



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 230 OF 2012

MASAI MARA WILDERNESS LODGES LTD.....PLAINTIFF

VERSUS

ELESER LIMITED.....DEFENDANT

RULING

The Notice of Motion dated 28/6/2012, is filed pursuant to **Order 40 Rule 2, Order 51** of the **Civil Procedure Rule** and **Sections 1A, 1B, 3A** and **63** of the **Civil Procedure Act**.

The applicant seeks an order of temporary injunction to issue restraining the defendant either by itself, its servants or agents from interfering with the plaintiff's possession, occupation and management of the premises known as Cismara/Talek/109. Mr. Ibrahim who urged the application said that prayers 2, 3 and 4 are spent because the plaintiff was in possession.

It is the plaintiff/applicant's case that the suit property belongs to it; that the applicant entered into an agreement with the defendant/respondent for construction of a tent and camp, staff quarters, kitchen and reception on the said land and it was to cost Kshs.52,000,000/-. The work was to be completed by Christmas 2011; that although the plaintiff fulfilled its obligations in the contract, the respondent did not do so and did not complete the work; that the respondent has also breached the contract by levying its heavy materials and equipment meant for other projects which has led to delay; the agreement between the parties has been terminated but the respondent has persisted on remaining on the suit premises; that the continued occupation of the suit premises by the respondent has delayed the opening of the camp and the applicant has as a result suffered substantial loss. The application was supported by the affidavit of Tiruvalanchuzi Swaminathan Viswanathan, the Attorney of directors of the applicant. The deponent deposed that the applicant has leased the said suit land for which it pays Kshs.40,000/- per month and pays 100 dollars for each room although the applicant gets no revenue on it due to the delays.

The respondent did not file any reply to the application nor was there an appearance at the hearing. The court proceeded to hear the application because an affidavit was sworn by the process server, Dominic Muinde confirming that the directors of the respondent were duly served with the Notice of Motion on 5/7/2012. The application had come under certificate of urgency.

The applicant exhibited as TSV(1), a sale agreement between Baraka Lodges Limited and the applicant for the suit property Cismara/Talek/109 on 28/1/2010, by which the applicant bought the business which was run by Baraka Lodges Ltd on the suit land. Though the applicant purported to have exhibited the agreement between the applicant and respondent as TSV2, what is exhibited is just correspondence between the parties on the contracts. The said contract is no longer binding on the parties since the applicant says that the respondent was unable to perform its part of the contract. The contract having been terminated there would be no good reason for the respondent to remain on the premises, the applicants

having indicated that the camp needs to be ready for occupation. The applicants are paying for the premises having leased them. I find that the applicant has demonstrated that they have a prima facie case with a high probability of success. If the respondent continues to deposit materials at the camp, it may not be put to the intended use soon and the applicants will suffer substantially in that tourists will not find it habitable. I therefore grant an order of injunction in terms of prayer 5 of the Notice of Motion. Costs to abide the suit.

DATED and DELIVERED this 27th day of July 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Karunga holding brief for Mr. Ibrahim for the applicant.

N/A for the respondent
Kennedy – Court Clerk