

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO 25 OF 2017

SALIM MOTI KIRENGE & 255 OTHERSPLAINTIFFS/APPLICANTS

VERSUS

BURUSI NYANJE

BURUSI MWATUNE

HARANGA MWATUNE

MWARUWA HARANGA

PATRICK MWAMLONGO.....DEFENDANTS/RESPONDENTS

RULING

1. The Application under consideration is the Notice of Motion dated 3rd February 2017 in which the Plaintiffs/Applicants are seeking for orders that pending hearing and determination of this application inter-partes and pending hearing and determination of the main suit, an order of temporary injunction to issue to restrain the defendants by themselves, their families, servants or agents or whomsoever from selling, constructing and/or in any other way alienating any portion of land at Malomani area within **South Samburu Group Ranch** situated at **Malomani in Samburu, Kwale County**.

2. The Application is based on the grounds on the face of the motion and supported by the Affidavit of Salim Moti Kirenge sworn on 3rd February 2017 and a Further Affidavit dated 6th March 2017. Briefly, the Plaintiffs state that they are all residents and have settled on a portion of land parcel known as **Title No. Kwale/South Samburu/68 Measuring 63359 Hectares** which belongs to **South Samburu group Ranch**. The Plaintiffs aver that on 21st December 2015 they came together with the knowledge of the Group Ranch Officials and the area Chief and agreed to request that 200 acres be hived off from the group ranch land and be sub-divided and allocated to the Plaintiffs for purposes of expanding their business and pursuant thereto a committee was formed to spearhead that resolution. That Plaintiffs state that the Group Ranch Management agreed to set aside the 200 acres for the development of the residents of Malomani Location. It is the Plaintiff's contention that while they were awaiting for sub-division of the land, the defendants herein began selling, constructing and ultimately alienating some portions of the land causing a lot of confusion and acrimony. That attempts by the local administration and elders to resolve the dispute bore no fruit and the defendants are in the process of alienating portions of the subject land to unsuspecting members of the public, and in the process creating confusion since there is no sub-division that has been done for each person to know his portion. It is the Plaintiffs contention that the Defendants have no legal right to sell land within the ranch and commence constructions before the same is sub-divided and everyone is shown his plot. Further, that the Defendants have no capacity to sell any portion of the subject land since the same is still under the group ranch and there is no individual ownership. The Plaintiffs aver that all their pleas to the Defendants to stop their illegal actions have not borne fruit, hence the filing of this Suit and Application.

3. The Application is opposed by the Defendants who filed a Replying Affidavit sworn by Haranga Mwatunje, the 3rd Defendant sworn on 17th February 2017. It is the Defendant's contention that they were born in that land which they inherited from their parents who died and were buried on it and have lived on the land as their homes for years. The Defendants aver that they are members of **Samburu**

Group Ranch and their parents lived on the land for several years without interruption. The Defendants further state that the Plaintiffs who live about five kilometers away from them moved into their area in the year 2015 and forcibly wanted to use it and construct houses but were stopped. The Defendants aver that the Plaintiffs are jealous of their area because it is developed and situated along the main road. They accused the Plaintiffs of selling open spaces and constructing structures during the night and weekends.

The Defendants also claim they have acquired the land by Adverse Possession.

4. In his Submissions, Counsel for the Plaintiffs reiterated the contents of the Supporting Affidavits and added that both the Plaintiffs and the Defendants have lived on the Suit Land since time immemorial. That the land belongs to **South Samburu Group Ranch** who agreed to give the Plaintiffs and the Defendants 200 acres and a dispute arose when the Defendants started selling parts of the land to third parties and started constructions, hence the need to restraint them. In their Submissions, the Defendants relied on the Replying Affidavit and the Documents filed.

5. I have considered the Application, the Affidavits on record and the Submissions made. The principles to be applied when considering an Application for Temporary Injunction are well settled. In the case of ***Giella –v- Cassman Brown and Co Ltd (1973)EA 358***, the Plaintiff must show that he has a *Prima facie* case with a probability of success; that he stands to suffer irreparable damage; and in the event of doubt, the Court will decide on the balance of Convenience.

6. Both the Plaintiffs and the Defendants are in agreement that Land Title **Number Kwale/South Samburu/68** belongs to **South Samburu Group Ranch** who have agreed to give off 200 acres thereof to give to the Plaintiffs and the Defendants. There is also no dispute that the Plaintiffs and the Defendants are living on the said land and have lived there from time immemorial. However, the dispute arose on how to share the 200 acres given by **South Samburu Group Ranch**. The Plaintiffs allege that the Defendants have started constructing and selling some parts while the Defendants maintain that they are in the portion they have lived in for years. There was no evidence of the alleged sale. The Plaintiffs have failed to show that they have a better right to the land than the Defendants. Both parties agree that they have lived on the Suit Land for several years. I believe constructions have been going on over the years. If the Court were inclined to grant the orders sought, it would mean that the Defendants are displaced from the land they have lived in for years. Such an order would amount to eviction of the Defendants from what they regard as their ancestral home. In my view, it is only after a proper sub-division has been carried out and each person shown his rightful plot that individual rights will be ascertained.

7. Having considered the Plaintiff's Application, I am not satisfied on the material before me that the Plaintiffs have established a *prima facie* case against the Defendants with a Probability of Success. In any event the Plaintiffs have not shown that damages will not adequately compensate them in the event of their case succeeding in the end. I am also of the view that the Balance of Convenience tilts in favour of the Defendants who are in and have been in occupation of the Suit Property together with the Plaintiffs for several years.

8. The upshot of the foregoing is that the Plaintiffs have failed to satisfy the conditions for granting the orders sought. In the circumstances, I find no merit in the Notice of Motion dated 3rd February 2017 and the same is hereby dismissed. Each party to bear their own costs.

Ruling delivered, dated and signed at Mombasa this 20th day of September 2017

C. YANO

JUDGE