



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**  
**AT KITALE.**

**CIVIL SUIT NO. 2 OF 2011.**

**JIMMY GICHUKI KIAGO            )**  
**MICHAEL NATO MUKHEBI    ) :::::::::::::::::::: PLAINTIFFS.**

**VERSUS**

**COUNTY COUNCIL OF NZOIA & 6 OTHERS :::::: DEFENDANTS.**

**R U L I N G.**

1. The notice of motion dated 18<sup>th</sup> January, 2011 seeks for orders of injunction to restrain the defendants, their agents or servants from trespassing and erecting structures on a public land known as Trans Nzoia /Emoru/26 pending the hearing and determination of the application. This application is based on the grounds that the defendants have encroached and erected structures on the suit premises contrary to the intended purposes. The applicants complained that the plot for meant for a school, hospital, parking and garden. These grounds are elaborated further in the applicants supporting affidavit. It is contested that the disputed land was set aside for public utility after the members of Emoru Settlement Scheme obtained their titles. The suit plot remained under the Settlement Fund Trust to be utilized as a primary, a nursery school and industrial area leaving an open space, a place for church and water area.
2. In further argument to support the above grounds, Mr. Barongo, learned counsel for the applicant submitted that the subject plot which is registered under the Settlement Fund Trustee was set aside for the benefits for members of the whole town. After the scheme was subdivided to the members, the subject plot was left for public utility and commercial purposes. The defendants have not shown what they intend to develop on the suit plot. They have failed to annex the drawings for the constructions. It is further alleged that the defendant are not members of Emoru farm. Moreover, no elections were held to constitute the welfare committee to decide the use of the subject plot. The applicants contends that they would be prejudiced if the facility is not used to develop a dispensary, a school and such other utilities for public use. As regards the locus standi of the applicants it was submitted under article 22 and 23 of the constitution, the applicants have a right to pursue their own claim for their own interest. As regards the alleged allocation of the plot to the defendants, this contravenes the provisions of section 11 of Cap 286 because no letters of allotment are annexed. The applicants annexed a map from physical planning showing the suit plot was meant for public utility. Thus the applicant have a prima facie case with great chances of success. They have annexed photographs to show the defendants have put up permanent structures which will affect their interest as residents of Emoru Settlement Scheme. According to counsel for the applicant the balance of convenience tilts in favour of the applicant.
3. This application was opposed. Mr. Aineah Idakwa , the clerk of the County Council of Nzoia swore an affidavit on behalf of the 1<sup>st</sup> defendant. It is denied that the plaintiffs have locus standi to institute this suit on behalf of Emoru residents. There is no consent by the resident agreed to be represented by the plaintiffs. Moreover, no leave was granted to the applicants to file a representative suit. The plaintiffs are not able to demonstrate what constitutes their grievances or the personal injury that they are likely to suffer. The suit property was set aside for a trading centre. It will be inevitable to allocate the plot for trading purposes which is within powers given to the 1<sup>st</sup> defendant under the provisions of section 166 of the Local Government Act. It is the 1<sup>st</sup> defendant who is supposed to control developments of the town centres. The subject plot is registered under the Settlement fund Trust but meant for the 1<sup>st</sup> defendant. Thus the 1<sup>st</sup> defendant cannot be stopped from planning and using the plot as per the local authorities Act. This was done by a planning committee which conducted the planning and allotted the plots. According to Mr. Kidiavai, learned counsel for the 1<sup>st</sup> defendant this application lacks merit and should be dismissed with costs.
4. This application principally seeks for an order of injunction. The elements to guide the court on whether to grant the

injunction are well established in a long line of authorities by the Court of Appeal. The applicant has to establish a prima facie case with a probability of success. Secondly, the court has to establish whether the applicant will suffer irreparable harm which cannot be compensated for in damages. Lastly, if in doubt, the court is supposed to determine the matter on a balance of probability. The Court of Appeal has provided guidance on what constitutes a prima facie case in the case of;

**MRAO LTD. VS. FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS [2003] KLR 125** in that case the Court of Appeal explained what constitutes a prima facie case in the following words :-

***“A prima facie case in a civil application includes but is not confined 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.”***

5. In this case, the applicants claim that by virtue of being resident and property owners of Emoru Settlement Scheme they are entitled to the suit plot, especially for purposes of public utility such as schools, dispensaries, open grounds and commercial purposes. On the part of the respondents, it is only the 1<sup>st</sup> defendant who filed an objection while maintaining that the applicants have no locus standi to bring this suit on behalf of the residents of Emoru Settlement. The second objection is that the applicants have not demonstrated what loss they will suffer and lastly the 1<sup>st</sup> defendant has the mandate under the Local Government Act to plan the development of Town center. The first issue to determine in this application as in all application seeking for injunctions is whether the applicants have established a prima facie case with a probability of success. The issue of locus standi must be addressed first. The applicants have annexed certificates of title, there is no doubt they are property owners of Emoru scheme. The applicants have sought for orders against the 1<sup>st</sup> defendant who has allocated public land to individuals without due regard to public utilities and seems to have allocated the entire parcel of land meant for public for a commercial centre. On the part of the defendants except for the 1<sup>st</sup> defendant, the 2<sup>nd</sup> to 7<sup>th</sup> Defendant did not file any reply. There is no disclosure of how they were allotted the plots and for what purposes. The are map attached to the application by the applicants shows that the plot was earmarked for public utility and it is under the name of Settlement Fund Trustee. Going by the evidence on record, it is not clear how the title for the suit plot was transferred if at all it was in favour of the 1<sup>st</sup> defendant. There is no plan that has been shown to this court by the 1<sup>st</sup> defendant on what developments they intend to put on the suit plots. The 1<sup>st</sup> defendant merely contests that it has the mandate and sole discretion to plan the commercial centres. I find the 1<sup>st</sup> defendant is less than candid with information on what developments have been approved on whether the developments are only of commercial nature, whether they are guided by an overall development plan covering the whole suit plot or whether the developments are of adhock nature. The above questions are important because the applicants are residents of Emoru Scheme obviously they have a legitimate expectations that a public utility plot should have such necessities like schools, dispensaries and recreational areas. In this regard, I find the applicant can seek a redress in their own rights which is also envisaged under article 22 and 23 of the Constitutional of Kenya. If the developments go on without taking into account this public utilities, the rights of the plaintiffs as residents of Emoru will be infringed upon. I therefore find they have loci standi to bring this suit in their own rights. The applicants have also fulfilled the threshold of granting an interim order of injunction to stop the defendants from carrying out any development until this suit is determined. The parties are hereby directed to comply with the Civil Procedure Rules regarding setting down the suit for hearing. This should be done within 6 months. failure to comply with the rules and set down the suit for hearing within 6 months, the order of injunction will lapse. Costs of this application will be in the cause.

Ruling read and signed this 22<sup>nd</sup> day of July, 2011.

**MARTHA KOOME.  
JUDGE.**