REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI 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

This is an application for Review, under O.41 R1 of the Civil Procedure Rules, of the Orders of this Court made on 15th February 2007

"*to allow the Applicant to substitute the cash deposit placed in Court with an insurance bond or bank guarantee of equal amount"*

mainly on the ground that the Applicant needs the funds to effect necessary repairs to restore the leased premises to acceptable standards. The Applicant claims that the premises have been systematically looted and destroyed by the Respondent landlord, necessitating the repairs costing in the range of Shs.42 million. The Applicant has offered alternative security.

In opposing this application, Justice (rtd.) A.B. Shah, lead Counsel for the Respondent, argued that the Applicant had not shown that there had been discovery of new and important evidence, as the need for repairs to the leased premises was known to the Applicant for a long time; and that there was no mistake or error apparent shown on the face of the record, and accordingly the Applicant had not complied with the review requirements outlined in O.41 R.1. He noted that the funds in Court were owed to the Respondent; that these were public funds, and the Court should use its discretion in disallowing its withdrawal as it would prejudice the Respondent. He referred to the case of ***Orero v. Seko*** (1984) KLR 238.

Mrs. Shaw, for the Applicant, argued that the Applicant simply wanted to "substitute" security, not deny the Respondent the right to security.

In granting an injunction to the Applicant, this Court noted as follows in its Ruling dated 15th February, 2007:

"***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."***

Clearly, this Court was not averse to ordering "alternative" security even at that time. The only reason it was not done was because there was no proper and acceptable form of alternate security offered or available at the time. The Court did not, and in fairness to the parties before this Court, cannot close its

doors to entertaining applications to alter the "form" of security. The whole essence of "security" is to protect both sides pending resolution. Now, the cash deposited in the Court, is not cash in the hands of the Respondent. It is simply "security" for the Respondent, that in the event it succeeds, the funds are available to satisfy the decree. So, then, if the security is substituted, say, by a bank guarantee or an insurance bond, what difference would this make to the Respondent, as long as it is "secure"? On the other hand, the cash that is sitting in Court, is of considerable benefit to the Applicant who needs to effect repairs, and who is willing to substitute the same with a bank guarantee.

Order 44 Rule 1 of the Civil Procedure Rules is clearly applicable, and can be invoked by the Applicant "for any other sufficient reason" – not just the two reasons (discovery of new matter and mistake) outlined in 0.44 R 1. The ***Orero*** case (supra) cited by the Respondent says as much, as does many other cases such as ***Nairobi City Council v. Thabiti Enterprises Ltd*** (C.A. 264 of 1996) and ***Wangechi Kimata v. Mutahi Wakabiru*** (C.A. No. 80 of 1985) – both Court of Appeal decisions.

Accordingly, in my view, the Applicant is entitled to the variation of the Order sought in prayer 2 of the Application. Despite this Court's indulgence in inviting the parties to agree on the "form" of security, and the choice of the bank or institution, the parties have regretfully not been able to come to agreement. It is now for the Court to make an Order that essentially protects both the parties, and at the same gives the Applicant access to its cash deposited in the Court. I will, therefore, allow prayer 2 of the application, and **Order that the Applicant provide a guarantee from a large, reputable bank, in the sum of Shs.37,433,314/= and upon the filing in this Court of such bank guarantee, the Applicant shall be at liberty to withdraw the equivalent funds deposited by it in this Court.**

With regard to the appointment of an arbitrator, I will invite the parties to agree on the same by 18th September, 2007, failing which this Court will invoke its powers under Section 12 of the Arbitration Act. This matter will be **mentioned** on 18th September, 2007. The interim Orders are extended until then. Those are the Orders of this Court.

Dated and delivered at Nairobi this 3rd day of August, 2007.

ALNASHIR VISRAM

JUDGE