



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 154 OF 2011

JAMES R. KETUIYO &
OTHERS.....PLAINTIFFS/APPLICANTS

VERSUS

MARA NORTH HOLDINGS LIMITED.....1ST
DEFENDANT/RESPONDENT

MARA NORTH CONSERVANCY LIMITED.....2ND
DEFENDANT/RESPONDENT

RULING

In a Plaintiff dated and filed on 28th June, 2011, the Plaintiffs sought the following orders -

- (a) ***permanent injunction restraining the Defendants whether by themselves, servants, workmen, agents and or otherwise howsoever from operating the business of providing game drives and other tourism excursions to tourists in the Plaintiffs' land known as CIS MARA/KOYAKI DUGURUGURUETI/491 and CIS MARA/KOYAKI DUGURUGURUETI all situate within Narok South District.***
- (b) ***a declaration that the leases held by the Defendants are null and void ab initio and that the Plaintiffs are entitled to reposses their land known as CIS MARA/KOYAKI DUGURUGURUETI/491 and CIS MARA/KOYAKI DUGURUGURUETI.***
- (c) ***The costs of the suit.***
- (d) ***such other or other relief as the Honourable Court may deem fit and just to grant.***

In a Notice of Motion dated and filed on the same date 28.06.2011, the plaintiffs sought the following orders -

- (1) ***that this application be certified urgent, service of the same be dispensed with in the first instance due to its urgency that this Honourable Court be pleased to hear this application and grant the orders sought herein.***
- (2) ***that due to the urgency of this matter this Honourable Court be pleased to exempt the plaintiff from the requirements of Order 3 Rule 2(c) of the Civil Procedure Rules 2010, at this stage.***

(3) that this Honourable Court do grant an injunction restraining the Defendants whether by themselves, servants, workmen, agents and or otherwise howsoever from operating the business of providing game drives and other tourism excursions to tourists in the plaintiffs land known as CIS MARA/KOYAKI DUGURUGURUETI/491 and CIS MARA/KOYAKI DUGURUGURUETI all situate within Narok South District.

(4) that cost of this application be borne by the Defendants/Respondents.

2. The Motion is premised to be brought under the provisions of inter alia Sections 3A and 3 of the Civil Procedure Act (*Cap. 21, Laws of Kenya*), Order 3, rule 2, Order 40 rules 1, 2 & 4 and Order 51 of the Civil Procedure Rules 2010, and all enabling provisions of the law.

3. Although long submissions, and authorities were cited to me by both counsel for the Applicants and the Respondents, I am inclined to dispose of this application both on brief procedural and substantive grounds.

4. On procedural grounds, the Applicants in their plaint sought a permanent injunction against the Respondents. In their Notice of Motion, they cite and rely upon the provisions of Order 40, rules 1, 2 & 4 of the Civil Procedure Rules 2010. That order provides for the grant of a temporary, not a permanent injunction. In terms of Order 2, rule 6(1) of the Civil Procedure Rules, the Applicants have departed from their pleadings. Parties are bound by their pleadings unless first amended under rule 6(2) of that Order 2. The prayers sought in the Notice of Motion do not therefore lie.

5. On the substantive grounds, (*if I were wrong in the above conclusion*) the principles for grant of temporary injunction in Kenya are now fairly settled. The Applicants' counsel referred to them in the cases cited to me -

(1) **Giella vs. Cassman Brown & Co. Ltd. [1973] E.A. 358,**

(2) **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,**

(3) **Major Kahugu Karebe vs. Councillor Rose Adhiambo Ogonda [2010] eKLR,**

(4) **Symon Gatutu Kimamo & 587 Others vs. East African Portland Cement Co. Ltd (*Machakos HCCC No. 333 of 2011 (OS)*(unreported).**

6. **Giella vs. Cassman Brown Ltd (*supra*)** is the *locus classicus* case on the principles for grant of temporary injunctions. These principles are that -

(i) the Applicant must show a *prima facie* case with a probability of success;

(ii) the applicant will suffer irreparable damage or loss;

(iii) when the court is in doubt it will decide the application on the balance of convenience.

7. In **Symon Gatutu Kimamo & 587 Others vs. East African Portland Cement Co. Ltd** (*supra*) the Hon. Justice Ngugi, observed -

"To these three factors (prima facie case, irreparable harm and balance of convenience), one might add another factor which a court is, at least, entitled to take into account after the first three, public interest. A temporary injunction will not normally issue if there will be harm to the public interest resulting from its issuance. Retired Justice Kuloba distilled these factors in his authoritative book on injunctions thus -

'The right formulation of (the principles) would be this, that among other considerations a court takes into account in determining whether a temporary injunction should be issued, first, whether there is a

significant likelihood that the applicant will prevail on the merits of the case at full trial. Second, the court will ordinarily consider whether there is a threat of irreparable harm. Finally there is the traditional consideration of whether harm to the respondent would outweigh the need for temporary relief. But there may be other matters, for example public interest, involved."

8. In **Mrao Ltd vs. First American Bank of Kenya Ltd** (*supra*), the Hon. Mr. Justice Bosire JA said -

"..So what is a prima facie case? I would say that in civil cases it is a case in 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."

In this case, the Applicants have not sought a temporary injunction. They have sought a permanent or mandatory injunction which is a direction to the Defendants/Respondents in effect to cease operations at the lands or areas in question. In a departure from their pleadings, the applicants have sought a temporary injunction. The concept of a temporary injunction is to maintain status quo until the full hearing of the dispute. In this case, if such an order were granted, the dispute would have been determined. The Defendants/Respondents would cease operations and there would little point in maintaining the matter to go for trial.

It seems to me therefore that such an order would cause irreparable harm to the Applicants and even if the Applicants were in a position to pay damages to the Respondents the quantification of such damages in a volatile industry such as tourism would be difficult. The balance of convenience would really require the maintenance of the status quo.

Finally, the public interest too, requires that as far as possible, the relationship and the industry be maintained and any matter of poor remuneration for the lands leased, or alleged breaches of contract, are matters which can be canvassed and determined at full hearing. That, I think was the intention of the Applicants when they in their plaint sought -

(i) a permanent injunction against the Respondents, and

(ii) a declaration that the leases by the Defendants are null and void ab initio, and that the Applicants are entitled to repossess the suit lands.

For those reasons, I would dismiss, with costs to the Respondents, the Applicants Notice of Motion dated and filed on 28th June 2011.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 23rd day of March, 2012

M. J. ANYARA EMUKULE
JUDGE