



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 105 of 2009**

KISIMA OLE SAKAU.....1<sup>ST</sup> APPELLANT/RESPONDENT  
TUMALE OLE SAKAU.....2<sup>ND</sup> APPELLANT/RESPONDENT  
DALAMERE OLE KIKANAE.....3<sup>RD</sup> APPELLANT/RESPONDENT  
MURUA GROUP RANCH.....4<sup>TH</sup> APPELLANT/RESPONDENT

**VERSUS**

MUTERIAN PARTOIP.....1<sup>ST</sup> RESPONDENT/APPLICANT  
COUNTY COUNCIL OF NAROK.....2<sup>ND</sup> RESPONDENT/APPLICANT

**RULING**

This Ruling relates to a Chamber Summons dated 19th February 2010 in which the Applicants, Muterian Partoip and County Council of Narok sought the following orders -

- (1) *That this application be certified as urgent in the first instance and service be dispensed with and the application heard ex- parte.*
- (2) *That the Respondents be restrained by way of a temporary injunction by themselves, their duly authorized agent, servants assigns, successors, and/or representatives from alienating, selling, transferring, taking possession, erecting structures, developing, constructing on an/or in any other manner howsoever interfering with Murua Group Ranch's ownership, physical possession and/or quiet enjoyment of all that parcel of land known as Plot Number CIS MARA MURUA/47, pending the hearing and final determination of this application and/or any further orders and/or direction of this Honourable Court.*
- (3) *That the Respondents be restrained by way of a Temporary Injunction by themselves, their duly authorized agents, servants assigns, successors, and/or representatives from alienating, selling, transferring, taking possession, erecting structures, developing, constructing on and/or in any other manner howsoever interfering with the Murua Group Ranch's ownership, physical possession and/or quiet enjoyment of all that parcel of land known as Plot Number CIS MARA MURUA/47, pending the hearing and determination of this suit.*

(4) That the Respondents by themselves their duly authorized agents, servants, employees, assigns, successors and/or representatives be compelled by an order of mandatory injunction to remove and/or demolish all and any structures, construction, building, developments and/or materials he has erected, constructed, deposited and/or caused to be erected, constructed, deposited on Plot Number CIS MARA MURUA/47.

(5) That this Honourable Court be pleased to issue an order of eviction against the Respondents compelling them to render and/or surrender to the Ranch vacant possession of Plot Number CIS MARA MURUA/47.

(6) That the Defendants be condemned to bear the costs of this application.

The Chambers Summons (*the Application*) was supported by the Affidavit of Gabriel Kinaiya sworn on 19th February 2010, and the grounds that -

(a) the Murua Group Ranch is the lawful owner of Plot Number CIS/MARA/47 having been allocated to it by the applicant;

(b) the members of the Group Ranch decided that the Applicant holds the land in trust for them;

(c) the Respondents are interfering with the Group Ranch's possession of the suit land;

(d) the Respondents have unlawfully entered into the suit land and built, started building, developing, erected and/or caused to be built buildings erected structures thereby impeding possession and development by the Group Ranch;

(e) the Respondents have acted fraudulently by occupying the suit land against the decision of the majority of the members of the Group Ranch,

(f) the Applicants will suffer irreparable loss unless the Respondents are restrained by way of temporary injunction.

The Application was opposed by the Respondents who in a Replying Affidavit of Kisima Ole Sakau sworn on 25<sup>th</sup> May 2012, depones on advice of his counsel on record that the Application is bad in law and is an abuse of the process of court and that the Applicants have come to court with unclean hands.

In addition to the Affidavit in Support, the Grounds on behalf of the Applicants, and the Replying Affidavit on behalf of the Respondents. Counsel for both parties filed written submissions. The submissions of the Respondents dated 25th May 2012, were filed on 7th June 2012, and those of the Applicants dated 4th June 2012, were filed on 13th June 2012.

I have considered the respective Affidavits in support, and against the Application for *inter alia* temporary injunction and permanent injunction together with the respective written submissions.

The genesis of the Application the subject of this Ruling is the Appellants' Memorandum of Appeal dated 12th June 2009 and filed on 15th June 2009, and the Appellants' own Notice of Motion dated and filed on 30th June 2009. the court in the first instance declined to certify that Motion as urgent, and dismissed it for non attendance by counsel of either the Appellants or the Respondents, on 19th August 2009.

Since filing the Memorandum of Appeal on 15th June 2009, the Appellants have taken no steps to file a Record of Appeal, and sadly, the Respondents (*the Applicants herein*) have taken no steps to have it struck out.

Following failure to pursue their Appeal by filing a Record of Appeal, the Respondents appear to

have embarked upon forcible and unlawful occupation of the suit land and erecting thereon buildings and other structures in total disregard of the fact that their suit (*Narok PMCC No. 16 of 2009*) had not been determined following the dismissal of their application for temporary injunction. In the circumstances, the Respondents/Applicants filed their Chamber Summons the subject of this Ruling.

The Respondents have not rebutted the averments by the said Town Clerk -

- (I) *That the members of MURUA GROUP RANCH held a meeting and resolved that Plot Number CIS/MARA MURUA/47 be registered in the name of the County Council of Narok to hold the same for members of MURUA GROUP RANCH (para. 3),*
- (II) *That the 1st, 2nd and 3rd Respondents are not officials of the MURUA GROUP RANCH and hence lack capacity to act on its behalf; (para. 6),*
- (III) *That the Respondents are acting without the authority of the members of MURUA GROUP RANCH and have grabbed the said land and are developing it for their own benefit, (para. 5),*
- (IV) *That parcel of land CIS/MARA/MURUA/47 has never been owned by the 1st, 2nd and 3rd Respondents and so their actions are illegal, malicious and have deprived the members of the said community from having access to necessary facilities like schools, market and hospitals which are essential to the development of any community, (para. 7) and the said community has therefore suffered harm, prejudice and loss as a result of the Respondents interference with said parcel of land (para. 8),*
- (V) *that since the said land was set apart for community development and the majority of the members of the said community resolved that the land be registered in the Applicant's name to hold in trust for the community, I pray that the court do order the Respondent to stop any construction and/or interference with the said land (para. 15),*
- (VI) *that it is only fair and in the best interest of justice that the Respondents be stopped from construction on the said land (para. 16),*
- (VII) *that the Respondents are trespassers on the said land and should be evicted, and resolution by the majority of the members of the Group Ranch should be adhered to and respected. (paras. 17 & 18).*

The Application herein is for both temporary and permanent injunction. In light of the fact that the Respondents have forcibly entered the suit land without any colour of right, the question of a temporary injunction does not apply. The submissions by counsel for the Respondents on the principles of **GIELLA VS CASSMAN BROWN & CO. LTD [1973] E.A. 358**, that an Applicant must show a prima facie with a probability of success, loss and damage which cannot be compensated in damages, and balance of convenience, would not help the Respondent. On the contrary they actually help the Respondents/Applicants.

Here is a party which files a suit before the subordinate court (*Narok PMCCC No. 16 of 2009*), against the Respondents/Applicants, fails in its application for temporary injunctive orders, files a Memorandum of Appeal against the Ruling of the lower court, and a similar application for injunctive orders in this court. The party, neither prosecutes the Application for temporary injunction, nor does it file a Record of Appeal nor move the court in any manner for determination of either the application for temporary injunctive orders, or the Appeal. In the end the court of its own motion dismissed the application for injunctive orders for non-attendance by counsel. No attempt is made to set aside that order or dismissal or reinstatement of the application. There is also no indication of the determination of the case in the lower court. That is a case of a party who is determined to clog the arteries of the courts as a camouflage for his own illegal activities.

The ultimate prayer in the Applicant's application is for an order of permanent injunction. The Civil

Procedure Rules have no provision for the circumstances under which a mandatory injunction may issue. The courts have therefore to resort to the common law, which is, by virtue of the Judicature Act (*Cap. 8, Laws of Kenya*), part of Kenya law.

A mandatory injunction is an order of court which directs and mandates the defendant or respondent to do a specified act or a specified cause of action.

In this case the Respondents have failed to prosecute their suit in the lower court. They have failed to follow their Memorandum of Appeal by filing a Record of Appeal in this court. They also failed to prosecute their application for injunctive orders in this court.

They contend that the members of the Murua Group Ranch who resolved that the suit land be registered in the 2nd Applicant's were either non members of the Group Ranch or a minority. If that be so, the Respondents have not demonstrated what steps they have taken reverse the resolution of the alleged minority, or shown any breach of the Group's constitution. The Respondents have also not shown what special interest, if any, they have in the suit land. This lends credence to the Applicant's averments that the Respondents are trespassers on the said land and should therefore be evicted. It is clear that the Group Ranch resolved that the suit land be set apart and given to the 2nd Respondent to manage it in trust for the community's benefit in erection of schools, market and hospitals.

No individual or group of individual should be allowed to override a resolution of the majority of the members of the Group Ranch. It is therefore only fair and best interest of justice that the Respondents be not only stopped from construction on the land, but should also be evicted therefrom.

For those reasons there shall issue orders in terms of paragraph 4 and 5 of the Chamber Summons dated 19th February 2012 and filed on 22nd February 2012. The Applicants shall also have the costs herein.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of April, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**