



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 107 of 2009

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NAKORET OLE MERIRAG & 3 OTHERS.....PLAINTIFFS

VERSUS

NKAMA GROUP RANCH & 5 OTHERS.....DEFENDANTS

R U L I N G

The plaintiffs claim in their plaint that 1st, 2nd and 3rd plaintiffs are registered members of the 1st defendant. Pursuant to the consent order made in Nairobi HCCC No. 447 of 1994 on 1st October, 2003 it was ordered inter alia that the survey and allocation of subdivisions of the suit pieces of land to the registered members was to be done in accordance with the agreement that was to be reached at a general meeting of the 1st defendant. They further claim that it was resolved in that consent order that the 4th plaintiff was to be registered as an orphan member of the 1st defendant and was to be entitled to all the rights and privileges of other members. Contrary to that consent, the 1st, 2nd, 3rd and 4th defendants have refused to so register the 4th plaintiff and have instead engaged the 6th defendant who is surveying the 1st defendant's pieces of land known as Plot Nos. 93 and 94 (the suit pieces of land) in an arbitrary and disproportionate manner without any meeting being held as ordered. They further claim that the defendants have sold a large chunk of land to the 5th defendant without the consent of the members or accounting for the purchase price thereof. They therefore seek a mandatory injunction to compel the defendants to register the 4th plaintiff as one of the members of that 1st defendant, a declaration that the purported survey is null and void and an injunction to restrain the defendants from continuing with the survey or allocation of the subdivisions pursuant to that arbitrary and disproportionate survey.

Contemporaneous with the filing of the suit the plaintiff filed an application under **Order 39 Rules 1,2,3, and 9** of the **Civil Procedure Rules** as well as under **Section 3A** of the **Civil Procedure Act** for injunction to restrain the defendants from going on with the said survey, allocation of subdivisions of the suit pieces of land to its members or sale of a portion of a portion thereof to the 5th defendant and the freezing of the 1st defendant's bank accounts until this suit is heard and determined. They withdrew that application and filed another one on 6th February, 2008 seeking more or less the same orders except the freezing of the 1st defendant's bank accounts. They, however, sought another order seeking the cancellation of the illegal and irregular subdivision and a fresh survey to be carried out in accordance with the consent order. This ruling is on that application.

The application is supported by the affidavit of the 3rd plaintiff in which he has basically adumbrated the plaintiffs' complaints as stated above and added that from the plaintiffs' observation, some pieces of land are smaller than others.

The application, even on its merits, is strongly opposed. In their replying affidavits the 3rd and 6th defendants have stated that the survey was duly authorized by the members' meeting of 25th June 2003 prior to the recording of the consent order on 1st October, 2003 and that the 3rd plaintiff actually witnessed the agreement with the surveyor. They accuse the plaintiffs of laches as the survey had gone on for about 4 years before they came to court and is complete and title deeds issued to some members of the 1st defendant. Except for 22 orphans who will get 50 acres each, all the other members will get equal parcels.

The defendants have also dismissed as dishonest the plaintiffs' claim that the sale of part of the suit pieces of land to the 5th defendant was not authorized by the members. The 3rd defendant has annexed to his replying affidavit minutes of the 1st defendant's meetings of 6th December, 2005 and 14th March, 2006 authorizing the sale of 250 acre to the 5th defendant and showing how the proceeds of sale of Kshs. 20 million have and will be utilized.

In opposition to the application, the 1st to 5th defendants have also raised a preliminary objection challenging the competence of this suit. Their counsel have argued that this court has no jurisdiction to determine the membership of the 4th plaintiff in the 1st defendant and that this matter is not only res judicata but also this being a representative suit filed without leave of the court, the entire suit is in the circumstances incompetent and should be struck out.

The 4th defendant having withdrawn his claim in this suit, the issue of whether this court has jurisdiction to determine his membership in the 1st defendant does not arise for my decision.

The defendants have not come out clearly on the issue of res judicata. They have not said if the previous suit involved the parties to this suit or parties through whom those in this suit claim or what issues were determined in those suits. In the circumstances I dismiss the res judicata issue.

I disagree with counsel for the defendants that this is a representative suit disguised as a private suit. Nowhere in the plaint have the plaintiffs claimed to sue on others' behalf as well. Though from the way paragraphs 13, 14 and 15 of the plaint are framed it might appear to be a representative suit, in my opinion, it is not. So the issue of leave of the court under **Order 1 Rule 8(1)** of the **Civil Procedure Rules** to file a representative suit does not arise. I find that the suit is competent and properly before court.

Having dispose of the preliminary points, I now wish to consider that application on its merits.

I have considered the rival submissions and the averments in the parties' affidavits in support of and in opposition to the application. The plaintiffs do not deny that the 1st defendant's members held the meetings pleaded. What they are disputing is that they were not present because they were not notified and as the exhibited minutes have not given the names of the members who attended the meetings, they doubt if any such meeting was ever held. The fact that the plaintiffs did not attend the meetings does not mean the same were not held. I therefore find that the survey work was duly authorized by the members of the 1st defendant including the 3rd defendant who witnessed the agreement which engaged the surveyor.

The plaintiffs have also not disputed the fact that the survey work is complete and that some members have been issued with title deeds. When interim orders were granted pursuant to the plaintiffs' application dated 31st July, 2007, the survey work was complete and records had been submitted to the Lands Office. The plaintiffs and/or their advocates did not serve the Lands Office with the interim orders in time. By the time they did that, the main titles had been closed for subdivision some members had already been issued with title deeds in respect of subdivisions thereof. The plaintiffs' application has therefore been overtaken by events. To grant the orders sought will therefore be an exercise in futility-- **Pricilla Krobought Grant Vs Commercial Finance Co. Ltd & Others, CA No. 227 of 1995.**

Even if the plaintiffs' claim had not been overtaken by events, I am of the view that they still stood no chance of obtaining the orders injunction they seek. This is because, first, in respect of the mandatory injunction they seek in paragraph 4 of the application' it is trite law that:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.”--Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALLER 901 at pg. 901.

In Showin Industries Ltd. =Vs= Guardian Bank Ltd. & Another [2002] 1 E.A. 284 it was held that an interlocutory mandatory injunction would be granted sparingly and only in exceptional circumstances like where the plaintiff's case is very strong and straightforward. Being an equitable remedy the application will be denied if it would be inequitable to grant it like where the applicants conduct does not meet the court's Approval or his equity has been defeated by laches. Besides the fact that the plaintiffs are guilty of laches, there are no exceptional circumstances in this case and the plaintiffs' case cannot be said to be very strong and straightforward. In the circumstances I find that they have not made out a case for the

grant of a mandatory injunction at an interlocutory stage.

The plaintiffs have also not made out a prima facie case for the grant of a prohibitory injunction. The 4th plaintiff having withdrawn his claim this is now a suit by three members complaining against what over 500 other members have approved and paid colossal sums for. An injunction will not only cause inconvenience but also great loss to the majority of the members.

For these reasons I dismiss this application with costs.

DATED and delivered this 25th day of November, 2009.

D.K. MARAGA

JUDGE.