



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 32 OF 2015

ROSEBELLA JEPTOO MUREI.....1ST PLAINTIFF

AMOS KIPKOECH.....2ND PLAINTIFF

VERSUS

STEPHEN KIBITOK SANG.....1ST DEFENDANT

EMMANUEL SITIENEI.....2ND DEFENDANT

JULIUS KIBOR BUSIENEI.....3RD DEFENDANT

R U L I N G

1. This is a ruling in respect of a Notice of Motion dated **16th March, 2015**. There are seven applicants in the motion who are seeking separate reliefs which at the end of the day will bring them into a common cause. Five of the applicants are seeking to be enjoined as plaintiffs in this case. Two of the applicants are seeking orders of injunction against the respondents and amendment of the plaint to include the five applicants.
2. Before I move to consider the application, a brief background leading to this application is necessary. Some six individuals were granted a lease over **L.R. No. 6482** as tenants in common in equal shares. The six were **Kipkemei Arap Surtan, Malekwen Arap Lagat, Kibitok Arap Murei, Kibor Arap Korir, Kibor Arap Busienei** and **Kibitok Arap Sang**. Of the original grantees of **L.R. 6482**, only two are alive. They are **Kibor Arap Busienei** who is the third respondent and **Kibitok Arap Sang** who is the first respondent.
3. **Dorcas Chemwetich Surtan, Esther Jerotich Kipkemei, Anthony Kipkemboi Kemei** and **Gideon Kipkoech Terer** are all administrators of **Kipkemei Arap Surtan**. **Pauline Korir** is the administratrix of the estate of **Kibor Arap Korir**. These five are the ones who are seeking to be enjoined as plaintiffs. The existing plaintiffs, that is **Rosebella Jeptoo Murei** and **Amos Kipkoech** are administrators of the estate of **Kibitok Arap Murei**. One of the original grantees of **L.R. No.6482** **Malakwen Arap Lagat** sold his share to **Emmanuel Sitienei** who is the second respondent herein.
4. **L.R. No. 6482** (suit land) was **109 hectares** which is about **283 acres**. The suit land is commonly known as **Kibulgeny Farm**. The applicants contend that there have been attempts to subdivide the farm equally amongst the six original owners but the attempts have been frustrated by the respondents. The applicants contend that the respondents are occupying more than their share would be after sub-division is done equally and that is why they are resisting to have the suit land sub-divided. The applicants further contend that the respondents are in the process of selling

portions of the land to third parties and they are apprehensive that if the sale is not stopped by way of injunction the respondents will sell more than what they are entitled to and it will become difficult to recover the land from third parties if it turns out that the respondents have sold more than what they are entitled to.

5. The respondents have opposed the applicants' application through two replying affidavits sworn by the first and second respondents on **29/4/2015**. The first respondent contends that the applicants are seeking permanent orders which are disguised as temporary orders. He further contends that as far as he knows, there is no surviving partner who has moved to dissolve the partnership. The first respondent states that when they bought the suit land in the **1960's** it was agreed amongst the partners that each partner was to occupy certain acres until issues pertaining the suit land were sorted out. He contends that there is a case which the partners have against a firm called **Greenfields Ltd** and one **Eric Kotut** and that this case is yet to be resolved. Whereas he is alive to the fact that the applicants have less acres, this is due to the outcome of the balloting which was undertaken. He contends that the status quo has obtained for over 40 years and it will be unfair to disturb the same.
6. The first respondent further contends that the applicants have acquiesced the current status quo and are thus estopped from seeking to disturb the same. The second respondent on his part denies that there is anyone who has sold any portion of the land or is in any way wasting or irregularly dealing with the same.
7. I have considered the applicant's application as well as the opposition to the same by the respondents. The first issue to be determined is whether the five applicants who are seeking to be enjoined in this suit should be allowed in as plaintiffs. The second issue for determination is whether the applicants have made out a case for grant of an injunction and if the new plaintiffs are entitled to enjoy the injunction orders. On the first issue, the applicants have demonstrated that they are administrators of the estates of two of the grantees of the suit land who were tenants in common in equal shares. They are coming in to represent the interest of their departed who had a stake in the suit land. Since the issue in this case is subdivision of the suit land, their presence in the case will assist the court to effectually and conclusively determine the issues in question.
8. On the issue of whether the applicants are entitled to injunction orders, the two existing applicants herein have demonstrated that they are administrators of the estate of one of those who had a stake in the suit land. They have deponed that they are only occupying **13 acres** when they are entitled to occupy about **47 acres**. This has not been denied by any of the respondents and in any case the first respondent has conceded in his replying affidavit that he is indeed aware that other stakeholders have less land. His only answer to their concerns is that the status quo has been existing for long and therefore should not be disturbed.
9. The applicants have demonstrated that the second respondent is in the process of selling portions of the suit land and that he has already entered into some kind of exchange agreement where he has been given land elsewhere and has brought in a third party. This is not denied. I find that the applicants have demonstrated that they have a prima facie case with probability of success. If an injunction is not granted the injury they will suffer will not be adequately compensated in damages. They will have lost their entitlements as third parties would have come in and taken their entitlements.
10. There was an argument by Mr. Ngigi that the applicants who are seeking to come into the suit cannot enjoy the injunction orders. This is perhaps because they were not yet parties as at the time the application was argued. This may be the position but it would not change anything. There are already those applicants who were in the suit before. Any injunction which will be given will not only benefit the two but all those who are entitled to a stake in the suit land as they have a common cause in this matter.
11. Once new parties are allowed into a suit, the plaint has to be amended to reflect the new parties.

Amendment of the plaint was one of the prayers. The amendment of the plaint would have been ordered even if it were not prayed for.

12. There was an argument by Mr. Ngigi that there was a partnership and that any matter touching on partnership has to be brought by way of originating summons. He cited two cases. The issue here is not a partnership. The six were tenants in common in equal shares in a grant issued by the Government of Kenya. There was no evidence of any partnership deed signed by the six as to require the matters to be resolved by way of originating summons. The respondents should have annexed that partnership agreement if their argument was to have any weight. The mere fact that it is pleaded in the plaint that the six were partners is not enough to bring up such an argument. The fact is that the six were tenants in common even if they chose to refer themselves as partners. It would have been a partnership if there was a partnership deed signed.

13. I find that the applicants application is well founded. The same is hereby allowed with costs to the applicants.

It is so ordered.

Dated, signed and delivered at Kitale on this **14th** day of **July, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Magut for applicants and Mr. Kisa for Mr. Ngigi for respondent. Court Clerk - Isabellah.

E. OBAGA

JUDGE

14/07/2014