



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 12 OF 2019

ESTATE OF MUSEE ARAP CHEPSIROR (represented by PACILICIA SENGE CHEPSIROR &

JUDITH CHELAGAT CHEPSIROR.....PLAINTIFFS

VERSUS

B.O.M. CHEPKOIYO PRIMARY SCHOOL...1ST DEFENDANT

WILSON SANGA.....2ND DEFENDANT

ROBERT MULIMO.....3RD DEFENDANT

EUNICE WANGUI.....4TH DEFENDANT

PERMANENT SECRETARY TREASURY.....5TH DEFENDANT

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

RULING

1. The Notice of Motion dated 5/2/2019 and filed on 7/2/2019 seeks the orders which are replicated herein below verbatim as follows:

(1)spent

(2) That while pending *inter partes* hearing of this application, the honourable court be pleased to order the preservation of the prevailing *status quo* regarding the land comprised in Title No. Sinyerere/Sitatunga Block 7/Chepkoiyo/144 in the following terms:-

(a) That the 1st and the 5th defendants do preserve the land comprised in Title No. Sinyerere/Sitatunga Block 7/Chepkoiyo/144 by not disposing, leasing or alienating the said land.

(b) That the applicants and who have at all material times been solely in possession and occupation of the land comprised in Title No. Sinyerere/Sitatunga Block 7/Chepkoiyo/144 do remain in exclusive possession and occupation of the said parcel of land.

(3) That upon *inter partes* hearing of the application the status quo order be extended to such time that the suit would be heard and determination.

(4) That the Officer in Charge, Sibanga Police Base, do ensure the compliance of the orders of this suit.

(e) That costs be in the cause.

2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of **Judith Chelagat Chepsiror** sworn on 5/2/2019. These are that the applicant are the administrators of the estate of Musee Arap Chepsiror who died in the year 2009; that the deceased owned 13.8 acres in Chepkoiyo farm which is occupied by his estate to date; that documents forwarded to land control board reflected the deceased's entitlement to be 13.8 acres; that however after survey the acreage was fraudulently reduced to 12.4 acres and the shortfall of 1.4 acres was issued with a new parcel number and allotted to 1st respondent who had not legally acquired it from

the deceased; that in 2017 the said parcel No. 144 was issued with a title in the name of the 5th respondent to hold in trust for the 1st respondent but on the ground the same remains in possession of the estate of the deceased; that title for plot No. 143 has not been issued in the name of the deceased for want of a full grant which has been delayed by a dispute as to how the land was to be shared. It is alleged that in the year 2018 the 1st respondent attempted to take possession of the land and the applicants are apprehensive the 1st respondent is likely to forcefully enter the suit land to plough the same or lease it to a third party. It is averred that the 1st respondent's institution stand on No. 422 far away from parcel no. 144 and that unless the *status quo* is maintained the suit may be rendered nugatory.

3. The replying affidavit to the application was filed on 5/3/2019. It is sworn by Joshua Nyakeruma Onyando, the Secretary of Board of Management- Chepsiror Primary school. The gist of his reply is that the deceased had a proposed acreage of 13.8 acres which was reduced upon a survey that included consideration of all public utilities on Chepkoiyo farm such as school; that in order to offset a loan owed by Chepkoiyo farm to the Agricultural Finance Corporation (AFC) the shareholders agreed to sell part of their land on individual basis to new persons and proposed to donate 8.1 acres to the 1st respondent; that the farm was surveyed in 1999 and the school was offered 5 acres; that this was approved by the annual general meeting of 16/6/1999 and ratified by another AGM held on 24/1/2001; that however by that date the deceased had sold 1 acre to one Pius Wekisi although the documents still reflected to be 13.4 acres; that therefore his entitlement of 12.4 acres which remained after the sale to Pius Wekisi was issued with No. 143 while the 1st respondent was allocated parcel No. 144 and 422. The deponent avers that plot No. 144 which is the parcel in dispute was formally given to the 1st respondent by Chepkoiyo Farm directors vide a letter dated 6/3/2004 and all objections were resolved by the committee. The deponent further states that the final members list duly signed by all members including the deceased was forwarded to the Land Registrar through the District Commissioner vide letter dated 26/7/2006 and it is now registered in the name of 4th respondent but reserved for the 1st respondent. However the respondents deny that the suit land shares a common boundary with plot No. 143 and they are separated by parcel No. 452 belonging to Pius Wekisi and as such the plaintiffs are not entitled to an order of injunction. The defendants deny that the land is in the possession of the plaintiffs; it is averred that in any event parcel No. 144 is public land and any occupation thereof would amount to trespass; that in 2013 the local community approached 1st respondent to donate land to set up a secondary school and the 1st respondent donated parcel No. 421 which now hosts Chepkoiyo secondary school; that the plaintiff attempts to invade the suit land commenced in 2009 and their actions have led to **Kitale Chief Magistrate's Criminal Case No. 1760 of 2018** which is pending determination. Thereafter it was decided the suit land be fenced off and funds have been committed to the purpose. It is averred that an injunction cannot issue as the defendants are registered owners who have demonstrated that their title was acquired lawfully property and procedurally and the plaintiffs do not have registrable interest in the suit land nor do they have any evidence of ownership of the suit land and do not thus merit an injunction order.

4. The 2nd, 3rd and 4th respondents are the chairman, secretary and treasurer of Chepkoiyo Farm Limited, they did not file a replying affidavit however they wrote a letter dated 4/3/2019 which they all signed and stamped with the company stamp indicating that the 1st respondent and Chepkoiyo secondary school are in possession of the lands allotted to the 1st respondent. They concur in all aspects with the narrative given in the replying affidavit of the 1st, 5th and 6th respondents.

5. I must in determining this application consider if the applicants have demonstrated that they have a prima facie case and if they would suffer damage that would not be capable of being compensated by way of damages in the event the orders sought were not issued.

6. It is apparent from documents filed so far that the suit land is in the possession of the 1st defendant and that it came to be in such possession after a series of meetings of the members of the farm. It is averred that the suit land does not share a common boundary with Parcel Number 143 which is owned by the applicants. Further it is deponed that a contractor has been engaged to commence works on the suit land for the purpose of erecting an early childhood development centre, a public institution.

7. In my view it is not crystal clear from the applicants' documents on the record that the applicants own the land or have ever owned it or had possession thereof. On the other hand the respondents have outlined the process by which they aver that the land came to be registered in the name of the Permanent Secretary to the Treasury to hold it on behalf of the 1st defendant. For now I consider that there is sufficient evidence that the suit land is owned by the 1st defendant and that any legality of the said title would have to be mounted at a full hearing of the instant suit.

8. Having found that the land is registered in the 1st respondent's name and that the applicants are not in possession of the land, no prima facie case has been made out by the applicants this court is therefore not in a position to grant the orders of temporary injunction they have sought.

9. There is also no evidence that the defendants intend to dispose of the land and indeed they have averred that there is intent to have a public institution constructed on it. I do not also for these reasons find that the applicants have established that they may suffer any loss or damage that may not be compensated for by way of damages.

10. Having found that the first two conditions for the grant of an order of interim injunction set out in the case of **Giella vs Cassman Brown 1973 EA 358** have not been shown to exist this court must consider where the balance of convenience lies.

11. It is true that the land is under dispute and that in normal circumstances there is need to preserve the suit land from disposal which may render the suit nugatory. Here before me are respondents who have not only outlined the process by which the 1st defendant obtained title to the suit land and that the land is actually held by an office in the central government of Kenya in trust for the 1st respondent. To my understanding the 1st respondent is not a profit making organization but a public institution funded by the Government.

12. If an order of injunction issues it is most likely that a programme meant to benefit the public, and especially the education of the children of tender age, may stall and I find the 1st respondent's averments to this effect to be justified, for a copy of a local service order has been annexed to the replying affidavit to show that funds for the purpose have been committed and therefore the construction of the intended early childhood education centre is imminent. It would be in the greater public interest to disallow the application.

13. However the exercise of discretion to grant or deny the application is not to be exercised in a vacuum: this court must similarly consider the position of the applicants specifically while contemplating this ground of balance of convenience. However the situation is not impressive: the applicant's camp is in disarray and there is no agreement even on the distribution under succession law of land belonging to the estate which is not the subject matter of the dispute herein. It is not known when the dispute between the heirs to the estate will ever be resolved if at all. No structures are alleged to be on the suit land and no specific use of the land by any beneficiary has been alleged by the administrators. No displacement of any beneficiary to the estate has been demonstrated. All these are matters which show that there is no loss that may not be compensated for by way of damages would occur if the orders sought were not issued.

14. Consequently, I find that the balance of convenience in this case does not favour a grant of the orders sought. I therefore find that the application dated 5/2/2019 has no merit and the same is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Kitale on this 24th day of April, 2019.

MWANGI NJOROGE

JUDGE

24/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the parties

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/4/2019