



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 2 OF 2011

FAST TRACK

**OLOOLAIMUTIA LODGE
COMPANY
LIMITED.....1ST PLAINTIFF
MAASAI MARA (SOPA) LODGE
LIMITED.....2ND PLAINTIFF**

VERSUS

**SIANA MAASAI MARA
CONSERVANCY.....1ST DEFENDANT
SAMMY
NKOITOI.....2ND DEFENDANT**

RULING

On 17th December 2010, the two plaintiffs **Oloolaimutia Lodge Company Limited and Maasai Mara (Sopa) Lodge Limited** filed this suit against **Siana Maasai Mara Conservancy and Sammy Nkoitoi**. The 1st Plaintiff claims to be the registered owner of L.R. 16216 situated in Narok County and adjacent to Maasai Mara National Park and the 2nd Plaintiff operates tourist facilitates including Lodges in Narok. The 1st Plaintiff has leased its property to the 2nd Plaintiff for 33 years with effect from 1st January 1993, on which is a lodge which hosts tourists for a fee of US\$ 60 per person per night payable to Narok County Council for gaining access to the park. The 1st defendant wrote to the 1st defendant on 31/8/2010 and 8/12/2010 demanding that visitors to the lodges and camps near Maasai Mara including the 2nd Plaintiff pay a fee to the 1st defendant in addition to US\$ 60 paid to Narok County Council. The said demand was to come into force on 15/2/2010. The plaintiffs are aggrieved by the said demand (levy) as it would increase the cost of tourism and reduce the number of visitors coming to the lodge due to high costs, and in turn occasion losses to the 1st plaintiff. The plaintiffs contend that the said charges are illegal and the defendants have threatened to erect barriers to enforce the demand. In the plaint, the plaintiffs have sought orders of permanent injunction to restrain the defendants from enforcing the said entry charges or erecting barriers to stop access to the plaintiffs' property and a declaration that the charges are illegal.

Filed simultaneously with the plaint, is the Notice of Motion dated 17/12/2010 in which the plaintiffs seek the following orders;

2. An injunction be issued restraining the defendants whether by themselves, their directors, officers, servants, employees and/or agents or any of them howsoever, from demanding or

enforcing entry charges against the Plaintiffs or visitors to the Plaintiffs' property known as Land reference Number 16216 situated within Narok County pending the hearing and determination of this application.

3. An injunction be issued restraining the defendants whether by themselves, their directors, officers, servants, employees and/or agents or any of them howsoever, from erecting barriers stopping access to the Plaintiff's property known as Land Reference Number 16216 situated within Narok County, or in any other manner whatsoever, denying the First Plaintiff's visitors access to the Plaintiffs' Property known as Land reference Number 16216 situated within Narok County pending the hearing and determination of this application.

4. An injunction be issued restraining the defendants whether by themselves, their directors, officers, servants, employees and/or agents or any of them howsoever, from demanding or enforcing entry charges against the Plaintiffs or visitors to the Plaintiffs' Property known as Land Reference Number 16216 situated within Narok County pending the hearing and determination of this suit.

5. An injunction be issued restraining the defendants whether by themselves, their directors, officers, servants, employees and/or agents or any of them howsoever, from erecting barriers stopping access to the Plaintiffs' Property known as Land Reference Number 16216 situated within Narok county, or in any other manner whatsoever, denying the First Plaintiff's visitors access to the Plaintiffs' Property known as Land Reference Number 16216 situated within Narok County pending the hearing and determination of this suit.

The application is supported by the affidavit of **Patrick Marekia**, the Group General Manager of Maasai Mara (Sopa) Ltd., owner of the 3rd plaintiff on 17/12/2010 and another by **Daniel Olempoe**, a director of the 1st Plaintiff who supports this application and urged that if the threat is implemented, it will cause great hardship to the shareholders of the 1st plaintiff. Mr. Kiragu, counsel for the applicant also filed submissions. He urged that the purpose of the interlocutory injunction is to protect the applicants against injury by violation of his right which can not be adequately compensated in damages. He relied on the case of **Mureithi Vs City County of Nairobi [1976-1985] E.A. 33**. Reliance was also made on **Hunker Trading Company Limited Vs Elf Oil Limited 2010** which emphasized the observance of the overriding objective of the Civil Procedure Rules, to ensure that justice is done to all the parties as the subject matter of the dispute is preserved. Counsel submitted that they have demonstrated that the plaintiffs have a prima facie case with high chances of success and that even on a balance of convenience, it would still tilt in their favour.

The application was opposed and a replying affidavit was filed by **Sammy Nkoitoi** dated 27/12/2011 and a notice of preliminary objection dated 29/12/2010. The preliminary objection was twofold, that there is no company resolution filed appointing **Hamilton & Harrison & Mathews** to act for the plaintiffs, secondly, the 1st Defendant can not be sued in its own name, because it is not a legal entity. **Mr. Makoloo**, counsel for the Defendant argued that the plaintiffs being an incorporated company according to resolutions of their respective Boards, a resolution authorizing the filing of this suit should have been filed simultaneously with the suit.

Mr. Makoloo also urged that the applicants have not come to court with clean hands because they failed to disclose the fact that they attended meetings where it was resolved that fees be levied. He urged that the applicants are not entitled to an order of injunction having failed to show utmost good faith. On that, counsel relied on the case of **Mrao Vs First American Bank of Kenya Ltd [2003] KLR 125** where the court declined to grant an order of injunction for the failure of the applicant to demonstrate utmost good faith.

Mr. Makoloo urged that the title in question has been subsumed by a subsequent title that was issued to the Respondent and the earlier title, if at all it existed, has been extinguished. Counsel relied on **Kenya Commercial Finance (K) Ltd Vs Afraha Education Society (2001) 1E.A. 80** where the court held that a title is relevant in declaration of a prima facie case. It was further submitted that so far, no date has been

set for the commencement of the collection of conservancy fees. Counsel argued that the plaintiffs cannot suffer irreparable harm because upon payment, receipts are issued and the loss can be quantified and paid back. On the issue of balance of convenience, counsel submitted that if an order is granted prohibiting the erection of gates, it will mean that the defendants will not collect fees from 3rd parties who do not oppose the payments and it is the defendant who will suffer economic loss.

The principles upon which the court may grant interlocutory injunctions are well settled in the case of **Giella Vs Cassman Brown Ltd [1973] E.A. 358;**

- (1) The plaintiff must demonstrate that he has a prima facie case with a probability of success;**
- (2) The plaintiff must demonstrate that unless an interlocutory injunction is granted, it will suffer irreparable harm;**
- (3) If the court is in doubt, it will consider the balance of convenience.**

In the instant case, the 1st Plaintiff claims to be the owner of the suit land **L.R. 16216** located at Narok County and borders Maasai Mara National Park. The 1st Plaintiff has leased the said property to the 2nd Plaintiff for a period of 33 years by 25/5/1993. The lease agreement was exhibited at page 1 to 12 of the application. However, the 1st Plaintiff did not avail a copy of the title to the land. The defendants are said to have established a Wildlife Conservancy known as Siana Maasai Mara Conservancy on **CIS/MARA/SIANA/A/1** which is run by the Siana Wildlife Registered Trust who want to introduce conservancy charges. The defendants threatened to levy conservancy fees by their letter of 15/6/2006 (page 41) and have renewed the threats in 2010. It is the plaintiffs' contention that levying of fees will drive the tourists away leading to loss in Kshs.600,000,000 investment in the lodge. To the contrary, the defendants have exhibited a title issued to them on 11/8/2010. They claim that the plaintiffs' title is subsumed and hence extinguished. Though the 1st Plaintiff did not exhibit its title to the land, it is not denied that the 1st Plaintiff leased the suit land to the 2nd Plaintiff in 1993 and the 2nd Plaintiff pays rent to the 1st Plaintiff. If the land was the defendant's, no reason has been given why they have not demanded rent from the 2nd Plaintiff. As pointed out by **Mr. Kiragu**, there is no evidence that the land for which the exhibited title was issued is the same as that claimed by the 1st plaintiff. There is an obvious dispute over the suit land and that issue can only be determined at a full hearing. Since the facts relating to ownership are contested, that is in itself evidence demonstrating that there is an arguable case. In addition, the plaintiffs are questioning the legality of the charges levied by the defendants. Since the plaintiffs claim that the lodge is on private land, then the basis of the defendants' charges is questionable and can only be determined after the hearing.

In **Mureithi Vs City Council of Nairobi [1970] E.A. 331**, Justice Madan quoted Lord Diplock in **American Cymamid Company Vs Ethium Ltd [1975] A. G. 366** where he said (p. 406);

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial...”

The applicants' rights to receive tourists at the lodge will be curtailed if the order of injunction is not granted as they will lose their source of income.

Will the plaintiff suffer irreparable loss? The defendant urged that since receipts are issued upon entry to the conservancy, it is easy to quantify the loss in the event the plaintiffs succeed. I am of a different view. If the charges are introduced, the tourists will stay away or may divert to go elsewhere that is cheaper thus causing loss to the 2nd Plaintiff and their Kshs.600,000,000 investment. In turn, the 1st Plaintiff will also lose their source of income and both plaintiffs will suffer irreparably. The plaintiffs are dependent on the tourist industry and these actions are injurious to the tourist industry. It is the plaintiffs' contention that it is easier to compute the defendant's loss in the event the suit is dismissed and I am of the same view. The court finds that even on a balance of convenience, the same tilts in favour of the

plaintiff because, if an order of injunction is granted, visitors will continue visiting the Lodge and the Conservancy and both parties will not suffer loss till this matter is heard and determined.

Mr. Makoloo submitted that the plaintiffs are not entitled to the orders sought because of material non disclosure, that the plaintiffs were party to the meetings in which the issue of conservancy fees was agreed. It is true that the plaintiffs' officers attended the meetings called by the defendants. But right from the onset, the plaintiffs have objected to the levy. In any event, attendance of the meetings where the Respondents agreed to levy charges did not mean that the plaintiffs had agreed to the levy of the charges. They were not party to the decision to levy charges and cannot be said to have withheld material facts that would warrant this court declining to grant an order of injunction.

As to whether the order should not be granted because no resolution of the plaintiff company was filed, authorizing counsel to file this suit, the Respondent did not cite the provision of law relied upon. Mr. Kiragu submitted that **Order 4 Rule (1) (4) Civil Procedure Rules** provides that if the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company. In this case, Patrick Marieka, the Group General Manager deponed to have been authorized to swear the affidavit in support of this application. It is not clear whether it was under seal. The point raised by the Respondent was decided in **Bugerere Coffee Growers Ltd Vs Sebaduka & Another [1970] E.A. 147**. The court said;

“...when Companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the Minutes...”

In the instant case, the counsel has not shown to court the said resolution authorizing to the filing of these proceedings. However, it would be premature for the court to strike out these proceedings on that basis. The overriding objective of the Civil Procedure Rules is that each party be given their day in court and not be locked out over a technicality such as the one alluded to. If there be such requirement, the same should be filed within reasonable time but before the hearing of the suit and if the plaintiff delays in complying, the Defendant can take out an application for striking out.

The other objection raised by the Respondent is that the 1st defendant is not capable of being sued in its own name because it is not a corporate entity or legal person. There are other defendants apart from the 1st defendant and an order or injunction cannot be denied just because the 1st Defendant cannot be sued in their own name. If there is a mistake in the name, the plaintiffs can apply to amend as the suit is still very freshly filed.

For all the reasons considered above, I find that the plaintiffs are deserving of an order of injunction in terms of prayers 4 and 5 of the Notice of Motion dated 17th December 2010 and the prayers are granted. Costs will be in the cause.

DATED and DELIVERED this 20th day of March, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:

Mr. Kiragu for Plaintiffs

Mr. Okeke holding brief for Makoloo for Respondents

Kennedy – Court Clerk