



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 341 OF 2016

NAWAZ ABDUL MANJI.....1ST PLAINTIFF
PROFESSOR HAROUN MENGECH.....2ND PLAINTIFF
TEK EGO BORE.....3RD PLAINTIFF
JOSEPH KIPLAGAT LESIEW.....4TH PLAINTIFF
PAUL BRENNAN.....5TH PLAINTIFF

VERSUS

VANDEEP SAGOO.....1ST DEFENDANT
ANDREW CHELELGO.....2ND DEFENDANT
HELLEN YEGO.....3RD DEFENDANT
JAMES WAWERU.....4TH DEFENDANT
DR. JOHN KIBOSIA.....5TH DEFENDANT
BRIAN CUTHBERT.....6TH DEFENDANT
PATRICK KIPROP.....7TH DEFENDANT
ISCAH MAIZ.....8TH DEFENDANT
SEATTLE LOGISTICS LTD.....9TH DEFENDANT

RULING

Nawaz Abdul Manjiplaintiff, **Professor Haroun Mengech, Tek Ego Bore, Joseph Kiplagat Lesiew, Paul Brennan**(hereinafter referred to as the **plaintiffs**) bring this suit as the trustees of Eldoret club and claim to be charged with safeguarding the interests of the club at all times for the benefit of the members of the club and the society as a whole and that at all times the plaintiff and the defendants are together charged with safeguarding the interests of the Eldoret Club in conjunction with one another. By notice of Motion dated 21st November 2016, the plaintiffs pray for orders of temporary injunction to issue restraining the defendants, their servants and or agents from cutting down the trees forming the natural environment and natural fauna within and around the Eldoret Club pending hearing and final determination of this suit and or pending further orders of this Honourable Court and that the defendants

be restrained from harassing the plaintiffs and taking other action that will be prejudicial to the plaintiffs' membership pending hearing and final determination of this suit and or pending further orders of this Honourable Court.

The application is based on grounds that the plaintiffs are trustees of the Eldoret Club and that the defendants are the chairman, the Vice Chairman and Committee members of the Eldoret Club. That throughout the month of September 2016 and October 2016, the defendants started cutting down the trees forming the natural environment of the Eldoret Club and for that matter destroying trees, the natural flora and fauna surrounding the Eldoret Club and the environment all together. The plaintiffs immediately raised their concerns with the chairman of the Club regarding these acts of destruction but the defendants are not willing to listen to and/or consider them. That some of the trees destroyed by the defendants have been in place since the colonial days and can never be replaced. The members of the club are now on the verge of withdrawing their membership from the club and thus cause irreparable loss and damage to the Club and the community and as a whole. The defendants have done this purely for their own personal gain. The defendants' defiance to continue harvesting the trees paints the plaintiffs as trustees who incapable of safeguarding the affairs and interests of the club. That it is fair and just that the prayers sought be granted. The applicants have proved on a balance of probability that they have a good case and granting the orders sought will not at all prejudice the defendants. That the balance of convenience tilts in favour of the applicants.

The application is supported by the affidavit of **Joseph Kiplagat Lesiew** one of the trustees of the Eldoret Club, who states that this case concerns the Eldoret Club, the natural environment of the Eldoret Club and its surroundings, the membership of the Eldoret Club and the general management of the Eldoret Club. That the names of all the trustees are, Nawaz Abdul Manji, Professor Haroun Mengech, Tek Ego Bore, Joseph Kiplagat Lesiew, Paul Brennan. That together they act in the capacity of trustees of the Eldoret Club having registered a trust to that effect and that as trustees of the club, they are charged with the policy-making functions of the Board of Trustees and the responsibility of the administration to administer and implement these policies thus.

- (i) **Vote on all motions of the Board of Trustees.**
- (ii) **Promote and support the organization in its relations with the public.**
- (iii) **Support a climate for effective change.**
- (iv) **Preserve institutional autonomy.**
- (v) **Protect the organization and its administration from undue pressure by external bodies.**
- (vi) **Participate in Community Trustees organizations if any that will keep each member abreast of state and national trends and issues regarding membership of the organization.**
- (vii) **Be courteous and treat other Board Members with respect.**
- (viii) **Consider the best interest of the organization at all time.**

The deponent states that the Club has several mature trees that have been growing on its land for ages and that these trees contribute to the beautification of the club, protect its golf course and as well ensure a cool and friendly environment around the club premises. That sometimes in the month of October 2016, the chairman of the club and his committee started cutting down several of the trees forming the natural environment of the club and for that matter destroying the environment. That in all these acts of destruction they as the trustees of the club were never consulted. That more importantly, the trees form part of the property of the general membership of the club and their role is merely to protect this property. The club membership has not, to the best of their knowledge made any resolution sanctioning this wanton destruction of trees and the club environment. They are apprehensive that they will lose both the environment and some members of the club some of whom have expressed their deepest

disappointment with the destruction of the environment and have so far stopped even playing golf on the grounds. They demanded an explanation from the chairman and his committee but no one has explained anything to them. They demand that these acts of destruction must stop at once. That it is to the best interest of justice that this Honourable Court do grant the orders sought.

In the replying affidavit of **Vandeep Sagoo** dated 25.11.2016, he states that he is the chairman of Eldoret club, duly elected competent and authorized to depose hereto on his own behalf and on behalf of the 2nd-8th defendants, the committee members of Eldoret club, who have authorized him to do so. He believes that the said notice of motion is devoid of merit fatally defective and ought to be dismissed summarily and that there is no authority by the other trustees to bring this suit. A preliminary point of law was to be taken out in limine to have the suit as well as the application struck out due to the import of the affidavit of Paul Brennan. According to the deponent, the notice of motion as presented does not meet the minimum requirements for the grant of the equitable reliefs of injunction for reasons that:-

- i. The plaintiffs have not demonstrated that they shall suffer irreparable loss.**
- ii. The Plaintiff's affidavit is characterized by material non-disclosure. He who comes to equity must do so with clean hands.**
- iii. The Plaintiffs suit presented is fatally defective, incapable of sustaining the present suit, and hence no chance of succeeding.**

The deponent states that the trustees of Eldoret club are appointed by the committee, the defendants, and tasked only to hold the immovable property of the club. The overall authority nonetheless vests in the membership of the club. That sometimes in October 2015, the club engaged the services of golf course consultants with a view of improving the dwindling quality of the course who advised inter alia that a number of greens are straggling due to lack of morning sunlight to the green as well as the lack of fresh airflow over the green, due to the eucalyptus blue gum tree in the vicinity. The height of the blue gums prevent the greens from receiving the all-important morning sunlight which all greens rely on for growth and health, and the density of the blue gum for forest is acting as a wind barrier preventing free flow of fresh air, thus creating cushion of stagnant air above the green, which in turn is responsible for suffocating the green and further that it was recommended that it would be prudent to remove some of the blue gum forest that are affecting the greens, but at the same time replant and create forests which do not grow overly tall to prevent morning sunlight and finally that within 5-7 years, Eldoret Golf club should once again have the forests that form an integral part of the beauty of the golf course, but still allowing the golf course to thrive. The club had also received reports from the experts that some of the trees were dangerous and likely to fall over during the wet season. That true to the experts' opinion, for the period between November, 2015 and March 2016, over 22 trees fell on the golf course, endangering the golfers on the course and members who were exercising. That to compound the problem, one of the trees fell into the neighbouring compound destroying the temporary structures therein and endangering the lives of those who were in the adjacent building. That with the danger the trees posed to the club, and the adverse comments by the gold course experts, the committee received further recommendation that to mitigate the impact of felling, it would only be necessary to be cut down 129 trees. This constituted the dangerous trees and those adversely affecting the course. Accordingly, a notice was placed in the usual manner on the notice board of the club, informing members of the intention to cut down the 129 trees and inviting interested members to submit their quotations before 29th February 2016. That with the above reports, and whereas it is admitted that the trees are important and contribute to the beauty of the club, the club sought and obtained permit for selective felling of the 129 trees to address the following concerns: -

- i. They posed a hazard to golfers and members of the club and third parties who own properties adjacent to the club.*
- ii. The trees were having adverse effects on the greens, tees and fairways.*
- iii. The selective harvesting was informed by professional advice, sought and obtained.*

iv. There are over 10,000 trees within the club property. The 129 trees sought to be felled could not in any imagination be classified as mass felling.

v. The club would plant tress to replace those felled.

vi. The loss of lives of golfers, members or 3rd parties could not be compensated by way of an award of damages

According to the respondents, the General Committee abides by the club Rules and by laws, the county Government by Laws as well statute hence on the 10th of March, 2016 the club submitted an Environmental Impact Assessment Report to NEMA for the selective cutting of 129 trees. That on the 8th of April, 2016, the club received the approval from NEMA, that on the 6th of April, 2016, the club applied for the approval by the County Government of Uasin-Gishu, which approval was granted on the 10th of May, 2016. The club also received approval from Kenya Forest Service on the 21st of May, 2016 and thereafter the highest bidder, M/s Seattle Logistics Limited of P.O Box 1128- 30100 Eldoret, was awarded the contract to purchase, fell and remove the 129 trees. That club Rules and By--Laws have a dispute resolution mechanism. In the matter before the court, the Plaintiffs, and any other member for that matter, can veto any decision by the committee by way of a special general meeting as contemplated under Rule 17.4 thereof. The Plaintiffs have not exhausted the said mechanism to warrant the cause before court.

1. That in particular the club By laws vests responsibilities as follows: -

a. Under Rule 3.1 – The immovable property of the club shall be vested in the trustees.

b. Under Rule 1.3- All acts done by the authority of the committee shall be deemed to be acts of the club and the members

c. Under Rule 7.7 – Entitles the committee to enter into contract on behalf of the club,

d. Under Rule 19.5 – Establishes the Greens committee which shall consist of the club chairman, Gold captain and two other members.

e. Rule 19.6 – Greens committee shall be responsible for the maintenance of the golf course but shall not carry out any alteration to golf course without the sanction of the General committee.

According to the defendants, the responsibility of the maintaining the golf course vests in the greens committee and that the general committee, the defendants herein, exercises oversight role over the said greens committee and that the Plaintiffs have no role in the management of the golf course and that no evidence has been exhibited to support the allegation that some members want to leave the club as a result of the selective felling. As a fact, some golfers who had expressed their intention to cut down on playing golf due to the hazards posed by the trees falling are now back due to the safer environment. That from the he believes that the interest in the trees passed to the purchaser on payment of the consideration hence the honourable cannot issue order against a person not party to these proceedings and the orders sought are likely to expose the club to huge award of damages for breach of contract.

The respondents believe that the orders sought are not based on any valid reasons but rumors and hear says and that the allegations contained in the affidavits of the applicants are un-informed and miscalculated at their best and further they state that the prayers sought cannot issue for the reasons that their allegation that the committee have gained personally is not supported whatsoever, it is a sensational statement meant to maliciously portray the defendants as dishonest people. They believe that this is an abuse of the court process and that the application before court does not meet the minimum requirements precedent to the grant of the orders of injunction as sought. The respondents believe that the applicants are undeserving of the orders sought as their affidavit is characterized by untrue allegations meant to hoodwink the court into granting the orders sought. They conclude with the legal maxim that he who

comes to equity must do so with clean hands and that the Plaintiffs have not demonstrated that they shall suffer irreparable loss. The application does not disclose a *prima facie* case. The defendant believes that the facts availed favor the harvesting of the trees pending the hearing and determination of the suit as the alleged loss that may be suffered by the Plaintiffs, if any is quantifiable and this may be compensated by an award of damages. That public interest is paramount and the honourable court ought to protect it. The respondents raised a preliminary objection on the basis that the application and the suit are fatally defective and bad in law there being no resolution passed to authorize the institution of the suit herein and appoint Messrs Alwanga & Company Advocates to act for the plaintiff. As such, there is no valid resolution authorizing the institution of these proceedings or the appointment of the said law firm to file proceedings on behalf of the plaintiff. The affidavits sworn by Joseph Kiplagat Lesiew in these proceedings are fatally defective and ought to be struck out. The entire proceedings are therefore null and void and ought to be struck out forthwith. The application and the suit are thus an abuse of the process of the court.

SUBMISSIONS BY M/S. ADHIAMBO

The applicants rely on the grounds of the application and the supporting affidavit and the supplementary affidavit of Nawaz Abdul Manji and refer to the locus classicus case of ***Giella Vs Cassman Brown***. The ***gravamen*** of the applicants' submissions is that property of the club vests in the trustees who are the plaintiffs whilst the beneficial interest of the property is to the membership. The trees form part of the Eldoret Club. They have evidence and supporting affidavit annexed by-laws, the club rules. The defendants who are committee members colluded before felling down the trees. The procedure was not followed. The authorities from NEMA and County Government did not consult the plaintiffs, trustees and membership were not and yet the trustees and committee have to work in union.

She urges the court that the applicants have a *prima facie* case with a probability of success. It is not clear on what basis the trees were cut down. There was no discussion between the members of the club, the committee and the trustees. The report relied upon was not tabled before the trustees through a meeting. The committee purportedly obtained authority in abuse of their powers. The specific Act thus the ***Trustees Perpetual Succession Act Cap 164 Laws OF Kenya*** does not provide that the acts of the trustees shall be with the consent of the committee. She further submits that if the action of destruction of the trees is allowed to proceed, irreparable loss will be caused to the plaintiff. The club has a duty of safeguarding the interest of its membership. The duty of the committee is to appoint members of the trustee. They cannot recover back the harvested trees that have been there for 50 years that have aesthetic value of the club members who are benefiting from the said environment. They cannot proceed with the suit and the substratum is destroyed. On a balance of convenience, she argues that applies parties rights override public rights. The rights of the plaintiffs ought to be safeguarded. They have not seen an invitation to a meeting of members. No resolution has been quoted. The process should not go on until hearing of the suit. On the 9th defendant, she argues that he is part of an illegal process and that he won a tender to fall the trees and not to purchase the trees.

SUBMISSIONS BY MR. TOROREI

Mr Tororei submits that the Plaintiffs have not established a *prima facie* case with a likelihood of success and that the suit is totally defective and therefore should be dismissed with costs. Paragraph 2 of the amended plaint indicates that the suit is brought for trustees of Eldoret club. It is also brought by the Plaintiffs in their individual capacities. The verifying affidavit is sworn by Joseph Kiplagat Lesiew on his behalf and on behalf of the Plaintiffs. Under Order 1 rule 13, the written authority of the other co-plaintiff is mandatory or they file individual affidavits. The letter of authority has not been filed or exhibited. The suit is a non-starter. 1st, 2nd, 3rd, 5th Defendants are not properly on record. He cites **NKR H.C.C.C NO. 142 OF 2005. Ndugu Mugoya and 473 Others versus Stephen Wangombe & 9 Others**. The learned Judge at page 3 and 4 clearly discussed the dangers of a case where the plaintiffs are not aware of the existence of a case. The 5th Plaintiff has deponed that he came to learn existence of the suit after he was informed of its existence. Paul Brennan denies ever participating in the meeting and did not authorize the use of his name. He is not aware of any meeting hence the suit is improperly before court. The second ground is that the operation of Eldoret Club is governed by the rules and by-laws. It

includes decision making. Mr Tororei further argues that the authority of the committee is mandatory before filing of the suit. The plaintiffs brought the suit as trustees of Eldoret Club and yet have no powers to do so and therefore the suit is not properly before court. The trusteeship is an organ of the club. Any decision by trustees trust in itself, be backed up by a resolution of the trustees. Some of the trustees are not aware of this suit.

Though the action of felling 159 trees is challenged, the court should look at the approvals by NEMA and The County Government Of Uasin Gishu and by Kenya Forest Services who have expertise and capacity to determine suitability of cutting the trees by any rule or evidence.

He cites the Black's Law dictionary and submits that immovable property includes lands and what is fixed therein but does not include crops and trees. The rules have an intended disputes resolution mechanism. Any party can convene a special general meeting. See rule. The general membership of the club has the power to vet the acts of the committee. The power to convene the SGM includes the power to remove entire committee. Despite the tree felling began in September, the Plaintiff have not engaged dispute resolution mechanism. Failure to take advantage of the mechanism is a clear abuse of court process by a few individuals. Courts of law should be very slow in entering and interfering in affairs of a private member's club. See decision of Janet Mulwa in *Nakuru Hccc No. 30 of 2015. Julius Wainaina Kariuki & 3 others Vs Michael Kandie & Kamonjo Kiburi & 4 Others.*

SUBMISSIONS BY MR. MUTEI:

On behalf of the 9th defendant, Mr Mutei opposed the application by the plaintiffs on the grounds of opposition. According to the 9th defendant, the suit is against him, is fatally defective. The plaint as amended included the 9th defendant though there are no allegations against him. There is no other mention of the 9th defendant. There is no allegation of any action done by 9th defendant and therefore there is no cause of action. There is no prayer against the 9th defendant. There is no single demonstration that the 9th defendant has contributed in any way in the acts complained of. The suit against the 9th defendant is a non-starter. Any application based in such a suit is based in the air. The rule about injunction is that there must be a demonstration that the defendant is about to infringe on the rights of the plaintiff. *Giella Vs Cassman Brown.*

There is no prima facie case against the 9th defendant with a probability of success. The 9th defendant fell 129 trees. He was stopped in the process. The plaintiff must demonstrate that damages cannot compensate them. The trees being cut are exotic trees with a lifespan. Damages will compensate the plaintiff. If the court is in doubt, it will determine on a balance of convenience. The process of felling the trees had started and therefore there are some trees on the ground. The balance of convenience tilts in favour of the 9th defendant. Due process was followed by the 1st defendant.

DETERMINATION

I have considered the application, supporting affidavit, replying and supplementary affidavit rival submissions and the authorities cited and do find that as is the practice in such cases in applications for temporary injunction, the power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1) whether the applicant has demonstrated a prima facie case with a probability of success.
- 2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.
- 3) Where the balance of convenience tilts if the court is in doubt.

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted to him. *Prima Facie* case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable

injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. **Irreparable injury** means that the injury must be one that cannot be adequately compensated for in damages. The existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

1-WHETHER THE APPLICANT HAS DEMONSTRATED A PRIMA FACIE CASE WITH A PROBABILITY OF SUCCESS.

On the first issue to as whether the Plaintiffs have established a prima facie case with probability of success, this Court finds that the defendants have not denied that the Plaintiffs are trustees of the Eldoret Club whilst the plaintiffs have not denied that the Defendants are members of the committee of the Eldoret Club. The Governing Act for trusts and trustees in this country is the **Trustees (Perpetual Succession) Act Cap 164 Laws of Kenya** which is an Act of Parliament to provide for the incorporation of certain trustees for the purpose of perpetual Succession to property and for purposes connected therein. Section 3 of the said Act provides for the incorporation of trustees. It thus provides

3. Incorporation of trustees

Trustees who have been appointed by any body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have
(1) constituted themselves for any such purpose, or the trustees of a pension fund or provident fund may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the trustees as a corporate body.

If the Minister, having regard to the extent, nature and objects and other circumstances of the trust concerned considers incorporation expedient, he may grant a certificate accordingly,
(2) subject to such conditions or directions generally as he thinks fit to insert in the certificate, and particularly relating to the qualifications and number of the trustees, their tenure and avoidance of office, the mode of appointing new trustees, the custody and use of the common seal, the amount of movable or immovable property which the trustees may hold, and the purposes for which that property may be applied.

(3) The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without

incorporation.

Section 4 provides that the certificate of incorporation shall vest in the body corporate all movable and immovable property and any interest therein belonging to or held by any person or persons for the benefit of the trust concerned. Though the certificate of incorporation has not been availed to the Court and that the trust deed has also not been availed and that it is not clear whether the property of the club is registered in the name of the trustees, it is not disputed that the Plaintiffs are the trustees of the club and therefore by virtue of Section 3 of the Cap 164, all movable and immovable property of the trust vests in the trustees. I have looked at the rules of Eldoret Club, referred to as **Eldoret Club Rule 2000** and do find that the general provision is very clear that the Manager of the Club and its funds shall be vested in the committee as defined in the rules except for such matter as are vested in the trustees as also defined in the rules. Rule 2.0 provides that the Club shall appoint three or more members of the Club 's resident in Eldoret as Trustees. Rule 3.1 appears to contradict Section 3 of Cap 164 by providing that movable property belongs to members whilst immovable property is vested in the trustees as the parent act does not envisage the property of the trust being vested in members or the committee which is not a body corporate.

The gist of the trustees' argument is that the members of the Club were not consulted before the decision to cut down the trees was made. I do agree with M/s Adhiambo learned counsel for the plaintiffs that it is arguable that it was not proper for the committee to make a decision touching on the land without consulting the trustees and members of the Club. However, the Plaintiffs have not annexed the certificate of incorporation of the trustees Eldoret Club indicating that the Plaintiffs are the incorporated trustees of the Eldoret Club. On the other hand, the Defendants have not denied that the Plaintiffs are trustees of the Eldoret Club. It appears that there will be enough light on this issue during the hearing of the suit.

Mr. Tororei, learned counsel for the defendants no 1 to 8 argues that the Plaintiffs required written authority to file the suit on behalf of the other trustees. It is arguable whether trustees need authority to file a suit in respect of the trust property as the law is clear that the trustees are an incorporated body that has power to sue or be sued hence it appears that it may not need the authority of the other members to file the suit as the same is body corporate with powers to sue and be sued in its own name and as found earlier, the parties herein have not annexed the documents of the trust deed and certificate of incorporation. However, I do not agree with Mr. Tororei that Trustees need the authority of the committee to file the suit as this will fly in the face of Section 3 and 4 of Cap 164.

Mr. Tororei further argues that the immovable property includes the land but not crops and trees and therefore the trees are not vested in the trustees and cites the definition of land in Black's law dictionary. This court finds that in most general sense, Land is comprehended as any ground, soil or earth whatsoever as meadows, pastures, woods, moors, waters, marshes etc. It includes not only the soil, but every attachment to it, whether attached in the cause of nature as trees and water or by the hand of man as building and fences. I do find that it is arguable that the trees attached on the Eldoret Club Land were attached in the cause of nature and therefore form part of the immovable property. Even if the court was to agree with the submissions by Mr Tororei on this issue that the immovable property does not include the trees the same would still be vested in the trustees as the property of the trust by virtue of section 4 of the Act.

Mr. Mutei learned counsel for the 9th defendant argues that there is no allegation against the 9th Defendant and therefore no prima facie case established against him. However, this court finds that the 9th Defendant was enjoined in this matter by the order of this court as the person who won the procurement contract to cut down the trees and therefore is a necessary party to be restrained from cutting down the trees.

2WHETHER THE APPLICANT IS LIKELY TO SUFFER IRREPARABLE HARM IF

INJUNCTION IS NOT GRANTED.

The second issue that requires determination is whether if injunction is not issued, the Plaintiffs will suffer irreparable harm. On this issue, the plaintiffs submit that the destruction of the forest will erode the esthetic value of the place as some of the trees being destroyed are very old and date back to the colonial days and that it takes time to have such trees. The Defendants on the other hand argue that the trees have been confirmed to be dangerous to the users of the Club as they pose a risk due to the fact that they have been falling and threatens the lives of the Golf way's users. I have balanced the two concerns and do find that though the falling trees are a threat to the golf cause users, it will lead to irreparable harm in clearing portions of the forests without consulting the trustees who are vested with both movable and immovable property of the Club. The harm on the trees far outweighs the harm on humans as the trees are beneficial to a large population and that if the plaintiffs succeed ultimately there will be no trees and that damages will not be adequate compensation.

3)-WHERE THE BALANCE OF CONVENIENCE TILTS IF THE COURT IS IN DOUBT.

On the issue of balance of convenience, I do find that it tilts towards conserving the status quo until the hearing and determination of the suit. However, it does not mean that the trustees cannot be consulted for a decision to be made to remove trees that pose danger to the users of the Club. Ultimately, the Court hereby grants orders of temporary injunction restraining the defendants, their servants and or agents from cutting down the trees forming the natural environment and natural fauna within and around the Eldoret Club pending hearing and final determination of this suit and or pending further orders of this Honorable Court and that the defendants be restrained from harassing the plaintiffs and taking other action that will be prejudicial to the plaintiffs' membership pending hearing and final determination of this suit and or pending further orders of this Honorable Court. Conversely, this court orders that the trees that have already been cut should be disposed of by selling the same to the benefit of the Club in consultation with the trustees of the Club. No orders as to costs as all parties are members of the club. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON 18TH DAY OF JANUARY, 2017.

ANTONY OMBWAYO

JUDGE