



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII  
Civil Case 71 of 2007**

**WILSON K. KISEET )**

**DAVID LEBOO OLE KILUSU ).....APPLICANTS**

**KOKWET OLE KUNINI )**

**VERSUS**

**1. COUNTY COUNCIL OF TRANS MARA ).. 1<sup>ST</sup> DEFENDANT**

**2. JACKSON NANGIDA – CHAIRMAN ).. 2<sup>ND</sup> DEFENDANTS**

**3. JACKSON MPARIO – SECRETARY )**

**4. OLONANA OLE WUANTAI – TREASURER)**

**5. SITATO OLE IKONET – MEMBER )**

**6. BENSON GISOI – MEMBER )**

**7. JACKSON NTAYIA – MEMBER )**

**8. OLEIUNGUA OLETONMCEL – MEMBER**

**ON THEIR BEHALF AND ON BEHALF OF THE MEMBERS OF OLOUSUICUT  
COMMUNITY**

**CONSERVATION TRUST**

**RULING**

On 21<sup>st</sup> June 2007, the applicant filed Originating summons under order XV1 rule 1(a)(e)(g) of the **Civil Procedure Rules**. The same was worded as follows:

**“LET THE RESPONDENTS COUNTY COUNCIL OF TRANS MARA and OLOISUKUT COMMUNITY CONSERVATION TRUST attend before the Honourable Judge in chambers on ..... the ..... of ....., 2007 at 9.00 0’clock in forenoon or soon thereafter in answer to the service of this summons, which is issued upon the application of WILSON K. KISEET, DAVID LEBOO OLE KILUSU and KOKWET OLE KUNINI all residents of Trans Mara in the Republic of**

**Kenya FOR ORDERS THAT:**

- 1. The 1<sup>st</sup> Respondent herein whether by itself or its servants or Agents, be restrained by an Order of injunction from doing the following acts or any of them, that is to say from paying out to the 2<sup>nd</sup> Respondents or any other party any portion of the park fees and/or any other funds it holds in trust for the Group Ranches and the communities around the Maasai Mara Game Reserve.**
- 2. the 2<sup>nd</sup> Respondents herein whether by themselves or their servants or agents, be restrained by an Order of injunction from doing the following acts or any of them, that is to say from demanding, receiving and/or collecting park fees and/or or any other funds held in trust by the 1<sup>st</sup> Respondent in trust for the Group Ranchers and communities around the Maasai Mara Game Reserve.**
- 3. The Respondents herein do deliver up to the applicants an account of all the monies paid by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondents of the park fees held by the 1<sup>st</sup> Respondent on behalf of the Group Ranches and residents of Trans Mara/**
- 4. An Order that the 2<sup>nd</sup> Respondents and each of them do deliver up and pay to the 1<sup>st</sup> Respondents all monies received out of the park fees kitty administered by the 1<sup>st</sup> Respondent on behalf of the Group Ranches and the residents of Trans Mara.**
- 5. An Order of permanent injunction restraining the 1<sup>st</sup> Respondent from paying to the 2<sup>nd</sup> Respondents or any other party any portion of park fees and/or restraining the 1<sup>st</sup> Respondent from delegating the administration of the park fees.**
- 6. The Respondents do pay the costs of this Suit.”**

Together with the Originating Summons the applicants also filed an application by way of chamber summons under **Order XXX1X rules 1,2, 3 and 9** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. They sought the following orders:

***(a) that the 2<sup>nd</sup> Defendant, its servants and/or agents be restrained by order of an injunction from demanding, receiving and or collecting park fees and/or any other funds held in trust by the first defendant for the communities around the Maasai Mara Game Reserve pending the hearing and determination of the originating summons.***

***(b) The 1<sup>st</sup> defendant, their servants and/or agents be restrained by an order of an injunction from paying out to 2<sup>nd</sup> defendants or any other party any portion of the park fees and/or any other funds it holds in trust for the communities around the Maasai Mara Game Reserve pending the hearing and detrmination of the Originating Summons.***

The application was supported by affidavits sworn by the applicants herein. The affidavits contained more or less the same depositions and I will highlight the contents of the 2<sup>nd</sup> applicant's affidavit.

David Leboo Ole Kilusu deposed that he was a resident of Kimintet within the County council of Transmara (herein after referred to as "**the Local Authority**").

He stated that the operations of the 2<sup>nd</sup> respondent would cover his area of residence and greatly affect his life along with the lives of other applicants. He added that the 2<sup>nd</sup> respondent was trying to recruit him and the other residents of the local authority into its membership. He was also aware that the 2<sup>nd</sup> respondent intended to demand and receive from the 1<sup>st</sup> respondent a portion of fees that the 1<sup>st</sup> respondent was receiving from the Mara Conservancy through a management agreement for the Maasai Mara Game Reserve and administer on behalf of the residents of the local authority. From the park fees, the 1<sup>st</sup> respondent was assisting the residents of the local authority in several ways including giving bursaries to needy students and social welfare activities for local residents.

The deponent further stated that although the 1<sup>st</sup> respondents had experienced hitches in discharging its functions, it was better suited in rendering the above services than the 2<sup>nd</sup> respondents. He set out the reasons for his objection to the 2<sup>nd</sup> respondents activities.

He stated, inter alia, that the 2<sup>nd</sup> respondent was a self-help group, which was governed by the provisions of the **Public Procurement and Disposal Act**.

He was fearful that the 2<sup>nd</sup> respondent would operate without any checks and balances and will be a conduit for embezzlement of park fees.

The said application came up for hearing on 10th March 2008. The defendant filed neither a replying affidavit nor grounds of opposition. Mr. Ogari who held brief for M/S Njenga Mbugua & Nyanjua advocates for the plaintiffs urged this court to grant the orders as sought.

Mr. Oguttu held brief for M/s Katwa and Kemboi Advocates for the 1<sup>st</sup> defendant. He submitted that the plaintiffs' suit had been brought under non-existence rules of the Civil Procedure. He further submitted that the plaintiffs were not capable of commencing their suit by way of originating summons in terms of **Order XXXVI** of the **Civil Procedure Rules**. He added that it had not been shown that there was any property that was in danger of being wasted or alienated, as the subject matter of the dispute was money.

In his view, no injunction could issue in the circumstances.

I have carefully considered the plaintiffs' application.

Whereas the plaintiffs have advanced a serious claim as against the defendants, the suit as commenced is defective in law. **Order XXXVI** of the **Civil Procedure Rules** specifies the types of claims that can be brought by way of Originating Summons and the plaintiffs' suit does not qualify. But even if the claim could have been brought by way of an originating summons, the law is very clear that an originating summons has to take the format as shown in form 13 or 13A of Appendix B. Secondly there is no appropriate affidavit in support of the originating summons, only verifying affidavits were filed as if the originating summons was a plaint.

The plaintiffs' capacity to bring this suit has not been disclosed. It is obvious that there are numerous persons who have the same interest in the suit as the plaintiffs. The provisions of **Order I rule 8** of the **Civil Procedure Rules** should therefore have been complied with. That was not done.

I am satisfied that the suit is defective and cannot be sustained by any amendment. I strike it out with costs to the 1<sup>st</sup> defendant. The Plaintiffs are at liberty to file an appropriate suit.

**DATED, SIGNED and DELIVERED** at **KISII** this 16<sup>th</sup> day of April 2008

**D. MUSINGA**

**JUDGE**

Delivered in open court of the presence of

Mr. Anyona HB for Njenga Mbugua for the plaintiff.

Mr. Ochwangi HB for Katwa Kemboy for the Defendant

**D. MUSINGA**

**JUDGE**