



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 461 OF 2008**

GOVERNORS BALLOON SAFARIS LIMITED.....PLAINTIFF

VERSUS

SKYSHIP COMPANY LIMITED.....1ST DEFENDANT

COUNTY COUNCIL OF TRANSMARA.....2ND DEFENDANT

R U L I N G

The Chamber Summons application has been brought by the Plaintiff, Governors Balloon Safari Limited under Order XXXIX rule 2 and 9 of the Civil Procedure Rules. It seeks three pertinent orders against the 1st and the 2nd Defendants on the following terms:

4. THAT a temporary injunction be granted pending the hearing and determination of this suit to restrain the First Defendant by itself, its servants, agents or otherwise from interfering with or causing the Second Defendant to breach the Plaintiff's contractual rights in the agreement dated 1st August, 2000.

5. THAT a temporary injunction be granted pending the hearing and determination of this suit restraining the Second Defendant from licensing or in any way authorizing the First Defendant to set up a hot air balloon safaris business or operation in the exclusive zone contained in the contract dated 1st August, 2000 between the Plaintiff and the second Defendant.

6. THAT pending the hearing and determination of this suit a mandatory injunction be issued compelling the second Defendant to remove the First Defendant's hot air balloon establishment from the exclusive zone in the contract dated 1st August, 2000 between the Plaintiff and the Second Defendant.

The basis upon which the application is grounded is cited on the face of the application thus:

(a) The Defendants threaten or are in the process of breaching the Plaintiff's contractual rights to operate its business under a contract dated 1st August 2000.

(b) The Second Defendant has failed to perform its contractual obligations under the clause 5.3 of the contract to enforce the negative covenant that obliges it not to authorise any breaches of the Plaintiff's contractual rights.

(c) The purpose and object of the said contract will be defeated if the Defendants are not restrained from breaching its express terms.

(d) The Plaintiff will suffer irreparable loss if the injunction order sought herein is not granted.

(e) Prior to 9th August 2008, the Second Defendant had misled the Plaintiff into believing that it would invoke its powers under the Local Government Act, Cap. 265 Laws of Kenya in order to prevent the First Defendant from interfering with the said contract.

(f) The said breach is imminent as the First Defendant is now in the final stages of launching its operations in the exclusive zone.

The application is supported by the affidavit of ARIS GRAMMATICAS, the Managing Director of the Plaintiff company. It is a lengthy affidavit. Mr. Aris sets out the nature of the Plaintiff's business and avers that it provided hot air balloon services to mainly tourists in a part of Masai Mara. Mr. Aris averred that the Plaintiff met the licensing requirement for the business which enabled it to obtain a licence from the 2nd Plaintiff and another from KCAA. Mr. Aris continued to outline the contractual rights conferred by the second Defendant to Mara Balloon Safaris Limited, an associate company of the Plaintiff Company, under the contract. Mr. Aris averred that the Defendants had breached the Plaintiff's rights and that as a result of the breaches the Plaintiff suffered loss. I have considered that affidavit together with the annexures to the said affidavit.

The application is vehemently opposed. The 1st Defendant, Skyship Company Limited, have filed a replying affidavit sworn by Mr. Adi Videnar, the Chairman and Chief Executive Officer of the 1st Defendant Company. In his lengthy affidavit, Mr. Adi Videnar responds to the plaint and the instant application. In that affidavit, Mr. Adi opposed the application for an order of injunction against his company first, under a technical ground that the Plaintiff has not specified the specific acts that should be restrained and that since there have been no finding of breach of contract, the injunction sought cannot lie. Mr. Adi also avers that the Plaintiff is guilty of deliberate suppression and/or concealment of material facts as well as distortion of the relevant factual position by the Applicant. Mr. Adi sets out details of how the 1st Defendant company applied for and obtained all the relevant authorities, licenses and permission necessary to conduct a hot air balloon business around Masai Mara National Reserve. Mr. Adi deposes that a dispute arose between the Plaintiff, the 1st Defendant and the 2nd Defendant over the hot air balloon business in the game reserve. He denies that the 1st Defendant has interfered with or infringed upon the actual rights of the Plaintiff under the terms of the contract between the Plaintiff and the 2nd Defendant. Mr. Adi also deposes that the contract between the Plaintiff and the 2nd Defendant does not and cannot confer upon the Plaintiff flight paths which it can claim as its own as that is within the exclusive jurisdiction of the Kenya Civil Aviation Authority (KCAA).

The 2nd Defendant has also filed a replying affidavit sworn by Wilberforce Wambulwa, the County Clerk of the 2nd Defendant, The County Council of Transmara, dated 15th September, 2008. Mr. Wambulwa has opposed the application. In this affidavit, Mr. Wambulwa deposes that the 2nd Defendant granted to Mara Balloon Safaris Limited the License to occupy a portion of the Mara Game Reserve, which is a trust land held by the 2nd Defendant local authority under the Local Government Act, to operate a balloon base within the same Game Reserve. He has annexed a copy of the agreement between the Plaintiff and the 2nd Defendant as annexure 'WW1'. He deposes that Mara Balloon Safaris Limited applied to the Civil Aviation Board to substitute its name with that of Governors Camp Balloon Safaris Limited which the 2nd Defendant did not object to on condition that the substitution of the name did not mean or create another company alongside the other. Mr. Wambulwa deposes that in breach of the condition set by the 2nd Defendant, Mara Balloon Safaris Limited substituted its name to the Plaintiff company. Mr. Wambulwa averred that the substitution was in breach of clause 10 of the Balloon Operations Agreement, annexure 'WW1' which provides:

“Changes to the agreement.

Any changes/or amendments to this agreement shall be approved by both parties and effected in writing and be appended to and form part of this agreement.”

Mr. Wambulwa deposes that for the reasons given in his affidavit, the Plaintiff is a stranger to the said Agreement and therefore cannot claim any breach of damages pursuant to the said Agreement. He deposes further that the 1st Defendant's operations were not within the Masai Mara Game Reserve, but that it had a base on private property for which the 2nd Defendant had no control. He deposes further that the 2nd Defendant was aware that the 1st Defendant had applied for, and was granted by KCAA, a license to operate hot air balloons and that the 2nd Defendant was not party to the licensing deliberations between the two. Mr. Wambulwa deposes that the 2nd Defendant allowed the 1st Defendant landing rights inside the Masai Mara and that the same did not amount to a breach of clause 5.3 of the Agreement between the 2nd Defendant and the Plaintiff.

There were other affidavits sworn for and against the application which I have also considered.

The application was argued interparties in which the Advocates highlighted submissions filed earlier by each of them. Mr. Oyatsi appeared for the Plaintiff/Applicant, Mr. Amoko for the 1st Defendant and Mr. Kemboi for the 2nd Defendant. Mr. Oyatsi contended that the Plaintiff's position was that it had two licenses, one for use of airspace by KCAA and the other for premises for the Landing and Taking off of the hot air balloons from the 2nd Defendant, issued under section 143 and section 166 of the Local Government Act. Mr. Oyatsi submitted that the Plaintiff and the 2nd Defendant entered into a contract which, under clause 5.2 and 5.3 gave the Plaintiff a base in an exclusive zone from which to operate hot air balloon services. The Plaintiff's contention is that having entered into that contract with the Plaintiff, the 2nd Defendant was prohibited under the contract from allowing or permitting any entity to set up a base for similar business within the exclusive zone.

The Plaintiff contends that in breach of the negative covenants in the contract, the 2nd Defendant entered into a written contract with the 1st Defendant dated 1st March, 2007 conferring upon the 1st Defendant the right to operate hot air balloon business from a base within the Plaintiff's exclusive zone. The Plaintiff contends that the 1st Defendant continued to set up its operation base within the Plaintiff's exclusive zone even after learning of the Plaintiff's contractual rights. Mr. Oyatsi submitted that in light of these breaches the Plaintiff was entitled to injunctive reliefs as sought in order to preserve its rights under the said contract and restrain further breaches of the contract.

Mr. Oyatsi submitted that the Plaintiff had demonstrated plain breach of clear covenants and relies on the case of DEVANI vs. BHADRESA & ANOR [1972] EA 22 where the court observed:

“Only where there is a plain breach of a clear covenant must an interlocutory judgment issue without regard to the balance of convenience.”

Mr. Amoko for the 1st Defendant submitted that the Plaintiff was trying to enforce a right not conferred to it under the contract. Mr. Amoko submitted that the Plaintiff was claiming the rights under the contract through an assignment from Mara Balloon Safaris Limited, which was the party with whom the 2nd Defendant contracted, without proof of the Assignment. That for the failure to demonstrate an assignment, the Plaintiff had no cause of action.

As against the 1st Defendant, Mr. Amoko submitted that the Plaintiff was alleging that the 1st Defendant had persuaded the 2nd Defendant to breach the contract between it and the Plaintiff. Counsel submitted that the Plaintiff had failed to provide any proof of persuasion. In any event, Mr. Amoko submitted, there were no particulars of persuasion or procurement pleaded in the plaint.

Mr. Amoko contended that the Plaintiff had to show the loss or injury it had suffered and he contended that none had been shown.

Mr. Kemboi for the 2nd Defendant urged the court to interpret clause 5.3 of the Contract between it and Mara Balloon Company Safaris Limited in reference to land. Counsel denied that section 166 of Local

Government Act applied. Mr. Kemboi submitted that the 2nd Defendant gave a Ballooning Base only in Masai Mara, which was the area falling under the jurisdiction of the said council. Mr. Kemboi submitted that the 1st Defendant was operating from private property over which the 2nd Defendant had no jurisdiction.

In regard to Plaintiff's AG3, letter to the Civil Aviation Board from the 2nd Defendant, Mr. Kemboi submitted that the letter made no mention of an agreement and the Plaintiff was not the entity of the change of name suggested by Mara Balloons Safaris and to which the 2nd Defendant did not object.

The Applicant/Plaintiff is seeking temporary and mandatory injunctive relief. The circumstances under which temporary injunctions generally can be granted are set out in the now notorious case of **Giella vs. Cassman Brown & Anor. 1973 EA 358**. Those for the grant of Mandatory Injunction are more strict. They were discussed in the case of **Kenya Breweries Limited vs. Okeyo [2003] 1 EA 109** where **Omolo, Tunoi and Lakha JJA**, held:

“A mandatory injunction ought not to be granted on a interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff.”

The same court cited with approval the case of **Locabail Interfinance Limited vs. Agro export and others [1986] 1 All ER 901** where the English Court stated in addition to words similar to the holding in the **Kenya Breweries Limited case**, supra, stated:

“Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it could appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”

The Plaintiff at the trial will have to prove that it had a contract with the 2nd Defendant and that the contract gave it a hot air balloon Landing and Taking off right to an exclusive zone, secondly, that under the contract, the 2nd Defendant was bound by a negative covenant not to permit any other company to operate similar services within the exclusive zone and that both Defendants had infringed on its right.

An issue has arisen, which was raised by the 2nd Defendant in response to the instant application. The 2nd Defendant contends that the Plaintiff was not a party to the Balloon Operations Agreement it relied upon to bring its claim against the 2nd Defendant. The said agreement is annexure 'WW1' to the 2nd Defendant's and 'AG2' to the Plaintiff's affidavit. In the recital to the Agreement it is clearly stated that the Agreement is between Transmara County Council, the 2nd Defendant in the case, and Mara Balloon Safaris Limited.

Mr. Oyatsi has relied on AG3, a letter in which the 2nd Defendant indicated to KCAA that it had no objection to Mara Balloon Safaris Limited substituting its name to Governors Camp Balloon Safaris Limited. The letter is dated 26th November, 2001 and states in part:

“We have been asked by Mara Balloon Safaris Limited that they wish to substitute the name with Governors Camp Balloon Safaris Limited. We have no objection so long as the substitution does not mean or create another operation company alongside the other.”

The letter does not support Mr. Oyatsi's submission. The name proposed as the substitute to Mara Balloon Safaris Limited is not the Plaintiff's. The Plaintiff is a totally different entity. Mr. Oyatsi submitted that the shareholders and directors of Mara Balloon Safaris and those of the Plaintiff were the same. That position is neither here nor there. The three companies are limited liability companies which are different legal entities. It is very strange to argue that since directors and shareholders of these companies are same, they could interchangeably operate with a licence issued to one of them.

The contract in question had very specific provisions regarding changes to the Agreement. Under Clause 10, the parties covenanted

“10. CHANGES TO THE AGREEMENT

Any changes and/or amendment shall be approved by both parties and effected in writing and be appended to and form part of this Agreement.”

The substitution of a name is a material change. From the conduct of the parties expressed in AG3, the change or substitution of a name needed the approval of both parties. That approval was to be in writing and had to be appended to and form part of the Agreement. AG3 can be described as a written approval by the 2nd Defendant to the substitution of Mara Balloon Safaris Limited with Governors Camp Balloon Safaris Limited. The burden is on the Plaintiff to show that indeed the 2nd Defendant gave its written approval for the substitution of change or assignment of the Agreement from Mara Balloon Safaris Limited to itself. No such approval has been shown. Further, none has been shown to have been reduced into writing and appended to the Agreement as part of the said Agreement.

In regard to this issue therefore, I do find that the Plaintiff has not shown it had a contract with the 2nd Defendant whether direct or assigned to it. Without a contract, the Plaintiff has not shown that there was any privity of contract between it and the 2nd Defendant. The Plaintiff has not demonstrated that it could claim any rights or privileges under the said contract. In the circumstances, the Plaintiff cannot benefit from the provisions of clause 5, upon which the injunctive reliefs sought herein lie. I am also not satisfied that the Plaintiff has demonstrated, on a *prima facie* basis, that it was deserving of the injunctive reliefs sought.

As held in **Kenya Breweries Limited case**, supra, before a court grants a mandatory injunction in an interlocutory application it has, to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted (emphasis mine).

In the instant application, I do not have a high degree of assurance that at the trial, it will appear that the injunctive reliefs sought, if issued at this stage, were rightly granted.

This ground alone is in my humble view sufficient to dispose off this application. It is my humble view that the Plaintiff has failed to establish a *prima facie* case with a probability of success at the trial.

Even if I was to determine this case on the basis of the second principle in **Giella’s case**, supra, I would still rule against the Plaintiff. The Plaintiff has not shown that it will suffer irreparable loss which is incapable of compensation by an award of damages. The Plaintiff has not shown that it will suffer any loss. The Plaintiff has contended it pays heavy fees to the 2nd Defendant. The fees it pays for the licenses needed to operate the business cannot be regarded as a loss in law. In any event, the Plaintiff has not shown that the 2nd Defendant is impecunious and incapable of meeting any decree this court may issue against it after the case is heard.

Even if the application was to be determined on a balance of convenience, even then, I find that the balance would tilt in the Defendants’ favour.

In conclusion, I am not satisfied that the Plaintiff is deserving of the 3 reliefs sought in this application. In the result, I dismiss the Plaintiff’s application in total with costs to the Defendants. The interim injunction granted to the Plaintiff at the *ex parte* stage is discharged.

Dated at Nairobi this 24th day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Oyatsi for the Plaintiff/Applicant

Mr. Amoko for the 1st Defendant

Ms. Oburu holding brief Mr. Kemboi for the 2nd Defendant

LESIIT, J.

JUDGE