



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.166 OF 2010

**BOARD OF GOVERNORS,
SOLAI KALE SECONDARY SCHOOL.....APPLICANT/PLAINTIFF**

VERSUS

ISAAC LELEI.....1ST RESPONDENT/DEFENDANT
CHRISTINE LELEI.....2ND RESPONDENT/DEFENDANT
SYLVESTER KIPYEGON BETT.....3RDRESPONDENT/DEFENDANT
DENNIS KIPTOO LELEI.....4TH RESPONDENT/DEFENDANT
SYLUS CHERUIYOT BETT.....5TH RESPONDENT/DEFENDANT
PASTOR MAIYWA JOHN PIERRE.....6TH RESPONDENT/DEFENDANT

RULING

The applicant is, from the copy of green card the registered proprietor of No.MAJI TAMU/ZIWANI BLOCK 1/42. It has been alleged that the 6 respondents, who are members of one family, have persistently trespassed and cultivated, and even grazed on the suit property. It is further averred that the 6th respondent brought two suits against the applicant in 2002 and 2007, respectively. That the suits were either struck out or withdrawn; that CMCC No.664 of 2007 was withdrawn after the 6th respondent undertook to vacate the suit premises. Only the 5th and the 6th respondents responded. The former filed a replying affidavit and the latter filed notice of preliminary objection the effect of which is that the suit is for striking out for the reason that the verifying affidavit is fatally defective as it offends **order 7 rule 1(2)** of the revoked **Civil Procedure Rules**; that the 5th respondent has never in any way interfered with the suit property.

The applicant has sought in the chamber summons dated 13th July, 2010 that the respondents be restrained by an order of injunction from trespassing upon, cultivating, grazing or dealing with suit property pending the hearing and determination of this suit. The applicant has *prima facie* shown that the suit property is registered in the name of Solai-Kale Secondary School.

The applicant has averred that the respondents have continually interfered with the applicant's quiet possession, by damaging the barbed wire fence, grazing on and cultivating the suit land. The respondents have not explained the nature of their interest on the suit land. One has denied trespassing, the other has only raised a technical point on the verifying affidavit. There are more than enough authorities for the proposition that a defect of a verifying affidavit cannot in itself be a basis for striking out the plaint; that a verifying affidavit has its own independent life from the plaint and it may be struck out without having to strike out the plaint; that a party whose verifying affidavit is struck out may be granted leave to file another one; that no prejudice is likely to be suffered by the respondents.

The respondents having failed to challenge the applicant's assertion of the ownership of the suit property, it follows that the applicant has demonstrated that it has a *prima facie* case. The land is occupied by a school and the persistent invasion by the respondents can be a source of interruption of learning which injury cannot be compensated by an award of damages. The applicant has the title and is in occupation, the balance of convenience is in favour of the applicant.

The application succeeds and there will be a temporary injunction in terms of paragraph c of the chamber summons dated 13th July, 2010 pending hearing and determination of the suit herein.

Costs to the applicant.

Dated, Delivered and Signed at Nakuru this 17th day of June, 2011.

**W. OUKO
JUDGE**