



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 32 OF 2015

NEKE SITETO MOPEI

KURESOI OLE NAISWAKU.....PLAINTIFFS/APPLICANTS

JACKSON SARUNI TIGIRANI

MICHAEL O. SEME

VERSUS

MURMENT M. SENTER

SAMSON MORONGO

DAVID MOISITETI.....DEFENDANTS/RESPONDENTS

PARAKENYI O. OLKAPORII

RULING

1. This suit was filed on **28th September 2015** by the four plaintiffs against the four defendants who are all residents of Moyoi location within the sub-county of Transmara.

The plaintiffs bring this claim on behalf of themselves and other members of **Moyoi group ranch** as well as on behalf of **Moyoi Ward Development Committee** which is registered as a self help group or project under the Ministry of Gender, Children and Social Development and which was created by members of **Moyoi group ranch** with the mandate to manage and/or supervise the resources obtaining within Moyoi group ranch for the benefit of the members of Moyoi location.

The defendants are officials or former officials to wit chairman, secretary, treasurer and former treasurer of the said **Moyoi development committee**. The plaintiffs claim against them is for an injunction to restrain them from acting in breach of the by-laws governing the resources on or accruing from hilltops, forests and any other sites set aside for **Moyoi Group Ranch**.

2. The claim is also for declaratory orders to the effect that the defendants are liable to pay **Moyoi group ranch** the sum found to have been misused, misappropriated or spent without authority of the members or **Moyoi ward development committee** and to the effect that the defendants have acted in breach of the by-laws governing resources on or accruing from hilltops, forests and any other site set aside for **Moyoi group ranch** therefore not eligible or fit to hold any position in the said group henceforth.

The claim is further for an account of all sums received and realized by the defendants for and on behalf of **Moyoi group ranch** members.

3. The plaint was filed contemporaneously with the **notice of motion dated 28th September 2015** for temporary injunction orders to restrain the defendants by themselves, their agents and/or servants from withdrawing, disbursing, utilizing the funds in any bank account belonging and/or in the name of **Moyoi group ranch** members without the authority of the **Moyoi Ward Development Committee** and/or howsoever otherwise acting in breach of the by-laws governing the resources on or accruing from hilltops, forests and/or any other site set aside for **Moyoi group ranch** and also from creating, running, operating and/or using a parallel committee referred to as **“Kilimapesa Finance Committee”** in dealing with and/or managing the resources of **Moyoi group ranch**. These orders were sought pending firstly the hearing and determination of the application interparties and secondly, the hearing and determination of the suit.

4. This ruling is therefore in respect of the Notice of Motion which is based on the grounds contained therein as fortified by a **supporting affidavit dated 28th September 2015**, deponed by the first plaintiff **Neke Siteto Mopei**. The defendants opposed the application on the basis of the facts and/or averments contained in a **replying affidavit dated 28th October 2015**, deponed by the second defendant, **Samson Morongo**, in his capacity as the secretary of **Moyoi Ward Development Committee**.

Both the supporting and replying affidavits have been given due consideration by this court in the light of the submissions made on behalf of the plaintiffs by the learned counsel, **Mr. Bosire** and on behalf of the defendants by the learned counsel, **Mr. Ochwangi**.

5. The key issue arising from the application and indeed the suit is the jurisdiction of this court to hear and determine this matter.

It is the defendant’s contention that this court lacks jurisdiction on grounds that the dispute herein involves members and affairs of the **Moyoi Ward Development Committee** which can only be addressed and resolved based on majority decisions and also that the dispute touches on the affairs of a welfare organization or self help group which cannot be adjudicated by this court.

6. It was the defendant’s submission that **Moyoi group ranch** is a self help group with its own rules and regulations concerning its operation. Therefore, any dispute arising was firstly to be resolved by calling of a special general meeting and this did not occur in the present circumstances. No attempt was even made to hold a special general meeting.

The defendants in contending that the group was required to first hold a special general meeting before rushing to court relied on the decisions in **Nyaribari vs Onyanya & Another [1988] KLR 521 and Patel & Others .vs. Dhanji & Others [1975] EALR 301**.

On their part the plaintiffs submitted that this court is possessed of the necessary jurisdiction to deal with disputes arising from a self help group and in any event the defendants have not cited any provision of the law which ousts the jurisdiction of this court.

7. In the opinion of this court, the jurisdiction of this court to deal with this matter is intact by dint of **Article 165 (3) (a)** of the Constitution. Such jurisdiction can firstly be ousted by express provision of the law rather than the by-laws of a self help group. In any event, the Moyoi group ranch by-laws exhibited herein do not exclude any court from adjudicating disputes arising between themselves in relation to membership and/or property of the group.

The cases cited herein by the defendants may not apply in the present circumstances as they did not involve the proprietary interests of the group. Herein, the plaintiffs are complaining about the defendant’s alleged mismanagement and misappropriation of property belonging to the group. The clear message sent in the cited cases was that the courts should be slow to interfere in the running of affairs of welfare groups, the remedy being in the hands of the members. This cannot be construed to mean that the

jurisdiction of the court in such matters is ousted “*ab-initio.*”

8. The objection to this application based on jurisdiction must therefore be overruled. The other basic issue arising in this application is whether the plaintiffs are entitled to interim orders of injunction against the defendants.

A temporary or interim or interlocutory injunction order is an equitable and discretionary order. Therefore, at this juncture this court is not required to decide the issues of facts but rather weigh up the strength of each side’s case.

The principles guiding the decision for or against the grant of a temporary injunction were firmly stated in the leading case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**, in the following terms:-

“The conditions for the grant of an interlocutory injunction are now....., well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. These principles have stood the test of time as they are applicable to this day.

With regard to the first principle i.e whether the plaintiffs have shown a prima facie case with a probability of success, the allegations against the defendants are centered on the manner in which they have carried out and operated the affairs of **Moyoi development committee** which was created to manage and/or supervise the resources obtaining within **Moyoi group ranch** for the benefit of the members of Moyoi location.

The plaintiffs allege that the affairs of the committee have not been conducted in accordance with the groups by-laws which are herein exhibited and marked “**NSM-3**” in the supporting affidavit. It is to that extent that the plaintiffs allege that the defendant have breached and continue to breach the by-laws and in particular provisions relating to the governing of the resources on or accruing from the hilltops, forests and any other site set aside for **Moyoi group ranch**.

10. The plaintiffs have also accused the defendants of over staying in office and failing to keep records and accounts of all financial transactions and also failing to convene an annual general meeting on yearly basis. It is also alleged that the defendants have utilized the group’s funds without necessary approval and have permitted the area chief and a member of a county assembly to handle and utilize funds belonging to the **Moyoi group ranch**.

The plaintiffs contend that new signatories to the bank account of the **Moyoi ward development committee** were elected and so were new members of the executive of the committee. The said elections are said to have been held on 19th February 2015 and were prompted by the defendant’s failure to account for money received and utilized.

11. The plaintiffs also contend that despite having been removed as executive members of the committee, the defendants have continued to hold themselves as such members and attempted to disguise themselves by using another name of “**Kilimapesa Finance Committee**” to run and manage the affairs of the **Moyoi group ranch** and without the approval of the said group or the **Moyoi development committee** thereby continuing to defraud and/or misappropriate the funds of the groups.

A perusal of the exhibited by-laws indicate that if indeed the defendants have conducted the affairs of the group in a manner not consistent with the said by-laws then there is a strong case against them for breach of the by-laws. However, the alleged breaches have to be established by necessary evidence during the hearing of the suit.

The entrance of a separate committee known as “*Kilimapesa Finance Committee*” and the exhibition of minutes of both sides showing that the defendants may have been dismissed as officials of the **Moyoi Ward Development Committee** on 19th February 2015 (see, annexure marked “*NSM 4*” in the supporting affidavit) and also showing that they were re-elected (if not all of them) as such officials on 2nd January 2015, (see, annexure marked “*SM 5*” in the replying affidavit) is a clear demonstration that the plaintiffs claim is highly arguable.

12. It is therefore the finding of this court that the plaintiffs have shown a “*prima facie*” case with a probability of success. They would on that ground alone be entitled to a temporary injunction order pending the hearing and final determination of this case. This being the position the other conditions for the grant of a temporary injunction do not fall for determination. In the end result, this application is allowed in terms of prayers (4) and (5) of the notice of motion dated 28th September 2015 but on condition that the plaintiffs do ensure that the suit is heard and finalized within the next eight (8) months from this date hereof failure to which the orders shall forthwith elapse. Otherwise the plaintiffs are entitled to the costs of this application. Ordered accordingly.

J.R. Karanja

Judge

[Read and signed this 19th day of November 2015.]