



**Africality CIO t/a Africality Maralal Safari Lodge Limited v Samburu County Government
(Environment & Land Case 14 of 2018) [2022] KEELC 2460 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2460 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 14 OF 2018
YM ANGIMA, J
JULY 21, 2022
FORMERLY NAKURU HCA 343 OF 2015**

BETWEEN

**AFRICALITY CIO T/A AFRICALITY MARALAL SAFARI LODGE
LIMITED PLAINTIFF**

AND

SAMBURU COUNTY GOVERNMENT DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated November 25, 2015 and amended on 20.01.2020 the Plaintiff sought the following reliefs against the Defendant:
 - (a) Special damages in the sum of Kshs.44,385,767/=.
 - (b) General damages for wrongful eviction.
 - (c) Costs of the suit.
 - (d) Interest.
 - (e) Any other relief the court may deem fit to grant.
2. The Plaintiff pleaded that vide an agreement dated November 1, 2014 it leased from the Defendant all that property known as Maralal Safari Lodge (the Lodge) within Maralal Wildlife Sanctuary for a period of 10 years for the purpose of operating a hotel and tourism business thereon. It was further pleaded that on October 10, 2014 it took possession of the Lodge for the purpose of undertaking renovations with the full knowledge of the Defendant. It was further pleaded that the Head of Terms signed by the parties was to be followed by a 'final agreement' consistent with its terms.



3. The Plaintiff pleaded that on or about September 23, 2015 whilst undertaking its routine operations the Defendant wrongfully and forcibly evicted it from the Lodge without prior notice or the sanction of a court order. The Plaintiff further pleaded that it suffered financial loss of Kshs.44,385,767/= as particularized in the amended plaint as a result of the said eviction for which the Defendant was liable.

B. The Defendant's Response

4. The Defendant filed a statement of defence dated May 16, 2016 and amended on March 11, 2021 denying liability for the Plaintiff's claim in its entirety. The Defendant pleaded that the suit was filed without a resolution of the Plaintiff company to do so. It admitted the ownership of the Lodge but denied that the Plaintiff was its operator as a lessee. Although the Defendant admitted the existence of the Head of Terms it pleaded that it merely contained the key elements of a proposed lease agreement which was never drawn and executed by the parties. The Defendant pleaded that no lease agreement could be executed between the parties as the due process of procurement under the Public Procurement and Disposal Act, 2005 and the relevant Regulations were not observed. The Defendant therefore contended that it had no legal capacity to enter into any binding lease agreement with the Plaintiff for the lease of the Lodge.
5. The Defendant denied that the Plaintiff had taken possession of the Lodge with its consent and pleaded that the Plaintiff was merely a trespasser at the material time. It was further pleaded that the Plaintiff had no capacity to enter into a lease agreement with the Defendant since its trust deed dated November 4, 2014 had not been registered.
6. The Defendant further pleaded that it had issued a written notice dated September 11, 2015 requiring the Plaintiff to vacate the Lodge but the Plaintiff had failed to comply. The Defendant denied knowledge and liability for the special damages pleaded by the Plaintiff and consequently prayed for dismissal of the Plaintiff's suit with costs.

C. Summary of Evidence at the Trial

(a) The Plaintiff's Evidence

7. At the trial hereof, the Plaintiff called one witness, Gabriel Lemalasia (PW1) and closed its case. PW1 testified that he was a director of the Plaintiff and he adopted the contents of his witness statement dated 08.01.2020 as his evidence in-chief. He also produced the documents contained in the Plaintiff's list of documents dated November 25, 2015 and the further list of documents dated March 3, 2020 as exhibits. The evidence of PW1 minored the contents of the amended plaint and he consequently prayed for the reliefs sought in the amended plaint.
8. During cross-examination, PW1 stated that it was Africality Cio which had approached the Defendant in 2014 for a lease of the Lodge and that Maralal Safari Lodge Limited was incorporated in 2015. PW1 conceded that he was aware that the Defendant was a state organ but contended that the County Governor had directed that the Lodge should just be leased out with or without an advertisement. He also conceded during cross-examination that the formal lease document on pages 32 – 38 of the Plaintiff's trial bundle was not executed by the parties.

(b) The Defendant's Evidence

9. It is evident from the material on record that the Defendant decided to close its case without calling any evidence.



D. Directions on Submissions

10. Upon conclusion of the hearing the parties were granted timelines within which to file and exchange their written submissions. The parties were granted 21 days each to do the needful. The record shows that the Plaintiff filed its submissions on April 5, 2022 whereas the Defendant filed its submissions on April 27, 2022.

E. The Issues for Determination

11. The court has considered the pleadings, evidence and documents on record in this suit. The court is of the opinion that the following key issues arise for determination herein:
 - (a) Whether the instant suit is incompetent and bad in law.
 - (b) Whether there was a legally binding relationship between the parties.
 - (c) Whether the Plaintiff has proved its case against the Defendant to the required standard.
 - (d) Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
 - (e) Who shall bear costs of the suit.

F. Analysis and Determination

(a) Whether the instant suit is incompetent and bad in law

12. The court has considered the material and submissions on record on this issue. The Defendant contended that the suit was incompetent and bad in law because it was filed without a resolution authorizing its filing. It was submitted that the incorporation of Africality Maralal Safari Lodge Ltd (the company) in this suit was an admission that the suit was incompetent and bad in law at the outset. The Defendant cited several authorities for the proposition that a suit filed by a company without a resolution of the board of directors authorizing its institution was incompetent and ought to be struck out.
13. The Plaintiff did not specifically address the issue of the competency of the suit in its written submissions. However, at the trial hereof the Plaintiff produced a company resolution dated November 15, 2015 authorizing the firm of Miller & Co. Advocates to institute the instant suit against the Defendant. The court has examined the pleadings and documents in this suit. The amended plaint shows that the Plaintiff is Africality Cio t/a Africality Safari Lodge Limited. The court is of the opinion that the real Plaintiff is the former and that the latter company is merely its trading name. Although the status of Africality Cio appears to be that of Charitable Organization, there is nothing on record to show that a “company” resolution was required for the purpose of filing the instant proceedings. Accordingly, the court is of the opinion that the legal requirements applicable to companies incorporated under the *Companies Act* may not necessarily be applicable to it. The court is thus not satisfied that the instant suit is incompetent for the reasons advanced by the Defendant.

(b) Whether there was a legally binding relationship between the parties

14. The court has considered the material and submissions on record on this issue. It is evident from the material on record that what the parties signed was merely a “Head of Terms” which envisaged that a formal lease agreement shall thereafter be drawn and executed by the parties. It is common ground that although the draft lease was prepared by the Plaintiff’s advocates it was never executed by the parties.



The copy of the draft lease on pages 32 – 38 of the Plaintiff’s trial bundle was not signed by any of the parties.

15. In its submissions, the Plaintiff contended that the “Head of Terms” should be construed as the lease agreement itself and that the parties should be considered as lessor and lessee. The court is, however, unable to agree with the Plaintiff’s submission on the issue. The head of terms was merely a preparatory document which contained the key terms to be included in the intended lease agreement. It is apparent that the leasing process was never concluded in that the ultimate lease document was never executed by the parties. In fact, in paragraph 5(k) of the amended plaint the Plaintiff pleaded that:

“The Head of Terms agreement signed by the parties was to be followed by a formal agreement consistent with the same.”

16. The court is unable to deem as done that which ought to have been done within the principles enunciated in the case of *Walsh v Lonsdale* [1882] 21 Ch.D 9 in the circumstances of this particular case. Whereas it may be possible for the head of terms to operate as a contract between the concerned parties only, the circumstances of this suit are peculiar. It is common ground that the Defendant is a state organ whose procurement and disposal process were subject to the Public Procurement Law. There is no evidence on record to demonstrate that there was compliance with the applicable legal regime under the Public Procurement and Disposal Act, 2005 which was then in force in 2014. It was the evidence of PW1 that it was the directive of the County Governor that the Lodge should be leased out with or without an advertisement as required by law.
17. The court is thus of the opinion that there was no lease or legally binding agreement between parties over the Lodge. The intended lease document was never executed by the parties hence the Plaintiff merely acted on a gentleman’s understanding to take possession of the Lodge, undertake renovations therein and operate it for the period of time it was in possession. The 2nd issue is consequently answered in the negative.
18. Even if the court had found that there was a lease between the parties, the court would not have been inclined to hold the Defendant liable on it for reasons of public policy. A court of law should not enforce any contracts which have been made in breach of the law. The court fully agrees with the decisions rendered in *Royal Media Services v IEBC & 3 others* [2019] eKLR and *Pakater Investment Company Ltd v Municipal Council of Malindi* [2016] eKLR on enforcement of contracts made in violation of public procurement law.

(c) Whether the Plaintiff has proved its case against the Defendant to the required standard

19. It is evident from the material on record that the Plaintiff’s case was hinged entirely on the existence of the alleged contract or lease for Lodge made in 2014. The court has found that there was no lease or legally binding contract between the parties over the Lodge. The court has found that although the Plaintiff took possession of the Lodge, renovated it and undertook operations thereon at its expense, such actions were undertaken on the basis of a gentleman’s undertaking and not a legally binding contract. In the premises, the court is not satisfied that the Defendant is legally liable to the Plaintiff. Accordingly, the court is not satisfied that the Plaintiff has proved its case against the Defendant to the required standard.

(d) Whether the Plaintiff is entitled to the reliefs sought in the amended plaint

20. The court has found and held that there was no legally binding agreement between the parties. The court has also found that the Plaintiff has failed to prove its claim against the Defendant to the required



standard. By taking possession of the Lodge and expending funds in operating it before any lease document could be executed and before compliance with the public procurement law the Plaintiff was doing so at its own risk. The Defendant could not be liable to the Plaintiff for expenses incurred in such circumstances. The Defendant cannot be faulted for repossessing public property which it was holding in trust for the people of Samburu County. Accordingly, the court finds and holds that the Plaintiff is not entitled to the reliefs sought in the suit.

(e) Who shall bear costs of the suit

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is of the view that although the Defendant is the successful litigant herein, it is not entitled to any costs on account of the role it played in the abortive lease of the Lodge. Accordingly, the court is of the opinion that the appropriate order to make on costs is that there shall be no order as to costs.

G. Conclusion and Disposal

22. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove its claim against the Defendant to the required standard. Accordingly, the Plaintiff's suit is hereby dismissed with no order as to costs.

It is so decided.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 21ST DAY OF JULY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Mushoka holding brief for Mr. Chege for the Plaintiff

Mr. Kibet for the Defendant

CA- Carol

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Y. M. ANGIMA

JUDGE

