



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ENVIRONMENTAL AND LAND DIVISION
CASE NO. 557 OF 2013
("FAST TRACK")

WALKING WITH MAASAI LTD.....PLAINTIFF

VERSUS

HENDRIK CHRISTOFFEL MARAIS.....DEFENDANT

RULING

1. The plaintiff/ applicant, **Walking with Maasai Ltd** filed a notice of motion dated **10th October, 2013** seeking the following substantive orders:-

a. That a temporary order of injunction do issue against the defendant, his agents, employees, servants and/or representatives, restraining them from interfering, selling, trespassing, using and/or dealing with the management affairs and/or the business of the plaintiff's clinic and vehicles namely KBN 646V and KBJ 647J, 2 camp site tents and the house situated on a 5 acre piece of land at Tiamanangion Shopping Centre, Olorte Location, Loita Division, Narok South District, Narok County, locally known as the CMF Base

b. That a Delivery up Order be issued directing the defendant to release forthwith 3000 Sterling Pounds and 2 Camp Site tents to the Plaintiff

c. That an Entry Order be made authorizing the Plaintiff to enter the building and the clinic at Tiamanangion Shopping Centre, and open it and run it for the benefit of the Olorte Maasai Community in Narok County.

2. The application is premised on the grounds on the face of the application and the supporting affidavit by **Kashu Parit**, a director of the plaintiff sworn on **10th October, 2013** and a further affidavit sworn on **16th November, 2013** by **Andre Brink** also a director of the plaintiff. In his affidavit, **Kashu Parit** depones that the plaintiff entered into a Memorandum of Understanding ("MoU") with the Olorte Community Development Trust ("the trust") to carry out programmes on behalf of the trust to promote the living standards of the Olorte Maasai Community. The MoU was to run for 15 years after which the land would revert back to the trust.

3. The community also entered into an agreement with an organization, **Christian Missionary Fund**

("CMF") allowing them to use land owned by the trust for a period of 15 years. After the 15 years, CMF would return the land to the community together with any developments therein. CMF built permanent structures thereon but after some time, they decided to move out of the area before expiry of the 15 years period. They entered into an agreement with the plaintiff to take up the house and other developments put up by CMF and in exchange, the plaintiff would pay CMF compensation of Kshs 1,050,000 for the use of these developments but would hand over the same to the trust after the 15 year period lapsed.

4. The plaintiff took possession and employed the defendant as its fundraising and liaison officer. They agreed that the defendant would occupy the house in furtherance of the plaintiff's objectives as its officer. During this time the Plaintiff secured and registered a Land Rover ambulance registration number **KBJ 647J** and used the same as a clinic stationed at the suit premises.

5. With time, the plaintiff became unhappy with the actions of the defendant whom they alleged had started acting against the interests of the plaintiff by writing false emails to the plaintiff's sponsors, causing deep divisions between the plaintiff and the Olorte Masaai Community, attempting to give away both the house and the ambulance to the Anglican Church of Kenya without authority from the plaintiff, employing his own nurse to run the clinic, registering a second Land Rover registration number **KBN 646V** used in the adult literacy programme in his name, refusing to hand over 3000 Sterling Pounds belonging to the Plaintiff and unjustly enriching himself by collecting revenue from the clinic and from 2 camp site tents where he hosted and charged "volunteers".

6. The application is opposed. In his replying affidavit sworn on **17th October, 2013** the defendant deposes that he came to Kenya as a volunteer and had never been an employee of the plaintiff; that he had never received a salary from them and was not renting the house, as the agreement between them allowed the defendant to use the house as his residence and office from which some programmes would run. It was his contention that he and his wife had personally funded the compensation package paid to CMF from their own sources including their donations from their parent church (*St. Paul's Ealing in England*) and other sources from the United Kingdom.

7. He traced the beginning of their fallout to **Andre Brink's** poor working relationship with both the local and donor communities and Brink's failure to account for donor funds. This had resulted in donor funds dwindling, leading to accusations by Andre Brink that the defendant was inciting the donors to reduce the plaintiff's funding and also inciting the community and local administration against the plaintiff.

8. On the issue of the Land Rover, **KBN 646V**, the defendant deposed that the same belonged to him as confirmed by the principal donors of the Plaintiff, Walking with Maasai UK. The vehicle had been donated to them by his wife's uncle, one **Rodge More O'Ferrall** and the defendant has personally paid import duty and registered the Land Rover in his name for use in his work. Regarding the 3000 sterling pounds and the tents, the defendant deposed that the money had been fully accounted for and that the tents were purchased by him for volunteer accommodation using funds sourced from his parent church (*St Paul's Ealing*) and well-wishers.

9. In his further affidavit, **Andre Brink** denied mismanaging the clinic and stated that there were several other projects that had been running successfully before the defendant arrived in Kenya. He instead accused the defendant of being negligent in the management of the clinic by failing to remit statutory deductions of the clinic's employees, failing to collect a 10,000 litre water tank donated by the Government, causing the closure of the clinic and using the Deputy County Commissioner Narok to forcefully reopen the clinic by breaking in.

10. The application was disposed of by way of written submissions. Counsel for the Plaintiff reiterated what was contained in their application and affidavits. They relied on the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** stating that the applicant had met the conditions enumerated therein. It was the plaintiff's contention that the defendant despite being the plaintiff's employee had been actively working against the interests of the Plaintiff, had used his position to unjustly enrich himself by using the assets (*motor vehicles*) of the Plaintiff for his own use, not accounting properly for the 3000 pounds donated for the use of the Plaintiff, denying the Plaintiff access to the Internet and to its Facebook page to

reach out to donors, painting a bad picture of the Plaintiff to donors who had in turn reduced their funding to the Plaintiff and not paying rent on the premises that he and his family occupied despite a notice to do so. In addition the defendant had not only caused the closure of the clinic but he had also used the Provincial Administration to side with him, which had an adverse effect on the Plaintiff's projects causing untold hardship and suffering to the Olorte Massai community.

11. Counsel for the defendant submitted that the Plaintiffs had not established a prima facie case as defined in **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** and that the licence as granted in the MoU could not confer a proprietary interest in land, as was held in **Hannah Wanjiku Gatoto & 2 Others v Moses Gatoto Karanja (Nairobi Civil case No 1220 of 2006)**. It was the defendant's contention that the plaintiff could therefore not claim rent or purport to evict the defendant. Furthermore, on the allegations that the defendant was causing untold suffering on the community, he submitted that the clinic was in operation having been reopened by the Deputy County Commissioner and the same was serving the community well.

12. He further submitted that any loss suffered by the plaintiffs could be compensated by way of damages including their alleged loss of revenue by the defendant collecting revenue from the tents and failure to pay rent. He relied on the case of **Ibrahim v Sheikh Bros Investments Ltd (1973) EA 118**.

13. On the third limb, he submitted that the balance of convenience tilted towards the defendant. He urged the court not to grant the orders sought by the plaintiff as granting them would result in closure of the clinic which would in turn cause untold suffering to the community.

14. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella vs 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. It must also be noted that the purpose of an injunction is to maintain the status quo pending the hearing and determination of the matter before it.

15. I must at this stage; state that from the facts outlined herein above, this is an interesting and complex case, with numerous allegations, supported by evidence advanced by both parties. But at this stage, all the applicant is required to demonstrate is not a case which must succeed but one which may succeed. The plaintiff has brought a basket full of allegations against the defendant. The defendant has responded in equal measure. Some of the issues that stand out for determination include the relationship between the plaintiff and the defendant, who paid the compensation money to CMF, who purchased which assets and who should operate the clinic. All these in my view are issues best determined during trial as they will require submission of oral and documentary evidence so that the parties are subjected to cross examination to test the credibility of the evidence tendered.

16. So has the applicant established a prima facie case? Having considered the application, the affidavits, submissions and authorities, I am not satisfied that the plaintiff has established a prima facie case to warrant the granting of an injunction. He has failed to convince this court on any of the allegations he has leveled against the defendant. The defendant in retaliation has punched holes into the plaintiff's story leaving the court with more questions than answers.

17. Having found that the plaintiff has not established a prima facie case but bearing in mind that the purpose of an injunction is to maintain the status quo, I will now address the issue of the clinic whose operation or closure will not only affect the parties in this suit but also the entire Olorte Maasai community. It is common ground that the community is the biggest beneficiary of the essential services offered by this clinic, which when in operation, is the only mobile clinic within a radius of 180kms from Narok town.

18. The personal wars between the two parties should not be allowed to interfere with the services offered

by the clinic. Both parties present themselves as people of honour whose main objective is to uplift the living standards of the Olorte community. It must therefore be very painful for both parties when the clinic is not in operation. Luckily for the community the clinic has since been reopened by the Deputy County Commissioner, although not through the best means and is now operational. I do not see why I should interfere with the current operation of the clinic. Any loss incurred by the plaintiff can be quantified and compensated by way of damages.

19. Status Quo shall be maintained as follows: both the plaintiff and the defendant are restrained from selling and/or disposing or wasting any of the assets purchased using donor funds or donated by well-wishers registered in the names of the plaintiff and the defendant and meant for advancement of the living standards of the Olorte community pending the hearing and determination of the suit.

20. Costs of the application will be in the cause.

Dated signed and delivered in Nakuru this day of 25th July, 2014

L N WAITHAKA

JUDGE

In the presence of:

Mr Bullo for the Applicant

Mr Njeru for the Respondent

Emmanuel Maelo : Court Clerk

L N WAITHAKA

JUDGE