 11th Defendants together with their families and friends have abrogated themselves larger plots in the land bigger than for the other members. He proceeded to highlight names of some of the members including the portions they have been allocated. He further claims that the 2nd to 11th Defendants have hoodwinked members of the 1st Defendant to accept that the subdivision exercise is complete by issuing members with fake titles that are not supported by Green Cards.

The application was opposed by the various Respondents who filed replying affidavit sworn by LEPERIN NKAIRABALI where he contends that the application is res judicata as the matter had already been dealt with in Machakos High Court Civil Suit Number 253 of 2009. He insists the allegations are unsupported and the Surveyor is a total stranger to the 1st Respondent.

The Plaintiffs' filed a further affidavit to reiterate their claim and controvert the averments in the replying affidavit.

The application was canvassed by way of written submissions

Analysis and Determination

Upon consideration of the instant Notice of Motion including the rivalling affidavits and submissions, the only issue for determination is whether the Applicants are entitled to orders of temporary injunction pending the outcome of the suit.

It is not in dispute that the 1st Defendant is a Group Ranch and proprietor of land parcel number Kajiado/ Kaputiei Central/ 5 hereinafter referred to as the 'suit land'. It is further not in dispute that the 2nd to 11th Defendants are officials of the 1st Defendant. What is in dispute is the Plaintiffs' claim that the 2nd to 11th Defendants have failed to equitably allocate the resultant subdivisions of the suit land to each of them in equal share and has only given their families as well as friends' bigger portions.

In their submissions, the Plaintiffs' reiterated their claim and relied on the decision of **Giella Vs Cassman Brown (1973) EA 358** to buttress their averments. In their submissions the Defendants insist the suit is res judicata as the subdivision of land parcel number Kajiado/ Kaputiei Central/5 was supervised by the Environment and Land Court at Machakos via ELC Case Number 253 of 2009. Further, a Decree had been issued to that effect. They relied on section 7 of the Civil Procedure Act as well as the case of **John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** to buttress their averments.

In the case of **Giella Vs Casman Brown (1973) E.A 358** the Court clearly established the principles for granting an injunction. As to whether the Plaintiff has established a prima facie case with a probability of success, I wish to make reference to the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** where the Court of Appeal described a prima facie case as follows:

“..... is a case 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”.

The Plaintiffs seek to restrain the 2 to 11th Defendants from dealing with the suit land. Before I proceed to analyse whether the Plaintiffs have established a prima facie case, I will proceed to first consider whether this matter is res judicata or not. The Defendants have raised these averments, furnished court with the Decree issued on 30th November, 2018 from the aforementioned Machakos ELC Case No. 253 of 2009 but not the full proceedings. Further, in the said Decree, I note there was direction for the supervision and subdivision of the suit land

herein. At this juncture, as a Court I am unable to make conclusive determination that the matter is res judicata unless all the documents and proceedings are furnished to me. I opine that the issue of res judicata is evidential and cannot be determined at this interlocutory stage without sufficient evidence.

The Plaintiffs have now sought for a restraining order to the said subdivision claiming only a few parties were represented in the said suit, which fact is opposed by the Defendants. It is worth noting that the Plaintiffs have not controverted the fact that there exists a Decree issued in Machakos ELC Case No. 253 of 2009 regarding the subdivision of the suit land. They however claim that they were not represented therein. Be that as it may, since there was already a Decree from a Court of Competent jurisdiction, as a Court I am unable to interfere unless sufficient evidence is offered to me. I further note that the Plaintiffs allege the subdivisions are unfair but failed to provide an update to the court on the current situation on the ground after the Decree had been issued Machakos via ELC Case Number 253 of 2009 after which the said exercise commenced.

In line with the principles established in the case of **Giella Vs Casman Brown (1973) E.A 358**, I find that the Plaintiffs have failed to establish a prima facie case to warrant the grant of the orders sought. Since the Plaintiff has failed to prove the first limb of the injunctive principles as established in the aforementioned case, I will decline to deal with the second and third limb.

In the circumstances, I find the application dated the 13th July, 2016 unmerited and will dismiss it with costs.

Date signed and delivered virtually at Kajiado this 9th Day of February, 2021.

CHRISTINE OCHIENG

JUDGE