



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL SUIT NO.6 OF 2012**

**MARA NORTH HOLDING LIMITED.....1<sup>ST</sup> PLAINTIFF**

**MARA NORTH CONSERVANCY LIMITED...2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TRANSWORLD SAFARIS KENYA LIMITED.....DEFENDANT**

**RULING**

1. Two plaintiffs instituted these proceedings vide a plaint dated **8<sup>th</sup> October, 2012** and filed in court on **9<sup>th</sup> October, 2012**. The Key prayer in the plaint is for an order of permanent injunction against the defendant. From the body of the plaint, one can gather that the prayer for injunction is predicated on alleged trespass to 788 parcels of land for which the plaintiffs claim to have proprietary interests.
2. Contemporaneous with filing the plaint, the plaintiffs filed an application for temporary orders of injunction pending the determination of the main suit. The application is dated **8<sup>th</sup> October, 2012** and when it was placed before the court on **9<sup>th</sup> October, 2012**, the court granted a temporary injunction for fourteen (14) days and directed service of the application with a direction that the same be heard on **17<sup>th</sup> October, 2012**.
3. No sooner had the defendant been served with the application and order, than they immediately lodged an application on **11<sup>th</sup> October, 2012**. The application by the defendant sought to set aside or vary the orders made by court on 9<sup>th</sup> October 2012.
4. On **17<sup>th</sup> October, 2012** both applications were listed before the court and upon hearing both parties, the court directed that both applications be heard on **29<sup>th</sup> October 2012**, additionally on the same day, and at the request of the parties, the court varied its orders made on 9<sup>th</sup> October 2012 ordering as follows:-

***“Pending hearing, the orders issued on 9<sup>th</sup> October 2012 are stayed on condition that the respondent in the main application makes payment to the applicants (plaintiffs) for every balloon landing at USD 50 per landing per person on upon the landing; failing which this order stands spent.”***

5. It is contended by the defendant, which is not denied, that payments are still being done as per the court orders.

6. Anyhow, the two applications were eventually heard and a ruling rendered on **7<sup>th</sup> November 2012**, dismissing the defendant's application to set aside and allowing the plaintiffs' application dated **8<sup>th</sup> October 2012**.

7. The matter appeared set for the next stage of hearing. But alas, it was not to be for on **8<sup>th</sup> November 2012**, a day after the ruling, the defendant filed yet another motion to set aside the entire ruling and orders of **7<sup>th</sup> November, 2012**. This application was served and when the parties appeared before court on **12<sup>th</sup> November, 2012**, the application to set aside was allowed by the consent of both parties. Additionally, the parties recorded the following order by consent;

**“Temporary stay granted and status quo ante the ruling of 7th November 2012 maintained!”**

The court then directed that the two applications be heard again on 4<sup>th</sup> December 2012.

8. As far as I can tell, there has not been any further action regarding these applications since then until the present application, now under consideration.

I have deemed it necessary to set out at length the chronology of events since commencement of this suit because in my view, the present application dated **24<sup>th</sup> September, 2013** is linked to the previous applications and orders, as I will demonstrate in a moment.

9. The application dated 24<sup>th</sup> September 2013, is expressed to be brought under section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, Order 3 Rule 2,4 and Order 51 of the Civil Procedure Rules 2010. It primarily seeks temporary injunctive orders against the defendant restraining them from taking off or landing on specific parcels of land situated in the Mara Region namely,

**CIS-MARA/KOYAKI/DAGURURUET/516&**

**CIS-MARA/KOYAKI/DAGURURUETI/519.**

10. According to the plaintiffs, these two parcels are among the 788 parcels of land within the MARA that constitute a private wildlife conservancy known as “Mara North conservancy”. The second plaintiff, it is alleged, is the holder of leases over the 788 parcels. I must pause here and observe that I have carefully perused the pleadings and the record and I have not come across evidence of the alleged leases except for parcels; **CIS MARA/KOYAKI/DAGURUETI/161,306,304, 516 AND 519**. In other words there is prima facie evidence that the plaintiffs have some proprietary interest in the parcels stated above only, meaning that it is incorrect to state that the plaintiffs have interests in 788 plots without tendering evidence of the same. It is not clear why the leases, if they exist were not filed together with the list of documents as required by the rules or annexed to affidavit in support of the plaintiffs' motion pending for determination. Anyhow, these are matters for another day.

11. Up until, the current application, the plaintiffs' chief complaint was that the defendant was trespassing on its parcels of land. The tort of trespass is known to our law, and it is indeed correct for an aggrieved person to seek court intervention whenever there is trespass or threat of trespass to his land. In the current application, however, although the plaintiff, prays for an injunction, the same seems to be based on a different cause of action namely nuisance. The key factual contention is that the defendant's activities while taking off, flying and landing their hot-air balloons are making so much noise as to cause untold misery to the plaintiffs. It is alleged, which is denied that the balloons make ***such loud noise when taking off and landing which noise is equivalent to that of a jet engine taking off***. The noise that is emitted has been a constant nuisance to the plaintiffs and their members, in particular, ***Kicheche Camp Limited and Elephant & Pepper Camp Limited***. The action of operating the balloons by the defendant, as I understood it, is irritating and quite disruptive. It has allegedly led to cancellation of booked safaris by tourists.

12. I have carefully considered this matter, read the submissions and case law tendered by the rival parties. To my mind, the following questions emerge for determination;

1. **Is the current application dated 24<sup>th</sup> September 2013, properly grounded on a pleaded cause of action?**
2. **If not is the application then an abuse of the court process?**
3. **Are the plaintiffs entitled in law to agitate for injunctive reliefs on behalf of third parties namely Kicheche Camp Limited & Elephant & Pepper Camp Limited?**
4. **What is the status of the court orders made by consent on 12<sup>th</sup> November 2012?**

13. Regarding the first question, it appears to me that the main grievance is not that the defendant is trespassing. The problem is that of the alleged noise from the, ***“machines that make tremendous stress, discomfort and irritation.....”*** (See ground No. 5 in support of the application). The complaint really is that the defendant is causing nuisance by operating its balloons. Nuisance is a tort recognized by law and its remedies are known (see **MWITA MERENGO V JOSEPH TUNEI MARWA & 2 OTHERS** [2012]eKLR. It is not the same as trespass! Given that the plaintiffs had not pleaded nuisance in their plaint I do not think that they are entitled to base an interlocutory application on a cause of action that is not pleaded (see **NAIROBI CITY COUNCIL v THABITI ENTERPRISES LIMITED** [1997] eKLR where the court of Appeal( *Per Tunoi JA as he then was*) Inter alia observed that;

***“it is now settled law that the only way to raise issues for determination by the court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them. See the case of CHARLES C. SANDE V KENYA CO-OPERATIVES CREAMERIES LTD. Civil Appeal No. 154 of 1992 (unreported). In this instance compensation was never pleaded and should not have been tried. The court was obligated to dismiss that relief.”***

14. Therefore the answer to the question posed above, is that the application is not grounded on a pleaded cause of action; consequently and in answering the second question, the application is an abuse of the court process.

15. To the extent that the application agitates violation of rights of third parties, namely, ***Kicheche Camp Limited and Elephant & Pepper Camp Limited***, the application is not maintainable. Our laws do not permit litigation via proxy except in limited and very specific situations. e.g. ***representative suits, suit by trustees e.t.c.*** Even then, an elaborate procedure is provided for on how that is to be done. It is wrong for the plaintiff to seek to agitate perceived violations of the rights of ***Kicheche Camp Limited and Elephant & Pepper camp limited*** in the manner in which they have done here.

16. I think I have said enough to demonstrate that this application should fail. However I must comment on the subsisting court orders that were recorded by consent on **12<sup>th</sup> November, 2012**. The effect of these orders, if unclear to any of the parties was to return the parties in this suit to the orders of 17<sup>th</sup> October, 2012. Now, the parties desired by consent that those orders, govern their relationship going forward. At the time the orders were recorded, the plaintiffs were aware of how the defendant operates its balloons. The plaintiffs therefore have not been caught by surprise by the alleged noise made by the balloons. They have always known and indeed benefited from that enterprise as they have continued to receive payment from the same. They are now estopped by record and conduct from now turning round after the consent to seek to amend it in a tangential manner. A consent order is a contract between the parties making it and they are bound by its terms. (See ***In Re The Estate of Ithara Ibutu (deceased)*** [2009] eKLR and ***Kenindia Assurance Co Ltd v Muturi*** [1990–1994] 1 EA 193 (CAK) for this proposition) It can only be set aside in accordance with the known and laid down principles of law. With that I say no more. The application dated 24<sup>th</sup> September,

2013 is hereby dismissed with costs to the defendant.

Orders accordingly.

**Dated and Signed and delivered in open court this 17<sup>th</sup> day of January 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Kibet holding brief for Mr Oyomba for the Applicant/plaintiff

Mr Amoko for the Defendant/Respondent

Emmanuel Maelo: Court Assistant

**L N WAITHAKA**

**JUDGE**