



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.218 OF 2010

WILDERNESS LODGES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

COUNTY COUNCIL OF NAROK.....DEFENDANT/DEFENDANT

RULING

1. By a chamber summons dated 7th May, 2010, Wilderness Lodges Limited who is the plaintiff herein seeks an order of mandatory injunction requiring the County Council of Narok who is the defendant/respondent, to stop all and any ongoing construction or development of tented campsite facilities, or public accommodation facilities, or any facilities ancillary thereto, within the restricted area, pending the reference and determination of the dispute between the parties by arbitration, pursuant to the provision of the lease between the parties, in respect of the title or property on which the lodge is situated. As indicated on the body of the application, the grounds giving rise to the application are as follows:

(a) By a written lease agreement made and signed between the plaintiff and the defendant (“the Lease”) on or before 23rd September, 2003 the defendant agreed to lease to the plaintiff the Lodge together with the ancillary services, situate within the Masai Mara Game Reserve (“the Reserve”) for a term of thirty (30) years from the 19th of September, 2003. In consideration, the plaintiff agreed to pay the defendant a quarterly rent computed in accordance with the formula set out in the first schedule of the lease.

(b) It was a specific and express term of the lease that the defendant would not construct or permit to be constructed or otherwise established any public accommodation facility within a radius of the (10) miles (“the Restricted Area”) of the Lodge save to the extent in existence at the date of the lease. This was aimed at ensuring that the plaintiff enjoyed exclusive control and derived the full benefit of the public accommodation facilities and ancillary services offered within the restricted area.

(c) The defendant has wrongfully and in breach of the aforesaid term of the lease, authorized/permitted three establishments to set up campsites within the restricted area.

(d) The defendant's wrongful actions will result in a dilution of the value of the Lodge and interfere with the peaceful enjoyment of the benefits and advantages of the lodge by the plaintiff's guest. In addition, the camp sites being established within the restricted area are detrimental to the sound ecology and environmental management of that part of the Masai Mara Reserve in which the plaintiff's Lodge is situated.

(e) The plaintiff has notified the defendant of a dispute under the Lease and has taken steps to refer the dispute to arbitration in accordance with clause 4(1) of the Lease. This court is vested with power to grant the orders sought herein which will operate as an interim measure of protection pending the reference and determination of the dispute herein by arbitration.

(f) Unless the defendant County Council is restrained by order of this honourable court, its breach and disregard of the exclusivity covenant by permitting the building of tented camps and tented lodges within the restricted area will result in greatly increased tourist and other human traffic, vehicles and development in the environs of the lodge, thereby diminishing and interfering with the peaceful enjoyment of the benefits and advantage of the lodge by the plaintiff's guests, and in a permanent dilution of the value of the lodge when the plaintiff has on the basis of the exclusivity expended substantial investment funds and upgraded the lodge.

(g) The failure by the defendant County Council to honour its obligations will also have a substantial, irreversible and irreparable effect on the Lodge's viability both financially and as a preferred destination in the Masai Mara. In addition to the breach, the three camp sites being constructed within the restricted area will unless stopped irreparably damage the sound ecology and environmental management of the part of the Masai Mara Game Reserve where the Lodge is situated causing irreparable loss and damage to the Lodge.

2. The application is also supported by an affidavit sworn by Nayan Patel the Managing Director of the plaintiff company, and two affidavits sworn by Toney Kitonga the Lodge Manager of Keekorok Lodge on 25th June 2010 and 23rd September 2010. The affidavits depone to facts supporting the aforementioned grounds. Of importance, is the fact that contrary to the lease agreement, the defendant has authorized a permanent tented camp complete with amenities and facilities to be constructed by Elewana African Ltd, and two fully mobile camps Salas Camp and Sakanlal Camp, all within the restricted areas of about 5 miles away from the Lodge. From the end of 2009, a campsite, Naima Lumbwa (Sun River Campsite), has been under construction following allocation of the site by the defendant on 1st October, 2009 to one John Ole Tome and others. It is deponed that the plaintiff was wrongfully and illegally evicted from the lodge and this issue is subject of another suit, i.e. HCCC No.1248 of 2003. It is maintained that there is a genuine dispute which in accordance with the lease agreement, should be resolved through arbitration. In the interim period the court should grant the interlocutory orders.

3. In response to the application, the respondent relies on two affidavits sworn by Gabriel Kenaya the Clerk and Chief Executive Officer of the respondent on 9th June 2010 and 9th July 2010. Gabriel Kenaya depones that the lease agreement signed between the parties only barred the respondent from allowing the establishment of any public accommodation facility within a radius of 10 miles, provided such a facility was not in existence at the time of the lease. Elewana African Ltd, Salas Camp and Sakanlal Camp, were already in existence at the time of signing the agreement and in any case,

no orders can issue against them as they are not parties to the suit. Further that the applicant lacks a locus standi to bring this suit as it is not in possession of the suit premises. Kenya further depones that the applicant is in breach of the terms of the lease agreement as it has made alterations, additional facilities and extensions to the leased premises. With regard to Naima Lumbwa (Sun River) Campsite, Kenya depones that it was approved way back on 28th November, 2000, and was in existence long before 19th September, 2003, the date of the commencement of the lease.

4. Mr. Lubano who appeared for the plaintiff, relying on Section 7 of the Arbitration Act 1995, Rules 2 and 8 of the Arbitration Rules, and Order XXXIX Rule 1 and 2 of the Civil Procedure Rules, urged the court to grant the orders of interlocutory and mandatory injunction sought by the applicant. It was submitted that contrary to the lease agreement, the defendant has authorized the construction of campsite within the restricted area thereby infringing clause 3(6) of the agreement which provided exclusivity of campsite within the restricted area. It was pointed out that although it was alleged that Naima Lumbwa Campsite was approved in the year 2000, the letter finalizing the allocation of the campsite was issued by the defendant on 1st October, 2009, long after the lease agreement had been signed.

5. It was maintained that the campsite could only have been established with the permission of the defendant. In accordance with clause 4(1) of the lease agreement, the plaintiff has notified the defendant of the dispute with a view to initiating the arbitration process. As regards the plaintiff's locus to file the suit, the plaintiff maintains that although they are no longer in the suit premises, they were wrongfully evicted and they are challenging that eviction. It was maintained that the validity of the lease can only be determined through arbitration. It was argued that the plaintiff had met the conditions of granting the orders sought. In this regard the following cases were relied upon:

- ***Kenya Airports Parking Services Ltd & another vs Municipal Council of Mombasa, Civil Case No.234 of 2009.***
- ***Communications Courier Ltd and another vs Telkom Kenya Ltd Civil Case No.249 of 2005.***

6. On his part, the respondent's counsel urged the court not to grant the orders sought maintaining that the applicant will not suffer any irreparable loss as it is currently not in possession of the suit premises. It is contended that a court order in a different suit has directed the removal of the applicant from the lease premises. An injunction has also been issued restraining the plaintiff from taking position or assuming the running of Keekorok Lodge. It was submitted that the allegation that steps have been taken to reinstate the applicant to the suit premises have not been substantiated as there was no evidence that the aforementioned court orders were being challenged.

7. It was argued that the alleged 3rd parties were authorized to put up their tented camps in the year 2000, and that the restriction only involved camps being set up after the signing of the lease. The court was urged not to rely on the letters exhibited by the applicant as they seem to have been interfered with. It was contended that the balance of convenience was in favour of the defendant who was already on site. It was further contended that there were other parties who though named in the body of the plaint, were not made parties to the suit. Finally it was contended that the applicant was not well suited to complain about the degradation of the environment as that was a preserve of National Environmental Management Authority (NEMA).

8. I have carefully considered the application, the affidavit in support and in reply thereto, as well as submissions made by counsel and the authorities cited. It is not disputed that the lease agreement subject of the suit herein contains an arbitration clause. Therefore, the jurisdiction of this court to hear this matter is limited under Section 7(1) of the Arbitration Act, to providing interim orders of protection

pending the hearing of the arbitration. The court can only grant such interim measures of protection if it is satisfied that the applicant has a *prima facie* case, and that if the orders sought are not granted the applicant will stand to suffer irreparable loss.

9. In this case, the applicant seeks orders of interlocutory injunction restraining the defendant from authorizing the establishment of any campsites within a radius of 10 miles of Keekorok Lodge, and also a mandatory injunction requiring the defendant to stop all and any ongoing construction or development of tented campsites. Although the applicant has demonstrated that there is a lease agreement which was signed between it and the defendant, which gave the plaintiff a measure of exclusivity for its campsite, and that this is what the plaintiff seeks to enforce during the pendency of the arbitration proceedings, it is evident that there is a dispute as to whether the 3 campsites were established before or after the signing of the lease agreement and this is an issue that will have to be resolved by the arbitrator. Further there are other intervening circumstances that make it difficult for this court to protect the plaintiff's exclusivity rights. This is because, that right appears to have been compromised by orders which have been issued by the court in other suits. The orders issued in the other suits, effectively take away possession of the premises subject of the exclusivity clause from the plaintiff.

10. Although the applicant has indicated that it is disputing the orders taking away possession from it, those orders are still in force and this court cannot ignore them. It would not be appropriate for this court to issue the orders sought by the applicant at this stage before the applicant sorts out the issue of possession of the suit premises. Finally, as regards the issue of degradation of the environment, that is a matter for the National Environmental Management Authority (NEMA). For the above reasons, I find that the application dated 7th May, 2010 must fail. It is accordingly dismissed.

Dated and delivered this 6th day of December, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Lubano for the plaintiff/applicant

Omogeni for the defendant/respondent

B. Kosgei - Court clerk