



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Civil Suit 110 of 2009

MARA CONSERVANCY PLAINTIFF

VERSUS

COUNTY COUNCIL OF TRANSMARA DEFENDANT

RULING

The genesis of the dispute between the plaintiff and the defendant is a Management Agreement dated 25th May 2001, hereinafter referred to as “**The Original Agreement**”, vide which the defendant appointed the plaintiff as the sole and exclusive manager of the Maasai Mara National Reserve, hereinafter referred to as “**The Game Reserve**”, for a period of five years. By a further agreement dated 12th April 2005, hereinafter referred to as “**The Current Agreement**”, the parties by consent terminated the original agreement and the defendant re-appointed the plaintiff as the sole exclusive provider of the management function which includes operating, promoting, collecting revenue and maintaining the Game Reserve on the terms more particularly set out in the current agreement.

The plaintiff averred that the current agreement, which was duly approved by the Minister for Local Government, was to run for a period of 10 years with effect from 12th April 2005. It is a term of the current agreement that the Clerk of the defendant will serve as an *ex-officio* member of the plaintiff and that the defendant will be a corporate member of the plaintiff. The plaintiff carries on conservation and management of game parks in Kenya whereas the defendant, being a local authority, holds in trust the said game reserve, commonly known as the “**Mara Triangle**”.

The plaintiff further stated that under the terms and conditions of the current agreement, the defendant gave an undertaking that during the ten years’ term, it shall, *inter alia*, not appoint any person other than the plaintiff as manager or operator of the game reserve.

Clause 12 of the current agreement stipulates as hereunder:

“12. TERMINATION

12.1 Notwithstanding anything herein contained, this agreement may be terminated with immediate effect by written notice given by one party to the other in any of the following events (without prejudice to any of the existing rights which may have accrued to either party hereunder and as a remedy either additional or alternative to any claim for damages):

- (a) if the other party commits a breach of any its undertakings contained in this agreement and shall fail to rectify the cause or shall not have caused sufficient progress to rectify the cause within thirty (30) days after a notice in writing has been served upon it requiring the same to be rectified;**
- (b) if pursuant to any court order, decree or process or otherwise steps are taken upon or against any part of the property and assets of the other party unless those steps are being contested by the other party in good faith; or**
- (c) if an effective resolution shall be passed by the dissolution or winding up of the other party (other than for purposes of reconstruction or amalgamation) or a receiver is appointed of the undertaking or assets of the other party or any part thereof; or**
- (d) in the case of the Council, by the Conservancy if under the Act the relevant Minister (as defined in that Act) orders or directs that the Council shall be wound up or dissolved or that the Game Reserve be acquired, operated and/or owned by a body other than the council;**
- (e) in the case of the conservancy, if it shall cease or threaten to cease to carry on business;**
- (f) if a payment due hereunder shall remain unpaid for a period of thirty (30) days after the same becomes due for payment;**
- (g) if the other party enters into a deed of arrangement or composition or suspends payments to its creditors;**
- (h) if any Government or any other competent authority nationalises, seizes or otherwise expropriates or assumes custody or control of all**

**or any part of the share capital, property, assets
or business of the conservancy.”**

The plaintiff claimed in its plaint that it had come to its attention that following a meeting of the defendant's Special Finance, Staff and General purposes committee meeting held on 9th June 2009, a resolution was passed, *inter alia*, to terminate the current agreement with effect from 1st July 2009. The minutes of the said committee meeting were subsequently adopted by the defendant's full committee meeting held on the same day. The plaintiff further claimed that the defendant has never served it with any notice of any breach of its obligations under the current agreement. The plaintiff therefore averred that the purported termination of the current agreement by the defendant together with its intention to engage another party to take over its functions under the said agreement is unlawful, unreasonable, arbitrary, capricious and constitutes a blatant breach of the said agreement.

The current agreement contains an arbitration clause and the plaintiff wishes to refer this dispute to arbitration in terms of the agreement. This suit was filed for purposes of instituting an application under **section 7 (1)** of the **Arbitration Act, 1995**, for interim measures of protection pending hearing and determination of the dispute between the parties herein by an arbitrator. Consequently, the plaintiff filed an application under the provisions of **section 7 (1)** of the **Arbitration Act, 1995** and **rule 2** of the **Arbitration Rules, 1997**, and sought, *inter alia*:

“(a) Pending the hearing and determination of the arbitration proceedings an order do issue restraining the defendant whether by itself, its employees, servants or agents or anybody otherwise howsoever from implementing the resolutions arrived at in the Special Finance, Staff and General Purposes Committee Meeting held on 9th June 2009 together with the resolutions of its full council meeting held on 9th June, 2009 or in any other way terminating the agreement dated 12th April 2005 or interfering with the plaintiff's rights under the agreement dated 12th April 2005 or entering into a new agreement or appointing any person other than the plaintiff as Manager or Operator of the Game Reserve.

(b) Pending the hearing and determination of the arbitration proceedings, an order restraining the defendant whether by itself, its employees, servants or agents or anybody otherwise howsoever from convening any meeting whatsoever to discuss or pass resolutions either through the Special Finance, Staff and General Purposes Committee, the full Council or at all whose effect is to terminate the agreement dated 12th April 2005 or in any other way interfere with the plaintiff's right under the said agreement or enabling the defendant to enter into a new agreement or to appoint any person other than the plaintiff as Manager or Operator of the Game Reserve.

(c) A mandatory injunction to compel the defendant whether by itself, its employees, servants or agents or otherwise howsoever to perform its obligations and duties under the agreement dated 12th April 2005 pending the hearing and determination of the arbitral proceedings.

(d) That the defendant do pay the costs of this application in any event.”

The plaintiff's application was supported by an affidavit sworn by **Martin Forster**, the Chairman of the plaintiff company. The affidavit basically is a rehash of the arguments raised in the plaint as already highlighted. A copy of the Management Agreement dated 12th April 2005 as well as minutes of the Special Finance, Staff and General Purposes Committee Meeting held on 9th June 2009 and those of the Special Full Council Meeting held on the same date were some of the annexures to the said affidavit.

The defendant filed a replying affidavit which was sworn by **Elijah Mung'aya**, its Clerk. He admitted that by the Management Agreement dated 12th April 2005 the plaintiff was appointed as the sole and exclusive provider of the management function of the Maasai Mara Game Reserve. He further stated that the plaintiff, being an agent of the defendant, breached the fiduciary trust bestowed on it by the said contract. He continued to state that owing to the material breach of the agreement by the plaintiff, the defendant convened the Special Finance, Staff and General Purposes Committee Meeting on 9th June 2009 and a full Council meeting on the same date, which passed a resolution to terminate the management agreement aforesaid. Subsequent to the resolution of the Council, the defendant instructed its advocate to issue termination notices and the same were issued on 24th June 2009.

The particulars of breach of the fiduciary trust were stated as hereunder:

“(a) causing the arrest and prosecution of the Council Chairman, the Chief Warden and other Council officials in particular in NAIVASHA CRIMINAL CASE NO. 991 OF 2009, REPUBLIC –VS- PETER NKOIDILLAH SHIRA AND EDWARD NKOTOL.”

(b) exploiting the Council through exorbitant percentage on gross revenue.

(c) Hiring a third party as a revenue agent contrary to the terms of the contract.”

The defendant further stated that the plaintiff had not performed its obligations under the agreement, in particular, by failing to render true accounts to the Council. The defendant further contended that **“the relationship between the parties herein has broken down irreparably and ought to be terminated forthwith without further much ado.”**

The defendant's County Clerk further deposed that the plaintiff moved to court and obtained ex-parte orders on

22nd June 2009 restraining the defendant from implementing the resolution arrived at on 9th June 2009. He therefore argued that a court cannot injunct that which has already taken place.

The defendant further stated that one of the plaintiff's directors, **Kijabe Kuya Tunai**, who is also a nominated councillor of the defendant together with another director of the plaintiff known as **Samuel K. Tunai**, have lodged several cases in court aimed at derailing the operations of the defendant for their own self interest. The plaintiff had even barred the defendant's chairman from visiting the Game Reserve.

In paragraph 19 of the replying affidavit, the defendant's Clerk deposed as hereunder:

“19. That from the foregoing it is clear that the relationship between the plaintiff and the Council is no longer tenable and is for termination. Am advised by my advocate on record which advice I verily believe as true that the contract between the plaintiff and the defendant stands frustrated both in fact and by law and that parties in a contract must be willing to be bound by the terms of the contract and that parties cannot be forced to remain in contractual relations.”

The defendant further stated that the dispute herein can only be resolved in the first instance by mediation and the plaintiff ought to have referred the matter to a mediator and later on to arbitration before approaching the court. It was further stated that **“there is no arbitration agreement in place referring the dispute to arbitration, such that the plaintiff would have invoked the provisions of section 7 (1) of the Arbitration Act, and that an arbitral clause in the Management Agreement dated 12th April 2005 cannot amount to arbitral agreement.”**

The defendant urged the court to set aside the ex-parte orders as they were occasioning substantial loss and damage to it. If the ex-parte orders are not set aside, the defendant stated:

“(a) it will have been deprived of its fundamental right not to be condemned unheard and

(b) the dispute resolution mechanism agreed by the parties herein in the Management Agreement dated 12th April 2005 will be rendered nugatory and in vain.”

The defendant further contended that the ex-parte orders granted by this court were in contravention of the provisions of **order XXXIX rule 2** of the **Civil Procedure Rules** as they had been issued under the provisions of **section 7 (1) of the Arbitration Act, 1995** and **rule 2 of the Arbitration Rules, 1997** and the court has no power to issue orders under those provisions.

Counsel for the parties filed their respective written submissions which I have carefully perused.

It is not in dispute that the parties herein entered into the agreement dated 12th April 2005. Clause 12 of the said agreement stipulates how the parties may terminate the agreement. There is also an Arbitration clause therein,

number 19. I deem it appropriate to reproduce the relevant portions thereof as hereunder:

“19. ARBITRATION

19.1 Any dispute between the parties as to the determination of any sum payable under this agreement (but not on any question as to the exercise of any other rights arising under this agreement) shall be referred by either the Council or the Conservancy for determination to an independent firm of internationally recognized certified public accountants in Nairobi selected by agreement between the parties or failing agreement selected by the chairman for the time being of the Institute of Chartered Arbitrators of the United Kingdom, Kenya Branch. Such firm shall be requested to settle any dispute and its decision shall be final and binding upon the parties and its costs shall be borne equally by the Conservancy and the Council.

19.2 If a dispute (other than one which falls under sub clause 19.1) arises out of or in connection with this agreement, including any question as to its existence, validity or termination, the parties agree to seek amicable non-binding settlement by mediation in accordance with the Nairobi Dispute Resolution Centre (DRC) Mediation Rules, which rules are deemed to be incorporated in this agreement. No party may commence any court proceedings or arbitration in relation to such dispute until the parties have attempted to settle by mediation and that mediation has terminated.

19.3 If the dispute has not been settled pursuant to the mediation within 30 days from when the mediation was instituted, upon filing for a Request for Arbitration by any one party, it shall be referred to and finally determined by arbitration in accordance with the Kenya Arbitration Act, 1995 and the Rules of the Kenya Branch of the Chartered Institute of Arbitrators, which Rules are deemed to be incorporated in this Agreement.

19.4 The arbitration shall take place at such venue as the parties shall agree, failing which Nairobi.”

It is admitted by both parties that serious differences have arisen between them. As a result the defendant purported to terminate the agreement and on the other hand the plaintiff moved to court to seek preservative orders pending resolution of the dispute pursuant to the provisions of **clause 19** of the **Current Agreement**. None of the parties argued that the arbitration clause is null and void or inoperative or incapable of being performed.

The defendant argued that injunction orders for breach of agreement can only be granted pursuant to the

provisions of **order XXXIX rule 2** of the **Civil Procedure Rules**. The defendant faulted the plaintiff for invoking the provisions of **section 7 (1)** of the **Arbitration Act, 1995**. I do not think that this argument bears any legal validity.

Section 7 (1) of the **Arbitration Act, 1995** states as hereunder:

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, any interim measure of protection and for the High Court to grant that measure.”

The plaintiff, being fully aware and recognizing the import of **clauses 12** and **19** of the Current Agreement, stated in paragraph 3 of the plaint that:

“This suit has been filed for purposes of instituting an application under section 7(1) of the Arbitration Act, 1995, for interim measures of protection pending the hearing and determination of the dispute between the parties herein by arbitration.”

In the text known as **“THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND”** by Sir Michael J. Mustill and Stewart C. Boyd, 2nd Edition at Page 329, the learned authors state as follows:

“An interlocutory injunction is an order of the court, normally negative in form, designed to protect the property or the rights of the parties from prejudice pending the resolution of the dispute.”

At page 330 the learned authors further state that:

“The court has power to grant an interlocutory injunction in respect of matters which are the subject of arbitration.”

The purpose of such an injunction is to maintain the *status quo* pending reference of the dispute to a Mediator or an Arbitrator.

Although the defendant advanced formidable arguments to demonstrate that the plaintiff was in breach of the Current Agreement and it was therefore entitled to terminate the contract, it is not the function of this court to resolve disputes arising between them when they have stipulated express arbitration provisions in a valid agreement. Such an issue must be left to an Arbitrator. In **OYUGI –VS- LAW SOCIETY OF KENYA & ANOTHER** [2005] 1 KLR 463, it was held that:

“Arbitration issues are essentially contractual matters. As the law, in such a private domain, primarily seeks to effectuate private choice, it is a matter of public interest and of judicial policy, that the parties in dispute be accorded wide opportunities for seeking solutions outside the restrictive procedures of the judicial process.”

From the foregoing, I must reject the defendant's contention that the interim orders that were sought and granted by this court on 22nd June 2009 were improperly obtained. **Order XXXIX rule 2** of the **Civil Procedure Rules** deals exclusively with suits for restraining defendants from committing breach of contracts. That particular rule need not be cited by a party who is filing an action for the sole purpose of obtaining an interim measure of protection in terms of the provisions of **section 7 (1)** of the **Arbitration Act, 1995**.

In **COMMUNICATIONS CARRIER LIMITED & ANOTHER –VS- TELKOM KENYA LIMITED**, Civil Case No. 249 of 2005 at Milimani Commercial Courts, Ochieng, J. granted an interim injunction restraining the defendant from terminating or interfering with the plaintiff's Telecommunication Services pending the determination of a dispute between the parties by arbitration. The application was filed pursuant to the provisions of **order XXXIX rule 2** of the **Civil Procedure Rules** and **section 7** of the **Arbitration Act, 1995**.

I am unable to appreciate the defendant's contention that there is no arbitration agreement in place referring any dispute between the parties to arbitration. An arbitration agreement means:

“An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

See **section 3** of the **Arbitration Act, 1995**. **Clause 19.2** of the **Current Agreement** clearly states that if a dispute arises out of or in connection with the agreement including any question as to its validity or termination, the parties agree to seek amicable non-binding settlement by mediation.

The right of any of the parties to terminate the agreement in terms of **clause 12** must be read together with the provisions of **clause 19**. Whether any of the parties has breached the agreement in a manner that necessitates its termination is a matter that ought to be referred to a Mediator.

The interim orders granted by Muchelule, J. on 22nd June 2009, *inter alia*, restrained the defendant from implementing the resolution arrived at in the Special Finance, Staff and General Purpose Committee Meeting held on 9th June 2009 together with the resolution of its full council meeting held on the same date, or in any other way terminating the agreement dated 12th April 2005 pending hearing and determination of this application and reference to arbitration. **Clause 19.2** of the **Agreement** stipulates that no party may commence any court proceedings or arbitration in relation to a dispute until the parties have attempted to settle the dispute by mediation and such mediation has terminated. It is therefore clear that the mediation process is part of the dispute resolution mechanism covered under **clause 19** that generally deals with “**Arbitration**”. **BLACK'S LAW DICTIONARY**, 8th Edition at Page 1003 defines “**Mediation**” as:

“A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”

On the other hand, the same dictionary at Page 112 defines “**Arbitration**” as:

“a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”

It is therefore clear that the parties chose to incorporate both mediation and arbitration in **clause 19**, only that resolution of any dispute between them would first be referred to a mediator and if the same is not resolved then to an Arbitrator.

The defendant cannot admit the validity of the Management Agreement dated 12th April 2005 and with the same breath purport to deny the existence of an Arbitration Agreement as contained therein. It has to recognize and accept the said agreement, warts and all.

If the orders sought by the plaintiff herein are not granted, the defendant will effect its resolutions to the prejudice of the plaintiff. If that happens the plaintiff is going to incur irreparable loss.

One of the prayers sought by the plaintiff is for a mandatory injunction to compel the defendant to perform its obligations and duties under the agreement dated 12th April 2005 pending the hearing and determination of the arbitral proceedings. I am alive to the legal position that a mandatory injunction should only be granted in clear cases and where it appears that the defendant is attempting to steal a march on the plaintiff. See **KENYA BREWERIES LIMITED & ANOTHER –VS- WASHINGTON O. OKEYO**, Civil Appeal No. 332 of 2000 at Nairobi. The parties herein have an agreement whose term is ten years with effect from 12th April 2005 unless terminated earlier in any of the circumstances provided in the agreement. The validity or termination of the agreement is subject to the arbitration clause as aforesaid. That notwithstanding, the defendant has unilaterally decided to terminate the agreement without referring the dispute to arbitration. In the circumstances, it may rightly be said that the defendant is attempting to steal a march on the plaintiff. It is therefore appropriate that the defendant be compelled by way of a mandatory injunction to perform its obligations under the agreement pending hearing and determination of the arbitral proceedings.

For the aforesaid reasons, I grant the orders as sought by the plaintiff in its application dated 19th June 2009. The defendant shall bear the costs of the application. For avoidance of doubt, I further direct that this dispute be referred to a mediator forthwith in accordance with the provisions of **clause 19** of the **Agreement** dated 12th April 2005 that relates to “**ARBITRATION**”.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF APRIL, 2010.

D. MUSINGA

JUDGE.