JAN BOLDEN NIELSEN.....PLAINTIFF

VERSUS

HERMAN PHILIPUS STEYN Also known as Hermannus Phillipus Steyn.....1ST DEFENDANT

HEDDA STEYN.....2ND DEFENDANT

NGURUMAN LIMITED.....3RD DEFENDANT

R U L I N G

1. Before me are three applications. One is an Application dated 12th July 2012 and filed on the same day by the 3rd Defendant seeking to strike out the Plaintiff's suit as against the 3rd Defendant. The second Application is dated 22nd July, 2011 and filed on 26th July, 2011 by the Plaintiff seeking the consolidation of **Nakuru HCCC. No. 103 of 2009 Nguruman Limited vs. Oldonyo Laro Estate Limited and by Counterclaim between Oldonyo Laro Estate Limited vs. Nguruman Limited & Hermannus Philipus Steyn** and **NKR HCCC No. 120 of 2010 Nguruman Limited vs. Jan Bonde Nielsen** (hereinafter called "the Nakuru Suits"). The Third application is by Notice of Motion dated 3rd September, 2012 by the 3rd Defendant seeking injunctive orders against the Plaintiff. This Ruling is therefore in respect to these three applications. I propose to first consider the Application for the striking out of the suit with respect to the 3rd Defendant.

2. The Application seeks the striking out of the Plaint dated 17th May, 2010 against the 3rd Defendant on the grounds that the same does not disclose a reasonable cause of action against the 3rd Defendant. The Application further seeks that the Plaintiff's suit against the 3rd Defendant be dismissed with costs to the 3rd Defendant. The 3rd Defendant relies on the grounds set out on the face of the Motion. The Application is brought under Sections 1A and 1B, 3A of the Civil Procedure Act and Order 2 Rule 15(a) and Order 51 Rule 1 of the Civil Procedure Rules. Since the Application was brought under Order 2 Rule 15 (1) (a) of the Civil Procedure Rules only, the same was not supported by any Affidavit.

3. The 3rd Defendant contended that the Plaintiff herein has failed to satisfy the elements to support a cause of action against it in that, the Plaint dated 17th May 2010 does not contain any averment that the Plaintiff enjoyed a right that has been violated by the 3rd Defendant and that the 3rd Defendant was liable for such a violation. Counsel for the 3rd Defendant submitted that the Plaintiff has not demonstrated how the 3rd Defendant is a necessary party to this suit nor has he demonstrated or shown that the Plaintiff had any dealings with the 3rd Defendant. It is further contended that the 3rd Defendant is a separate and distinct entity from the 1st and the 2nd Defendants, who are its shareholders, thereby having no proprietary rights to the 3rd Defendant's property, apart from the shares they own. It was further contended by the 3rd Defendant that the Plaintiff's prayer in the Plaint for lifting the corporate veil is

futile as the Plaintiff has already sought diverse remedies against the 1st and 2nd Defendants in their personal capacities as members and not agents of the 3rd Defendant, that there has been no averment in the Plaint as to when the property of the 3rd Defendant, particularly the property comprised in Title No. Narok/Nguruman/Komorora 1 (hereinafter "the Suit Property") became part of a partnership property between the Plaintiff and the 1st Defendant. It was further contended that the joinder of the 3rd Defendant in these proceedings is improper as no cause of action has been established as against it and its continued joinder is contrary to the overriding objective embodied under Sections 1A and 1B of the Civil Procedure Act. Mr. Nyaencha learned Counsel for the 3rd Defendant, analyzed in great detail the Plaint and referred to various authorities to show that the Plaint did not disclose any cause of action against the 3rd Defendant. He submitted that as pleaded, the allegations in the Plaint do no point towards any act or blame of the 3rd Defendant, that none of the Plaintiff's rights had been violated by the 3rd Defendant, that the 3rd Defendant had been wrongly joined in these proceedings and finally that the Plaintiff had not demonstrated that the 3rd Defendant was a necessary party to these proceedings. It is on this premise that the 3rd Defendant sought the striking out of the Plaint as against it.

4. Although he did not file any Replying Affidavit, the Plaintiff opposed the application on points of law. Mr. Oraro learned Counsel for the Plaintiff ably submitted on behalf of the Plaintiff that the application is unmeritorious in that the 3rd Defendant had filed a previous application dated 15th October, 2010 for striking out the suit as the same had not disclosed any cause of action, that the said application was however withdrawn on 4th October, 2011 to pave way for the Plaintiff to argue its application for injunction. That to file a further application to strike out the Plaintiff's suit having unconditionally withdrawn a similar application in circumstances where the court has determined that the suit discloses a prima facie case is not only res judicata but also an abuse of the court process. It was contended that the 3rd Defendant is estopped from proceeding with the application on the principle that a party in a suit cannot approbate and reprobate, that the issue of whether or not the Plaintiff has a reasonable cause of action had been decided by a court of concurrent jurisdiction on the Plaintiff's Application for injunction dated 30th August 2010 vide a Ruling by Justice G.V Odunga dated 30th March, 2012, where the learned judge concluded that the Plaintiff had established a prima facie case for the purposes of a prohibitory injunction. That further, the 3rd Defendant had unsuccessfully sought to enter summary judgment in one of the Nakuru suits, **Nakuru HCCC No. 120 of 2010 Nguruman Limted –v- Jan Bonde Nielsen** in respect of the same subject matter where the court held that the issues raised by the defence were at the core of the Defendant's claim and the same should be fully canvassed at the hearing of the suit or during the pendency of this suit. Moreover, the Plaintiff contended that the Pleadings and reliefs sought cannot be determined without the participation of the 3rd Defendant that this fact therefore makes the 3rd Defendant a necessary party.

5. I have considered the Application, the oral and written submissions by counsel on record. I have also considered the many authorities relied on by the respective parties. The Plaintiff raised the question of res judicata, in that the 3rd Defendant had filed a previous application dated 15th October 2010 for striking out the suit. That the said application was however withdrawn on 4th October 2011 to pave way for the Plaintiff to argue its application for injunction and that filing a further application to strike out the Plaintiff's suit having unconditionally withdrawn a similar application thereto is not only an abuse of the court process but res judicata. Section 7 of the Civil Procedure Act prohibits the court from trying any issue which has been substantially in issue in a former suit. I note that the 3rd Defendant did withdraw its application dated 15th October, 2011 which was similar to the instant application. This was with the leave of court. It was contended by the Plaintiff that this was done to expedite the hearing of the Plaintiff's Notice of Motion dated 30th August, 2010 which was then later determined. Can the withdrawal of that application estop the 3rd Defendant from bringing a subsequent application of the same nature? Can it be said to be re judicata as alleged by the Plaintiff? Can it be said to be an abuse of the court process? I think not. In my view, Section 7 operates only in instances where a matter has been litigated upon and a decision made. In the present case, the application was withdrawn before it was heard. To my mind therefore, this did not bar the 3rd Defendant from bringing the said application again for consideration by the court. Neither issue estoppel nor res judicata does arise.

6. As regards the issue of res-judicata vis a vis the ruling of Hon. Odunga J wherein my learned brother found that a prima facie case had been established, I propose to address the issue later in this ruling.

7. I now proceed to examine the 3rd Defendant's Application on merit. There are two main issues for determination. One is whether the Defendant is a necessary party to the suit and whether it has been improperly enjoined in the instant suit and the second, whether there is a cause of action against the 3rd defendant by the Plaintiff. The Law on joinder of parties is well settled. Rule 10(2) of Order 1 of the Civil Procedure Rules provides that;

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

Thus, from the plain reading of this provision, it is obvious that the court has the discretion to strike out any party who is improperly joined in any proceeding. In the exercise of this discretion the court will of course act according to reason and fair play and not according to whims and caprice. So who is a necessary party and does the 3rd Defendant fit the criteria for such a party? In my view, a 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the Court. If a 'necessary party' is not impleaded, the suit may be a non-starter as the relief(s) sought, if granted, may be ineffective. In this regard, the question that arises is whether the 3rd Defendant is a necessary party for purposes of enabling the court to effectually and completely adjudicate upon the matter at hand. I have carefully read the Plaint dated 17th May, 2010. I have also read the ruling by my brother Honourable Justice G.V. Odunga as pointed out by learned counsel for both sides. Whilst the Plaint looks somehow bare as relates the role, if any, of the 3rd Defendant in the wrongs that constitute the basis of this case, certain parts of the said ruling paints the 3rd Defendant in a different picture. At pages 62, 65 and 66 of the said ruling, my learned brother delivered himself thus:-

"The 3rd defendant's position is that the 3rd defendant is a separate legal entity and therefore arrangement between the 1st defendant and the plaintiff should not affect the 3rd defendant. However, it is well established that in deserving cases courts of law are empowered to unmask the veil incorporation (sic).

According to the return dated 5th April 1997, by that date the 3rd defendant had 1,426 shares out of which 1,298 were held by the 1st defendant. The 2nd defendant does not seem to feature in the said return. By 29th July, 2008 the returns of the 3rd defendant show that the 3rd defendant had 10 shareholders holding the same 1,426 shares …….. There are implied indicators that the two had some venture one way or another. What else would someone make out of the employment of such phrases as "And you are the only counterpart for me"? I am not saying conclusively that there was a partnership. What I am saying is that the evidence on record shows that the relationship ran deeper than suggested by the defendants. The 3rd defendant, however, would have nothing to do with this relationship since it is a different person and was not privy to the ongoings between the two friends-turned-foes.

A company registered under Cap 486 is, of course a distinct legalentity from the shareholders. However, that incorporation, as already stated above may be unmasked. <u>When the same is done the individuals behind the company are revealed and according to the plaintiff when that revelation comes out it will be clear that he is also part and parcel of whatever constitutes the 3rd defendant. That however, will await the main suit."</u>

8. On the basis of the foregoing, my learned brother proceeded to issue an injunction against all the

Defendants, including the 3rd Defendant, restraining them from interfering with the plaintiff's homestead commonly known as Ol donyo Laro. In the case of **Amon vs. Raphael Tuck & Sons Ltd (1956) 1 ALL ER 273,** the court held, inter alia:-

" The party to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? ……. The only reason which makes a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. ……

It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly and legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally—that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested."

9. As I have already stated, the drafting of the Plaint in this case as far as the 3rd Defendant is concerned was not one of the best. Looking at the recitals, the Plaintiff did not make any allegation whatsoever against the 3rd Defendant. No wrong doing on its part was ever pleaded. To that extent, I think the 3rd Defendant is right to claim that no cause of action has been established against it. However, a careful reading of prayer numbers (B), (E) and (G) of the Plaint would show that if granted those prayers may have some legal consequences on the 3rd Defendant. My view is, any answer in the affirmative to those prayers will have adverse impact on the legal interests of the 3rd Defendant. Although not expressly stated, one of the alleged partnership properties is the so called the Nguruman Property which is undeniably owned by the 3rd Defendant. Can an effective order be made thereby in the absence of the 3rd Defendant? I entertain some doubt. These matters in my opinion cannot be effectively resolved in the absence of the 3rd Defendant in this suit. The Court can only make a complete and final decision in the questions involved in this action in the presence of the 3rd Defendant. I therefore find that the 3rd Defendant is a necessary party in this suit, and such joinder was and is indeed warranted.

10. The other issue for determination is whether there is a cause of action against the 3rd defendant by the Plaintiff. The term "cause of action" is defined in the **BLACK'S LAW DICTIONARY 9TH EDITION** at Page **251** as;

"A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person"

In the foregoing, one can therefore summarize a cause of action to mean an act on the part of the defendant which gives the plaintiff his cause of complaint. The 3rd defendant maintains that the Plaintiff does not have a cause of action against it and as such elaborately attempted to illustrate this in its written submissions by examining the Paragraphs of the Plaint dated 17th May 2010. Counsel to the 3rd Defendant, also submitted that this was not the usual striking out application, as the same only seeks removal of the 3rd Defendant who in their view was irregularly enjoined. In a rejoinder, the plaintiff's counsel pointed out that the Court in his application dated 30th August, 2010, found that he had demonstrated a prima facie case. A prima facie case in the Plaintiff's view is beyond a case which discloses a reasonable cause of action. I must hasten to add that the power of striking out a pleading or even a party is one that a court should exercise sparingly and cautiously, as the same is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. Both parties have argued gallantly on their respective positions. In the case of **D.T. DOBIE & COMPANY (KENYA) LIMITED –vs- MUCHINA (1982) KLR 1 Page 9** Madan J held;

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before missing a case for not disclosing a reasonable action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits

of the case for that function is solely reserved for the trial judge as the court itself is not usually fully informed so as to deal with the merits……. No suit ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption…….a court of justice ought not to act in darkness without the full facts of the case before it"

11. I have already expressed my doubt as to whether the Plaintiff has disclosed any cause of action against the 3rd Defendant. Majority of, if not all, the allegations in the Plaint have been directed at the 1st and 2nd Defendant. At the time of arguing the injunction application, a similar argument was put forward but Hon. Odunga J was of a different opinion and held that a prima facie case had been established and issued an injunction against all the Defendants. The learned Judge was clear in his mind as to what a prima facie case is. He examined the definition given by the Court of Appeal in the case of **MRAO VS. FIRST AMERICAN BANK OF KENYA LTD.** Since that issue is still pending before the Court of Appeal, I do not think that I can revisit it at this stage. All in all however, I will reject the application on the basis that the 3rd Defendant is a necessary party and not otherwise. Accordingly, the application dated 12th July, 2012 is dismissed with costs.

12. I will now embark on the second application. This is the Notice of Motion dated 22nd July, 2011. In the application, the Plaintiff has sought orders for consolidation of this suit with the Nakuru suits. The Plaintiff further sought directions necessary for the conduct of the said consolidated action and for the costs of the suits and those of the application.

13. The Motion is supported by the Affidavit of Peter Bonde Nielsen, a director of Oldonyo Laro Estate Limited and the son of the Plaintiff who stated that he was duly authorized to swear the Affidavit of behalf of his father and the aforesaid company. In it, it was contended that the pleadings in this case and the Nakuru suits have raised common questions of law and fact. It was further contended that the consolidation of the aforementioned suits was necessary as the same will avoid the duplication of proceedings, multiplicity of suits and the possibility of divergent findings on the same or similar questions of law and fact. The deponent further asserted that various Courts had by way of various pronouncements called for the consolidation of these suits.

14. Mr. Oraro for the Plaintiff submitted that the 3rd Defendant in this case is the Plaintiff in the Nakuru cases, that the claim for trespass is ancillary to a determination on the circumstances under which the Plaintiff came onto the property, that the issue of the environment and land is merely consequential, that the true dispute is the joint venture. He further submitted that Article 162 (5) (b) of the Constitution of Kenya regarding the fetter on the jurisdiction of this court on matters of environment and land does not apply, that the Commercial Division of the High Court has jurisdiction to hear the Nakuru suits, that it was not necessary that consolidation of suits has to be made at case conference, that Hon. Wendoh J, Hon. Emukule J and Hon. Odunga J had all previously resolved that there was a common question of law and had directed that all the suits be heard together. Counsel further submitted that the pendency of the Appeals cannot act as a stay of the order appealed from and therefore consolidation could properly be ordered. Counsel referred to various authorities in support of the proposition that even where parties were different, consolidation could still be ordered. Counsel therefore urged that the application be allowed.

15. The 3rd Defendant opposed the Application vide a lengthy Replying Affidavit sworn by Moses Loontasati Ololowuaya who is both the director and Chairman of the 3rd Defendant. The 3rd Defendant contended that the Court does not have jurisdiction to entertain the application as presented before the court as the Nakuru suits are suits that pertain to occupation and title to land, that due to this fact, those suits should be heard and tried by the Environmental and Land Court which was established by Article 162(2)(b) of the Constitution of Kenya and the Environmental and Land Court Act, 2011. That in view thereof, the consolidation of the Nakuru suits with this suit will not be proper, that the jurisdiction of this court has not been properly invoked. It was further contended that, though there were rulings in all the three suits that made pronouncements calling for the consolidation of the cases, the said pronouncements were made orbiter and therefore not binding on this court. It was further argued by the 3rd Defendant, that in the alternative, the said rulings were now subject to pending appeals in the Court of Appeal. It was the

3rd Defendant's contention therefore that it would be improper for this court to order consolidation of the proceedings in all the three cases in light of the Appeals.

16. Mr. Nowrojee, learned Counsel for the 3rd Defendant submitted that there are no common questions of law and fact, and that the Plaintiff had failed to point out the alleged common questions of law and fact in these matters in its application. Counsel submitted that this suit and the Nakuru suits involve different parties altogether. He was of the view that consolidation can only be made at the case conference stage and not at this stage. He urged that the application be dismissed.

17. I have carefully considered the application, affidavits on record and the rival submissions by learned counsel and the cited authorities. There are a number of issues that seek the resolution by this Court. The first issue is the question raised by the 3rd Defendant about the jurisdiction of this court to hear the present application seeking consolidation. It is the Respondent's submission that the court has no jurisdiction to entertain the present matter as the Nakuru suits are now subject to the Environment and Land Court. The 3rd Defendant contended that the Nakuru suits raise the issue to do with occupation of land. The issues pertaining to land in this country are now under the special jurisdiction of the Environment and Land Court and not the High Court. In so far the jurisdiction of the Land and Environment Court is concerned I agree with Mr. Nowrojee that that is the court that should oversee matters touching on land. I note however, that the Nakuru suits were pending before the promulgation of the Constitution of Kenya 2010. As such, I agree with the submissions of Mr. Oraro that for the said reason, the Nakuru suits fall under the Transitional and Consequential provisions of the Constitution under Section 22.

18. Mr. Oraro submitted that by dint of Section 22 of the Constitution of Kenya Transitional and Consequential provisions aforesaid the High Court still has jurisdiction to hear the Nakuru suits. I have looked at that Section. That provision provides that pending suits relating to land and environment shall continue to be heard and determined by the same court until the establishment of the Environment and Land Court or as may be directed by the Chief Justice or the Registrar of the High Court. As at the time the application was being canvassed before me, the Environment and Land Court had already been established. Further, the Chief Justice did direct in September, 2012 vide Gazette Notice No. 13573 of 28th September, 2012 that all matters which are for that court pending in the High Court and were part heard do continue to be heard and determined by the High Court and that all the others be transferred to the Environment and Land Court. In this regard, the question that arises is whether the Nakuru suits are part heard before the High Court. This fact was not addressed by the parties. The Court was not told whether the Nakuru suits are part heard or not. What is clear is that several applications have been heard and determined in those suits. A matter is said to be part heard the moment the same is listed for trial and the Plaintiff makes the opening statement. This fact was never established at the hearing of the application. This Court cannot speculate. It was upon the Plaintiff to produce evidence to the effect that the suits were part heard and therefore suitable to be tried by the High Court. Since the Plaintiff did not do so and in the absence of any direct evidence to show that the Nakuru suits are part heard, I will apply Section 108 of the Evidence Act and hold that the said suits are candidates for the Environment and Land Court and not the High Court. In any event, as early as 7th April, 2009 when the Plaint in **HCCC No. 103 of 2009 Nguruman Ltd vs. Ol Donyo Laro Estate Ltd** was filed, the same was designated for the Environment and Land Division of the High Court at Nakuru.

19. The Plaintiff contended that claim concerning land in the Nakuru suits was not central but merely a consequential issue. The true dispute, as the Applicant submitted, has to do with a Joint venture or a Partnership where an issue of interest in land is ancillary. I have looked at the Plaints in the Nakuru suits. The general pleading is about the Plaintiff's right therein to own and possess the suit property to the exclusion of the Defendants in those suits. They are suits about trespass to land and a right to own and occupy land. Indeed a look at the prayers will show that the issue in those suits is about ownership and right to occupy the suit property. The issue of the partnership or joint venture was introduced by the Defendant in those cases **OL DONYO LARO ESTATE LTD** in **HCCC No. 103 of 2009** by way of counterclaim. However, in that Counterclaim, that Defendant prayed that the said suit be stayed pending the hearing and determination of this suit. In any event, a counterclaim is a completely different and

separate law suit from the original claim. The original claim having been for land, the commercial aspect sought to be introduced by the Counterclaim does not change the nature of the suit. Accordingly, I reject the Plaintiff's contention that the claim for land is not a central issue in the Nakuru suits.

20. The other issue is whether it would be proper for the court to make the order to consolidate this and the Nakuru suits. The law on consolidation is well settled. Consolidation of suits is done under the inherent powers of the Court and for purposes of achieving the overriding objective of the Civil Procedure Act, that is for expeditious and proportionate disposal of civil disputes. Therefore, the main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. However, such consolidation can only be ordered within known parameter of the law. In the case of **EAN KENYA LIMITED v JOHN SAWERS & 4 OTHERS [2007]** eKLR, Waweru J stated this on consolidation;

"……the test to be applied is not whether the parties are the same but whether the same or similar questions of law or fact are involved in the suits".

It is quite clear that in the Nakuru suits, the central issue would be ownership and right to occupy the suit property whilst in this suit, it is manifestly clear that the issue is the commercial transaction between the Plaintiff and the 1st Defendant, viz, the alleged partnership. To my mind, these are not similar questions of law to warrant a consolidation.

21. The other issue is the Plaintiff's contention that three courts had previously made pronouncements in favour of consolidation of the three cases. These were, the Rulings made by Hon. Justice Wendoh in **Nakuru HCCC no. 103 of 2009** 1st April 2011, Hon. Justice Emukule in **Nakuru HCCC 120 of 2010** on 8th April 2011 and the Ruling by Hon. Justice Odunga in this case on 30th March, 2012. The 3rd Defendant submitted that the said rulings were made obiter and were therefore not binding on this Court. Firstly, it should be understood that none of the Honorable Judges was considering an application for consolidation. They made these observations in passing. However and most importantly, as at the time the rulings were being made, the Environment and Land Court had not been established and neither had the Honorable the Chief Justice given the directions he gave in September, 2012 and confirmed on 9th November, 2012 vide Gazette Notice No. 16268, as to the continued handling of the land cases in the nature of the Nakuru suits by the High Court. Accordingly, I find that I am not bound by the observations of my learned brothers and sister as they made without considering the effect of Section 22 of the Transition Clauses of the Constitution of Kenya.

22. The 3rd Defendant also submitted that the Plaintiff had failed to adhere to Order 3 Rule 2 and Order 11 Rule 3(1)(h) . I note from the court records that the subject cases were instituted before the coming into force of the new Civil Procedure Rules 2010 on 17th December, 2010. As such the aforementioned rules on the furnishing the court with a list of witnesses and witness statements, plus the requirement of trial conference may not be applicable. Further, I must add that this is a court of Justice and as such, undue reliance should not be placed on technicalities as the court must always endeavor to do justice between the parties before it. I also find that issues to do with pre-trials have been brought rather belatedly owing to the fact that since 2010 this suit has never taken off due to the cross applications filed insistently by the parties.

23. In the foregoing, I have come to the inescapable conclusion that the application is without merit and I dismiss the same with costs.

24. This leads me to the final application. A Notice of Motion by the 3rd Defendant dated 3rd September 2012. In the said application, the 3rd Defendant has sought several orders. They include an order for variation of the interlocutory injunction given by the Honorable Mr. Justice Odunga on 30th March, 2012, to allow for the definition and delimitation of the extent of the physical boundaries of the Plaintiff's homestead (hereinafter referred to as "Oldonyo Laro"); that further, the aforesaid order be varied so as to limit the extent of the said order's geographical application to within the physical boundaries of Oldonyo

Laro; that the said order be varied to grant the 3rd Defendant unrestricted access into and out of any and every part of the suit property save for and except for Oldonyo Laro; that the said order be varied so as to grant the 3rd Defendant quiet and unrestricted possession, occupation and enjoyment of any and every part of the suit property to the extent that such possession and occupation and enjoyment does not interfere with Oldonyo Laro.

25. The 3rd Defendant further seeks an order of injunction pending the hearing and final determination of this suit, to restrain the Plaintiff, his servants, agents and employees or otherwise from interfering with the 3rd Defendant's right to access into and out of and every part of the suit property and to further restrain the Plaintiff, his servants, agents and employees or otherwise from interfering with the 3rd Defendant's enjoyment of quiet possession and occupation of any and every part of the suit property save for and except for Oldonyo Laro. There is also sought such consequential or furthers orders that this court may deem just plus the costs of the application. The grounds in support of the motion are set out on the face of the application. The same is supported by the Supporting and Further Affidavits of Moses Loontasati Ololowuaya sworn on 3rd and 24th September, 2012, respectively.

26. The 3rd Defendant contends that vide the Ruling of 30th March, 2012, the Honorable Justice Odunga issued an interlocutory injunction restraining all the Defendants whether by themselves or through their agents, servant or employees from interfering with the Plaintiff's homestead commonly referred to as Oldonyo Laro. However, it is contended that the court never defined the geographical limits and extent of the Oldonyo Laro. It is further contended that the 3rd Defendant is the registered proprietor of the suit property which comprises of over 70,000 acres and that Oldonyo Laro comprises of about 10 acres of the property. That the suit property hosts various tourist camps and other facilities. That further, Oldonyo Laro camp is located in the northern most tip of the property and is surrounded by an electric fence. The Applicant contends that the Plaintiff has presently been applying the injunction issued by this court as though it operates on the whole property. The Applicant is apprehensive that given the circumstances, any legal and legitimate right that accrues to it as the proprietor of the suit premises except for Oldonyo Laro, maybe construed by the Plaintiff as amounting to breach of the injunctive orders granted by this court. That the injunctive orders granted by this court are causing undue hardship to the Applicant as the Plaintiff's employees, servants and agents are abusing the injunction by denying the Applicant, its employees, servants and agents unrestricted access into and out of every part of the suit property. That the Plaintiff has further abused the injunction granted by this court by blocking and barricading several areas within the property, including the Applicant's property and the main access road to the property along Magadi Road. That the Plaintiff's servants or agents man the main gate and allow unauthorized persons to access the property. The Applicant further alleges that the Plaintiff is always accompanied by administrative police on the basis of the said injunctive order to harass the 3rd Defendant's employees. That further, the Plaintiff's employees have built approximately 15 camps outside the Oldonyo Laro camp on various locations within the suit property. That the occupants of these camps are armed and carry telescopes and radios used to intimidate and harass the 3rd Defendant's employees, servants and agents. It's alleged that some of these camps are located in areas as far as 28km, 18 km, 19km, 15km, 13km, 5km, and 1km away from Oldonyo Laro Camp. It is further contended that the occupants of these camps are causing wastage, environmental degradation and grave dereliction on the property.

27. The 3rd Defendant's further contention is that being aggrieved and dissatisfied by the injunction and in particular with the abuse of the said injunctive orders by the Plaintiff, the 3rd Defendant has lodged an Appeal against the same. It is on these grounds that the 3rd Defendant has requested the court to vary the order of 30th March, 2012 in the interests of justice and to further allow the injunction sought as the 3rd Defendant is entitled to unrestricted access into and out of every part of the suit property plus quiet possession, occupation and enjoyment apart from the Oldonyo Laro.

28. The Plaintiff opposes the motion by way of a Replying Affidavit sworn by Peter Bonde Nielsen, the Plaintiff's son, sworn on 19th September, 2012. There is also a Supplementary Affidavit by Jackson Nemushai , the Chief ranger at Oldonyo Laro Estate in charge of security and conservation, sworn on the 26th September, 2012. The Plaintiff further filed a Notice of Preliminary objection dated 19th September,

2012. The Plaintiff contends that the Application by the 3rd Defendant has not been brought in good faith and is only intended to interfere with the status quo of the subject matter of the proceedings and to deny the court the opportunity to determine the dispute between the parties. The Plaintiff denied abusing the court order, it contended that at all material time the Plaintiff established a camp known as Ol Donyo Laro at the northern part of the suit property, while the 1st Defendant was in a camp at the southern end of the suit property. It was contended that it was the understanding of the parties that the whole property would be managed as one but with the right of access available to all parties.

29. The Plaintiff contended that the contention by the 3rd Defendant that the Ol Donyo Laro Camp is restricted to 10 acres is erroneous, as such restriction would render it inaccessible and also take away essential facilities like water and the access to the airstrip, that each camp is accessed through a common road and that it was also intended that such camps should enjoy the facilities available on the whole property as a game reserve. The Plaintiff admitted that there is an electric fence but the same constitutes only two stands of electric wire hanging over 6 feet to discourage and deter elephants from coming into Ol Donyo Laro Camp. The said fence, it was contended, runs along the eastern and northern side of the Ol Donyo Laro Camp. The Plaintiff's position was that there is only one barrier on the main entrance which has been in existence for nearly 10 years, a fact that the 3rd Defendant is fully aware of and that further no road blocks or barricades have been set up since the dispute arose in 2008 and that neither has there been any movement nor restrictions imposed on the servants and employees of the 3rd Defendant as is alleged. The Plaintiff denied allowing unauthorized persons within the suit property and contended that there is the existence of a public footpath used by the general public to cross the property and that the same is monitored to ensure that poachers do not have access to the property. It was the Plaintiff's contention that the presence of the Administrative Police Officers did not mean that their services were being utilized, that the said Officers being agents of the Government have a right to access and leave the property at a time of their choosing.

30. The Plaintiff denured the allegation that there are 15 camps spread outside Ol Donyo Laro and contended that there are 11 camps which have always existed with the prior agreement of the 1st Defendant and that the said camps were established as security stations. The Plaintiff insisted that no camp or out post has been created since the advent of this dispute. The Plaintiff elaborated that the 11 posts were part of Ol Donyo Laro, 8 of which were security outposts and 3 of which are staff quarters for the employees of Ol Donyo Laro. That the people that man the said outposts are utilized to monitor the movement of wildlife population, protect human lives and prevent poaching activities, that the said personnel do not use telescopes or carry firearms to harass the employees of the 3rd Defendant as alleged. The Plaintiff denied the existence of any wastage or environmental degradation caused by the persons that man these 11 posts. It was alleged that in August 2010, 18 members of staff of the 3rd Defendant were arrested during an attack on the Ol Donyo Laro airstrip and criminal charges preferred against them, that there has been arson attacks on the Plaintiff's property during the pendency of this suit. For the said reasons, the Plaintiff urged that the application be dismissed.

31. I have carefully considered the Affidavits on record, the rival submissions by the respective parties and the authorities adduced by each counsel. I may not have reproduced them here but I have considered each one of them in detail. I propose first to deal with the preliminary objection dated 19th September, 2012 raised by the Plaintiff with respect to the motion. It was contended by the Plaintiff that the application is res judicata to the extent that the application raised issues which were directly and substantially in contention in the application for injunction dated 30th August, 2010 which were determined in the ruling of 30th March, 2012 by the Honorable Justice Odunga. The 3rd Defendant however, contended that the application is one based on Order 40 Rule 7 of the Civil Procedure Rules which concerns the variation of an interlocutory injunction. Having carefully considered the application, it would seem from the Affidavits on record that the matters before me are solely to do with variation of injunctive orders given by Hon. Odunga J. These seem to have arisen after the application for interlocutory injunction had been argued and determined. To my mind therefore, what the 3rd Defendant seeks is for the court, after examining the allegations raised, to vary the said orders and not a re-examination of the matters that have already been determined. To that extent, I consider the Objection to

be without merit and I dismiss the same.

32. This paves way for the consideration of the application on merit. The application seeks two sets of orders. The first set is those orders that are concerned with the variation of interlocutory orders of injunction of 30th March 2012, while the second set are orders that seek injunctive orders against the Plaintiff. I propose to start with the former.

33. In prayer numbers 1 to 4 of the Motion, the 3rd Defendant has asked this court to vary the injunction of 30th March, 2012 for the definition and delimitation of the extent of the physical boundaries of the Plaintiff's homestead. The jurisdiction to vary an injunction is donated by Order 40 rule 7 of the Civil Procedure Rules. The issue that arises is, under what circumstances is the court to exercise its discretion under this rule? Counsels referred to various authorities on this issue. Mr. Nyaencha for the 3rd Defendant referred to both Indian as well as local cases. Mr. Oraro on his part referred to the case of **Reef Building Systems Limited –v- Nairobi City Council Nairobi HCCC no. 1357 of 2001 (unreported)** where Ringera J held that;

" ….I have cogitated on the matter and come to the conclusion that as the order for injunction is an equitable relief issued to prevent the ends of justice from being defeated, it may be discharged or varied or set aside if it is shown it is contrary to the ends of justice to retain it in force. Such would be the case, I venture to think, if it is shown, for example, that the order was irregularly obtained, or there is a subsequent change in circumstances that it was unjust to maintain it in force, or it was otherwise unjust and inequitable to let the order remain".

34. In the matter at hand, it cannot be said that the order was obtained irregularly. The same was obtained after an inter-parties hearing, where both parties were present and is therefore a regular order in all respects. To my mind, all the cases relied on by the parties point to one result, that the court will exercise the jurisdiction and discretion given in Rule 7 of Order 40 of the Civil Procedure Rules, if it is equitable and just to do so. The Order of 30th March, 2012 reads as follows:-

"THAT pending the hearing of this Suit, an interlocutory injunction does hereby issue restraining the Defendants their agents, employees and/or nominees from interfering with the Plaintiff's homestead commonly known as Oldonyo Laro" (emphasis mine)

The question that then follows is whether there has been a change of circumstances to persuade the court that it would be unjust and inequitable to maintain the order as it were. The 3rd Defendant argued that while issuing the injunctive order in question, the court failed to define the geographical limits and extent of the Plaintiff's homestead commonly known as Ol Donyo Laro and that this lack of definition, has consequently led the Plaintiff to venture into and carry out activities beyond Ol donyo Laro. It is for this reason that the Applicant seeks a variation of the injunction.

35. In this regard, it is advisable to ascertain what is meant by the term "the Plaintiff's homestead known as Ol donyo Laro" in the order of 30th March, 2012. The 3rd Defendant specifically requested that the Court undertakes the exercise of delineation of this homestead to its geographical and physical boundaries. It was the 3rd Defendant's contention that the Ol donyo Laro comprises of about 10 acres out of the possible 70,000 acres of the suit property. The 3rd Defendant however, did not indicate how the specific area of 10 acres was arrived at. Obviously, the Plaintiff contested this representation and asserted that this is a tactic employed by the 3rd Defendant to have the camp restricted to an un-demarcated area of 10 acres in the suit property. It was further contended by the 3rd Defendant that the Luxury tents and other facilities do not comprise the Plaintiff's personal quarters and are therefore not part and parcel of the Plaintiff's homestead. That in the foregoing, the Plaintiff's personal quarters is a distinct establishment from the Ol donyo Laro Camp, although they are both situate in the northern tip of the suit property and commonly referred to as a whole as Ol donyo Laro. Again, there is nothing that has been produced to support this assertion except references to sworn affidavits of previous applications in this suit.

36. At this juncture, a question that lingers in the mind of the court is, were all facts, as presented to this court, presented to the Honorable Justice Odunga at the time of making the injunctive order? Did the Plaintiff accurately inform the court what his homestead was? How far does his homestead stretch? Is the homestead as was prayed in prayer 8 of the application dated 30th August, 2010 within the suit property and if so, how far and wide did it or does it stretch? The 3rd Defendant asserts that the Plaintiff has taken different positions as is evidenced by a Further Affidavit sworn on 9th November, 2011 and his present Replying Affidavit dated 19th September, 2012. However, in my view, these propositions and counter propositions does not help the court discern the correct position on the ground. For that reason, I am inclined to move away from these arguments and stick to the heart of the matter, that is, whether Ol donyo Laro is capable of physical and geographical delimitation for the purpose of variation of the injunctive order.

37. I have always understood the law to be that a party who comes to court must seek reliefs that are clear and specific. Further, a court must always give orders that are capable of enforcement. The 3rd Defendant did not produce a map or survey plan of the suit property, Narok/Nguruman/Kamorora/1 to support its assertions as to the physical and geographical boundaries of Ol donyo Laro Camp or even the suit property. How then can the court go about varying the injunctive orders without this critical information? The 3rd Defendant did not tell the court and/or specifically demonstrate to the court what the order of 30th March, 2012 refer to that is now different on the ground. I have seen the sketch map of the property showing the location of the said Ol donyo Camp and other 15 camps produced as exhibit "MLO5" in the Supporting Affidavit. With all due respect, this does not help the 3rd Defendant's case. The sketch does not have the proper details in order to be relied on. For example, the same is not dated, its source is not disclosed and it has no key to give the appropriate details that go with such a plan. It is not a scientific plan that can conclusively be relied on at this stage of the proceedings. In my view therefore, it is not possible to rely on it to come up with a scientific determination of the allegations or assertions of the parties in this suit. Further, I note that there was no site visit nor any planned site visit to the aforesaid homestead or suit property to assist the court in ascertaining the physical boundaries or delimitations of Ol donyo Laro, if any, or establish the alleged 15 posts or barricades alluded to in the motion. To my mind therefore, to vary the Order and attempt to give distinct boundaries and geographical delimitations of what Ol donyo Laro looks like or should look like as is proposed by the 3rd Defendant would be an exercise in futility as the court would assume the role of a surveyor without the necessary tools or expertise. On this premise, the variation of the orders of injunction as sought by the 3rd Defendant is not possible. I therefore decline to grant the orders sought in terms of prayer nos. 1 to 4 of the 3rd Defendant's motion.

38. The second limb of the application has to do with the grant of an interlocutory injunction to restrain the Plaintiff, his servants, agents and employees or otherwise from interfering with the Applicant's right to access into and out of and every part of the suit property and to further restrain the Plaintiff, his servants, agents and employees or otherwise from interfering with the Applicants enjoyment of quiet possession and occupation of any and every part of the suit property save for and except for Ol donyo Laro. The principles upon which an interlocutory injunction may be granted are well settled. One has to establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and if in doubt, the court will decide the matter on a balance of convenience.

39. In the foregoing, the 3rd Defendant must demonstrate that it has met the above principles to warrant an injunction. The purpose of an injunction is to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it. The 3rd Defendant in the instant application has raised certain issues which it believes would warrant an injunction. It has been stated that the Plaintiff was denied orders that sought to have it involved in the management of the suit property together with the Applicant. As such, the activities he has been carrying out, namely, monitoring any questionable vehicles which approach the suit property, erecting barriers and barricades at the main entrance, monitoring footpaths to ensure poachers do not have access to the property, erecting and using

security outposts to monitor the movement of wildlife population and prevent animal-human conflict as admitted in the Plaintiff's Replying Affidavit, amounts to management of the suit property which was expressly disallowed by this court. As such, the Plaintiff has gone over and above what the court granted and such conduct essentially amounts to an abuse of the court process. It is the contention of the 3rd Defendant that the Plaintiff should be restrained from abusing the court process. As such the court should restrain, by way of an injunction, the Plaintiff from interfering with the Applicant's occupation and possession of every part of the suit property with the exception of Ol donyo Laro.

40. Does the Applicant raise a prima facie case with a probability of success? The 3rd Defendant, addressed in extenso the Plaintiff's activities on the suit property. On the other hand the Plaintiff has denied those allegations and to the contrary pointed out that the kind of orders that are being sought here by the 3rd Defendant are similar to those raised in the Nakuru suits, where the judges in the respective suits were dealing with the issue of trespass by the Plaintiff. That the courts in those suits had held that the matters raised at the interlocutory stage should be dealt with at the main trial. I have looked at the rulings of Hon. Wendoh J and Hon. Emukule J in the above cases. They do not seem to have been dealing with any applications for injunction, but one for exclusion of a Counterclaim from the suit and for summary judgment. To my mind therefore reference to the Nakuru suits has no basis.

41. I have considered the allegations and counter allegations in this matter. All the allegations by the 3rd Defendant are vehemently denied by the Plaintiff. It should be noted that it is difficult at this stage for the court to ascertain the truth or the correct position from the disputed Affidavits. However, it is my believe that that does not preclude the court from making a determination on the issues presented to it. There are some of the issues that are not disputable. It is not disputed that the Plaintiff did apply to be allowed to participate in the management of, inter alia, the suit property but was denied that prayer. It is not also denied that at present, by virtue of the order of 30th March, 2012 the Plaintiff would seem to have access to probably the entire suit property (the Affidavits have alluded to the use of an airstrip, roads, rivers, control of wildlife etc), it is also admitted by the Plaintiff in paragraph 7 of the Replying Affidavit of Peter Nielsen that in his initial arrangement with the 1st Defendant all parties were to have access to all parts of the suit property. Most important of all is that the 3rd Defendant is undeniably the registered proprietor of the suit property.

42. It is against that background that the 3rd Defendant has sworn that its right of access to, quiet possession and enjoyment of the suit property is being curtailed and or breached by the Plaintiff. Of course the Plaintiff has denied these allegations. Then this court poses the question, if the Plaintiff is not committing any of the alleged breaches or ills, what loss or damage will the Plaintiff suffer if the 3rd Defendant is allowed to enjoy its proprietary rights over its own property as sought in the injunctive orders?

43. To my mind, the injunction that was made on 30th March, 2012 was for the purpose of maintaining the respective parties positions in the suit property until the dispute is determined. I do not think that it extinguished the 3rd Defendant's legal rights over the suit property. It only meant that the Defendants were to desist from harassing or interfering with whatever the Plaintiff was undertaking in its homestead known as Ol Donyo Laro (whatever it meant). I have already declined to interfere with that order. Both the Plaintiff and the 3rd Defendant are within the property. I note that the Plaintiff has indicated in the Replying Affidavit of Peter Nielsen that there is a real threat to the property of Ol donyo Laro and the lives of the employees who work there if the application is allowed. He did not elaborate neither can the court speculate what he meant by that statement. As I have already stated, it is not easy to tell one way of the other where the truth lies between the contradictory affidavit evidence on record. What if at the trial it is established that the 3rd Defendant has truly been subjected to the complaints alleged in paragraphs 13 to 15 of the Affidavit in Support? Won't the constitutional right of the 3rd Defendant to own property not have been greatly compromised? Can the damage suffered be compensable?

44. I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the **Giella –v-s Cassman Brown case.** The court may

look at the circumstances of the case generally and the overriding objective of the law. In **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589 Ojwang Ag. J** (as he then was) at page 607 delivered himself thus:-

"Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in Giella –vs- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover Internationale made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:-

" A fundamental principle of ….that the court should take whichever course appears to carry the lower risk of injustice if it should turnout to have been 'wrong' ……"

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –vs- Cassman Brown, the Court has had to consider the following questions before granting injunctive relief.'

i) is there a prima facie case ….

ii) does the applicant stand to suffer irreparable harm…..

iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice…….

If granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a much larger risk of injustice if I found in favour of the defendant than if I determined this application in favour of the applicant."

45. In that case, the court proceeded to grant the injunctive reliefs sought. It is clear that in that case, the court did not find a prima facie case but granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing of the case, find that a greater injunction has been occasioned.

46. The guiding principle of the overriding objective is that the court should do justice to the parties before it. The interests of the parties before court must be put on scales. The Plaintiff has an order in his favor. Its employees are continuing to carry out their duties without any interference by the Defendants as a result of the order of 30th March, 2012. What loss, damage or hardship will the Plaintiff suffer if likewise the 3rd Defendant is also allowed to enjoy its proprietary rights over the suit property without interference but within the parameters of the order of 30th March, 2012? I see none.

47. Accordingly, for the foregoing reasons, I will allow prayer nos. 3 and 4 of the motion dated 3rd September, 2012 with a rider that:-

Provided that these orders are subject to the order made on 30th March, 2012 in that, the 3rd Defendant shall not have access to or shall not purport to exercise its right of enjoyment of quiet possession and occupation in the suit property on the Plaintiff's homestead known as Ol donyo Laro or the 11 out posts or camps or any other area currently operated or occupied by the Plaintiff.

48. I should point out here that I have mentioned the 11 out posts or camps because I peremptorily

believe that those outposts or camps may have existed at the time the order of 30th March, 2012 was made. There was no cogent evidence to show that they were erected after 30th March, 2012.

49. The upshot of the matter is that this court partly allows the 3rd Defendant's Application dated 3rd September, 2012 as aforesaid. Costs shall be in the cause.

50. Before concluding this ruling, there is one issue the court has to address. It would seem that the parties in this suit are content in filing one application after another. I get a feeling that the parties have no interest whatsoever to fixing this matter for trial. I believe it is only the route of viva voce evidence at a trial that the issues herein can conclusively be decided which route however, the parties seem afraid to take. In this regard, as Hon. Odunga J limited the order of 30th March, 2012 to 12 months in his penultimate paragraph so do I in this ruling. Further, in order to bring the parties to their senses as to prosecuting this matter, I direct that parties do take steps to conclude pre-trials within 90 days of today, in default either of the parties is at liberty after complying to invoke the provisions of Order 11 Rule 2(0) (ii) of the Civil Procedure Rules

DATED and DELIVERED at Nairobi this 10th day of December, 2012.

A. MABEYA

JUDGE