



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 341 OF 2019

FORMERLY (KAJIADO) ELC CASE NO 186 OF 2018

KASAINO OLE SELEKA 1 ST PLAINTIFF

JAMES MOKOIRE MOONKA..... 2 ND PLAINTIFF

JOHN MILIA MULI.....3 RD PLAINTIFF

KILELO OLE SEITA..... 4 TH PLAINTIFF

MANINA RIKOYIAN..... 5 TH PLAINTIFF

- VERSUS -

DANIEL KIRIA LETURESH1 ST DEFENDANT

ELIJAH KEEN NAINI.....2 ND DEFENDANT

JOSEPH KIPAIPAI NTAANI3 RD DEFENDANT

EUSTACE N KITHUMBI.....4 TH DEFENDANT

JOSIAH K LESSAN..... 5 TH DEFENDANT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....6 TH DEFENDANT

MINISTRY OF LANDS AND PHYSICAL PLANNING,KAJIADO COUNTY SURVEYOR.....7 TH DEFENDANT

KAJIADO COUNTY REGISTRAR.....8 TH DEFENDANT

DIRECTOR OF PHYSICAL PLANNING, KAJIADO COUNTY9 TH DEFENDANT

RULING

1. The plaintiffs initiated this suit at Kajiado Environment and Law Court through a plaint dated 27/11/2018. The plaint was subsequently amended on 12/11/2019. Subsequent to that, at the prompting of the plaintiffs, Ochieng J recused herself from adjudicating this dispute and sent the file to the Presiding Judge of the Environment and Land Court at Nairobi. The Presiding Judge of the Court, S O Okongo, assigned the file to me on 25/10/2019.

2. Before me for determination is the plaintiff’s application dated 12/11/2019 through which the plaintiffs’ seeks the following verbatim interlocutory orders against the defendants:

1. That this application be certified as urgent and that the same be heard on a priority basis by Presiding Judge or any ELC Judge owing to the recusal of Ochieng J on 8th October 2019.

2. An order of the court injuncting the defendants/respondents from proceeding with the intended ongoing sub-division of

the suit property (jointly and severally being LTK/OLGULULUI/OLOLARASHI/6477) pending the hearing and determination of this application and substantive suit.

3. An order of the court invalidating all actions of the defendants/respondents in relation to the suit land in ELC 186 of 2018 Kajiado, which are devoid of legality per sections 7, 21 (c) and 23 (b) of the Community Land Act 2012 and the ancillary Community Land Regulations 2017.

4. An order of the court that the Presiding Judge renders a verdict in respect of the plaintiffs' motion dated 27th November 2018 in ELC 186 of 2018 Kajiado, and also hears this application and the substantive suit.

3. The application was supported by an affidavit sworn on 12/11/2019 by John Milia Muli. In summary, the case of the plaintiffs is that they are members of the Olgulului Olorarashi Group Ranch, registered under the **repealed Land (Group Representatives) Act Cap 287**. The Ranch owns Parcel Number LTD/OLGULULUI/OLOLARASHI/6477 and other Group resources. The 2nd, 3rd and 4th plaintiffs are Secretary, Treasurer and Vice Chairman, respectively, elected as officials of the Ranch under the repealed Act. On 19/11/2018, the 1st defendant, with the collusion of the 4th and 5th defendants, orchestrated the election of Olgulului Olorarashi Group Ranch which the 1st, 2nd and 3rd defendants were elected as officials and an illegal Certificate of Incorporation granted on 21/11/2018 under the repealed **Land (Group Representatives) Act, Cap 287**. They contended that the said Act was repealed effective from 21/9/2016. Secondly, the elections held on 19/11/2018 were a nullity and defied the relevant provisions of the **Community Land Act [Sections 7,45 and 47] and Regulations 3(8) and 4(2) of the Community Land Regulations of 2017**. Thirdly, there was no proper community assembly that would have legally elected a community land management committee which, in any event, would not have been elected under the repealed law but under the **Community Land Act of 2016**.

4. Consequently, the plaintiffs contend that the Group Ranch officials elected and registered under the repealed Act are illegally in office. They seek the following verbatim orders in the main suit:

a. An injunction stopping the 1st, 2nd and 3rd defendants from assuming the leadership of Olgulului Olorarashi Group Ranch pending the hearing and determination of this suit (sic);

b. An order of the court invalidating the elections of the 19th of November and all consequential actions of the 1st, 2nd and 3rd defendants in relation to the assets and moneys of the community;

c. A declaration by the court that the sub-division of the suit land is illegal for failure to abide with EMCA 1999, the Wildlife Conservation and Management Act 2012, and the Community Land Act 2016;

d. An order of the court stopping the ongoing sub-division forthwith;

e. An order of the court injunctioning the 7th, 8th and 9th defendants from approving sanctioning or issuance of resultant titles in respect of the suit land;

f. An order nullifying all actions of the defendants with effect from 19th November 2018;

g. An order of the court restoring the status existing before the 19th of November 2018;

h. An order mandating the proper officials of Olgulului/Olorarashi Group Ranch to comply with the law pertaining to Community Land Act 2016;

i. Costs

j. Any other relief that may be viable or expedient for the court to grant

5. Besides the foregoing, the plaintiffs contend that the 1st to 3rd defendants are engaged in illegal sub-division of the Community Land. It is on account of the above grounds that the plaintiffs/applicants seek the interlocutory orders itemized in the application under consideration.

6. The 1st to 5th defendants opposed the application through a replying affidavit sworn on 3/7/2020 by Mr Daniel Kiria Leturesh. He deposes that he is the Chairman of the Group Ranch. In summary, their case is that the Constitution of the Group Ranch was amended on 15/8/2012 to provide a framework on the holding of an annual general meeting. The annual general meeting held on 19/11/2018 was duly convened in tandem with the Constitution of the Group Ranch and new group representatives were duly elected. Prior to that, in 2005, members of the Group Ranch had resolved to sub-divide the suit land. The Group Ranch applied to the Director of Land Adjudication and Settlement for consent to dissolve the Group Ranch and divide the land among the members. The sub-division has been ongoing since 2006. It was in the interest of the members that the suit land be sub-divided and individual titles be processed.

7. The application was canvassed through written submissions. Counsel for the applicant submitted that the **Land (Group Representatives) Act, Cap 287** ceased to have the force of law on 21/9/2016. Land held by group ranches was supposed to be converted into community land and registered as community land under the Act. Further, land held by group representatives was not supposed to be sold, leased or converted into private land before it is registered under the Act. Counsel argued that the sub-division of the suit property by the 1st to 3rd defendants before conversion of the Group into a community and before registration of the land as community land amounted to an illegality.

8. Counsel argued that instead of undertaking the transition set out in the Community Land Act, the 1st to 4th defendants decided to purport to conduct an election under the repealed Act and the 4th defendant issued them with an illegal certificate under the repealed law. Counsel

added that there was no legally cognizable community or a valid community land management committee. Counsel urged the court to grant the orders sought in the application.

9. In response, the 1st to 3rd defendants filed written submissions through the firm of Tobiko, Njoroge & Company Advocates. Counsel for the said defendants framed the following as the four issues falling for determination in the application: (i) whether this court has jurisdiction to hear and determine this application; (ii) whether the applicants had satisfied the criteria for grant of injunctive relief; (iii) whether the ongoing sub-division of the Group Ranch land was legal; and (iv) whether the issues raised by the applicants were *res judicata*.

10. Counsel argued that this court lacked jurisdiction to adjudicate this dispute because **Section 39(3)** of the **Community Land Act** provides for alternative dispute resolution mechanisms. Counsel added that since the plaintiffs had raised the issue of lack of an environmental impact assessment licence, the dispute should be referred to the National Environment Tribunal.

11. Counsel added that the plaintiffs had not satisfied the criteria in **Giella v Cassman Brown (1973) EA 358**. Further, counsel added that the balance of convenience tilted in favour of the group members who stood to suffer irreparable damage if the injunctive orders were granted.

12. On the legality of the sub-division, counsel submitted that the sub-division was legal because it began in 2006. Counsel added that **Regulation 26(7)** of the **Community Land Regulation 2017** provided that group ranches that were dissolved before the passage of the **Community Land Act** should be allowed to complete the process within three years of the commencement of the Act hence the defendant should be allowed to complete the sub-division.

13. On the issue of *res-judicata*, counsel submitted that the plaintiffs contested the validity of the elections of the group representatives in the application dated 27/11/2018 and Ochieng J directed parties to comply with Order 11 and the matter be heard on priority basis, hence the issue was *res-judicata*.

14. I will dispose the two issues touching on the jurisdiction of the Court before I focus on the key questions in the application. The first limb of the issue of jurisdiction is hinged on **Section 39(3)** of the Community Land Act. Section 39 of the Act provides as follows:

1. A registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.

2. Any dispute arising between members of a registered community, a registered community and another registered community shall, at first instance be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.

3. Where a dispute or conflict relating to community land arises, the registered community shall give priority to alternative methods of dispute resolution.

4. Subject to the provisions of the constitution and this Act, a court or any other dispute resolution body shall apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.

15. I have considered the above issue in the context of the circumstances of this case and the above legal framework. Firstly, the present suit was not initiated by a registered community; it was initiated by individuals. Secondly, it is not clear at this moment if Olgulului Oloarashi Group Ranch is a registered community within the meaning of the Community Land Act 2016. Thirdly, the present suit involves parties who are not members of the Group Ranch. I do not therefore think there is a proper basis for shutting the doors of this court to the plaintiffs on the basis of the framework in **Section 39 (3)** of the **Community Land Act**. I accordingly reject that limb of objection to the jurisdiction of this court.

16. The second limb of objection to the jurisdiction of this court hinges on the doctrine of *res-judicata*. The 1st to 3rd defendants contend that Ochieng J made binding pronouncements on the issue of elections. I have looked at the record. The Judge did not make any finding on the issues under Consideration in the present application. What the Judge did on 23/5/2019 was to give directions on disposal of the main suit. She did not make findings on the issues in the present application. I therefore see no proper basis for invoking the doctrine of *res judicata* in the present application. Having disposed the question of jurisdiction, I now turn to the application dated 12/11/2019.

17. I have considered the application, the responses thereto, and the parties' submissions. I have also considered the relevant legal framework and jurisprudence. Two key questions fall for determination in the application. The first question is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive relief. The second question is whether the final order sought in prayer 3 of the motion is available at this stage. I will make brief sequential pronouncements on the two questions in the above order.

18. The criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive relief was articulated in **Giella v Cassman Brown (1973) EA 358**. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate that if the injunction is denied, he would stand to suffer injury that may not be indemnified through an award of damages. Third, should the court have doubt on both or either of the above two limbs, the application is to be decided on a balance of convenience. Lastly, at this interlocutory stage, the court does not make conclusive or definitive findings on the key issues in the suit. Definitive and conclusive findings are reserved for judgment after trial

19. Without saying much, from the evidential materials presented to the Court, the 1st to 3rd defendants appear to be carrying out sub-division of the Group Ranch land on account of a certificate of incorporation issued to them on 21/11/2018 by Mr Eustace N Kithumbu, Registrar of Group Representatives, under the **repealed Land (Group Representatives) Act, Cap 287**. The said Act was repealed by the Community Land Act of 2016 which came into force on 21/9/2016. There is therefore a probability, as contended by the plaintiffs, that the certificate of incorporation dated 21/11/2018 pursuant to which the three defendants are sub-dividing the land may be an illegality. The defendants will have the opportunity to demonstrate otherwise at the trial of the suit.

20. Secondly, the dispute in this suit relates to land resource belonging to a large group. It is imperative that the court establishes that a proper transition process has taken place within the framework of the **Community Land Act** and there is in place a legitimate community land management committee before the sub-division and disposal of the group land resource can continue. Put differently, if the group land resource is not preserved, there is likely to be irreparable injury to the plaintiffs and to other members of the Group Ranch. In the circumstances, the court will preserve the suit property and fast-track the disposal of the main suit.

21. On the second question, prayer 3 is in the nature of a final order. Were the court to grant it at this interlocutory stage, trial will become an academic exercise. I will therefore not grant that prayer at this interlocutory stage.

22. In light of the foregoing, the plaintiffs' notice of motion dated 12/11/2019 is disposed in the following terms:

- a. Pending the hearing and final determination of this suit, the sub-division of Land Parcel Number LTK/Olgulului/Ololarashi/6477 shall remain suspended and the Registrar of Community Land shall not register any instrument relating to the said land.**
- b. The plaintiff shall amend the plaint to join the Registrar of Community Land as party to this suit.**
- c. A hearing date within the next term shall be set for this suit at the time of rendering this ruling.**
- d. Costs of the application shall be in the cause.**
- e. Parties are encouraged to pursue alternative dispute resolution within the framework of the Community Land Act in the interim period.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF NOVEMBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Ms Koki Mbulu for the Plaintiffs

Mr Mukeli for the 1st to 3rd Defendants

Court Clerk - June Nafula