



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Civil Suit 15 of 2010**

**AFRICAN SAFARI CLUB LTD.....PLAINTIFF**

**VERSUS**

**1. KIMANA TIKONDO GROUP RANCH**

**2. DANIEL MPUTE NINA**

**3. KANKA LAON**

**4. KIRAPASH LPAU**

**5. OFFICER COMMANDING POLICE DIVISION (OCPD) KAJIADO SOUTH**

**6. OFFICER COMMANDING POLICE STATION (OCS) LOITOKITOK.....DEFENDANTS**

**R U L I N G**

1. This is an application by the Plaintiff (by **chamber summons dated 29<sup>th</sup> December 2009**) for temporary injunction pending disposal of the suit. It is sought to restrain the Defendants “from interfering in any manner howsoever with the (Plaintiff’s) tenure of the property known as (L.R.) Kimana/Tikondo/359, its facilities and/or business established thereon or its peaceable possession thereof...”

2. The application was brought under **Order XXXIX, rules 1, 2, 3 and 9** of the old **Civil Procedure Rules** (the **Rules**). **Section 3A** of the **Civil Procedure Act, Cap 21** (the **Act**) that saves the inherent power of the court is also cited.

3. The grounds for the application as stated on the face thereof are -

(i) That the Plaintiff is lawfully on the suit property “where it has put up diverse developments in the nature of tourist facilities”.

(ii) That the Defendants have threatened the Plaintiff’s tenure and/or its peaceful possession thereof, “including occasioning barring of access thereto, with resultant evacuation of the Plaintiff’s guests in the premises and cancellation of bookings relative thereto. In the event the Plaintiff has been exposed to serious loss and damage, and its custom and goodwill stands to be affected irredeemably”.

(iii) That the Defendants’ acts are an affront to the Plaintiff’s proprietary rights over its lawful development and/or facilities, and are also in breach of the agreement between the Plaintiff and the 1<sup>st</sup>

Defendant and thus unlawful.

(iv) That the temporary injunction sought is necessary so as to forestall further breaches of the law and continued loss and damage to the Plaintiff.

4. There is a supporting affidavit sworn by one FRANK H. NEUGEBAUER, the managing director of the Plaintiff. It gives the evidential backing to the application. Annexed to the supporting affidavit are a number of documents, including a lease agreement (called "Head of Agreed") dated October 1999.

5. Interim relief by way of interim injunction was granted *ex parte* on 4<sup>th</sup> January 2010. It was subsequently extended *inter partes* from time to time.

6. The Defendants opposed the application by replying affidavit filed on 17<sup>th</sup> February 2010 which was sworn by the 2<sup>nd</sup> Defendant. A number of documents are annexed to the said affidavit.

7. The following grounds of opposition, *inter alia*, emerge from the replying affidavit -

(i) The Plaintiff failed to obtain all necessary consents required under the law, particularly land control consent, to give legal effect to the Head of Agreement.

(ii) The Plaintiff was in any event in breach of the Head of Agreement in that it delayed failed or refused to pay rents due and fees for tourist/guest bed-nights.

(iii) That because of the Plaintiff's breaches the 1<sup>st</sup> Defendant duly declined to renew the Plaintiff's lease.

(iv) That the Defendants therefore lawfully entered into negotiations with a third party to lease out the suit premises, and a Memorandum of Understanding with the third party was duly signed.

(v) That the Plaintiff's lease duly expired and was not renewed, but the Plaintiff continued in unlawful occupation and possession for about 2 months before the premises were closed and the Plaintiff peacefully yielded possession to the 1<sup>st</sup> Defendant on or about 23<sup>rd</sup> December 2009.

(vi) That subsequently the 1<sup>st</sup> Defendant entered into a lease with a third party on 11<sup>th</sup> January 2010 over the premises for a term of 25 years (from 1<sup>st</sup> January 2010).

(vii) That there is thus a new tenant in the premises.

(viii) That the Plaintiff has not established a *prima facie* case with a probability of success.

(ix) That the Plaintiffs having been in breach of the Head of Agreement, and having not made full disclosure, is not entitled to the equitable relief sought.

(x) That the Plaintiff's loss or damage (if any) is purely financial and capable of precise calculation or estimation, and can therefore be compensated by an award of damages.

(xi) That the balance of convenience is in favour of the Defendants.

8. There is a supplementary affidavit filed by the Plaintiff on 16<sup>th</sup> March 2010 in response to the Defendants' replying affidavit. It answers issues raised in the replying affidavit.

9. The application was canvassed by way of written submissions. The Plaintiff's submissions were filed on 25<sup>th</sup> May 2010 while those of the Defendants were filed on 2<sup>nd</sup> June 2010. I have read and considered the submissions, including the authorities cited.

10. The considerable delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health that extended over a number of years. But thanks God I have now regained my full health.

11. The parties' respective rights in this suit cannot be fully and effectually adjudicated upon at this interlocutory stage, and the court must refrain from purporting to do so. That is the function of a full trial of the action upon tested evidence. Conflicting untested affidavit evidence is simply not suitable for a full and proper adjudication of all the issues in dispute in the suit.

12. For purposes of the present application, the Plaintiff has to demonstrate that it has a *prima facie* case with a probability of success, and that it stands to suffer irreparable loss or injury unless the temporary injunction sought is granted. If the court is unable to decide the application upon those two principles, it will do so upon a balance of convenience. See the well known case of **Giella – vs – Cassman Brown & Another [1973] EA 358**.

### *Prima facie case*

13. The Plaintiff and the 1<sup>st</sup> Defendant executed between them a Head of Agreement which was supposed to be followed by a formal Lease-Agreement to be registered (Clause 18). The formal Lease-Agreement was to be prepared by the Plaintiff's advocates. However, the 1<sup>st</sup> Defendant was to "supply such documents (title documents or others) as may be required by the (Plaintiff or its) advocates for preparing and completing and registering the lease" (Clause 16).

14. As it happened, no lease was prepared or registered. No correspondence has been exhibited by the Plaintiff demanding that the 1<sup>st</sup> Defendant do produce such documents as the Plaintiff or its advocate may need to prepare and register the lease.

15. But it appears that the Plaintiff and the 1<sup>st</sup> Defendant acted upon the Head of Agreement as if it were a lease agreement. The Plaintiff took possession of the demised premises and conducted business thereon for the full term of the lease, 10 years. In the course of this time differences arose between the two parties and the 1<sup>st</sup> Defendant did not agree to the Plaintiff's exercise of its option to renew for another 10 years.

16. It is the Plaintiff's stand however that by the time the 1<sup>st</sup> Defendant manifested its stand in this regard the Plaintiff had already exercised its option to renew. Whether in fact and in law there was renewal of the lease (or contract) for another 10 years is an issue to be determined at the trial.

17. Prior to adjudication of this issue however the court must decide the precise nature of the relationship between the Plaintiff and the 1<sup>st</sup> Defendant in view of non-execution and registration of a formal lease. Within this issue will be other issues, for instance: whose fault was it (if any) that a formal lease was not prepared and registered?; whether or not land control consent was necessary, and the effect of lack thereof in the relationship between the Plaintiff and 1<sup>st</sup> Defendant; etc.

18. *Prima facie*, however, it is doubtful whether the formal relationship between the Plaintiff and the 1<sup>st</sup> Defendant was capable of being extended for a further 10 years at the option of one party without a formal lease agreement having been executed and registered. It must be remembered that there were other consequences stemming out of failure to execute and register a formal lease. For instance, under Clause 4 of the Head of Agreement, in the event of the Plaintiff failing to obtain all necessary consents, licenses and permissions from the relevant authorities before the commencement date of the lease, the Head of Agreement became null and void and of no effect. And under Clause 13, though the Plaintiff was the sole owner of any building, development and expansion on the leased property, it would "forfeit any investment made on the (property) should the formal Lease-Agreement not materialize within the specified period. Thereafter any buildings, development and expansions would belong to the (1<sup>st</sup> Defendant) solely and absolutely, including all contents".

19. And so, though the parties proceeded as if the Head of Agreement was a lease notwithstanding that no

formal Lease-Agreement was executed and registered, it is doubtful if a lease was thereby created, and if it was, whether the same was capable of extension for another 10 years. I am therefore not satisfied that the Plaintiff has a *prima facie* case with a probability of success.

**Irreparable Loss**

20. Irreparable loss or damages is one that cannot be remedied by an award of damages. In the present case I am satisfied that whatever loss the Plaintiff might suffer as a consequence of guests/tourists cancelling their bookings is capable of calculation or estimation in terms of money. We are here not dealing with a straight-forward case of a landlord taking the law into his own hands and evicting a tenant. This is a case where the term of the lease (if there was one) has come to an end after running its course. There are serious doubts of law if in fact there was a proper lease capable of extension by option of the Plaintiff. It also appears that the 1<sup>st</sup> Defendant may have lawfully entered into a lease with a third party upon expiry of the Plaintiff's lease, thus complicating the matter further.

21. So, the plea that the Plaintiff has a clear interest in the 1<sup>st</sup> Defendant's property that ought to be protected by an injunction pending disposal of the suit is not germane to this case at all.

**Balance of Convenience**

22. Even upon a balance of convenience I would have found for the Defendants. The parties did not legally formalise their relationship raising doubts whether in law there was a lease between them. It will be a matter of evidence at the trial by whose default (if any) this state of affairs came to be. But no material has been placed before the court so far indicative of the Plaintiff's efforts to prepare and ensure registration of a Lease-Agreement as required by the Head of Agreement.

23. Whatever relationship in law was created by the Head of Agreement, it ran its full course of 10 years. It is doubtful in law that the unsatisfactory relationship could be extended for a further 10 years by option of only one party.

24. More importantly, the business relationship between the parties had so deteriorated that there were serious threats of breach of the peace such that law enforcement agencies had to intervene to maintain peace. The Plaintiff blames the Defendants for this state of affairs. The Defendants on the other hand blame the Plaintiff on account of its breaches of the Head of Agreement (some of them, like late payment of rents, are admitted). It is not in the interests of the parties that this state of affairs be maintained. On the contrary, it is best that the parties part ways, cut their losses and move on.

25. In the result therefore, I find no merit in the chamber summons dated 29<sup>th</sup> December 2009. The same is dismissed with costs to the Defendants. The interim injunction earlier granted, if still in place, is hereby lifted. Those will be the orders of the court.

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2012**

**H. P. G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS**

**28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**  
.....  
**JUDGE**

