



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 2 OF 2021

ROBERT CHERUKWO CHEMRIGAI.....1ST PLAINTIFF

ANTHONY RUTO LOITARUK.....2ND PLAINTIFF

VERSUS

PHILIP LODAMA.....1ST DEFENDANT

SIMON PALOKAPEL.....2ND DEFENDANT

DOMINIC MUKUTANO.....3RD DEFENDANT

LOWIWARENG LONGAR.....4TH DEFENDANT

CHRISTOPHER RUTO.....5TH DEFENDANT

LOCHILARUK WEPEGH.....6TH DEFENDANT

ROBERT DIAKAPUS.....7TH DEFENDANT

LOTULIA YOMIYOM.....8TH DEFENDANT

PHILIP YARAPONG.....9TH DEFENDANT

MARKO LODOMO.....10TH DEFENDANT

WILLIAM KIRANGOLE.....11TH DEFENDANT

STEPHEN ANGARI.....12TH DEFENDANT

DAVID KAMAMA.....13TH DEFENDANT

RULING

1. The application dated 15/1/2021 and filed in court on 18/1/2021 has been brought by the plaintiffs under **Order 40 Rules 1, 4(1) & 5** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act**. The plaintiffs seek the following orders:-

(a) ...spent

(b) ...spent

(c) That an order of temporary injunction do issue restraining the defendants/respondents by themselves, their servants, agents from demarcating, allotting or dealing in any other manner the land known as Toghomo Community Land pending

hearing and determination of the main suit.

(d) That O.C.S Marich Police Station do supervise and ensure compliance of the court order.

2. The application is supported by the affidavit of the 1st plaintiff sworn on 15/1/2021. The grounds on the face of the application are that the applicants herein are the legal representatives of **Sotot** and **Talai clans** whose members reside at **Toghomo Community Land**; that on or about 26/6/2020 the defendants registered a self-help group known as **Toghomo Sub-location Land Committee** and begun to demarcate and subsequently issued allotment letters to individuals without the consent of the plaintiffs' clan; that the activities being undertaken by the defendants would delineate the suit land rendering plaintiffs' clans members destitute; that the defendants actions amounts to dispossession of the plaintiffs clans and would suffer irreparable loss which cannot be compensated by damages and that the plaintiffs have a *prima facie* case with probability of success.

The Response

3. In response to the application the defendants filed a replying affidavit sworn on 20/4/2021 by **Simon Palokapel** the 2nd defendant, on his own behalf and on behalf of the other defendants.

Submissions

4. On 8/4/2021 the court directed the parties to file their submissions and the application be disposed of by way of written submissions. I have perused the file record and found no submissions filed on behalf of the parties.

Determination

5. The issues that arise in the instant application is whether an injunction should issue restraining the defendants from demarcating allotting or dealing in any other manner with the land referred to as Toghomo Community land pending hearing and determination of this suit.

6. The applicants are apprehensive that their clans would be rendered destitute if the demarcation and allocation of the suit land continues. The propriety of the demarcation and allocation and the defendants' locus in the demarcation exercise is under challenge.

7. In their replying affidavit the respondents state as follows: that the application is bad in law in that the applicants have conceded that the suit land is undemarcated and the reference to Toghomo Community Land is therefore reference to an indeterminate expanse of land; that the respondents and their families live in Toghomo Sublocation and are in possession of land either as individuals or families or clans from which they eke out a living; that the orders sought would violate the respondent's constitutional rights and visit hardship upon the respondents yet their ownership of parcels within the land is not under challenge. They aver that if any order should issue it should be directed at the Toghomo Sublocation Land Committee Self Help Group as an association.

8. It is therefore clear that the defendants have not rebutted the plaintiffs assertion that they have formed themselves into a self-help group and that they are intent on demarcating the land in Toghomo. Their suggestion that the order should be directed at the self-help group goes against the holding of the court in matters such as **Kipsiwo Community Self Help Group v Attorney General and 6 Others [2013] eKLR**. In any event that self-help group has not been enjoined as a respondent in this matter and I cannot issue an order against a non-party. What is of relevance to this court is that the respondents have had the opportunity to deny the allegation that they are the self-help group members and officials and they have not denied it and I must believe that they are.

9. The allegation that the subject matter land is unascertainable may not matter in this case because the respondents have conceded that there is an administrative unit known as Toghomo and it should be presumed by this court that the land that is being referred to is located within that administrative unit.

10. In this court's view there must be a community residing within the land and if as the plaintiffs are stating the defendants are bringing in non-community members with the intention of allocating them land it is clear that the plaintiffs and others may suffer loss. In this court's view the demarcation of land should be considered and implemented with the participation of the residents of the area concerned.

11. I also find that the issues raised in **paragraph 6** of this ruling are best determined at the main hearing of the suit.

12. I am satisfied that the applicants have in accordance with the test in the case of **Giella Vs Cassman Brown 1973 EA 358** demonstrated that they have a *prima facie* case against the defendants and that they may suffer loss that can not be compensated for by way of damages in respect of land that they may have resided on for a long period. Consequently and to avert any prejudice to any of the parties this court finds it necessary to allow the application by the plaintiffs.

13. I therefore allow the plaintiffs' application dated 15/1/2021 in terms of **Prayers Nos. (c) and (d)** thereof.

14. I also direct that the plaintiffs shall file and serve their bundle of copies of documents to be relied on within **14 days** of this order and that the defendants shall file and serve their bundle of documents to be relied on within **14 days** of the last date on which service of the plaintiff's bundle is due and no documents shall be filed outside the given time frames without leave of court formally applied for with justification.

15. This suit shall be mentioned on the **8th June 2021** for issuance of a hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 11TH DAY OF MAY, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.