



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.232 OF 2010

**YARE SAFARI LIMITED.....APPLICANT/
PLAINTIFF**

VERSUS

**TOWN COUNCIL OF MARALAL.....RESPONDENT/
DEFENDANT**

RULING

This ruling is in respect of an amended chamber summons dated on 5th October, 2010 in which two main prayers are sought as follows:

“4. That this Honourable court be pleased to restrain the defendant from evicting the plaintiff from or interfering with its quiet enjoyment of Tourist Lodge and Camp Site known as Yare Camel Club at Rankau within the Town Council pending the hearing and determination of this suit.

5. That this honourable court be pleased to restrain the defendant, its agents and/or servants from preventing the plaintiff’s employees from entering, leaving and or being in the suit property, Tourist Lodge and Camp Site known as Yare Camel Club at Rankau, within the Town Council of Maralal until further orders of the court.”

It was the applicant’s contention that it established the club between 1986 and 1988 at its own costs and with its own labour; that through a verbal and written representations of the respondent, the applicant was led to believe that it would carry on the business of tourists lodge and camp site for as long as the applicant desired thereby creating proprietary estoppel. By its conduct, the respondent has set out to prevent the applicant from carrying on the aforesaid tourist camping business on the suit premises; that the business constitute a valuable investment and the applicant has made very heavy investment in the estimated sum of Kshs.20,520,000/=; that the respondent is determined to evict the applicant from the suit premises without compensation for the improvements made over the years.

The application is opposed on the grounds that the applicant in bringing it and obtaining *ex parte* orders failed to make material disclosure that the parties had recorded a consent in the Business Premises Tribunal Case No.5 of 2009 in which the applicant had agreed to vacate the suit premises within four (4) months, among other terms; that the applicant had been evicted pursuant to the above consent order; that damages will be adequate compensation in lieu of the orders of injunction sought herein.

I have considered the arguments as well as the authorities cited by learned counsel for the applicant. It is common ground that the applicant and the respondent entered into a tenancy agreement on 1st January, 1988 in respect of the suit premises for a period of twenty years. On 21st November, 2008, the respondent served a notice upon the applicant to terminate the tenancy. The applicant made a reference to the Tribunal being Nyahururu Business Premises Rent Tribunal Case No.5 of 2009. The parties subsequently recorded the consent alluded to earlier.

From the totality of the pleadings and the foregoing summary of the background, can it be said that the applicant has demonstrated a *prima facie* case? The applicant's claim against the respondent is, first, a declaration that proprietary estoppel arose when the applicant acted on the representation of the respondent and expended its money and labour in establishing the Tourist Lodge and Camp Site at Rankau; an order directed at the respondent to give the applicant a lease of 20 years from 31st January, 2008 or in alternative compensation of the applicant in the sum of Kshs.20,520,000/= for improvements and an order of permanent injunction restraining the respondent from interfering with the applicant's enjoyment of the lodge and camp.

Basically, the applicant's claim is premised on the doctrine of equitable estoppel, a doctrine which is attributed to Lord Denning when he first propounded it in his well-known work "*The Discipline of Law*" and subsequently explained it in **Central Landon Property Trust Vs. High Trees House Limited** (1947) 1KB 130 at P.206 as follows:

"If the defendant led the plaintiff to believe that he would not insist on the stipulation as to time and if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or..... on his part it is a kind of estoppel. By his conduct he evidenced an intention to affect their legal relations

.....
When a man has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."

See also **Kay Jay Rubber Products Ltd Vs. Development Finance Company (K) Limited and Another** (1991) KLR 195. Without deciding with finality whether or not there is in the circumstances of this dispute equitable or proprietary estoppel, the question remains whether the applicant has established *prima facie* that it is entitled to the reliefs sought based on that doctrine. There is no doubt that the twenty-year lease granted by the respondent has expired.

It is equally common ground that the respondent duly served upon the applicant the requisite notice to vacate upon the expiry of the lease. The applicant challenged the notice in the Business Premises Tribunal, and a consent recorded giving the applicant four (4) months to vacate the suit premises on or before 31st September, 2010. Pursuant to that consent, order, the applicant was evicted from the suit premises. The consent order has not been set aside, stayed or challenged on appeal. Prayer 4 in this application has, in the circumstances, been overtaken by the eviction and the respondent cannot be restrained in the terms spelt out in that paragraph. That leaves prayer 5 which is couched in a language

which is a mixture of both prohibitory and mandatory injunction namely; that the respondent be restrained-

“.....from preventing the plaintiff’s employees from entering, leaving and/or being in the suit property.....”

It is now settled that a mandatory injunction can be granted both at the interlocutory stage as well as at the trial. It will, however, only be granted at the interlocutory stage when the case before the court is clear and unusually strong. In other words, as was explained in **Shepherd Homes Limited Vs. Sandahun** (1971) 1 Ch.34,

“On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction.”

I do not think, with respect, that this is a clear and unusually strong case in view of the contrasting affidavit evidence. Secondly, in its own prayer, the applicant has sought compensation in the sum of Kshs.20,520,000/=. Payment by way of damages, in lieu of injunction, for the improvements made by the applicant on the suit premises will be adequate compensation.

For the reasons stated, I come to the conclusion that the applicant has failed to demonstrate that it has a *prima facie* case with a probability of success. The respondent having taken possession, the balance of convenience tilts in its favour.

In the result, this application is dismissed with costs to the respondent.

Dated, Delivered and Signed at Nakuru this 18th day of March, 2011.

W. OUKO

JUDGE