

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 238 OF 2015

JOHN C. CHEPTUM.....1ST PLAINTIFF

KENNETH KIPRUTTO KIPSANG.....2ND PLAINTIFF

JOSEPH CHESIRE.....3RD PLAINTIFF

JAMES YATOR.....4TH PLAINTIFF

(SUING AS REPRESENTATIVES OF KAKIBII FAMILY)

VERSUS

FREDRICK KITUM CHESANG.....1ST DEFENDANT

JOHN CHEBET ARAP CHEMISTO.....2ND DEFENDANT

CHERONO CHEBOI.....3RD DEFENDANT

JOSEPH EGO.....4TH DEFENDANT

JOSEPH KIPKNG'ENY KIPKURGAT.....5TH DEFENDANT

RULING

The Plaintiffs seeks orders of temporary injunction to restrain the defendants/respondents by themselves, their agents or servants or whomsoever from selling and carrying out activities including other developments and dealing of whatever nature in respect of the Plaintiffs'/Applicants' Kakibii Family land at the lower and upper sides of the Kabarnet-Iten Road at Rokocho Village, sub-location and location of Keiyo South sub-county in the County of Elgeyo Marakwet the property of the 17 families of the Plaintiff's/applicant's Kakibii family pending the interpartes hearing of the application and the hearing of the main suit.

The application is based on grounds that ever since the period up to and after 24.8.2015 to date, the defendants/respondents jointly and severally have been, and are still, selling the suit land to third parties including people from the County of Baringo and making other developments among other dealings with the suit land without the consent of all the 17 family members of Kakibiii family.

That they are opposed and/or they object to the defendants'/respondents' activities on grounds including the suit land belong to and is an inheritance of all the 17 families of the Kakibii family including the defendants/respondents and the plaintiffs/applicants. Nobody including the defendants/respondents should be allowed to grab, sell and deal in whatever manner with the Kakibii family members land. The suit land is to be shared among the 17 Kakibii family members including the suit parties. The 17 Kakibii families resolved that no Kakiii family land should be sold by anybody including the defendants/respondents. The plaintiffs/applicants including the applicant feel sorry for anybody including the defendant/respondents and their purchasers among other third parties for going against the resolution and wishes of the 17 Kakibii families in respect of the suit land. The Plaintiffs/applicants want to bring to the court's attention the main issues including the place the 17 Kakibii families must live from generation to generation in the suit land which must not be sold and developed before the suit land is shared among and according to the wishes of the 17 Kakibii family members. The plaintiffs/respondents do not want to

know third parties or buyers on matters done by the defendants/respondents against the wish of the plaintiffs/applicants .

The respondents filed a replying affidavit sworn by **Fredrick Kiptum Sang** who states that the suit land belongs to them and they have been living there since time in memorial. That they inherited the same from their forefathers. That in the year 1979, the clan elders of Kamugul, Kakibii and Kamelgoi put up definite boundaries along the suit land to distinguish the parts belonging to the three sub-clans and the Plaintiffs/applicants have no idea about that as they do not live there. That the Plaintiffs/Applicants are not even aware of any developments in the suit land or how long they have lived there. That as such, the Applicants are not residents of Rokocho sub-location, they are only aware of two families Kaptula and Kapcheptoo which makes up the Kakibii family and not the 17 family members as claimed by the applicants. That they are not aware of any resolution made by the Kakibii families that no land belonging to the Kakibii family should be sold by anybody including them as they never participated in that meeting and there are no minutes to that effect. That if the applicants have an issue in the share of the suit land, they should explain to this Honourable Court how the land they moved into then, the highlands was shared amongst themselves. According to the respondents, the applicants should have first explored other mechanisms as alternatives to resolving the dispute for example using the clan elders and area chiefs since they are conversant with the history of the suit land. That in the premises, the application before the Honourable court is premature and which this court should not entertain. In the circumstances, the application is frivolous, misconceived, bad in law and an abuse of the court process and the same should not be allowed. That it is therefore in the interest of justice that the applicants' application is not allowed. That it is therefore in the interest of justice that the applicants' application is not allowed. That he swears this affidavit in opposition to the Plaintiffs/Applicants' application now before this Honourable court.

The principles of granting an injunction are clear and well laid out, (see *Giella Vs. Cassman Brown Ltd E. A 1973 at page 358*). That the applicant must establish a prima facie case with a probability of success, the applicant has to show he will suffer irreparable loss if the orders are not granted and if the Court is in doubt it will decide the case on a balance of convenience. I have considered the supporting affidavit, replying affidavit and rival submissions and do find that both parties are claiming to own the suit land which appears unadjudicated. Before adjudication ***issues of ownership and irreparable harm are not justiciable*** and therefore the court can only determine the application on balance of convenience which tilts towards maintaining the status quo as both parties are claiming ownership of the land. The balance of convenience tilts towards an order preserving the land described as Kakibii family land at the Lower and Upper sides of the Kabarnet Iten road at Rokocho village. Both parties are restrained from selling the land and developing the same but should occupy the same as it is on the ground pending the hearing of the suit. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY, 2017.

ANTONY OMBWAYO

JUDGE