



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA
AT KITALE.

CIVIL SUIT NO. 91 OF 2010.

SIMON LAGAT & 16 OTHERS ::::::::::::::::::::::::::::::::::: PLAINTIFFS.

VERSUS

JOEL SOI)
DAVID KOECH) :::::::::::::::::::::::::::::::::::

:::::::::::::::::::::: DEFENDANTS.

JOSEPH TANUI)
PATRICK BOSIRE)

R U L I N G.

1. This suit is instituted by 17 plaintiffs against the defendants. According to the plaint filed on 28th October, 2010. Simultaneously , the filing of the suit the applicant filed he chamber summons dated 27th October, 2010 in which they are seeking the order of injunction to restrain the defendants by themselves, servants or agents from entering, carrying developments/ constructions, any making or transferring in any manner plots Nos. 333, 374, 375 and 376 at Motosiet Training Centre pending the hearing and determination of this suit. This application is predicated on the grounds that the defendants have wrongfully, illegally and without any color of right alienated land meant for the plaintiffs at Motosiet Trading Centre. It is also alleged that the defendants have commenced construction of a permanent structure thereby blocking a public access road that is used by the plaintiff since 1977. It is also indicated that the defendants have filed orders of County council which directed them not to carry out constructions that is in contravention of the Physical planning Act and the Building bylaws. It is further alleged that the defendants have abused authority bestowed upon them as officials of Motosiet farm. This application is supported by the affidavit of Simon Lagat sworn on 27th October, 2010. He has given a cronology of how the plaintiffs who areshareholders of Motosiet farmsurrendered their parcel of land to the county council of Trans Nzoia so as to create the Motosiet Trading Centre. The council drew out a plan of an urban market with 20 plots. The plaintiff claimed that they come to an agreement with the county council. They created a space for an open market and a road was created to allow unlimited passage to the market. However, the defendants have allocated themselves the plots which were set aside for Motosiet Trading centre to the detriment of the plaintiffs. They are even set out to construct permanent structures on the spaces left out for open air market. The clerk of the county council wrote to the defendants to warn them not to construct any structures which were contrary to the plan anbd the council by laws. The advocate for the plaintriffs also wrote to the defendants however they contitued with the constructions as per the annexed photographs of the building.

2. This application was opposed. Counsel for the respondent relied on the replying affidavit by David Koech sworn on 12th November, 2010. It is contended that the entire parcel of land which also consists of the disputed plots was owned by Motosiet Farm which was subdivided into 378 portions in 1994. The

respondent annexed the copies of the subdivision by the survey of Kenya and the Department of Physical Planning. Out of the 378 plots the three disputed plots were included and they were allocated to the respondents who were issued with the title way back in 1994. It is plot No. Kaplamai/Kachibora/Block 7 Motosiet 166 which was set aside for a market. It is therefore denied that the plaintiffs had any interest over the plots stated in the plaint. In further argument counsel for the respondent submitted that the applicant have not established a prima facie case with a probability of success. The respondent have annexed certificate of search to prove that they are the registered owners of the disputed plots since 1994 that also show the claim by the plaintiff is time barred. Further more the suit filed by the plaintiff was also faulted because it is a representative suit which was filed without the leave of the court. One of the so called defendant has withdrawn for the reasons that he was not consulted before trhe suit was filed.

3. The principle element to determine in this application is whether the applicant has established a prima facie case with a probability of success. Secondly, whether irreparable harm which cannot be compensated for in damages would arise and if in doubt, the court is supposed to determine the matter on a balance of probability. In the case of **MRAO LTD. VS. FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS [2003] KLR 125** the Court of Appeal explained what constitutes a prima facie case in the following:-

“A prima facie case in a civil application includes but is not onfined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

4. Applying the above principles to the present case, I do not wish to be labour the submissions by counsel for the respondent that leave was not sought by the plaintiffs to file a representative suit. This is because no prejudice can be said to have been sufered by the respondents. Secondly, the letter and the spirit in the administration of justice is to ensure the substantive justice as the overlachingobjective. Regarding the substantive prayers, the plaintiffs claim that they are bonafide stake holders and traders at Motosiet Trading Centre. Therefore they are entitled to the use of Plot Nos. 333, 374, 375 and 376 at Motosiet Trading Centre. However, this is denied by the defendants who have annexed copies of certificates of official search to show that the said plots were surveyed and titles were issued way back in 1994 to the respondents respectively. Accordingly, this lends credence to the submissions by counsel for the respondent that this suit is time barred. On the basis of this contention, I am not satisfied that the plaintiffs case demonstrate a prima facie case with a probability of success to warrant the granting of an order of injunction. The plaintiff merely annexed a copy of a map whose authenticity cannot be verified.

5. For the above reasons, the plaintiffs’ application does not meet the threshold for granting an interim order of injunction. The allegations that the defendants allocated themselves land belonging to the late Richard Chelinge and Rosaline Changwony are trhe fact that they have tampered with the map and allocated themselves with the disputed plots way back in 1994 can only be established through a trial if the plaintiffs can overcome the issue of the varidity of their claim which is said to be time barred. The application is hereby dismissed with costs to the respondents.

Ruling read and signed this 11th day of February, 2011.

**M.K. KOOME.
JUDGE.**