



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 54 OF 2020

KILELO OLE KILITIA.....1ST PLAINTIFF
KIKARDI OLE NOOMPATIT.....2ND PLAINTIFF
KETURA TIRKUALE3RD PLAINTIFF
MARIKA OLE KITESHO.....4TH PLAINTIFF
SAIYANKA OLE KIREKEI.....5TH PLAINTIFF
MOLOIMET OLE LEPAPA.....6TH PLAINTIFF

VERSUS

DANIEL METOE.....1ST DEFENDANT
DANIEL MAPI MBARNOTI.....2ND DEFENDANT
SUYIAN LEPARUA.....3RD DEFENDANT
MBIRIKANI GROUP RANCH.....4TH DEFENDANT
THE COUNTY LANDS ADJUDICATION OFFICER, KAJIADO....5TH DEFENDANT
THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 27th August, 2020 where they seek for various orders including leave of court to give notice of institution of this suit by public advertisements in any of the local daily newspapers; temporary injunction against the 1st, 2nd and 3rd Defendants from withdrawing funds from Account No. 0740262366427 at Equity Bank Loitoktok Branch in the name of MBIRIKANI Group Ranch pending outcome of the suit; temporary injunction against the 1st, 2nd and 3rd Defendants, their agents or servants from undertaking survey, subdivision, allocation or alienation of LR. No. LOITOKTOK/ MBIRIKANI/ 730 pending the outcome of this suit; 1st, 2nd and 3rd Defendants to be compelled to render accounts of the 4th Defendant to the Plaintiffs and the Community Assembly or Annual General Meeting and the court to appoint an auditor.

The application is premised on the grounds on the face of it and the supporting affidavit of the 1st Applicant KILELO OLE KILITIA where he deposes that the 4th Respondent has a Constitution and By Laws which governs its decision-making process, operations and decisions. He confirms that the 1st, 2nd and 3rd Respondents were elected at the 4th Defendant's Annual General Meeting held on 27th March, 2019. He claims on 29th February, 2020 the 1st to 3rd Defendants including some members of the group ranch committee entered into a written agreement with Geoflex Consultants Co. Ltd to map out, survey, subdivide, show parcel beacons to members to enable them process individual title deeds in respect to land parcel number Kajiado/ Imbirikani/ 733. Further, the property described in the written agreement with Geoflex Consultants Co. Ltd as Kajiado/ Imbirikani/ 733 is nonexistent. He contends that the 1st to 3rd Respondents are using a Letter of Consent from the Land Control Board issued in 2005 to subdivide the suit land which consent has since been rendered void. He explains that the aforementioned surveyor submitted his invoice of Kshs. 81, 880, 000 on 9th March, 2020 to the 4th Respondent for payment which was received but never brought to the attention of the Special General Assembly. Further, the said private surveyors have moved to court for breach of contractual obligations against the 1st to 3rd Respondents and are claiming Kshs. 500,000,000. He avers that the 1st to 3rd

Respondents have approached the 4th Respondent's tenants for advance payments of lease rents. Further, the 4th Respondent has never held its Annual General Meeting and or Community Assembly to deliberate on the mapping, subdivision and or beaconing of land parcel number Loitoktok/ Mbirikani/730. He states that the 1st to 3rd Respondents are acting in breach of the 4th Respondent's Constitution. Further, several opinion leaders including Chiefs, Former Ward Representatives views on management of 4th Respondent have been ignored. He reiterates that the 1st to 3rd Respondents have never tabled their remunerations by virtue of being office holders and never opened books of accounts for inspection. Further, the suit property is at the detriment of being alienated and wasted away. He reaffirms that the suit raises substantial issues of law as the 1st to 3rd Respondents are hiding under the cover of COVID – 19 pandemic to manage and run affairs of the 4th Respondent.

The 1st to 4th Defendants opposed the application and filed a replying affidavit sworn by the 1st Defendant DANIEL METOE where he confirms that the 4th Defendant has its Constitution and By Laws which they adhere to. He contends that the Agreement dated the 29th February, 2020 between Geoflex Consultants Co. Ltd and the 1st to 4th Defendants was frustrated by dint of a force majeure before the same came into operation. Further, that they had forwarded the name of Charles Amesa Angira t/a Geoflex Consultants Co. Ltd to the County Government of Kajiado for its approval, vide their letter dated the 13th March, 2020 and on 16th March, 2020 they received a response from the said office informing them that the said Surveyor was not suitable to conduct the survey. He confirms that on 16th March, 2020, the 1st to 4th Defendants held a meeting with Charles Amesa Angira t/a Geoflex Consultants Co. Ltd and relayed this information. Further, the Plaintiffs were duly notified of the termination of the survey and title registration agreement dated the 29th February, 2020. He avers that land parcel number Kajiado/ Mbirikani/ 733 belongs to the 4th Defendant and that consent of the Land Control Board issued in 2005 to subdivide the said land is still valid. He denies that the surveyor submitted an invoice amounting to Kshs. 81, 880,000/= to them and insists the same is a forgery which they reported to the Directorate of Criminal Investigations (DCI) Loitoktok vide OB No. 2020 and investigations are ongoing. Further, that the said Surveyor has not undertaken any survey works and cannot claim any payment and he filed a suit in the High Court to wit Nairobi Misc Case Number E 677 of 2020 which was rejected and they were awarded costs. He claims the Plaintiffs are acting in cahoots with the said surveyor so as to scuttle the subdivision exercise. He further denies that the survey exercise has been undertaken without consultation with the members and states that the Plaintiffs even participated in the 4th Defendant's opinion leaders meeting held on 7th March, 2020 in which the 1st Plaintiff including others resolved that the surveyors fees be secured from the 4th Defendant's tenants so as to cushion vulnerable members. He further denies that no funds belonging to the 4th Defendant has been misappropriated. He reiterates that the 4th Defendant has only engaged one surveyor namely Kolmans Geomatic Consultants whose activities are being monitored as well as supervised by the Respondents together with the Land Adjudication and Settlement Officer, Office with the County Government of Kajiado. He reaffirms that the Applicants failed to undertake subdivision and allocation of individual titles to members of the 4th Defendant during their tenure in office. Further, that out of over thousands of members of the 4th Defendant, it is only the Plaintiffs who are disgruntled and yet they do not represent any class of members. He insists the instant application has been overtaken by events since the Plaintiffs are seeking to stop a survey exercise which has been continuing since April, 2020 and is at an advanced state.

The Plaintiffs' filed a further affidavit sworn by the 1st Applicant KILELO OLE KILITIA where they reiterated their claim and denied the averments in the replying affidavit. They insist the 1st to 3rd Defendants are not running the affairs of the 4th Defendant properly; contend that the opinion leaders meeting was not an Annual General Meeting and that the surveyor is carrying out works without consultation with the members.

The 5th and 6th Defendants did not file any response to oppose the instant application which was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 27th August, 2020 including the various affidavits and rivalling submissions, the only issue for determination is whether the 1st to 3rd Defendants should be restrained from subdividing and allocating the suit land pending the outcome of the suit.

The Plaintiffs in their submissions aver that they have met the three thresholds of law in granting injunctive reliefs. They insist the meeting held on 7th March, 2020 to discuss survey was not an Annual General Meeting and the resolutions made therein are a nullity. Further, that they raised complaints on how the lease funds were being used by the 1st to 3rd Defendants. They contend that no books of accounts have been submitted to court and the appointment of the surveyors is not known to the membership. They claim they will suffer irreparable harm if the orders sought are not granted. To buttress their averments, they relied on the following decisions: **Giella Vs Cassman Brown (1973) EA 358; Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125 and Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012.**

The 1st to 4th Defendants in their submissions contend that no class suit has been filed by the 1st to 4th Applicants on which prayer for issuance of notice of institution of suit can be granted. Further, for a representative suit, notice has to be given to all affected members. To support their averments, they have relied on the following cases of **Jack Mukhongo Munialo VsNzoia Sugar Co. Ltd & Another (2017) Ekkr and Ahmed Dolal & 9 Others (suing on their behalf and on behalf of 27 members of Likoley Farmers V KENGEN & Another (2018) eKLR.** They further submitted that the Applicants had not satisfied the test for granting an injunction. To support these arguments they relied on the following decisions: **Giella Vs Cassman Brown (1973) EA 358 and Fredrick Nganga Thuo V Peter Mungai Njuho (2019) eKLR.**

I will proceed to decipher whether the Plaintiffs have established a prima facie case to warrant the orders sought for temporary injunction as established in the case of **Giella Vs Cassman Brown (1973) EA 358.** It is the Plaintiffs' contention that the 1st to 3rd Defendants hired a surveyor to commence the subdivision of land parcel number Kajiado/ Mbirikani/ 733 without consent of the members; controlled and managed the affairs of the 4th Defendant without authority of the community assembly; failed to disclose the costs of mapping, subdivision as well as beaconing to the members as well as source of funds to cater for it; and failed to open books of accounts for 4th Defendant for inspection by the members. The 1st to 4th Defendants have opposed these allegations and explained how the surveyor was hired to

undertake the subdivision exercise. They contend that the survey exercise is being undertaken with consultation with the members and the Plaintiffs even participated in the 4th Defendant's opinion leaders meeting held on 7th March, 2020 where the issue of how to cater for the survey fees was resolved that the same was to be secured from the 4th Defendant's tenants so as to cushion vulnerable members. They denied the allegations on misappropriation of funds.

From perusal of annexures in the respective affidavits, I note in the minutes for the Opinion Leaders Meeting held on 7th March, 2020, wherein the 1st Plaintiff attended, all the members present supported the subdivision and payment of the exercise using the lease fees. Further, as per the letter dated the 9th December, 1991, the Director of Land Adjudication and Settlement actually gave consent to dissolve the 4th Defendant. Further, a consent of the Land Control Board to that effect was issued on 17th August, 2005 to subdivide the 4th Defendant's land parcel number Loitoktok/ Mbirikani/ 27. I note there are photographs annexed to the supporting affidavit confirming the subdivision exercise has been ongoing with the Kolmans Geomatic Consultants (K) Ltd confirming as per their letter dated the 4th July, 2020 that they completed the boundary survey and prepared Cadastral Plan for the 4th Defendant including coordinates list. The Plaintiffs had an issue with how the Surveyor was engaged to undertake the exercise but I note as per the letter dated the 17th March, 2020 the Geoflex Consultants Limited Contract was terminated after the County Government of Kajiado declined to issue its approval. Further, they have since moved to court for breach of contract. The 1st to 4th Defendants have annexed the Agreement they had with the Kolmans Geomatic Consultants (K) Ltd to undertake subdivision of the group ranch land. On perusal of the 4th Defendant's Constitution annexed to the supporting affidavit, I note the 1st to 3rd Defendants as officials of the 4th Defendant are mandated to oversee the survey exercise. On the issue of the accounts, the Plaintiffs did not furnish this court with any statements to confirm the alleged misappropriation and I opine that this is an evidentiary issue which will require viva voce evidence to be adduced. In the case of Leonard **Letitio Onetu & 2 others v Karasanka Ole Maai & 5 others [2021] eKLR**, this court favourably cited the case of **Peter Tomito Korinko & 2 Others V Korinko N Nkoliai & 12 Others (2014) eKLR**, where 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 undertaken the same for free.

Based on the facts before me, while associating myself with the decision cited above at this juncture, I find that the six Plaintiffs who have not demonstrated if they are representing the other members of the 4th Defendant have failed to establish 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 the Plaintiffs. They have also not demonstrated if the 1st to 3rd Defendants have declined to allocate them their rightful share of the 4th Defendant's land. Based on 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 27th August, 2020 unmerited and will proceed to dismiss it.

Costs will be in the cause.

Dated, Signed and Delivered Virtually in Kajiado this 29th Day of July, 2021.

CHRISTINE OCHIENG

JUDGE