REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 28 OF 2011

MARA NORTH CONSERVANCY LTD……..PLAINTIFF

VERSUS

KOINANKE OLE NKOITOI……...1ST DEFENDANT

(also known as Peter Nkuitoi sued in his
Capacity as Chairman of the Mara North

Landowners Association)

MARA NORTH LANDOWNERS
COMPANY LIMITED…….....…….2ND DEFENDANT
JOSEPH TUBULA OTUNI…….....…….3RD DEFENDANT
KOINANKE OLE NKOITOI
(also known as Peter Nkoitoi)….....……...4TH DEFENDANT

RULING

On 28th February 2011, **Mara North Conservancy Ltd**, the Plaintiff herein filed this suit against **Koinanke Ole Nkoitoi**, in his capacity as Chairman of Mara North Landowners Association, **Mara North Landowners Company Ltd**, and **Koinanke Ole Mkoitoi** (1st and 4th defendants). The Plaintiff seeks the following orders;

(a) Permanent injunction restraining the 1st, 2nd, 3rd and 4th Defendants whether by themselves, servants, workmen, agents or members, and/or otherwise howsoever from interfering with or interrupting the Plaintiffs business of operating a private conservancy in Narok South District, in particular from taking over control or management of the Plaintiff's conservancy and/or stopping the plaintiff's clients from conducting game drives within the Plaintiff's conservancy pending the hearing and determination of this application;

(b) Permanent injunction restraining the 1st and 4th Defendants whether by themselves, agents or members, or otherwise howsoever from breaching the terms of the agreements to lease they have with the Plaintiff by terminating the same, discontinuing to discharge their obligations thereunder or otherwise transferring or vesting any interest in the said parcels of land to third parties pending the hearing and determination of this application;

(c) A declaration that the 1st, 2nd, 3rd and 4th defendants for tortuously interfering with the Plaintiff's business operations and/or contracts;

(d) Damages against the 1st, 2nd, 3rd and 4th Defendants do pay the Plaintiff the costs of this suit.

Filed simultaneously with the plaint, is the Notice of Motion of the same date in which the plaintiff seeks the following orders;

3. THAT due to the urgency of this matter, this Honourable Court be pleased to exempt the Plaintiff from the requirements of Order 3 Rule 2 (c) of the Civil Procedure Rules at this stage and appoint such other time during the proceedings herein as may be reasonable for compliance with the same;

4. THAT this Honourable Court be pleased to issue an order restraining the Defendants jointly and severally whether by themselves, servants, workmen, agents or members, or otherwise howsoever from interfering with or interrupting the Plaintiffs business of operating a private conservancy in Narok South District, in particular from taking over control or management of the Plaintiff's conservancy or stopping the Plaintiff's clients from conducting game drives within the Plaintiff's conservancy pending the hearing and determination of this application;

5. THAT this Honourable Court be pleased to issue an order restraining the 1st and 4th Defendants jointly and severally whether by themselves, agents or members, or otherwise howsoever from breaching the terms of the agreements to lease they have with the Plaintiff by terminating the same, discontinuing to discharge their obligations thereunder or otherwise transferring or vesting any interest in the said parcels of land to third parties pending the hearing and determination of this application;

6. THAT this Honourable Court be pleased to issue an order restraining the 1st and 2nd Defendants whether by themselves, servants, workmen, agents or members, or otherwise howsoever from interfering with or interrupting the Plaintiffs business of operating a private conservancy in Narok South District, in particular from taking over control or management of the Plaintiff's conservancy or stopping the plaintiff's clients from conducting game drives within the Plaintiff's conservancy pending the hearing and determination of the suit herein;

7. THAT this Honourable court be pleased to issue an order restraining the 1st and 4th Defendants jointly and severally whether by themselves, agents or members, or otherwise howsoever from breaching the terms of the agreements to lease they have with the Plaintiff by terminating the same, discontinuing to discharge their obligations thereunder or otherwise transferring or vesting any interest in the said parcels of land to third parties pending the hearing and determination of the suit herein.

The motion is predicated on grounds proved on the face of the application and facts contained in the affidavits of **George Constantine Sphikas** dated 28th February 2011 and 11th March 2011. **Mr. Oyomba Advocate** urged the application on behalf of the Plaintiff. The application was opposed and **Letangule Advocate** for the Respondents filed a preliminary objection dated 8th March 2011 with a supplementary preliminary objection on 11th February 2011.

Briefly, the background of this case is that the plaintiff operates a private Conservancy in the Maasai Mara, Narok South District. It entered into agreements to lease about 800 parcels of land comprising 27,824 ha for 5 years with effect from 1st January 2009. The leases were executed between the individual landowners and the plaintiff. The power of Attorney has vested in the plaintiff to manage the parcels of land under lease. The plaintiff manages the land by conserving the ecological bio-diversity. The plaintiff had in turn agreed with 11 tourists camps and lodges to take their guests there for game drives for a fee.

On 23rd October 2010, **Letangule & Company Advocates** wrote to the plaintiff stating that they had

been instructed to issue the plaintiff with notice to terminate the lease agreements. The notice did not disclose the land parcel numbers and the landowners who are affected. Between 20th October 2010 to 20th January 2011, the 3rd and 4th defendants acting in their own capacity, held meetings with the persons who had signed lease agreements, persuading them to terminate the leases and threats have been issued to the plaintiff. On the 27th January, 2011 the 3rd and 4th defendants visited the District Commissioner seeking to be allowed to manage the conservancy. It is the plaintiff's contention that if the defendants make good their threats to take control of the conservancy and stop the plaintiff's clients from taking their guests to the plaintiff's conservancy for game drives, the plaintiff will suffer irreparable damage to their business and also cause injury/harm to the tourist industry.

Mr. Oyomba submitted that there was no privity of contract between the defendants and plaintiffs and therefore have no *locus standi* to seek the termination of the contracts; the 2nd defendant being a Limited Liability Company, had no interest in the parcels of land that compose the conservancy and that the notices of termination were null and void as they did not comply with the terms of the contract on termination.

The Respondent did not file a replying affidavit but filed a preliminary objection and a supplementary preliminary objection containing several points. In the case of **Mukisa Biscuits Co. Vs Westend Distributors (1969) EACA 696, [page 701]**, the East African Court of Appeal considered what a preliminary objection entails. **Sir Mr. Charles Mairbold** said;

"A preliminary objection is in the nature of what used to be called a demurrer. It raises a prima point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained, or if what is sought is the exercise of judicial discretion…"

The question is whether the points raised by the defendants fit the above definition of what a preliminary objection is.

Miss Kituku, who urged the objection submitted that the subject land being agricultural land, the consent of the Land Control Act should have been sought. She relied on **Kahia Vs Nganga (2004) I EA 75** and **Joseah Kipkirui Rono Vs Geoffrey Maritim – HC No. 14 of 2010**, where the courts held that failure to comply with provisions of the Land Control Act to obtain consent, rendered the transaction void. In reply to this objection, Mr. Oyomba submitted that Land Control Board consent is a factual issue that needs to be proved by evidence. Mr. Oyomba relied on the case of **A. J. Ltd Vs Catering Levy Trustees (2005) KLR**, where J, Ojwang held that an objection must only be on point of law and not subject to evidence which must await trial. In the instant case, it was my view that whether or not the Land Control Board consent was obtained will need to be proved by the plaintiff and that can only by way of evidence at the trial. That is not a pure point of law.

The other point taken by Ms Kituku, is that the leases in question are not signed by 800 landowners, the defendants have not been given any leases contrary to the **Law of Contract Act**, **Section 3 (1)**, which requires that a contract for disposition of an interest in land must be in writing and signed by the parties. Mr. Oyomba submitted that they have signed 800 leases with the landowners and it was not possible to exhibit all of them.

In my view, that is not a pure point of law because that is an issue for determination at the hearing, whether or not the leases complied with **Section 3 of the Law of Contract Act**. It must be proved by adducing of evidence. In any event, the facts seem to be in contest.

The defendant also took up the point that the leases contravene Section 19 of the Stamp Duty Act, in that stamp duty was not paid in respect of the leases but that during the pendency of this matter and after the preliminary objection had been filed, served on 11th March 2011, the plaintiff paid the stamp duty without seeking the leave of the collector of stamp duty under **Section 19 3(b) of the Act**. Counsel urged the court to adopt the decision in **Computer Source Point Vs Lantech Ltd Hcc No. 375 of 2002** and **Weetabix Ltd Vs Healthy U 2000 Ltd (2006)**, where the courts have held that where an instrument is

chargeable with stamp duty, it is not admissible in both Civil or Criminal cases unless it duly stamped. **Section 19 (1) of the Stamp Duty Act** provides;

"(19) (1) subject to provisions of sub-section (3) of this Section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceeding whatsoever, except;

(a) in Criminal proceedings; and

(b) in Civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped".

3 – 5"
Section 111 of the Registered Land Act also provides as above. That no instrument required by law to be stamped shall be accepted for registration unless it is duly stamped.

In reply to that objection, Mr. Oyomba submitted that under Section 19 (3) of the Act, a party can be allowed time to have the instrument that requires stamp duty to be stamped or stamp duty to be paid. **Justice Emukule**, considered **Section 19 (3)** in the case of **Surgi Pharm Ltd Vs Aksher Pharmacy Ltd – Hcc 295 of 2004**. He observed that under **Section 19(3)**, if any unstamped instrument was produced before a court, the court had three options to take; if the time for stamping had expired, it shall be impounded unless it is forwarded to a collector, or the person presenting it be given reasonable opportunity to apply to the collector for leave to stamp it out of time or in other cases, the instrument will be received in evidence upon payment of the amount of the unpaid duty and the penalty remitted to the collector of the document is admitted in evidence upon payment of the amount of unpaid duty and the penalty remitted to the collector after the document is admitted in evidence. I do agree with the above observations as representing the correct position. This case has just been filed. The instrument is yet to be produced in evidence. In any event, the plaintiff has gone ahead and paid the stamp duty after this objection was raised. It cannot be determined at this stage whether it was paid out of time or not. I think the most important consideration here is that duty be paid even if late. Besides, Section 19 leaves the court with a wide discretion on how to remedy the situation. That objection cannot be the basis of striking out of this application or suit.

There was objection raised to the special power of Attorney allegedly issued to the plaintiff to manage the conservancy. The Defendant denies having signed the said power of Attorney. If that is so, then that is not an issue to be resolved by way of a preliminary objection. Evidence will need to be adduced to prove who signed it.

As to whether Mr. Oyomba should disqualify himself from the conduct of this case, for having attested to the leases and the special power of Attorney, because he may be called as a witness, counsel said that he was an employee of **Muthoga Gaturu Advocates** when the leases were drawn and he no longer works for the said firm of advocates. The documents were drawn by the firm of Muthoga and Gaturu Advocates. The persons who can be called as witnesses are the drawers of the documents and counsel who merely attested may not be a privy to the contents. There would be no reason to call for disqualification of counsel.

In the instant case, the points I have considered above are not pure points of law but factual. I find that issues raised are factual in nature and the objections cannot be sustained. The preliminary objection is hereby dismissed.

The Defendant did not file any affidavit in reply to the plaintiffs' affidavits and the facts deponed therein. The court will deem the said facts to be undisputed and therefore correct.

The plaintiff exhibited a sample of the lease agreements entered into with the landowners. Paragraph 4 of

the lease provides the manner in which the leases could be terminated. In the event of default after notice to remedy or mending the breach, a party to the agreement could terminate the lease by giving to the other party six months written notice. I have seen the notice issued by Letangule & Company Advocates to the plaintiff on behalf of the defendant, which was seven days notice. That is contrary to the lease agreement. In **Quality Group Ltd Vs General Motors Ltd – Hcc No. 30 of 2009**, the court prohibited the defendant from terminating a contract otherwise than as agreed in the agreement. The notice issued to the plaintiff recognizes that there was a lease agreement and the terms of the lease must be complied with. Otherwise, parties will enter into agreements and not take them seriously.

It is the plaintiffs' submission that they entered into lease agreements with 800 individual landowners and that the notices issued by the defence counsel do not disclose which landowners they act for in respect of what parcels of land. These facts were not disputed. Another letter addressed by Saina Advocates to Plaintiff asked the plaintiff to stop paying rents to the landowners and counsel attached a schedule of landowners and their respective parcel numbers. Some of the landowners had signed against their names but others did not, raising questions as to whether the instructions from landowners were genuine. The last straw was when Saina Sena Advocate addressed the letter dated 15th February 2011, asking the plaintiffs to stop their clients from game drives and that a fee of 80 dollars per client, had been imposed. It is apparent that from the above notice, the threat to terminate the leases was real, the plaintiffs have heavily invested in the conservancy and the landowners had not come up to terminate the leases in accordance with the agreement. This court is satisfied that the plaintiff has indeed demonstrated that it has a prima facie case with chances of success and if an order of injunction is not granted, the leases may be terminated illegally, the persons whom the counsel represent will move in and the plaintiff's investment Will be destroyed and it will suffer irreparable loss. Even the scales of convenience tilt in the plaintiff's favour because it is carrying on Tourism business, plans are made in advance and the termination notice issued if carried out by the defendants, will deprive the plaintiffs of their earnings without due notice.

The defendants have not demonstrated that they are privy to the contracts between the plaintiff and the landowners and have no authority to terminate the contract. The 2nd defendant is a limited liability company and has not shown that it has any interest, either legal or equitable in the said piece of land. The 1st defendant is an uncorporated body that has no legal capacity to seek to take control of the conservancy and the notices issued by the defendants are therefore questionable.

In the result, I am satisfied that the plaintiff has demonstrated that it has a prima facie case with high chances of success and if the order of injunction is not granted, the lease agreements are likely to be illegally terminated by the defendants. The defendants are hereby restrained from interfering with the plaintiff's business and breaching the terms of the agreements in terms of prayer 6 and 7 of the Notice of Motion pending hearing and determination of this suit.

Costs to be in the cause.

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

R. P. V. WENDOH
JUDGE

PRESENT:
No appearance for Plaintiff
Mr. Nyamwange holding brief for Koech for Defendants
Kennedy – Court Clerk