



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 51 OF 2007

KILIMANJARO SAFARI CLUB LIMITED PLAINTIFF/APPLICANT

VERSUS

COUNTY COUNCIL OF OLKEJUADO 1ST DEFENDANT/RESPONDENT

WILDERNESS LODGES LIMITED 2ND DEFENDANT/RESPONDENT

RULING

On 28th March, 2002, the Applicant and the First Respondent entered into a lease agreement over the suit land, allowing the Applicant to operate a safari lodge and tented camp for a period of 37 years. One of the terms of that lease was that the First Respondent would not, within a radius of two miles, construct or allow any person to construct any lodge, hotel or tented safari camp during the lease period.

Now, barely four years into that lease, the 1st Respondent has entered into a fresh lease agreement with the Second Respondent adjacent to the Applicant's land, to do exactly the same – construct and operate a game lodge and safari camp.

The Applicant says that this is in breach of the terms of its lease, and it stands to suffer irreparable loss should the Second Respondent proceed with the development of the land in its neighbourhood. The Applicant also complains of “harassment and intimidation” by the First Respondent, resulting in loss of business.

The Applicant wants the “**dispute**” referred to arbitration in accordance with Clause 4 of the lease, and has already invoked the arbitration process. Meanwhile, in order to preserve the subject matter of the arbitration, and so that the entire arbitration process is not rendered nugatory, the Applicant wants restraining orders against both the Respondents, as follows:

***“4. That this Honourable Court be pleased to issue an injunction against the 2nd Respondent its agents or servants restraining it from taking possession of all that parcel of land known as Kajiado/Amboseli/12 and undertaking any construction on the said parcel pending the hearing and determination of the Arbitration between the Applicant and 1st Defendant.*”**

***6. That this Honourable Court be pleased to issue an injunction against the 1st Respondent to restrain it and its officers and agents from harassing, intimidating, threatening or in any way harming*”**

the officers of the Applicant pending the hearing and determination of this application (sic) pending the hearing and determination of the Arbitration.”

Both parties are in agreement that the lease does indeed provide for arbitration in the event of a dispute between the parties. The Applicant says that the grant of a lease to the Second Respondent, in breach of the terms of its lease with the First Respondent, is “**a dispute**” within the meaning of Clause 4 of the lease, and ought to be referred to arbitration. The First Respondent says that the lease between it and the Applicant “has been determined by virtue of the non-payment of the outstanding rent.” So, the First Respondent’s case is that the lease having been terminated, there is nothing to refer to arbitration.

That argument, in my view, is highly misplaced. The very fact that the First Respondent says that the lease has been determined on account of the Applicant’s breach is in itself an acknowledgement that there is “**a dispute**” between the parties. The fact that the First Respondent entered into a lease with another party, in violation of its lease with the Applicant, is as much “**a dispute**” between the parties within the meaning of Clause 4.

The First Respondent cannot simply act unilaterally and say that the lease has been determined without saying how, when, and under what clause. On the other hand, the Applicant does not accept that the lease has come to an end. That clearly is “**a dispute**”.

If the parties to a contract have chosen, as indeed they have here, that their dispute shall be referred to arbitration, then that is exactly what they shall do. And it is for the Court to encourage resolution of the disputes through arbitration, where the parties have so chosen, on through other methods of Alternate Dispute Resolution.

Now, having found that there is clearly an issue here that forms the subject matter of arbitration, the next question is whether an injunction can issue, or “preservation orders” made, to save the subject matter of arbitration. **Clearly, the answer is yes.** What would be the point of arbitration if the suit land, the very subject and essence of the arbitration, is simply taken over through the unilateral act of one party? And, what would be the point of arbitration if one of the parties (without an appropriate restraining order) is able to substantially alter the status quo intended by the lease agreement? Only an injunction would stop the breaching party from altering the status of the parties until the dispute is resolved. The law envisages the grant of injunctions pending resolution of disputes.

The next question is whether the Applicant has demonstrated a case for preservative orders pending arbitration. I am satisfied that **it has**, at least against the First Respondent. If I do not grant the orders sought against the First Respondent, the subject matter of the dispute – the leased premises – may not be available to the Applicant, and the entire arbitration process would be rendered nugatory. The Applicant has shown that “**a dispute**” has arisen within the meaning of Clause 4 of the lease, and I have found that the First Respondent’s assertion that the lease has been “determined” is in itself “**a dispute**” within the same meaning. Accordingly, I can safely say that the requirements set out in the case of **Giella v. Cassman Brown** (1973) E.A. 358 for the grant of an injunction have been satisfied by the Applicant. However, Order 39 Rule 2A of the Civil Procedure Rules implores upon me to consider the terms upon which I should grant the restraining order. I recognize fully the urgency of a quick resolution of this matter. There is a lot at stake, not just for the parties, but for our country, and more particularly the tourism sector. I have also noted that the Applicant is seriously in arrears of rent, amounting to Shs.37,433,314/= as stated in the Replying Affidavit. This figure has not been controverted by the Applicant. **Accordingly, the grant of an injunction against the First Respondent will be limited to a period of only three months, and will be conditional upon the Applicant depositing the sum of Shs.37,433,314 in Court within the next 30 days, of which Shs.5,000,000/= will be deposited in Court by 16th February, 2007.** The Applicant has offered to provide a charge over one its properties, instead of depositing the funds. As I have not seen this offer in a deposition, nor has the Valuation Report in respect of such property been provided to this Court, I cannot accept the same.

With respect to the order of injunction sought against the **Second Respondent**, I am not satisfied that the Applicant has made out a satisfactory case against it. The Second Respondent is not privy to the contract

between the Applicant and the First Respondent, nor is it concerned with all the disputes between these parties. Order 39 Rule 2 of the Civil Procedure Rules, under which this application is brought, does not cover the Second Respondent who, as I said, is not privy to any contract, the subject of challenge here. The Applicant's contract is with the First Respondent, and it would have been legitimate to seek a restraining order against it, stopping it from committing a breach of the lease, and from handing over the property to any other person. However, there is no such prayer, either in the Application or in the Plaint, and, therefore, none can be given. The prayer against the Second Respondent is invalid. **I find that there is no basis of an order against the Second Respondent; and I disallow the same with costs to the Second Respondent.**

Accordingly, I allow prayer 6 of the application limited to a period of **three months** from today, **and on condition that the sum of Shs.37,433,314/= is deposited in Court as security within the next 30 days, of which Shs.5,000,000/= shall be deposited by 16th February, 2007.** There shall be liberty to apply. Those are the orders of this Court.

Dated and delivered at Nairobi this 15th day of February, 2007.

ALNASHIR VISRAM

JUDGE