REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 503 of 2006

RUTH TIPIS……..…….…….....…….PLAINTIFF

VERSUS

WILDERNESS LODGES LIMITED…….....…..…..…..1ST DEFENDANT

MICHAEL KOIKAI…….…….....……..……2ND DEFENDANT

ANDREW KISOSO…….....……..……3RD DEFENDANT

R U L I N G

In a plaint filed on 7.9.2006, the plaintiff seeks the following primary prayers:

(a) A mandatory injunction directed at the defendants, their agents, employees or servants compelling the defendants to re-open the plaintiff's premises, staff canteen **(Keekorok)** and to grant the plaintiff access to the said premises.

(b) A permanent injunction restraining the defendants either by themselves, their agents and/or servants from locking or interfering with the plaintiff's right of ingress or egress to the said staff canteen **(Keekorok)** or doing any act that would interfere with the plaintiff's quiet possession.

(c) Special damages for:

(i) Cost of reconstruction of Staff Canteen Keekorok) valued at ….KShs.2,000,000.00

(ii) Loss of goods of a value of ….....……KShs.3,000,000.00

Total **KShs.5,000,000.00**

The basis of the plaintiff's claim can be found in paragraphs 5, 7, 8, 9, 10 and 11 of the plaint. In paragraph 5 it is averred that at all material times, the plaintiff was and still is, a licencee of Narok County Council and was licenced to operate a business to wit; the Staff Canteen **(Keekorok)** also known as the Ole Tipis Canteen by the Narok County Council in Narok District from 1969, which business and premises is situate within the Masai Mara Game Reserve. In paragraph 6 it is averred that the plaintiff shares a common boundary with the 1st defendant who are licensed to operate a business by the Narok County Council within the Masai Mara Game Reserve in Narok District. In paragraph 7, it is averred that on or about 19.6.2006 the 2nd and 3rd defendants being servants and/or agents of the 1st defendant, acting on the instructions of the 1st defendant damaged, pilfered and/or plundered the plaintiff's said premises and denied access to the plaintiff to the said premises, i.e. the Staff Canteen **(Keekorok)** without any lawful cause, excuse or justifiable cause. In paragraph 8 it is averred that in the alternative and without

prejudice to the foregoing, the 2nd and 3rd defendants acting by themselves and/or acting through their employees, servants and/or agents damaged, pilfered and or plundered the plaintiff's said premises, and denied the plaintiff access to the said premises, i.e. the Staff Canteen **(Keekorok)** without any lawful cause, excuse or justifiable cause. In paragraph 9 it is averred that the 2nd and 3rd defendants acting on the instructions of the 1st defendant and/or with their express consent/abetting and connivance, locked or caused the plaintiff's said business to be locked by their agents, servants, employees, which actions are illegal unjustified and inhibit the quiet enjoyment of the Licence issued to the plaintiff by Narok County Council. In paragraph 10, the plaintiff avers that the defendants have persistently denied the plaintiff access to the said premises and have through themselves, their employees, servants and/or agents prevented the plaintiff and/or her employees, agents and servants by use of force or otherwise, from gaining access to the said premises and in paragraph 11 it is averred that as a result of the defendants' actions, the plaintiff's goods worth KShs.3,000,000.00 were destroyed. Further part of her premises were also destroyed and vandalized and the plaintiff will require KShs.2,000,000.000 to reconstruct the same. The defendants actions have therefore caused the plaintiff to suffer loss of KShs.5,000,000.00.

Simultaneously with the filing of the plaint, the plaintiff lodged an application under Section 3A and 63(e) of the Civil Procedure Act, Order L rule 1 of the Civil Procedure Rules and all enabling provisions of the law seeking primarily the following orders:-

(2) An interim mandatory injunction directed at the defendants either by themselves, their agents, employees or servants compelling them to open the plaintiff's premises, Staff Canteen **(Keekorok)**, situated within the Maasai Mara Game Reserve within Narok District and to grant the plaintiff access to the said premises, pending the hearing and determination of the application.

(3) A temporary injunction restraining the defendants either by themselves, their agents and/or servants from locking or interfering with the plaintiffs right of ingress or egress to the said Staff Canteen **(Keekorok)** or doing any act that would interfere with the quiet possession thereof pending the hearing and determination of this suit or until further orders of the court.

The application has been made on the following primary grounds:-

1) That the acts of the defendants have occasioned a huge loss to the plaintiff by way of lost business.

2) That the acts of the defendants have exposed the plaintiff's premises and goods to theft, vandalism and wanton waste.

3) That the plaintiff's rights have been interfered with by acts of the defendants which acts are illegal and injurious to the plaintiff's demonstrated legal rights.

4) That substantial loss has been occasioned to the plaintiff.

The application is supported by the plaintiff's affidavit sworn on 7.9.2006. The affidavit elaborates the averments in the plaint and concludes that the plaintiff has suffered substantial loss and continues to suffer loss as the premises Staff Canteen **(Keekorok)** remains unlawfully closed by the defendants and that her reputation as a businesswoman and the goodwill cultivated and enhanced over the years now suffers immensely as a result of the acts of the defendants.

On 7.9.2006, the plaintiff appeared ex-parte before me and I certified the application urgent but declined to grant the ex-parte mandatory injunction sought as I was not persuaded that the same was deserved on the basis of the material availed to me. The application was then served on the defendants. On 20.9.2006, the defendants filed a replying affidavit sworn by the 3rd defendant. Their advocates also filed Grounds of Opposition on 11.9.2006.

On 13.9.2006 the plaintiff filed a supplementary affidavit which was sworn on 12.9.2006 which

explains that her Manager one Robert Tipis had erroneously filed Narok SRM CCC No.60 of 2006 which has since been withdrawn. The defendants have also filed a supplementary affidavit sworn on 27.9.2006 which introduces a lease between the 1st defendant and Narok County Council.

The application was canvassed before me on 25.9.2006 and 2.10.2006 by Mr. Kiptum Learned counsel for the plaintiff and Mr. Gitonga Learned counsel for the defendants. The main complaints of the plaintiff are that on or about 19.6.2006 the 1st defendant acting through its agents the 2nd and 3rd defendants invaded her premises and maliciously demolished and damaged the said premises. The defendants then shut her out by locking the undemolished and undamaged part of the premises with the result that the goods therein are going to waste due to the defendants' acts of vandalism and destruction. The plaintiff has therefore suffered loss as enumerated in the plaint and still continues to suffer irreparable loss in lost business, wanton waste, theft and vandalism of goods. Hence the suit and application.

The defendants have denied the plaintiff's allegations and contend that the plaintiff has not disclosed the premises in which she does business unlike the 1st defendant which has exhibited a lease showing the premises in which it operates. They accuse the plaintiff of being economical with the truth and refer to Narok SRM CCC No.60 of 2006 in which a non legal entity called "**Keekorok Lodges"** was the only entity sued by one Robert Ole Tipis and Block Safaris Company Limited. In the premises, the defendants are of the view that the plaintiff has not established a prima facie case with a probability of success.

I will consider the application in the light of the principles applicable. Those principles were set out in the case of **Giella – vs- Cassman Brown and Company Limited & Another [1973] E.A 358** where Spry V.A. at page 360 said as follows:-

"**First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience."**

Those principles have been consistently applied by our courts. Where what is sought is a mandatory injunction, an applicant assumes a bigger burden as he must establish special and peculiar circumstances and the standard of proof is one beyond balance of probabilities. So has the plaintiff shown a prima facie case with a probability of success? The acts complained of allegedly occurred on or about 19.6.2006. That is a period of nearly three (3) Months before this suit was filed. An injunction may not be useful with regard to goods allegedly lost which the plaintiff says include: perishable foodstuffs and vegetables, furniture and fittings, unknown cash and personal effects. The plaintiff herself has given KShs.3,000,000/= as the value of the said goods. With regard to the complaint about the demolished part of the premises the plaintiff has also given her valuation of the damage as KShs.2,000,000.00.

With regard to the prayer for a mandatory injunction, the order sought in this application is sought pending the hearing and determination of this application. None is sought pending the hearing of the suit. Since I declined to grant one at the ex-parte stage, the prayer is now merely academic. Even if the plaintiff had sought one pending the hearing of the suit, I would have been disinclined to grant the same because in my view, the plaintiff has not crossed the first hurdle in her attempt to obtain even a prohibitory temporary injunction. The plaintiff's evidence of title to the premises is a Restaurant Liquor Licence issued to her by a Licensing court. This document describes the plot as "***isolated."*** The plaintiff also relies on a Single Business Permit issued to her by the County Council of Narok as further evidence of title to the premises. That document describes the plot number as Mara. I am not satisfied that those two documents confer any known interest in land. The plaintiff's premises are not in my view sufficiently defined by her documents. Not even a Temporary Occupation Licence has been exhibited. The next problem the plaintiff has not explained to my satisfaction is why none of the defendants was mentioned in the suit her manager filed in the Senior Resident Magistrates Court at Narok i.e. SRM CCC No.60 of 2006. That suit was between the plaintiff's manager, Robert Ole Tipis and Block Safaris Company Limited as plaintiffs and Keekorok Lodges as defendant. It is illustrative that that suit was filed on 20.6.2006 a day after the alleged offending acts were committed by the defendants. It is striking that

the 2nd and 3rd defendants were not parties to that suit and were not even referred to in the affidavit in support of the application for a mandatory injunction therein. Yet in the supplementary affidavit sworn by the plaintiff in this application on 12.9.2006, the plaintiff depones at paragraph 5 of the said affidavit that the suit was against the defendants herein together with an entity called Keekorok Lodges. This averment flies in the face of the pleadings exhibited by the defendants in this application. The plaintiff has not been candid on an issue that is in my view crucial: to wit: the identity of those who committed the acts complained of by her.

On its part the 1st defendant has exhibited a lease over **L.R. No. NAROK/CIS-MARA/KOYAKI/3**. That lease is for 30 years with effect from 19.9.2003 and is between the 1st defendant and the Country Council of Narok. The 1st defendant is in no doubt as to where it does business. The averments in both the replying affidavit and the Supplementary Affidavit sworn by the 3rd defendant were not challenged by any subsequent affidavit by the plaintiff.

My above analysis of the affidavit evidence availed to me leads me to the finding that the plaintiff has not established a prima facie case with a probability of success at the trial. I do not strictly speaking have to consider the other conditions set out in the rule making case of **Giella –vs- Cassman Brown & Company Limited [1973] E.A. 358**. However even if I were to consider this application on the basis of the 2nd condition that is as to whether the plaintiff will suffer irreparable injury unless the injunction is granted, I would still find in favour of declining the injunction. From the pleadings it is clear that the injury the plaintiff can suffer if the injunction is refused is compensetable by damages.

Having found that the plaintiff is not entitled to a prohibitory injunction, it is obvious that a case has not been made out for the grant of a mandatory injunction. In **Malindi Air Services & Another –vs – Halima Abdnour Hassan Nairobi C. A. APPL. NO 2002 (UR)** the Court of Appeal held;

"**A mandatory injunction at an interlocutory stage is rarely granted only when the plaintiff's case is clear and incontrovertible."**

AND in **Locabail international Finance Limited – vs – Agroexport and Others [1986] 1 All E. R. 901** it was stated

"**A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then 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 match on the plaintiff. Moreover before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction."**

From what I have said before, the conditions for the grant of a mandatory injunction are absent in the matter at hand.

In the end the plaintiff's application dated 7.9.2006 and filed on the same date is without merit and I dismiss it with costs to the defendants.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER, 2006.

F. AZANGALALA

JUDGE

1.11.2006

Read in the presence of:-