



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC LAND CASE NO. 9 OF 2021**

**ISAAC KIBIEGO KITUR.....PLAINTIFF**

**VERSUS**

**FLORA YEGO .....1<sup>ST</sup> DEFENDANT**

**LEAH YEGO .....2<sup>ND</sup> DEFENDANT**

**JANE YEGO .....3<sup>RD</sup> DEFENDANT**

**RULING**

**The Application.**

1. The plaintiff filed the instant suit on the **11<sup>th</sup> February 2021** by way of a plaint that was accompanied by a motion seeking an order of interim injunction against the defendants, to restrain them from interfering with the suit land herein, that is, **Title No Cherangani Kachibora Block 1/ (Osorongai) 48** which is registered in his name.

2. The grounds for the application are that the plaintiff being an elderly man while in the process of arranging his affairs engaged himself in the process of subdividing his land for distribution amongst his children and purchasers but the defendants who are his biological daughters objected to his being issued with the consent of the Land Control Board for subdivision on the ground that they deserved more land than that which the plaintiff had allocated them. Consequently the plaintiff was denied the consent. The plaintiff contends that the defendants' actions are illegal. In the supporting affidavit of the plaintiff it is deponed that the defendants are married and that they live in their respective homes. The plaintiff exhibits a copy of the title deed for the land showing he is the registered owner and so there is no dispute regarding that fact.

**The Response.**

3. The 1<sup>st</sup> defendant filed a response on behalf of all defendants. In her sworn affidavit dated **16/2/2021** she depones that she and the 1<sup>st</sup> defendant, being daughters to the plaintiff and their father being polygamous, belong to the 1<sup>st</sup> house, and that the 3<sup>rd</sup> defendant belongs to the 3<sup>rd</sup> house but was taken into the 1<sup>st</sup> house at tender age due to the demise of her mother; the 2<sup>nd</sup> wife and the 1<sup>st</sup> wife are deceased; the 1<sup>st</sup> family used to live in Nandi and the plaintiff was gifted **15 acres** of ancestral land at Kapkoimur in Nandi by his father, but the family later moved to the present area and started farming; subsequently their father was paid dowry for their marriage and he bought the land using the proceeds thereof and some contribution from their mother obtained from farming; however after disputes arose between their parents their mother lodged a claim before the Land Disputes Tribunal which awarded her **16 acres** out of the suit land. **15 acres** were awarded to a son from the 2<sup>nd</sup> house and **5 acres** to the 3<sup>rd</sup> defendant, while the plaintiff was left with **45 acres**; that the defendants are now in occupation of the portions which they claim and no more; these are the portions that their mothers were entitled to in accordance with the tribunal ruling, which was allegedly implemented on the ground by a government surveyor. The defendants aver that the plaintiff acquired the land by purchase using the dowry paid for them and that the shares of the deceased wives of the plaintiff were transferred to their children which the plaintiff denies as can be seen from the supplementary affidavit. It is averred that the application does not meet the threshold required for the issuance of an injunctive order.

**The Plaintiff's Rejoinder.**

4. The plaintiff filed a further affidavit on **5/3/2021** denying the matters raised in the defendants' response.

**The Plaintiff's Submissions.**

5. On the **11/2/2021** this court gave directions that the instant application be disposed of by way written submissions and the applicant filed his submissions on **11/3/2021** while the respondents filed their submissions on **6/3/2021**. I have considered both sets of submissions.

6. The plaintiff relies on the age old decision of **Giella Vs Cassman Brown 1973 EA 358** and cites the indefeasibility of title issued to him in his name and avers that he does not hold the title in trust for the defendants who he alleges have not demonstrated any interest in the suit land. He avers that the defendants have not shown the kind of trust they claim in respect of the suit land. He denies that the suit is ancestral land and adds that he purchased the land during the defendants' tender age. He avers that the defendants being his children can not force him to give them land and cites the case of **Edward Kipkosgei Chemurbii & another Vs Charles Kosgei & another 2014 eKLR** and **Muriuki Marigi Vs Richard Muriuki & 2 others 1997 eKLR** for that proposition.

7. The plaintiff also dismisses the decree in **Kitale PMCC No 14 of 2005** as incapable of implementation as it is more than **12** years old and further states that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were in any event not parties to that case and that the succession proceedings have not been taken out in respect of Zipporah Yego who was the party in the case. The plaintiff also states that infringement of the right to use one's own land can not be compensated for by way of damages.

#### **Determination.**

8. The issue for determination is whether an injunction should issue as prayed by the plaintiff.

9. The plaintiff must establish that he has a prima facie case and that he would suffer loss that cannot be compensated for by way of damages in order to deserve an interim injunction. If the court is in doubt it will rule on the application on a balance of convenience.

10. Regarding whether a *prima facie* case has been established, I must state that the plaintiff has relied on the allegation that the defendants are interfering with his land. The defendants have turned out to be none other but his own daughters. Though this court is in agreement with the case law cited by the plaintiff's counsel to the effect that a parent can not be compelled to give his children land, this is not a mere case of children forcing their father to give them more land against his wish; the claim that there was an old tribunal award that granted the defendant's mother and the 3<sup>rd</sup> defendant land many years ago is relevant and sufficient to persuade this court that the plaintiff may not have a *prima facie* case. The supplemental claim by the plaintiff that the decree relied on by the defendants is more than **12** years and cannot be implemented now is staved in the face by the allegation that a government surveyor implemented the decree on the ground and that the plaintiff thwarted his wife's attempts at obtaining title. It is further watered down by the claim that the defendants only claim the land that was so demarcated in favour of their mother and nothing more and that they are already in occupation of that land. In addition it is clear to this court that the instant application has sprung out of the denial by the Land Control Board of an application by the plaintiff for consent to subdivide the suit land as he wishes. That application must have been made under the **Land Control Act** and in this court's view the remedy to a denial of a consent under that law does not lie in this court as a first instance remedy. The plaintiff has not demonstrated that he has exhausted the processes set down in that Act before proceeding to lodge the instant application. In the light of the foregoing I am not persuaded that the plaintiff has established a *prima facie* case.

11. As to whether the plaintiff may suffer loss that can not be compensated for by way of damages the court notes that the plaintiff is now an old man intent on settling his affairs in preparation for the summons to that other world where mortals are ushered into after they have as Shakespeare would have said, "...shuffled off this mortal coil". He does not allude to any farming land lost to the defendants or any loss of profits. His counsel has put it very well, that in his belief, infringement of one's land rights can not be compensated for by way of damages.

12. However the matters raised by the defendants have brought up a deep history of the land or rather what is alleged to be its history. In the circumstances of this case where other persons have cast a reasonable element of doubt as to the veracity of the plaintiff's claim of absoluteness of his title over the land they occupy, the converse of the plaintiff's counsel's submission is true, and in this court's view, damages can be awarded to the plaintiff in the event the defendants' claim fails. I do not find that the plaintiff has established the possibility of irreparable loss.

13. The two main limbs of the test in **Giella Vs Cassman Brown** (supra) having failed, the plaintiff's application must fail and I hereby dismiss it with no orders as to costs.

14. I have nevertheless given consideration to the plea that the suit be heard on priority basis and though no person knows either the day or the hour, in view of the age said to be the plaintiff's, I hereby order that parties shall comply with the rules expeditiously in readiness for the fixing of a hearing date and this matter shall be mentioned on the **14<sup>th</sup> April 2021** for the purpose.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 16<sup>th</sup> day of March, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**