



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ELC NO. 280 OF 2013

(MULTITRACK)

**GREEN BUFFALO SAFARIS EA LTD.....PLAINTIFF**

**VERSUS**

**KENYA WILDLIFE SERVICE.....DEFENDANT**

**RULING**

1. The plaintiff/applicant, **Green Buffalo Safaris EA Ltd**, filed a Notice of Motion dated 2<sup>nd</sup> April, 2013 seeking the following substantive order;

*A temporary order of injunction restraining the Defendant from distressing, repossessing, attaching and interfering with the Plaintiff's quiet enjoyment of the tenancy of the parcel of land known as L.R. Number 12881/NAKURU ("the suit property") pending the hearing and determination of this suit.*

2. The Application is premised on the grounds set out therein and in the supporting affidavit sworn by **Isaac Mwangi** on 2<sup>nd</sup> April, 2013 the Managing Director of the Plaintiff Company. He depones that the Plaintiff is the legal tenant of **L.R. No.12881/Nakuru** (*suit property*) having been in occupation since 2010. The occupation resulted from a lease signed between themselves and the Defendant after securing a tender from the Defendant to construct a luxury tourist tented camp in **Hells' Gate National Park** and operate the same for a period of 25 years. The Plaintiff alleges that the Defendant has illegally terminated the lease agreement without notifying the Plaintiff and had gone on to re-advertise a new tender in the National dailies. This was despite the Plaintiff undertaking to get a National Environmental Management Authority's (**NEMA**) approval which was delayed together with financing of the project due to uncertainties in the business environment as a result of the upcoming elections at that time. The plaintiff having invested Kshs 14.8 million in the development of the property would suffer irreparable damage if the application was not allowed.

3. The Defendant opposed the application vide a replying affidavit sworn by **Salome Gachago** on **10<sup>th</sup> May, 2013**. She deponed that she was the Business Development Manager of the Defendant and that the tender was aimed at boosting revenue for the Defendant. They invited bids from the private sector to realise this goal and the Plaintiff was one of the applicants who were successful. One of the terms of the agreement was that the Plaintiff had to put up a tented camp within 12 months of acceptance of the offer. However, for reasons best known to themselves, the Plaintiff was unable to obtain financing and did not complete the construction as agreed. On several occasions the Defendant had visited the site to inspect the

progress only to find that construction had not yet begun which was a fundamental breach of the contract and had equally been treated to a litany of excuses from the Plaintiff a fact that prompted the Defendant to invoke Clause 7 of the lease agreement to re-enter the premises. The Defendant had been very gracious to the Plaintiff, by giving numerous extensions of time to enable the plaintiff acquire the requisite financing and complete the project but this generosity was abused by the Plaintiff who kept giving false promises and had even bid for another tender without paying any rent. To her the application had been brought in bad faith and should be dismissed but if the court was inclined to grant the injunction then it should be granted with a condition that the Plaintiff be made to pay rent arrears.

4. The Plaintiff filed further affidavit sworn on **8<sup>th</sup> June, 2013** and **9<sup>th</sup> December, 2013**. **Isaac Mwangi** deponed that the tender alluded to by the Defendant had been cancelled; that there was construction ongoing at the site, as evidenced by the construction plan of **1<sup>st</sup> February, 2011**; that materials were brought on site in **May 2011** and that failure to get NEMA approval was the major hindrance to getting financing; that the Defendants had never demanded rent and should consider compensating the Plaintiff to the tune of Kshs 156 million. He attached invoices of the costs incurred by the Plaintiff stating that the lease was never terminated by the Defendant, nor did they issue any notice signalling their intention. He further claimed that the amount for compensation due to them was actually Kshs 89,967,920.

5. The application was urged by way of written submissions. Counsel for the Plaintiff reiterated the facts in their affidavits and relied on **Giella v Cassman Brown & Co. Ltd (1973) EA 358** stating that the applicant had established a *prima facie* case with probability of success because the Defendant had never issued the Plaintiff with any notice to vacate as was required in the lease agreement and that advertising for a new investor was a breach of the lease agreement. Counsel further submitted that the Plaintiffs would suffer irreparable damage that could not be compensated by an award in damages having invested more than Kshs 90 million.

6. On their part, counsel for the Defendant equally relied on the case of **Giella v Cassman Brown & Co. Ltd (supra)**. They argued that the Plaintiffs had not established a *prima facie* case as they had breached the terms of the lease agreement on several occasions, including the requirement to construct the camp within 12 months. He further submitted that any loss suffered by the plaintiffs could be compensated by way of damages as the losses suggested by the Plaintiff were all pecuniary in nature. The plaintiff was insincere as they had kept changing the amount they claimed to be loss incurred; that the balance of convenience actually tilted towards the Defendants as it is in their best interests and that of the general taxpaying public that a serious bidder be found. Counsel relied on the cases of **Nyanza Fish Processors Ltd v Barclays Bank of Kenya Ltd [2009] eKLR**, **Abbellana Properties Ltd v National Social Security Fund Board of Trustees & 3 Others [2009] eKLR** and **Kyangavo v Kenya Commercial Bank [2004] 1 KLR 126**

7. The issue that stands out for determination is whether on the facts and circumstances of this case, the applicant is entitled to the orders of injunction sought at this interlocutory stage.

8. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella v Cassman Brown & Co. Ltd (1973) EA 358**. The Applicant needs to show that he has a *prima facie* case with probability of success; that he stands to suffer irreparable damage that cannot be compensated by an award in damages and if the court is in doubt, it will determine the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case.

9. Admittedly, the applicants are seeking to benefit from an equitable remedy, therefore they must show a good account of themselves as far as the issues in dispute are concerned. A court of equity would not normally allow a party to benefit from its own wrong and at the same time a plaintiff would not be able to defeat the rights of a defendant, when the fault is largely attributable to him. The powers of the court in an application like the present one is discretionary and since the discretion is judicial, it cannot be exercised without any recourse to the law and facts of the case. As they say judicial discretion has to be exercised on the strength and basis of the law and facts of the particular case. It means therefore that although the powers are wide, they are also restrictive.

10. I have stated that it is a pre-requisite factor that before the court can exercise its discretion to grant an order of injunction, the applicant must satisfy the court that his case, falls within the conditions precedent in the grant of an injunction. The injunction is granted to preserve the status quo pending the ascertainment of the rights of the parties at a full hearing. It is also granted to restore or regain what has been lost through an express contravention of the law. In essence, an injunction is given in protection or assertion of some legal right or equitable right already infringed or is about to be infringed.

11. Has the Plaintiff made out a *prima facie* case with a probability of success? In **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** a *prima facie* case was described as:

***“... 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.”***

12. It is common ground that the plaintiff and defendant entered into a lease agreement. It is also common ground that the plaintiff failed to complete the construction of the tourist camp within the stipulated period; that the defendant has now terminated the agreement and is in the process of finding another investor. This is the action that the plaintiff now challenges as being unlawfully undertaken by the Defendant. To be granted the order of injunction that it seeks, the plaintiff must show that it has established a *prima facie* case with good chances of success and must show a good account of themselves as far as the issues in dispute are concerned. From the affidavit evidence placed before me and submissions by the respective counsels, the applicant has not adduced any evidence to convince this court that they complied with the terms of the lease and therefore deserve the injunction sought. They entered into an agreement with the defendant with clear terms and conditions. The plaintiff did not fulfil any of these conditions. The defendant on the other hand has demonstrated how they continuously bent backwards to accommodate the plaintiff. They extended time and even offered to step in to guarantee financing. All the while, they did not charge the plaintiff any rent. Furthermore, the fact that the Plaintiff is also not quite sure as to what figures it claims as loss and compensation does not show a good account of themselves. At one time they claim to have lost Kshs 14.8 million. They then claim compensation of Kshs 156 million and later give a figure of Kshs 89 million loss incurred. A party who does not fulfil their obligation cannot expect to be assisted by the court. The plaintiffs cannot be allowed to occupy a position which is acquired in contravention of the law. My view therefore is that the applicant has not established a *prima facie* case.

13. On whether the plaintiff will suffer irreparable damage that cannot be compensated by an award in damages, I am of the view that any loss and damage allegedly suffered by the plaintiff can be quantified and the plaintiff can be compensated by way of damages as their loss as suggested is pecuniary in nature. Since I have no doubt in my mind, I find it unnecessary to consider the third limb.

14. The upshot of the foregoing is that the Notice of Motion dated 4<sup>th</sup> July, 2013 has no merit and is hereby dismissed costs.

**Dated signed and delivered in Nakuru this 25<sup>th</sup> day of July 2014**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Githiru for Plaintiff/Applicant

Mr. Njuguna S. K. holding brief for

MS. Ombonya for defendant/respondent

Court Assistant: Emmanuel Maelo.