



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**CASE NO. 113 OF 2014**

**EZEKIEL KIPROP LAGAT.....PLAINTIFF**

**VERSUS**

**JAMES KIRWA.....1ST DEFENDANT**

**COSMAS ROTICH.....2ND DEFENDANT**

**DAVID LAGAT.....3RD DEFENDANT**

**FRANCIS MERES.....4TH DEFENDANT**

**IRENE CHELULE.....5TH DEFENDANT**

**RULING**

**Ezekiel Kiprop Tirop, (hereinafter referred to as the plaintiff)** has brought this suit against **James Kirwa and 4 others (hereinafter referred to as the defendants)** claiming that he purchased land from Agricultural Development Corporation of Kenya with the defendants sometimes in the year 1969 and has been in occupation since then. They allocated themselves according to their shares whereupon he was allocated 15 acres in plot number Kiplombe/Kiplombe Block 2 (Kapkeben) 38 which is now being surveyed by the 5th defendant. He claims the efforts to stop the 4th defendant from encroaching into the said 3 acres of his land have been futile necessitating this suit.

He prays in the suit for a permanent injunction against the defendants, their servants, agents or anyone acting on their behalf from selling, transferring, subdividing all that parcel of land known as Plot Number Kiplombe/Kiplombe Block 2(Kapkeben) 38.

The suit is accompanied with an application dated 8.4.2014 seeking for orders that this Honourable Court be pleased to issue an order of temporary injunction against the defendants, their servants, agents or anyone acting on their behalf from selling, transferring, sub-dividing, all that parcel of land known as Plot Number Kiplombe/Kiplombe Block 2 (Kapkeben) 38 un-surveyed pending the hearing of the main suit.

The application is based on grounds that the plaintiff/applicant is the absolute owner of the suit land and that the defendants who are the survey committee of Kapkeben farm have forcefully moved the Applicant from his suit land where he has been residing on for over 40 years. That the 4th defendant has been allocated the said parcel without any colour of right by the 1st, 2nd and 3rd defendants. The plaintiff claims that the Survey Committee were not elected by members and are mere impostors. That they are not shareholders and not well versed with the intentions of the shareholders. Lastly, that the defendants have no authority to move a member from his/her plot and their actions are *ultra vires* their mandate.

The application is supported by ***the affidavit sworn by the Plaintiff*** wherein he states in the year 1966 or thereabouts, he joined Kapkeben Farm where land was being leased by The Agricultural Development Corporation. That they later purchased the same from The Agricultural Development Corporation in the year 1969 till 1978 when they completed payment. That after the said purchase, they allocated themselves land according to their shares and he was allocated plot No. 38 measuring 15 acres. He claims that the fencing and ploughing of the suit land is illegal and without any colour of right and that if the defendants are not restrained by an order of this Honourable Court, he shall stand to suffer irreparable loss and damage. Moreover, that if the said survey committee and the surveyors allow the 4th defendant to his land, he will not have another parcel of land as he is the rightful owner of all that piece of land. That the committees are not members/shareholders and their mandate was solely to assist the surveyors in picking boundaries and not to allocate them shares or move themselves elsewhere. That the houses standing on the ground have been fenced off by the 4th defendant and he cannot even access to move his animals in order to graze them.

In reply to the application, ***Francis K. Meres, the 4th defendant states in his affidavit sworn on 23.4.2014*** that he is the original shareholder of Kapkeben Farm which the members bought parcel No. L.R. NO. 8936. That the portion of land bought by the members of Kapkeben Farm was over 800 acres and was shared proportionally to the members depending on the number of shares each held but a portion measuring approximately 192 acres was taken by the Government as a Military Barracks. That however, in 1999 or thereabouts, this military barracks ceded the portion measuring 192 acres and the members of the said Kapkeben Farm allocated members the farm proportionately using the original shareholding and that they temporarily took occupation of their proportional portion and he was allocated 4.8 acres. That recently, the members resolved to survey the parcel and demarcate the boundaries. The committee approached him and informed him that his parcel will be taken as a public utility owing to it being in a central place on the entire parcel. That he is aware that after the survey was done, the surveyor informed the members that the land was 178 acres and not 192 acres and all the members agreed that each person's entitlement would be reduced proportionally. That members also agreed that the dry land and swampy land would be shared proportionally among the members together with all public utilities. That after the proportionate reduction of his parcel owing to the reduction of the acreage and the contribution of public utilities, he was entitled to 4.3 acres of land, thus 3.3 acres dry land and 1 acre in the swamp.

The committee had informed him that the parcel he temporarily occupied would be used as a public utility and he did not have any objection as he was told that he would be given the land elsewhere and that at the time when the survey of the Plaintiff's land was done, he had already been given 1.5 acres of the portion owing to the proportionate contribution by the members. That when the survey of the plaintiff's land was done, it was found out that he had an excess of approximately 2.15 acres.

That since he already had 1.5 acres being contributed proportionally by members for public utilities he was asked by the committee to take up 1.86 acres of the 2.15 acres being the excess from the Plaintiff's land and add one acre of the land from one of the individuals who had purchased from the Plaintiff and who had accepted to move to the one acre which had been proportionately contributed by members and the remaining 0.5 acres contributed proportionally by members for public utilities so that approximately 3.3 acres would be consolidated and given to him.

That he has therefore not occupied the Plaintiff's land as the 3.3 acres was a consolidation of 1.86 acres from the excess of 2.15 acres held by the Plaintiff plus one acre which was exchanged by *bonafide* purchaser of the Plaintiff's land and 0.5 acres which had been proportionately contributed by the members for public utility.

That the allegations that he has prevented him from accessing his land is not true as the Plaintiff was given a chance to chose which portion of land to be excised in case of an excess and he chose to retain the portion with a homestead and treed he had planted. That he has therefore been allocated the 3.3 acres which he has ploughed and already planted maize.

That all the members of the group are satisfied with the process and granting the orders sought will greatly prejudice him as he was given the land after due process was followed and proper guidelines

adhered to. The 1st defendant on his part, states that the original members of Kapkeben Farm were 43 and the plaintiff was one of the major shareholders. However, the number of members has risen to 100 due to the fact that some original members have sold land and others have died hence the issue of succession has arisen. That the said group initially brought parcel No. 8936 and each individual got a share of the land proportionately. That however, there was a parcel of land which measured approximately 192 acres which was actually part of the land purchased by the group but had been taken over as part of military barracks by the government. That in 1999 or thereabouts, the Government ceded from the said 192 acres and members felt that they should temporarily occupy the parcel in order to avoid any illegal grabbing. The members therefore agreed that each member should temporarily occupy the parcel in proportion of their original shareholding hence the plaintiff/applicant therefore occupied 15 acres and all other members including the 4th respondent who had been allocated 4.8 acres also occupied their share of land on temporary basis.

That the reason for the temporary occupation was to await the processing of the allotment letters which are yet to be processed up to date and a proper survey to be conducted. That in the meantime, the plaintiff/applicant had sold 5 acres of his parcel to five individuals each one acre and the said persons are in occupation of the parcel up to date.

In 2011, members agreed to engage the services of a surveyor to carry out the survey and to demarcate the land for each person. That the members agreed that each person shall have a share of the dry land and swampy land in proportion to their share in the land. Members also agreed that they shall contribute proportionately for the public utility land and roads. That when the surveyor conducted the survey, she found out that the land was 178 acres instead of 192 acres. That the members therefore agreed that each person would have his acreage reduced proportionately for the reduced parcel. That the surveyors also surveyed the swampy land and the area was approximately 34 acres and in dry land approximately 144 acres of which each member was to share proportionally. That the public utilities in the dry land was agreed to be approximately 9 acres and in the swamp approximately 2.9 acres. This was to be contributed proportionally by the members and that from the proportionate sharing of dry land, the plaintiff was to get 10.5 acres of the dry land and 2.77 acres in the swamp; the balance was for the acreage lost after survey and public utility.

That the Applicants parcel was surveyed on November, 5th and 6th 2013 and the person he had sold land was given a portion from the plaintiff's land. That the plaintiff therefore received 5.5 acres in the dry land and 2.77 acres in the swamp.

That the 4th defendant share was 3.3 acres in the dry land and 1 acre in the swamp after his proportionate reduction from the original share and his contribution in public utilities and roads. That the committee and members in general asked the 4th defendant to surrender 3.3 acres to be used as public utility as it is centrally placed in the whole parcel.

That the 4th defendant agreed to give his land and the members agreed that the proportionate contribution of each member for the public utility and his excess land had temporarily by any member shall be given to the 4th defendant to his full share.

That by the time the plaintiff's portion was being surveyed, 15 acres had already been proportionately contributed by members whose land had been surveyed and the 4th defendant had been shown the land.

When the plaintiff's land was surveyed, it was found that he had been holding 2.15 acres in excess; that is having given one acre each to the five individuals who had bought the land from the Plaintiff and 5.5 acres being the balance of the share of the Plaintiff in the dry land.

The committee requested one of the persons who had bought one acre from the Plaintiff to exchange it with the one acre which had been proportionately contributed by members whose land had by then be surveyed so that his share of one acre he had purchased from the Plaintiff be consolidated with the 1.86 acres from the 2.15 acres which were found to be in excess from the Plaintiff's land plus the remaining 0.5 acres which had been proportionately contributed by members and the same be consolidated and

given to the 4th defendant. The said purchaser one, Henry Sambu agreed to move to the said one acre and the portion was consolidated as stated and given to the 4th defendant. The Plaintiff's land was therefore not interfered with as he got his full share of what he was entitled to. That the process was done fairly and openly and it is only the Plaintiff who is not satisfied with it because one does not want to be given a share of the swampy land whereas all members have agreed to have a proportionate share of the same. The plaintiff was further given an opportunity to chose which portion of the excess land was to be excised and he showed the surveyors the portion which he had not developed while ensuring that the part which has a homestead and where he had planted trees remained his.

There is therefore no prejudice that will be suffered by the Plaintiff and thus this application should be dismissed. That there exist no parcel known as Kiplombe/Kiplombe Block 2 (Kapkeben) 38 and the Plaintiff has not made any effort to prove its existence. That the number 38 is the Plaintiff's original membership Number and not a parcel number hence any orders he respects to that parcel shall be in vain. That no allotment letters have been issued to any member and the committee still following upon the same.

The defendants believe that the plaintiff has not shown a *prima facie* case with probability of success and there is no reason for the honourable court to exercise discretion in his favour. The 4th defendant has already occupied the 3.3 acres and he has already planted and the orders sought herein shall prejudice the 4th defendant.

The **plaintiff responded to this affidavits** and stated that he was allocated 15 acres as deponed and that he had not sold any part of the land. He claims that the 4th defendant settled on his parcel of land without any colour of right.

The plaintiff **through E. K. Melly & Company Advocates** submits that land parcel No. Kiplombe/Kiplombe Block 2(Kapkeben) 38 is his property and has been illegally been fenced off by 4th defendant. He therefore submits that he has established a *prima facie* case with a likelihood of success. However, the plaintiff has not annexed any document of title to demonstrate that the suit land is registered as claimed.

The defendants through **Kamau Lagat and Compay advocates** argue that the applicant has not demonstrated that land parcel No. Kiplombe/Kiplombe Block 2(Kapkeben) 38 exists and that the occupation of the whole parcel of land was temporary and that the parties are proprietors in common. They further argue that the plaintiff has not established any superior right over the defendants.

What I have to determine here is whether on the material presented, this court properly directing itself can conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. The plaintiff's case is that he bought land with the defendants from the Agricultural Development Corporation in the year 1969 till 1978 when they completed payment. That after the said purchase, they allocated themselves land according to their shares and he was allocated plot No. 38 measuring 15 acres. He claims that the fencing and ploughing of the suit land is illegal and without any colour of right and that if the defendants are not restrained by an order of this Honourable Court, he shall stand to suffer irreparable loss and damage. Moreover, that if the said survey committee and the surveyors allow the 4th defendant to his land, he will not have another parcel of land as he is the rightful owner of all that piece of land. That the committees are not members/shareholders and their mandate was solely to assist the surveyors in picking boundaries and not to allocate them shares or move themselves elsewhere. That the houses standing on the ground have been fenced off by the 4th defendant and he cannot even access to move his animals in order to graze them. The above facts are not controverted and therefore I do find that the plaintiff has demonstrated on *prima facie* basis that he a right over the suit property. The above notwithstanding the court finds that it has been established that the plaintiff was initially allocated 15 acres. However, there is a dispute as to whether the plaintiff sold part of the 15 acres to third parties. Moreover, there is an issue as to whether the acreage of the parcel of land was reduced from 192 acres to 178 that was to be shared by members proportionately. The upshot of the above is that there is no doubt that the plaintiff has some interest in the disputed land which is also being claimed by the 4th Defendant.

On the issue as to whether the plaintiff is likely to suffer irreparable loss, the plaintiff does not tell us in affidavit or otherwise when he lost possession of the disputed parcel of land, however, the 4th defendant confirms that the plaintiff is supposed to lose 2.15 acres which they refer to as an excess of his portion. I do find that since the parcel of land is not surveyed any loss of a portion of the same will be irreparable.

On the issue of balance of convenience, I do find that it has been admitted by the 4th defendant that the disputed property of land is considered as an “excess land” in regard to the portion of the plaintiff. It is not clear how it was determined to be an excess but it is evident that the excess portion was excised from the plaintiff's initial allocation. I do find that the balance of convenience tilts towards granting an injunction in terms of prayer 3 of the Notice of Motion dated 8.4.2014.

Ultimately this court grants an order of temporary injunction against the defendants, their servants, agents or anyone acting on their behalf from selling, transferring, sub-dividing, all that parcel of land known as Plot Number Kiplombe/Kiplombe Block 2 (Kapkeben) 38 un-surveyed pending the hearing of the main suit. Costs in the cause. Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2015.**

**ANTONY OMBWAYO**

**JUDGE**