REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL CASE NO. 199 OF 2015

KIMITEI ROTICH.....1ST PLAINTIFF/APPLICANT

PAULO CHEPKURGAT.....2ND PLAINTIFF/APPLICANT

ELIZABETH KIPKEMBOI.....3RD PLAINTIFF/APPLICANT

(Suing on behalf of the residents of Chebororwo Community)

VERSUS

THE BOARD OF GOVERNORS,

CHEBORWO AGRICULTURAL TRAINING CENTRE...1ST DEFENDANT/RESPONDENT

THE MINISTRY OF AGRICULTURE.....2ND DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL on behalf of

THE COMMISSIONER OF LANDS.....3RD DEFENDANT/RESPONDENT

AND

UASIN GISHU COUNTY.....1ST INTERESTED PARTY

ELGEYO MARAKWET COUNTY.....2ND INTERESTED PARTY

RULING

The plaintiffs suing on behalf of members of Cheborowo community pray for an order of temporary injunction restraining the defendants, their agents and/or servants from unlawfully fencing off or causing damage, carrying out acts of waste hindering the plaintiff's quiet enjoyment of and/or alienating the suit land No. Chebororwo Agricultural Training Centre Farm VR 2210 and VR 3047 until determination of the suit. The application is based on grounds that the residents of the area have unanimously agreed to have the plaintiffs herein who sit in the Committee of the Chebororwo Community bring this suit on behalf of the various residents therein. The 1st respondent is currently fencing off the suit land with a view of denying the applicants access to the land. The suit land is community land and has been so since time immemorial. The respondents are in the process of transferring the suit land to the 1st respondent without any colour of right. The plaintiffs allege that they will suffer irreparable loss and damage if the defendant/respondents continue putting up an electric fence around the suit land and that their right of

quiet and peaceful enjoyment of the suit land is being denied. The plaintiffs claim that they have prima file case with high chances of success. That balance of conveniences lies in favour of granting the orders sought to stop the acts of illegality being committed further against the applicants.

It is in the interest of justice and fairness that the plaintiff's absolute proprietary as the lawful owners of the suit parcels of land be preserved by this honourable court. The application has been bought in good faith and without undue delay.

The application is supported by the affidavit of Kimitei Rotich, one of the members of the Community who claims to have lived and occupied the suit land since he was born and has lived on the farm with other members since time immemorial and that they have been using the suit land as a grazing area, cultivation, fetching water, firewood and also utilized the same as their shrines. That the whole Chebororwo ATC farm measures 2,500 acres and they are entitled to 1,800 acres whereas the respondents are entitled to 677.5 acres. That sometimes in June 2015, the 1st respondent entered the suit land and is in the process of constructing electric fence around the whole 2,500 acres farm without their consent. That if the said electric fence is allowed to be constructed, the whole community will be prevented from entering therein and this will result to a great loss since they will not be able to access their farms and their livestock will have nowhere to graze. The construction of electric fence will greatly inconvenience the community and yet they were not even involved in the decision fence the property. There was no environmental impact assessment done before constructing the said electric fence.

According to the plaintiff, sometimes way back in the year 1955 or thereabouts, the Ministry of Agriculture requested the local community to give them land to be used as a vaccination ground for livestock. That the land initially belonged to all members before the 1st defendant encroached and changed the name to Chebororwo Agricultural Training Centre farm in order to facilitate fraudulent transfer of the suit land. That following a series of meetings with the whole community, the management of ATC, the Ministry of Agriculture and the local administration, it was agreed that the suit land be sub-divided between them and the ATC as recommended by the Ministry of Agriculture.

In June 2015, the 1st respondent entered the suit land and is in the process of constructing electric fence around the whole 2,500 acres farm without their consent. The plaintiffs pray that the respondent be ordered to stop the construction of electric fence pending the hearing of the main suit. That some members have built their houses on the suit land and even buried their loved ones on the suit land. The respondents illegally and unlawfully surveyed the suit land without the knowledge of the applicants. The respondents entered land actually on a genuine bargain to establish an Agricultural Training Centre on 677.5 acres but has now decided to fraudulently take all the 2500 acres. That the suit land is very critical to their wellbeing and if the same is taken away from them, they will be total destitutes. That there is need that the prevailing status quo be maintained in order to preserve their interests. That it is in the best interest of justice that the preservatory orders be given to protect their interest.

Mr. Nelson Maritim, the Chief Officer, Housing and Physical Planning, Uasin Gishu County, the Interested Party herein states that he is aware that the 1st defendant has been in occupation of the suit properties since the year 1957 managing a public utility to wit an Agricultural Training Centre (Chebororwo ATC). The 1st defendant has enjoyed quiet possession of the suit property to the exclusion of the plaintiffs/applicants and has maintained cordial and harmonious relationship with the neighbouring community and was even in the process of obtaining title deeds over part of the suit property claimed by the plaintiffs/applicants prior to the Devolution System of Government.

That the suit parcel earlier on being managed by the National Government was inherited by the 1st defendant under the Devolved System of Government and currently under the management of the Interested Party as the Interested party under the Transition to County Government is the custodian and assumed the day to day management of the 1st defendant (Chebororwo ATC) on whose land is the subject matter of the instant case. According to the 1st defendant, the Interested Party (County Government of Uasin Gishu) is mandated under the Fourth Schedule of the Constitution of Kenya to hold and own the assets and functions within its jurisdiction previously undertaken by the National Government under the

Devolved System of Government. That part of the mandate of the Interested Party is County Planning and Development, including land survey and planning, boundaries and fencing. The Interested Party have undertaken massive developments and was in the process of doing further developments on Chebororwo ATC before the plaintiffs invaded the land and caused interference.

The interested party laments that as at now, three key projects in which the interested party has committed millions of money have stalled in the suit land. The projects are construction of Multipurpose Hall at Chebororwo ATC Contract No. UGC/T/014/2014/2015 at contract sum of Kshs.16,357,670 (Sixteen million three hundred and fifty seven thousand and seventy shillings), construction of Electric Fence at Chebororwo ATC Contract No. UGC/T/015/2014/2015 at contract sum of Kshs.15,323,849 (Fifteen million three hundred and twenty three thousand eight hundred and forty nine shillings) and construction of Multipurpose Hall at Chebororwo ATC Contract No. UGC/T/016/2014/2015 at contract sum of Kshs.13,029,220 (Thirteen Million and Twenty Nine thousand Two Hundred and Twenty two shillings). That all the contracts were signed in the month of April 2015 and they are now at risk of being sued by the contractors who are complaining of the evident failure to hand over peaceful site for commencement of work. It is noteworthy that all the contractors committed their own money to get performance bond guarantees as a prerequisite of signing the contracts which contracts ought to have been concluded by now and the performance bonds discharged.

It is the interested party's case that the plaintiffs encroached part of the 1st defendants parcel of land, the suit property and caused destruction, interference with construction works and threatened to demolish the facilities erected on the suit property. That as a result of the plaintiff's interference, the Interested Party continues to suffer prejudice and massive losses due to the fencing process having been stopped and the assets and facilities of the 1st defendant are under risk of wasting, damaging and/or wanton destruction by the plaintiffs/applicants. All efforts to remedy the issue have been frustrated by the indolence, refusal and/or blatant disregard by the plaintiffs who have adamantly refused to stop any acts of interference despite repeated demands to do so. That allowing the plaintiffs/applicants' application is not going to be in the best interest of the public as the 1st defendant which is a public institution shall suffer irreparable loss as it shall be denied its lawful right to the use of its property to wit a duty to serve the general public and which use is beneficial to the public at large.

The plaintiffs/applicants have not in any way demonstrated that they own and/or have been in occupation of the suit property and thus they do not have any prima facie case against the respondents to entitle them the injunction orders being sought. That there is no cause of action obtaining against the respondents and as such, the application lacks merit and the orders sought therein cannot be granted. That it is therefore, very clear beyond peradventure that the plaintiff's suit and the application is frivolous, fatally defective, bad in law, and abuse of the court process and the same should be dismissed. That the application is brought in bad faith as it is apparent that the plaintiffs/applicants are being driven by greed and self-aggrandizement.

Mary Kamau (OGW), the DDA Market Development and Agricultural Advisory Services in the Ministry of Agriculture, Livestock and Fisheries, State Department of Agriculture, Market Development and Agricultural Advisory Services Section and states that Chebororwo Agricultural Training Centre was established in 1957 as a Livestock Improvement Centre (LIC) under the Veterinary Department before it turned into a Farmers Training Centre (FTC) in 1959. In 2006, it changed its status to an Agricultural Training Centre (ATC) with an expanded mandate to cater for all crops and livestock through provision of seeds and breeding stock, training of farmers and stakeholders. That at the time the institution was formally handed over to the devolved units on 28.2.2014, it was raising Kshs.18 million annually, had more than 60 heads of cattle, 120 galla goats as breeding stock, over 120 tonnes of maize and 100 tonnes of wheat. That she also knows that the institution is among the oldest and largest ATC in the country with its land ascertained to measure approximately 2,500 acres (1,000 Ha) as follows:

(i) LR No. Moiben/Meibek/2210 measuring 1232 acres

(ii) LR. No. Moiben/Meibek/3047 measuring 1229 acres

(iii) Public Roads traversing through the institution covering approximately 15 acres.

That the parcels of land were delineated, designated and described in the Kenya (Designated Land) Regulation under the Legal Notice No. 751 of 1st June, 1963. That as at the time the institution was transferred to the devolved units, it was in the final stages of processing titles for its said parcels of land which had been surveyed in 2011 at the instance of the then District Surveyor (Kapsowar). That she is aware that the County Government of Uasin Gishu which manages the institution has since rolled out an elaborate plan to finalize surveying, registration and issuance of title documents in respect of the said parcels of land to the 1st respondent.

She is not aware that the said parcels of land are community lands or were at one time donated by the plaintiffs/applicants or their ancestors as alleged or at all. On the contrary, the said lands were designated by Legal Notice No. 751 hence are properties of the institution. That she is not aware of any negotiation between the Ministry of Agriculture and applicants herein or alleged squatters over land designated for and belonging to an institution and in particular she denies knowledge or authenticity of the letter dated 20.8.1996. By Legal Notice No. 751, the said parcels of land were set apart and reserved for a public function hence were and remain alienated government lands. The then Permanent Secretary in the Ministry of Agriculture, Livestock Development and Marketing lacked moral and legal authority or mandate to alienate or purport to alienate government lands. In any case, the said parcels of land were not available for allocation to applicants or the alleged but undisclosed ancestors who were allegedly squatting thereon at the material or at all. The fact that the applicants or their alleged descendants were squatters on alienated government land meant that they lacked any proprietary interest over the said lands.

Mr. Kimitei Rotich filed a supplementary affidavit stating that the land in dispute is not surveyed and that the applicants' occupation and use of the property from time immemorial has been exclusive, peaceful and open, continuous and uninterrupted. He prays that the application be allowed.

Joyce Kiplimo, the Legal Officer for the 2nd Interested Party filed a replying affidavit stating that Chebororwo Agricultural Training Centre, the 1st respondent herein is a centre created to train farmers from Elgeyo Marakwet County and neighbouring counties under the principle of co-operation and collaboration as enshrined in the Constitution of Kenya.

That Chebororwo Farmers Training Centre falls within Chebororwo village, Chebororwo location, Marakwet East District, Elgeyo Marakwet County. For that reason, it is within the administrative and electoral boundaries of Elgeyo Marakwet county, the 2nd Interested Party herein. That she knows of her own knowledge that the said resource being in one county cannot be legally managed by and from the neighbouring county. In that regard therefore, the management of all the affairs of the 1st defendant rests with Elgeyo Marakwet County Government and not the 1st Interested Party. That since its inception, the Chebororwo Agricultural Training Centre has been managed from Iten and Tambach, all within Elgeyo Marakwet County. That the 2nd Interested Party has *bonafide* interest over the institution and the land, the subject matter of this suit. That the Interested Party has learnt that actions by the 1st Interested Party herein shall adversely affect the said institution and by extension, the farmers who are residents of Elgeyo Marakwet County.

That in view of the foregoing, the 2nd Interested Party supports the motion to the following extent that:

(a) The management of the 1st defendant/respondent is vested on the 2nd Interested Party on the basis that is a resource within territorial borders of the 2nd Interested Party.

(b) The suit property ought to be preserved pending the hearing land determination of this suit.

(c) That the fencing being carried out by the 1st Interested Party is offensive to the intended preservation for the following reasons:

(i) It is being carried out without the approval and participation of the 2nd Interested Party despite the resource being located within its territorial boundaries.

(ii) It is being carried out without involving all the stakeholders.

(iii) No public participation has been carried out is encouraged by the Constitution of Kenya (2010).

(d) The 2nd Interested Party favours status quo to be maintained pending the hearing and determination of the suit on the following terms:

(i) The intended fencing by the 1st Interested Party to be suspended forthwith. The alleged loss that may be suffered by the 1st Interested Party on the basis of the cancelled bonds is quantifiable and this may be compensated by an award of damages.

(ii) That public interest is paramount and the honourable court ought to protect it.

(iii) That the plaintiff be restrained from erecting any structure on the suit premises but may graze their animals squatters may only be evicted by following due process.

(iv) That the plaintiffs shall not trespass to the 700 acres or so, being utilized for as field farms by the 1st respondent.

The applicant submits that he has established a prima facie case with a probability of success as the land in contention has been used by the community for grazing, farming, water source, shrines and therefore, a source of likelihood. By farming of the land amounts to a violation of basic rights of the plaintiff's access to land.

The plaintiff argues that the recognition of community land rights is therefore, imperative for the protection of property rights, cultural rights and religions rights of the indigenous people. He added that the plaintiffs' rights are protected under Article 40(1) of the Constitution. He further submits that the property could only be acquired under Section 6(2) of the Compulsory Acquisition Act (repealed). He also refers to section 107 of the Land Act, 2012 which ought to be followed when the Government intends to compulsorily acquires land.

On irreparable loss that cannot be compensated for by way of damages, the plaintiffs argue that their attachment to the land is so immense that no amount of compensation whether monetary or alternative land can make good the damage. The community has buried their loved ones and close relatives on the land. The presence of grave yards and shrines in the parcel of land are attachment that cannot be adequately compensated by way of damages. There are natural salt licks for livestock which improves the diet of their animals and sites for performance of initiation ceremonies that cannot be compensated howsoever. On balance of convenience, the plaintiffs argue that it lies squarely in favour of the applicants.

The 1st defendant argues that the plaintiff has not set out a prima facie case with the likelihood to succeed. He argues that the protection under the Constitution of the right to property does not obtain until is possible to lay claim in the property concerned. According to the 1st defendant the plaintiffs have no property rights or ancestral rights in the property.

The 1st defendant further argues that the plaintiffs have no capacity to bring the suit as the land in dispute was set aside for public use by Legal Notice No. 751 of 1963 Kenya (designated land) regulations of 1963 that clearly set aside Cheborорwa Agricultural Training Centre Farm VR 2210 and VR 3047 for public use and therefore, not available for alienation. The land in issue is not community land as it is not registered anywhere as community land. The 1st defendant argues this court to dismiss the application with costs.

The 1st Interested Party submits that the applicant has not established a prima facie with probability of success as they lack any document to show ownership of the property. He argues that the suit land is held by the 1st defendant for the benefit of the people of Kenya. He argues that the injunction will contravene and infringe on Kenya's struggling economy. The development within the suit land must be protected at all costs as they belong to the public.

On the issue of suffering irreparable injury which cannot be compensated by award of damages, the Interested Party argues that the plaintiffs can be compensated in damages, if they succeed, but they will be unable to compensate the respondent if he succeeds. On balance of convenience, they argue that the defendant will suffer more inconvenience if injunction is granted as they have done extensive development on the suit property and the entire public will suffer if injunction is granted.

Mr. Odongo for 2nd and 3rd defendants argue that the suit lands are public lands and therefore the court cannot entertain the applicants' case. He further argues that the plaintiffs do not state that they are landless or that their ancestors resided on the land. Last but not least, he argues that the 1st defendant will be more inconvenient if injunction is granted.

This court observes that the existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. ***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. The plaintiffs have demonstrated only that they have been utilizing the land from time immemorial but have not established any rights over the property. I have considered the application, all affidavits on record and do find that the land in dispute is alienated government land allocated to the Chebororwo Agricultural Training Centre which was established in 1957 as a livestock improvement centre under the veterinary department before it turned into a farmers training centre in 1959. The land measures 2500 acres known as L.R. No. Moiben/Meibek/2210 and L.R. No. Moiben/Meibek/3047. The said parcel is delineated, designated and described in the Kenya/Designated land regulation under the legal notice No. 751 of 1.6.1963 as public land. The plaintiffs have not demonstrated that the land in issue is community land as alleged. I do find that the plaintiffs have not demonstrated that they have a prima facie case with a likelihood of success.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that 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. I do find the plaintiffs' claim if successfully can be compensated with damages or another piece of land and assuming that the land belongs to the community, the said community can be given alternative land for grazing their animals.

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., this court finds that it tilts towards not granting the injunction as the property under dispute belongs to the public and is designated for purposes of improving the lives of Kenyans in terms of Agriculture and livestock. The plaintiffs' private interests cannot override the public interest. The application is otherwise dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2017.

A. OMBWAYO

JUDGE