



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 360 of 2009
MASAI MARA NORTH CONSERVATION LTD. PLAINTIFF

VERSUS

STEFANO CHELI (*sued in his capacity as*
The Chairman of) **KENYA ASSOCIATION**
OF TOUR OPERATORS **1ST DEFENDANT**
JOHN CLEAVE (*sued in his capacity as*
Vice-Chairman of) **KENYA ASSOCIATION**
OF TOUR OPERATORS **2ND DEFENDANT**
MICHAEL CANN (*sued in his capacity as*
The Treasurer of) **KENYA ASSOCIATION**
OF TOUR OPERATORS **3RD DEFENDANT**
LEMKE CONSERVANCY LIMITED **4TH DEFENDANT**

RULING

The application before the Court is by way of a Chamber Summons dated 8th December, 2009, and taken out under **Sections 1A, 1B, 3A and 58 of the Civil Procedure Act; Order XXXIII Rules 1, 2 and 3 of the Civil Procedure Rules**, and all other enabling provisions of the law. By the application, the Plaintiff seeks from the Court the following orders –

1. *That pending the hearing and determination of this application, all further proceedings in this suit be stayed.*
2. *That the Plaintiff and the four Defendants do appear and state the nature and particulars of their respective claims to the subject matter in dispute, namely the sums of US\$39,720.00 (“the said sum”) held by the 2nd and 3rd Defendants and maintain or relinquish the same and abide by such orders as may be made hereon.*
3. *That the said 2nd and 3rd Defendants be relieved from defending the claim of US\$39,720.00 by the Plaintiff and/or the 4th Defendant.*
4. *That the 2nd and 3rd Defendants be discharged from the claim by the Plaintiff and/or the 4th Defendant to the extent of US\$39,720.00.*
5. *That the costs of this application be provided for.*

The application is supported by the affidavit of Michael Kamm, the 3rd Defendant herein and the Treasurer of Kenya Association of Tour Operators (“KATO”) and is based on the grounds that –

- (a) *The Plaintiff and the 4th Defendant are making claims to be entitled to the said sum.*
- (b) *The 2nd and 3rd Defendants have no interest in the said sum other than for their charges and costs.*
- (c) *It is fair and equitable to grant this application to facilitate just, expeditious, proportionate and affordable resolution of the dispute among the parties herein.*

In his replying affidavit, Martin Sonderby Nielsen, the Director of the Plaintiff herein, opposes the application and avers that the sum of US\$39,720.00 referred to in the 2nd and 3rd Defendants application is not the only subject matter of this suit since the Plaintiff is also claiming the sum of Kshs.2,944,324.50 from the Defendants, three declaratory reliefs or orders, interest on the amounts claimed from the Defendants and costs. He also raises an issue touching upon the existence of the 4th Defendant. His case is that according to the records held in the office of the Registrar of Companies, Lemek Conservancy Limited does

not exist and therefore there is no such a person in law.

In a supplementary affidavit sworn by Dominic Nchoi, the Director of Masai Mara Lemek Land Owners Conservancy Limited, the deponent avers that the sum of US\$39,720.00 forms a separate and distinct plea of the Plaintiff's claim contrary to the allegations in paragraph 4 of the Plaintiff's affidavit. He contends that the inter pleader is justified and this Court would not be "splitting" the claim as alleged in the Plaintiff's replying affidavit and that this would not be a piece meal exercise.

At the oral canvassing of the application, Mr. Chelanga appeared for the 2nd and 3rd Defendant/Applicants; Mr. Mwiti appeared for the Plaintiff/respondent and Mr. Kinyanjui for the 4th Defendant. After considering the pleadings and the submissions of Counsel, I find that there is one main issue for determination. This is whether the Court should hear the inter pleader aspect of the suit and leave the other issues to be attended to at a later date, or whether the entire suit should be heard at once. According to the amended plaint which was filed in Court on 21st July, 2009, I note that the Plaintiff made nine prayers, three of them declaratory orders, as follows –

- (i) ***A declaration that the Plaintiff controls a total area of 21,275 hectares in the combined Koiyaki and Lemek conservation areas out of a total of 36,784 hectares and consequently that the Plaintiff controls 57.84% of the total Koiyaki and Lemek conservation area.***
- (ii) ***A declaration that the Plaintiff was entitled to be paid Kshs.7,794,917 out of the total Kshs.13,476,690 being 57.84% of the total amount collected by KATO as game viewing fees during the period between 1st January, 2009 and 3rd March, 2009 in the Koiyaki and Lemek conservation areas.***
- (iii) ***A declaration that US\$10.00 management fees collected by KATO in respect of every game viewing ticket sold to non resident adults totaling US\$39,720.00 during the period between 1st January, 2009 and 3rd March, 2009 is the property of the Plaintiff exclusively and which the 1st, 2nd and 3rd Defendants are obligated to pay to the Plaintiff exclusively.***
- (iv) ***An order directing KATO represented by the 1st, 2nd and 3rd Defendants to forthwith pay to the Plaintiff the sum of US\$39,720.00 being the sum received by KATO on account of management fees voluntarily paid out by camp owners in the Koiyaki Lemek conservation areas for the management of the Plaintiff's conservancy.***
- (v) ***An order directing KATO as represented by the 1st, 2nd and 3rd Defendants to forthwith pay the Plaintiff the sum of US\$39,720.00 being the sum received by KATO on account of management fees voluntarily paid out by camp owners in the Koiyaki Lemek conservation areas for the management of the Plaintiff's conservancy.***
- (vi) ***Interest on (iv) and (v) above from 4th March, 2009 until payment in full.***
- (vii) ***Costs of this suit together with interest thereon from the date the same is assessed until payment in full.***
- (viii) ***Any further or other reliefs as this honourable Court shall deem fit and just to grant in the circumstances of the case.***

A quick look at these prayers shows clearly that they are inter-related. If the issues relating to the inter pleader matters are separated from the rest of the suit and heard alone on their own, this would in effect mean that the Court would have to come back a second time to hear the other issues. Where a suit raises several inter-related issues for determination, it is, in my view, more prudent to all the parties that all issues be litigated at once rather than litigate them by instalments. The latter procedure would be time consuming and would not be conducive to an expeditious disposal of the suit. On the contrary, it would embellish the time taken in the whole trial and that in turn only serves to embellish the costs as well. Such an eventuality would clearly be prejudicial to the parties, especially those whose issues are left for determination on a subsequent date.

Another issue raised by the 2nd and 3rd Defendants relates to the 4th Defendant. To start with, in the amended plaint filed in Court on 21st July, 2009, the 4th Defendant is described as "Lemek Conservancy Limited". In subsequent pleadings, I note that the name has been changed to read "Masai Mara Lemek Land Owners Conservancy Limited". In law, these are two separate and distinct entities and they cannot answer to being one and the same person. A decision will have to be made as to whether the 4th Defendant is Lemek Conservancy Limited or Masai Mara Lemek Land Owners Conservancy Limited. The problem will arise when it is remembered that a letter from the office of the Registrar of Companies confirming that Lemek Conservancy Limited could not be traced in their data base index, which suggested that there was no such company. It is also to be recalled that Masai Mara Lemek Land Owners Conservancy Limited was registered only on 7th April, 2009; yet some of the events giving rise to the present suit and this application mostly took place between 1st January and 3rd March, 2009. However, for the purposes of this ruling, that is a matter for another day at another forum.

For the reasons outlined above, I find that it is not prudent to separate the issues in this matter but that all of them should be canvassed at one hearing. Being of that persuasion, I decline to grant the orders sought but direct that the parties herein prepare the suit for trial.

It is so ordered. Costs in the cause.

Dated and delivered at Nairobi this 27th day of May, 2010.

L. NJAGI
JUDGE