



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 51 of 2007

KILIMANJARO SAFARI CLUB LTDPLAINTIFF

V E R S U S

COUNTY COUNCIL OF OLKEJUADO.....DEFENDANT

R U L I N G

I. Application notice of motion dated

18th January, 2008

1. The application of notice of motion 18th January, 2008 seeks for this court order to:-

(i) Stay operation and or execution of the orders issued on 20th day of December, 2007 till the determination of the application.

(ii) Discharge or set aside orders issued on 20th day of December, 2007

(iii) That the application of 28th November, 2007 be fixed on its own merits

2. The relationship between the plaintiffs and defendant is that of “landlord and tenant”. The defendant was represented by P. C. Ouduso and was led by the Hon. Mr. Justice A. B. Shah. (Rtd). The plaintiffs were represented by M/s Ransley, Mcvicker & Shaw Advocates.

3. The parties dispute concerned a game lodge and matters had been referred to arbitration. A pending suit HCCC 182/2005 (not perused or seen by this court) related to this matter was noted.

4. By an application of 28th November 2007, an application was filed by the plaintiffs seeking orders of injunction on grounds that the issue between the parties was distress of rent not possession. They relied on the case law of Gusii Mwalimu Investment Co. Vs Mwalimu Hotel Kisii Ltd. Court of Appeal at Kisumu CA 160/95 (Tunoi, Shah & Lakha JJA) where possession by landlord was obtained by an illegal distress.

5. This court granted the application for injunction after hearing full arguments from the parties.

II Order XXXIX rule 4, 9 Civil Procedure Rules

6. The advocate for the defendant C. P. Ounduso filed this application of 18th January, 2007 seeking to set aside the orders of this court of 20th December, 2007. He was led by P. L. Mutuli who argued the application.

7. The applicant/defendant prays that the orders of this court be set aside on grounds that when the application came for hearing C. P. Ounduso advocate and the defendant were absent. Further the then lead counsel Hon. Mr. Justice A. B. Shah (Rtd) had withdrawn from the matter. That the matter proceeded exparte. The applicant/defendant now prays that the orders of this court be discharged under Order XXXIX r 4, 9 Civil Procedure Rules. That reads:-

“any order for an injunction may be discharged or raised or set aside by the court on application made thereto by any party dissatisfied with such order”.

III: Opinion

8. In this matter, I do not think that the new Lead Counsel

C. P. Ouduso for the applicant read the file before making this application. (They are permitted to do so on payment of archive fees under the Judicature Act).

9. The Hon. Mr. A. B. Shah appeared as a lead counsel. He first raised a Preliminary Objection and this court made a ruling marked No 1. The Preliminary Objection was overruled. There was an inter-parties hearing on the main application. The Hon. Judge argued that application.

10. He nonetheless pointed out to court, perhaps in the form of a complaint that C. P. Ouduso had failed to come to court and left him alone to argue the application. He suspected that C. P. Ouduso was participating in the campaigns.

He wished that it be put on record to protect himself for any professional misconduct. The court accordingly noted and put it on record that C. P. Ouduso and his clients were absent.

11. The application before me states that this matter was heard “exparte”. If it was so, the rules to set exparte hearings is Order 1Xb r 8 Civil Procedure Rules. As it is the matter was not heard exparte but inter-parties. This means that the application of 28th November 2007 was heard inter- parties and on its merits. There was counsel representing the defendants.

12. The question argued by the plaintiff/respondent is whether the defendant/applicant were on appeal to this court? The application was opposed by then and at one point the issue of the defendant/applicant being in contempt arose.

13. Order XXXIX r 4, 9 Civil Procedure Rules the court may vary or set aside orders of injunction. The grounds given by the advocate that he was on the election campaign trail and that the application was heard exparte is not ground for this court to vary its orders and or set its orders aside. There was counsel who appeared – as lead counsel.

14. I hereby decline the application which I accordingly dismiss with costs to the plaintiff/respondent.

DATED THIS 19TH DAY OF FEBRUARY, 2008 AT NAIROBI

M. A. ANG’AWA

J U D G E

P.L. Mutuli leading P.C. Onduso instructed by Inamdar & Co. Advocates for the plaintiff/respondent

A.W. Shaw of instructed by Ransely McVicker & Shaw & Co. Advocates for the defendant/applicant