



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 47 OF 2020

LEONARD LETITIO ONETU.....1ST PLAINTIFF

JULIUS LENGETE OLODARU.....2ND PLAINTIFF

TETU LESINET.....3RD PLAINTIFF

VERSUS

KARASANKA OLE MAAL.....1ST DEFENDANT

EMMANUEL KILELU MBARARIA.....2ND DEFENDANT

JACKSON LEMOMO MEREESI.....3RD DEFENDANT

ESELENKEI GROUP RANCH.....4TH DEFENDANT

THE LAND ADJUDICATION OFFICER.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 4th August, 2020 wherein the Applicants' seeks orders of temporary injunction against the 1st to 3rd Defendants either by themselves, their agents or servants from proceeding with the subdivision, survey, allocation and or alienation of parts of land parcel number KAJIADO/ ESELENKEI/ 1, hereinafter referred to as the suit property pending the hearing and determination of the suit. Further, that the 1st to 3rd Defendants be restrained from withdrawing monies or funds from Account No. [XXXX]: Eselenkei Group Ranch held at Kenya Commercial Bank, Emali Branch pending the determination of this suit and an order be issued for the auditing of the 4th Defendant's book of accounts including bank accounts by a Public Auditor.

The application is premised on the grounds on the face of it and the supporting affidavit of LEONARD OLETU where he deposes that the Plaintiffs are bona fide and registered members of Eselenkei Group Ranch and therefore hold shares to the suit property which is a community land that the 4th Defendant holds in trust including for the benefit of the community. He claims the 4th Defendant has never held elections since the year 2015 as the 1st to 3rd Respondents have blatantly refused to do so. He explains that in 2019 during the congregation of the 4th Respondent's Annual General Meeting, together with three other members of the Community Land Management Committee, they resigned from being members of the said committee due to embezzlement including misappropriation of funds by the 1st to 3rd Respondents herein. Further, on 6th January, 2020, about 13 members of the 4th Defendant wrote to the 5th Defendant expressing their complaints, frustrations and misconduct on the part of the 1st to 3rd Defendants in the control, management including conduct of the 4th Defendant's affairs. He insists the members of the 4th Defendant's management committee is not legally as well as properly constituted. He avers that on 20th January, 2020, the 5th Defendant summoned the Management Committee of the 4th Defendant to mediate on the raging dispute between the members but the same failed. Further, the Kajiado South Sub County Security Committee chaired by the Deputy County Commissioner resolved that the marking of group ranch boundaries to proceed; and the 1st Defendant to call an annual general meeting of the members after demarcation of the said boundaries. He avers that the 1st to 3rd Defendants without calling for the Community Assembly for decision making, proceeded to procure the services of Geodev (K) LTD , a land survey as well as mapping company to subdivide and beacon the suit property. Further, the surveyor is currently busy surveying and fixing beacons on the land. He reaffirms that the actions of the 1st to 3rd Defendants are illegal and unlawful. Further, the 1st to 3rd Defendants have been jointly and severally receiving unaccounted sums of money

on behalf of the 4th Defendant and engaged in embezzlement of the said funds invested in the aforementioned account. He states that the 1st Respondent has singlehandedly been withdrawing funds from the 4th Respondent's account and depositing in various private accounts. He further claims the 1st to 3rd Respondents have been fraudulently receiving monies in cash and on account of MPesa accounts from the 4th Respondent's agents which were meant to be deposited in the 4th Respondent's account for investments as well as developments. He reiterates that there is lack of transparency in distribution of plots in Oltotoi Trading Centre on the part of the 1st to 3rd Respondents as they demarcated the said plots and distributed to their cronies. Further, the 1st to 3rd Respondents have failed to convene meetings for purposes of coordinating the development agendas of community land use plans.

The 1st Defendant KARASANKA OLE MAAI who is the Chairman of the 4th Defendant opposed the application and filed a replying affidavit where he deposes that the group ranch has been holding annual general meetings every year save for 2020 due to the COVID Pandemic. He confirms that on 13th November, 2018, they held an annual general meeting where the 1st Plaintiff was elected as a Committee member of the Group Ranch. Further, on 1st July, 2019, they held another annual general meeting where they were reelected into office including the 1st Plaintiff. He contends that land known as Loitoktok/ Eselenkei/ 1 is non-existent as the same was closed for subdivision and individual members issued with title deeds. Further, the subdivision has been ongoing from 2004. He avers that on 20th January, 1993 during an annual general meeting, the members passed a resolution for the group ranch to be subdivided. Further, subsequently, in 2004, the then officials entered into a Survey Agreement for subdivision of the Group Ranch. Further, the said Agreement was terminated on 10th January, 2011 as the Surveyor failed to perform his obligations. He states that on 31st May, 2011, during an AGM, it was resolved to register 1,523 new members and to subdivide the Group Ranch. Further, the officials entered into a Survey Agreement with Geotechnika Africa Limited for subdivision of the Group Ranch as well as Oltotoi Trading Centre on 31st December, 2018. He further avers that Geotechnika Africa Limited handed over to Geodev (K) Limited as they lacked manpower, and this culminated in another Agreement with them dated the 19th June, 2020. He claims the Plaintiffs in frustrating the survey process have been writing letters threatening to disrupt the exercise. He further reiterates that they are expected to finalize the process of subdivision and issuance of individual title deeds to members within three (3) years and have since received communication from the Ministry of Lands and Physical Planning to that effect to finalize the said exercise by end of June, 2021, failure of which the Community Land Act shall apply. He contends that the orders sought are prejudicial as it will affect non parties to this suit and over 2000 former members who have been issued with title deeds. Further, it will be prejudicial to members who have not been issued with title deeds. He further reiterates that the continued subdivision will not prejudice the four Plaintiffs as they would get their rightful shares from the Group Ranch.

The 5th Respondent opposed the application and filed a replying affidavit sworn by J K Lessan, the Land Adjudication and Settlement Officer, where he denies having been engaged in mediation/arbitration process between the parties. He deposes that Geodev (K) LTD surveyors are currently engaged in the marking of the perimeter boundary and subsequently they will produce an approved subdivision plan. He contends that the allegation that the 4th Respondent has never held its elections since 2015 is false. Further, that elections were conducted on 13th November, 2018 and new officials including the Applicants were elected into office. He insists after resignation of the four (4) members of the committee, the remaining six (6) still form a quorum capable of transacting business of the ranch. Further, their resignation was purely personal and voluntary, therefore not binding to the majority of the members in the Group Ranch. He explains that under the Community Land Act, all group ranches with a Certificate of Dissolution have up to three years to finalize subdivision and Eselenkei is one of them. He reiterates that the current officials are now a caretaker committee and mandated to finalize the subdivision process including issuance of title deeds to the members, thereafter their office will be dissolved.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 4th August, 2020 including the respective parties' affidavits and rivaling submissions, the following are the issues for determination.

- Whether the 1st to 3rd Defendants should be restrained from subdividing the suit property pending the outcome of the suit.
- Whether the 1st to 3rd Defendants should be restrained from operating the 4th Defendants accounts.

The Plaintiffs in their submissions aver that they have satisfied the criteria set for injunctive reliefs. They claim the 4th Defendant has no mechanism for internal dispute resolution but they attempted to engage in internal dispute resolution mechanisms. They contend that their case demonstrates a prima facie case with probability of success. Further, they stand to suffer irreparable harm if the orders sought are not granted. They insist the balance of convenience tilts in their favour. To buttress their averments, they relied on the following decisions: **Samuel Macharia & Another Vs Kenya Commercial Bank & 2 others (2012) eKLR; Giella Vs Cassman Brown (1973) EA 358; Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 Others (2016) eKLR; Winfred Nyawira Maina Vs Peterson Onyiego Gichana (2015) eKLR; and Kwanza Estates Limited V Dubai Bank Kenya Limited (2013) eKLR.** The 1st to 4th Defendants in their submissions insist the Plaintiffs have not established a prima facie case to warrant the orders sought. They insist the suit property is no longer in existence; the grant of an injunction shall create a statutory crisis and offends the rules of natural justice. Further, the granting of an injunction would be tantamount to condemning some of the parties unheard. They reiterate that the continued subdivision will not jeopardize the Plaintiffs as they would get their rightful shares. They aver that the Plaintiffs will not suffer any irreparable harm as just like 3, 600 members of the Group Ranch are entitled to their respective parcels of land upon subdivision. To support these arguments they relied on the following decisions: **Giella Vs Cassman Brown (1973) EA 358; Imanke Ole Lekincha Lolojie & 105 Others V Mailua Group Ranch & 2 others (2020) eKLR; Peter Tomito Korinko & 2 Others V Korinko N Nkoliai & 12 Others (2014) eKLR; Panian Ole Motua & 3 Others V Registered Group Representatives Kimana Tikondo Group Ranch (2006) eKLR; and Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR.**

In line with the principles established in the case of **Giella Vs Cassman Brown (1973) EA 358**, I will proceed to decipher whether the Plaintiffs have established a prima facie case to warrant the orders sought for interlocutory injunction. The Plaintiffs claim the 1st to 3rd Defendants have commenced subdivisions of suit property without consent of the members. Further, no AGM has been held and the said

Respondents are swindling monies from the 4th Respondent's accounts. They insist the committee membership of the group ranch is not properly constituted and the subdivision should be terminated. From the averments in the replying affidavits and respective annexures, it has emerged that the 4th Defendant has indeed been holding annual general meetings contrary to the Plaintiffs' averment. It has also emerged that subdivision of the suit property commenced in 2004 and over 2000 members have already been issued with their respective title deeds. I note the 1st Plaintiff was an elected official but he decided to voluntarily resign from his position. In the minutes for the AGM dated the 13th November, 2018, it is evident the members present were all pushing for the subdivision of the suit property. Further, as per annexure 'KOM 3', it is clear the members on 26th January, 1993, resolved to dissolve the Group Ranch and were to obtain consent of the Land Control Board to enable them do so. Further, the Respondents have annexed the various Agreements they have with the respective surveyors for the subdivision of the Group Ranch. I note the issue of subdivision has time lines, and based on the letter from the Ministry of Lands and Physical Planning which was annexed to the Respondent's affidavit, the officials of the Group Ranch are expected to conclude the exercise which has been ongoing from 2004 by end of June 2021.

On the issue of the accounts, I opine that this is an issue that can only be dealt with during hearing once viva voce evidence is adduced to prove that upon auditing of the accounts, there is evidence of misappropriation of the funds. I note the suit property is no longer in existence and the Plaintiffs have not indicated if they are acting for the rest of the members and neither have they controverted the averments by the Defendants. In the case of **Peter Tomito Korinko & 2 Others V Korinko N Nkoliai & 12 Others (2014) eKLR**, Justice Okongo while declining to grant an order of injunction observed that stopping a process that has cost the members huge sums of money due to minor faults and errors in the exercise which can be corrected , is unfair.

I note the Surveyors have been engaged from 2004 to undertake this exercise and the Plaintiffs have not confirmed whether they have done the same for free.

Based on the facts before me, at this juncture, I find that the Plaintiffs who are only three members, have not established a prima facie case to warrant the orders sought to restrain the continued subdivision of a group ranch including allocation of land to all the members that include them. They have further not indicated whether the Defendants denied them their rightful shares of the group ranch. In line with the parameters set in the case of **Nguruman Ltd v Jan Bonde Nelson & 2 others, Civil Appeal No.21 of 2014(UR)** where the Court of Appeal decided that where a prima facie case is not established, then irreparable injury and balance of convenience need no consideration and I will decline to consider the remaining two conditions as the Plaintiffs failed to meet the first condition set to warrant the grant of an injunction.

It is against the foregoing that I find the Notice of Motion application dated 4th August, 2020 unmerited and will proceed to dismiss it.

Parties are directed to comply with Order 11 of Civil Procedure Rules.

Costs will be in the cause.

Dated, Signed and Delivered Virtually in Kajiado this 21st Day of June, 2021.

CHRISTINE OCHIENG

JUDGE