



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 172 of 2012**

**MARIGAT GROUP RANCH & OTHERS.....PLAINTIFFS**

**VERSUS**

**WESLEY CHEPKOIMET & 19 OTHERS.....DEFENDANTS**

**RULING**

By the Notice of Motion dated 11/7/2012, the plaintiff/applicant seeks the following orders:-

3. That this Honourable court be pleased to issue an order of temporary injunction restraining the defendants either by themselves, agents, servants and any body claiming under them howsoever, from further entering, occupying, cultivating, grazing, interfering with the survey (process of subdivision) or in any way dealing with the suit land to-wit Baringo/Marigati/1 pending hearing and determination of this suit;
4. That this Honourable court be pleased to set aside, review and/vary its ex-parte orders of the 10<sup>th</sup> July, 2012;
5. That in the alternative, this Honourable court be pleased to substitute its order of the 10<sup>th</sup> July 2012 with an order transferring the applicant's suit herein to the High Court at Eldoret for hearing and determination;
6. That costs of this application be in the cause.

The application is premised on grounds found in the body of the application and an affidavit sworn by Mr. Gordon Ogola, the applicant's counsel. The applicant contends that when the matter came up for the preliminary objection raised by the defence on 3/7/2012, counsel holding brief stepped out of court to get further instructions after adjournment was denied but the matter proceeded in the counsel's absence as no time had been allocated, and that there was a genuine mistake on the part of the plaintiff's counsel and the court and that therefore, there is an apparent error on the face of the record and there are sufficient grounds to warrant the setting aside and review of the court's orders; that the High Court has original jurisdiction in all matters and the striking out of the suit was a draconian measure; that the orders of the court are prejudicial to the plaintiff/respondent since the applicants have high probability of success as against the respondents.

The application was opposed and an affidavit was sworn by Wilfred Kandie and Laban Kemei who describe themselves as some of the defendants. They deponed that the application is an abuse of the court process because under the **Land (Group Representations) Act Cap 287**, there is a prescribed dispute

resolution mechanism; that Mr. Ogola was present in court but avoided taking part in the proceedings so that a leeway could be created for this application and that striking out a case does not mean the applicants cannot move to the proper court; that the case had been brought under certificate of urgency and therefore an adjournment was not justified. Mr. Kipkenei, counsel for the respondents urged that even if the case is reinstated, it will not serve any purpose because this court lacks jurisdiction as it should have been filed in the Magistrate's Court at Kabarnet; that Kabarnet Court does not fall within the jurisdiction of the High Court of Kenya, Nakuru. Counsel also urged that the case having been struck out, cannot be transferred. He further added that this was a simple application that did not require attendance of Mr. Ogola.

In reply, Mr. Ogola stated that the respondent has misconstrued **Section 10** of the **Group (Land Representative) Act** because it only relates to disputes between members and their office bearers but in this case the dispute is between members of the Group Ranch and trespassers.

I have considered the application and the objection thereto. The suit that was truck out was filed by Mr. Ogola, counsel for the plaintiffs who is aware of **Section 12** of the **Civil Procedure Act** and Gazzete Notice 1756 of 27/2/2009 which stipulate where civil matters should be filed. Counsel knowingly and intentionally filed the suit before this court ignoring the clear provisions of the law. I considered the above provisions in my earlier ruling. The provisions are meant to provide good management and administration of cases.

Is there any error on the face of the record as alluded to by counsel? I find none. This matter had been filed by Mr. Ogola under certificate of urgency. The applicants were granted an interim order of injunction and the matter was listed for hearing on 4/6/2012. On that day, another counsel held brief for Mr. Ogola and said that the notice of the preliminary objection filed by the respondent was too short and that Mr. Ogola was held up in a case in Mombasa. The matter was coming up for inter-partes hearing on that date and it was adjourned. Again on 3/7/2012, Mr. Ogola was absent and had sent Ms Opiyo to hold his brief as he was allegedly held up a court in Nairobi. The court was satisfied that the application for adjournment was not merited bearing in mind that the matter had been brought under certificate of urgency and that the date had been given when both counsel were in court. The court was very clear when it declined to grant an adjournment and I find no error on the face of the record. Besides, Ms Opiyo clearly stated that she had no instructions that Mr. Ogola was in Nairobi, and she never sought time to get instructions. It is incorrect for counsel to state that it was inadvertence on the part of the counsel.

**Section 10** of the **Land (Group Representative) Act** provides for dispute resolution where an issue arises as to who the officials of the Ranch are. The **Section** reads as follows:-

**“S.10 (1). If it appears to the registrar that there has been a dispute among the officers or members of a group so that he is not satisfied as to who are the officers of the Group, the registrar my in writing require the officers of the group to produce to him evidence of either –**

- (a) the settlement of the dispute and the proper appointment of officers of the group; or**
- (b) the institution of the proceedings of the settlement of the dispute and of a declaration as to who are the officers of the group, and where he does so the officers shall provide evidence accordingly within the time specified and it shall be signed by at least three of the officers.**

**(2) A district magistrate's court shall have jurisdiction to settle disputes and make declarations for the purposes instituted under (1)(b) of this section.”**

From a reading of the plaint, it seems that there is no dispute as regards who the officers of the Group Ranch are. In their defence the defendants claim to be members of the Group Ranch and if there is a dispute as to membership, then it falls under **Section 28** of the **Act** and it is the District Magistrate's court that has jurisdiction to determine the issue of membership. In this case, though the wider dispute is over the ownership, occupation and use of the land, the first question that will have to be determined is that of the membership of the Group Ranch.

In the end, the applicant has not satisfied this court why the court should review or set aside its orders. Parties should not intentionally flout the law just because of **Article 259** of the **Constitution** where the courts are urged to do substantive justice. In the same breath parties should not flagrantly abuse the court process only to rely on **Constitutional** provisions. It would be abusing the very **Constitution** which requires the court to administer justice without undue regard to technicality and expeditiously. In **Kenya Bus Services Ltd & Others v AG, NRB HCC 413/05**, the Constitutional Court observed:-

**“Rules of procedure should be observed as failure to do so may result in prejudice and injustice and failure to observe rules of procedure amounts to an abuse of the court process.”**

Counsel had a chance to request the court to have the matter transferred to the proper court but failed to attend court or apply for transfer in good time. Courts will not assist the indolent. For this reason, I decline to grant the orders sought. Let the applicants file this matter in the proper court at Kabarnet or Eldoret High Court. The applicant to bear the costs of this application.

**DATED and SIGNED this 28<sup>th</sup> day of March, 2013.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr Mbugua for the plaintiffs/applicants  
Mr. Kipkenei for the respondents/respondents  
Kennedy – Court Clerk