



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

**ELC NO. 1022 OF 2007**

**(FORMERLY HCCC NO. 426 OF 2003)**

**KILIMANJARO SAFARI CLUB LTD.....PLAINTIFF**

**V E R S U S**

**KENYA WILDLIFE SERVICES.....DEFENDANT**

**R U L I N G**

The Plaintiff is a tenant to the Defendant pursuant to a lease entered into between the parties in respect of 20 Hectares of property situated in the Tsavo East National Park on which there is a lodge erected known as Tsavo Safari Camp. The lease was for 33 years commencing 1<sup>st</sup> December 1987. By letter dated 11<sup>th</sup> February 2003 the Defendant issued a 30 days notice to the Plaintiff to carry out repairs and remedial work on the property failing which the lease would be terminated. The Plaintiff wrote back on 5<sup>th</sup> March 2003 to say it had commenced the repairs and/or remedial works. On 9<sup>th</sup> April 2003 the Defendant issued a notice to terminate the lease on the basis that the Plaintiff was in a fundamental breach. That is when the Plaintiff filed this suit claiming that the notice was unlawful and illegal and that it was the Defendant who was in breach of the lease agreement. The suit sought a permanent injunction and damages for breach of contract. With the suit was filed a chamber application for a temporary injunction.

On 13<sup>th</sup> July 2005 the parties consented to the appointment of Mr. Omesh Kapila to hear and determine the dispute between them and to file his award in 45 days. The Arbitrator heard the matter and gave an award. On 20<sup>th</sup> June 2008 the Defendant filed the present chamber application under Order 45 rules 15

(1), 16 and 19 of the Civil Procedure Rules and section 3A of the Civil Procedure Act to have the Arbitrator's award dated 27<sup>th</sup> April 2007 set aside and/or reviewed or varied on the basis that the Arbitrator had:-

- a) misconducted himself;
- b) acted unlawfully and illegally;
- c) failed to address all the issues raised before him;
- d) failed to appreciate that the lessee was in breach of the terms of the lease and the lessor had given notice of termination of the lease.

The application was supported by an affidavit sworn by Alphonso Wadeyua, the Defendant's legal officer. The replying affidavit was sworn by Sandeep Rajnikant Desai who is the General Manager of the Plaintiff company. The Plaintiff was basically saying that the Arbitrator had dealt with all the issues raised in the claim and there was therefore no misconduct at all.

Mr. Wandabwa for the Plaintiff and Mr. Rustam Hira for the Defendant filed written submissions on the application which I have considered.

Under Order 45 rule 15 (1) the grounds for setting aside an award are:-

- (a) corruption or misconduct of the Arbitrator or Umpire; and
- (b) that either party has fraudulently concealed any matter which he ought to have disclosed, or has unlawfully misled or deceived the Arbitrator or Umpire.

No allegation of corruption on the part of the Arbitrator, or fraudulent concealment, misleading or deceit by the Plaintiff, was made as a basis for the application. It is misconduct that forms the ground. It is alleged the Arbitrator did not address all the issues in the claim; failed to appreciate that the lease had been terminated; and that he had acted unlawfully and illegally.

It is now settled that the Defendant cannot rely on section 3A of the Civil Procedure Act for its application when Order 45 of the Civil Procedure Rules contains provisions to protect it as a party not satisfied with the Arbitrator's award or the procedure leading to it namely:-

- a) the court may modify or correct an award under rule 13;
- b) the court may remit an award to the Arbitrator under rule 14; and

c) the court may set aside the award on the grounds of corruption or misconduct, etc, under rule 15 (**Kibutha –Vs- Kibutha [1984] KLR 243**).

Further, the general rule is that the court is reluctant to interfere with an arbitration award where the parties were heard and given the opportunity to question each of the witnesses resulting in a full adjudication upon the matters in issue. The court will, however, intervene if it is alleged that the Arbitrator in arriving at the decision has done so on a wrong understanding or interpretation of the law (**Rashid Moledina –Vs- Hoima Ginnors [1967] EA. 645**). It should be appreciated that the parties chose arbitration as the mode of settling their dispute and had agreed to be bound by the Arbitrator's decision.

In the case of **Nyangau –Vs- Nyakwara [1986] KLR 713**, the Court of Appeal held that misconduct occurs if the Arbitrator refused to hear the evidence of a material witness. It agreed with the observation by Lush, J in the English decision of **Williams –Vs- Wallis & Co. [1914] 2 K.B. 478 at page 484** as follows:-

*“Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is within the meaning of the expression, “misconduct” in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside.”*

I would also imagine that it would be misconduct if the Arbitrator communicates about the case with other people, or discusses it with one of the parties or their lawyer in the absence of the other.

No personal misconduct was alleged against the Arbitrator, nor was it alleged that there was a material witness who was not heard. It was alleged he failed to address the real issues before him; failed to appreciate that the lessee was in breach of the terms of the lease and the lessor had given notice of the termination of the lease; that the lessee had not provided a true and full account of all occupancy; and that there was no guarantee that the lessee would pay rent now that it has not been paying in the past.

I have looked at the Arbitrator's award. The parties agreed before him that the plaintiff filed in this case would be the basis of the Plaintiff's claim. The Defendant's case would be based on the Defence and Counterclaim. There was an agreed bundle of documents. Each side called witnesses and thereafter the advocates filed written submissions. There is no dispute therefore that each side was allowed to put its case.

The Plaintiff shows that the Plaintiff was challenging the notice to terminate the lease. It was alleged to have been done in breach of the terms of the lease and sought general damages for the breach. In the Defence and Counterclaim the Defendant alleged a number of breaches. They include the allegation that the premises had been kept in deplorable and untenable condition; rent had not been paid; and the Plaintiff had failed to render a true and full account of the occupancy. The Defendant maintained it was entitled to terminate the lease which it had done, and therefore was entitled to possession. It sought accounts and general damages for breach of contract.

The Arbitrator considered the evidence of each side and concluded that the Defendant's letters dated 30<sup>th</sup> January 2003 and 11<sup>th</sup> February 2003 sought inspection of the premises and notice of the maintenance and repair work that was required. These were in compliance with Clause 3(g) of the lease. The Plaintiff had then proceeded diligently to execute such works which it had completed by October 2005. There was a joint inspection on 21<sup>st</sup> July 2006 which showed all the work was completed. The Arbitrator found the Plaintiff had not paid rent and had not rendered full account of all occupancy and was ordered to render it

beginning 1<sup>st</sup> January 2003.

I have looked at Clause 3(g) of the lease. Where the Plaintiff was served with notice to carry out maintenance and repairs within 30 days and had not, the Defendant was required to enter the premises and carry out the works whose costs would be recoverable on demand by action. Failure to carry out maintenance or repairs in 30 days could not immediately lead to the termination of the lease.

The Plaintiff had not paid rent and had not provided a true and full account of occupancy. However, the notice contained in the letter of 11<sup>th</sup> February 2003 was in regard to repairs. The same was for the notice of 9<sup>th</sup> April, 2003. No notice was given for failure to pay rent or provide accounts. There could not have been termination of the lease on basis of these breaches.

In short, the award shows the Arbitrator substantially dealt with all the issues and his findings accorded with the terms of the lease and the law.

The consequence is that the application is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF APRIL 2011**

**A. O. MUCHELULE**

**J U D G E**