



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 507 of 2006

MAN EATERS LODGE LIMITED.....PLAINTIFF

VERSUS

KENYA WILDLIFE SERVICE.....DEFENDANT

RULING

By a plaint filed on 12.9.2006 the plaintiff prays for the following primary orders:-

- (i) **A declaration that the defendant's trespass upon the plaintiff's land in may, 2005 and August, 2006 is unlawful.**
- (ii) **A permanent injunction to restrain the defendant whether by itself or acting through its officers, agents or servants from trespassing into the plaintiff's land and harassing, intimidating or in any way threatening to harm the plaintiff's servants, employees agents and/or officers.**
- (iii) **A declaration that the plaintiff is entitled to the quiet possession and enjoyment of LR No.4344/2 registered in the District Land Registry at Mombasa as Grant No.C.R. 27415/1.**
- (iv) **General damages for trespass.**

The foundation of the plaintiff's claim is pleaded in paragraphs 3,4,6,7,8,9,12 and 13 of the plaint. In paragraph 3 it is averred that the plaintiff was and is the registered leasehold owner entitled to possession and quiet enjoyment of land adjoining Tsavo Station in Taita Taveta District comprising about 12.14 hectares known as L.R. No.4344/2 registered in the District Land Registry at Mombasa as Grant No.C.R. 27415/1 (**hereinafter the suit land**). It is next averred in paragraph 4 that the plaintiff was at all material times before the 17.8.2006, developing a luxury tourist facility on the property having obtained all necessary Statutory approvals. The construction work was scheduled to be completed before tourist peak season commencing late August, 2006. It is further pleaded in paragraph 6 that since May 2006, the defendant through its servants and/or agents have on many occasions trespassed upon the plaintiff's land, destroyed the access road to the land and intimidated its servants, agents and directors with threats. It is next averred in paragraph 7 that on or about 25.5.2006 the defendant through its officers, servants and/or agents without the consent of the plaintiff unlawfully entered the plaintiff's land and harassed and intimidated the plaintiff's servants and/or agents with unsubstantiated claims that the plaintiff was not the rightful owner of the property. It is then further pleaded in paragraph 8 that on or about 17.8.2006, the defendant through its officers, servants and/or agents armed with firearms entered the plaintiff's land with a bull dozer and proceeded to demolish the access road to the plaintiff's land. During the one hour operation, the said agents of the defendant instructed the plaintiff's servants to immediately stop the

construction work on the plaintiff's land. It is then pleaded in paragraph 9 that on or about 18.8.2006, the defendant's officers and/or agents unlawfully drove into the plaintiff's property armed with rifles and demanded that the plaintiff's workers, servants, and/or agents immediately stop the construction work on the property. The stoppage orders were accompanied by threats of imprisonment to the workers if they did not obey the orders. It is further averred in paragraph 12 that as a result of the trespass the intimidation and coercion by the defendant aforesaid the plaintiff was forced to cease any further work on the project hence delaying the project which was to be opened in August during the peak tourism period. In the premises the plaintiff seeks the orders stated above.

Simultaneously with the plaint, the plaintiff filed an interlocutory application seeking injunctive reliefs in the terms sought in the plaint pending the hearing of the suit. The application is supported by the affidavits of Mulji Ratna a director of the plaintiff and Panchani Vinod Parbat a foreman of the plaintiff at its construction site on the suit property. Mulji Ratna has also sworn a further affidavit on 3.11.2006. The affidavits have substantially elaborated upon the averments in the plaint and the grounds in the application. Annexed to those affidavits are various exhibits including copies of the title to the suit property, an Environmental Impact Assessment Report and Correspondence on various contentions issues including change of user Approvals for an access road and security.

The application is opposed. The defendant's advocates have filed Grounds of Opposition and there is a replying affidavit sworn by one Tom Sipul the defendant's Lands Manager. It is deponed in that affidavit that although the plaintiff has a title the defendant has a problem with the extension of lease as the land is within the gazetted National Parks which cannot be alienated without de-gazettement and that the change of user and approval of the project were done without consultation with the defendant. It is also deponed that the change of user will have a negative impact on the defendant's activities as it will interfere with the ecosystem of Tsavo East National Park. It is also deponed that the area where the property is is in a jungle extremely dangerous and unsafe to the plaintiff's employees and their guests from both wild animals and bandits. It is also deponed that from records there is no access road to the suit property as the initial use of the property since colonial days was for a tannery and later a proposed tented luxury lodge which was served by Nairobi-Mombasa Railway line only. It is also deponed that the access road available is not a classified road for public use and the plaintiff or its employees and or guests are not entitled to use it. It is further deponed that as a policy the defendant will not allow continual and constant use of the access road as the same is close to an animal corridor and traffic using the road has to be protected from wild animals by the defendant's rangers and the road will be used by poachers in the guise of going to the property. It is also deponed that the defendant's employees or servants at no time entered upon the suit property but the plaintiff attempted to forcefully use its access road despite being warned against doing so and further without authority purported to construct another access road through the defendant's park. It is further deponed that the defendant's employees closed the illegally constructed access road and stopped the plaintiff and its agents from using any of its roads as an access. It is then deponed that on information from the plaintiff's director the Environmental Impact Assessment Report was obtained by making of a false statement and was thus suspect. It is further deponed that the defendant is contemplating moving the court to challenge the extension of lease with change of user and the approval of the project by NEMA without consultation with the defendant.

The application was canvassed before me on 21.11.2006 by Mr. Majanja Learned counsel for the plaintiff and Mr. Lutta Learned counsel for the defendant. The advocates relied upon their clients' respective affidavits and vigorously urged their clients' respective positions.

I have considered the affidavit evidence and annexures exhibited. I have also considered the able submissions made to me by the learned counsels appearing. Having done so, I take the following view of the matter. Central to the determination of the dispute between the plaintiff and the defendant is the issue of title to the suit property, the user thereof and access to the same. With regard to the title to the suit property, the plaintiff has exhibited "MRI" to its further affidavit sworn by Mulji Ratna aforesaid. That annexure is a copy of Grant No.C.R. 27415/5 which was formerly made to one Mohamed Ashraf Sheikh as administrator of the estate of Mohamed Aslam. The leasehold comprised in the grant was for 99 years from 1.4.1913. The Land is described as adjoining Tsavo Station in Taita Taveta District comprising 12.14 hectares and is L.R. No.4344/2. The exhibit further reveals that on 4.4.2005 an endorsement of

renewal of the lease for a further 50 years was registered. The endorsement further contains change of user to Permanent Tourist Lodge. The lease was then by a transfer registered in the name of the plaintiff on 18.5.2005. It is evident from the exhibit that the extension of lease for a further 50 years and the change of user were effected before transfer to the plaintiff.

With regard to the access road to the suit property, the plaintiff has exhibited correspondence exchanged between it and various authorities. Of relevance to the matter at hand is the letter dated 18.12.2003 from the Ministry of Lands and Settlement to M/s M.A. Khan regarding the access road to the suit property. In that letter the Director of Surveys in the said Ministry confirms that from their records the suit property is served by a 15m (50 feet) access road running parallel to the railway line into the Tsavo Trading Centre on a North Westerly direction. Also of significance is the letter dated 28.11.2005 from Kenya Railways addressed to M/s Voi Wildlife Lodge in respect of provision of a level crossing. That letter confirms approval of the level crossing subject to the payment of KShs.364,800.00. The letter was further to another one dated 28.4.2004 headed “**Level Crossing – LR No.4344/2 Tsavo Taita**”, in which Kenya Railways sought to know the exact kilometrage for the level crossing. Of equal significance is the letter dated 16.6.2006, from the defendant to M/s Anjarwalla and Khanna Advocates in which the defendant acknowledged the plaintiff’s title to the suit property but stated that the contentious issue was the access road. The defendant further acknowledged that “**According to the survey plan-attached to the title, the land is served by an access road running parallel to the railway line and this is confirmed by a letter from the Ministry of Lands dated 18.12.2003.**”

With regard to approval of the plaintiff’s project on the suit property the plaintiff has exhibited “**MR3**” to its further affidavit sworn by the said Mulji Ratna. That exhibit is an Environmental Impact Assessment Report **which was approved by the National Environment Management Authority (NEMA)** in its letter dated 26.4.2006. Also exhibited is a copy of the Environmental Impact Assessment Licence dated 29.5.2006.

As against the exhibits relied upon by the plaintiff, the defendant contends that it has a problem with the extension of lease, the change of user and the approval of the plaintiff’s project by **NEMA** and boldly states that it is contemplating moving the court to challenge the extension of lease the change of user and the approval of the project by **NEMA**. With regard to the access road the defendant takes contradictory positions. It first contends that there is no access road to the suit property. It then contends that the only known access road available is not a classified road for public use and the plaintiff or its employees and or guests are not entitled to use it. It further contends that the area where the suit property is situated is inside the park and is in a jungle area which is extremely dangerous and unsafe for the plaintiff’s employees and their guests from both wild animals and bandits. “**There is no such place as Tsavo Trading Centre existent as alleged by the plaintiff.**”

The positions taken by the defendant fly in the face of the annexures exhibited by the plaintiff and even the defendant’s own letter dated 16.6.2006 referred to above in which the defendant unequivocally acknowledged the plaintiff’s title to the suit property and the existence of a road of access running parallel to the railway line.

I am aware that I am not trying this case. I am not therefore required to make definitive findings of fact or law at this interlocutory stage. On a prima facie basis however, the plaintiff has established a title to the suit property which has been acknowledged by the defendant. The plaintiff has further established that a change of user of the suit property was effected even before it acquired the suit property. It has also shown on a prima facie basis that its project has received the blessings of the National Environment Management Authority who have licenced the said project. Finally the plaintiff has established again on a prima facie basis that it is entitled to an excess road to the suit property. The defendant desires to challenge the plaintiff’s title, extension of lease and change of user. It is perfectly entitled to do so. It may or may not succeed. It has not done so yet. Its title to the suit property can only be speculative. It hopes to succeed. So its interest in the suit land remains just that “**hope.**” That is not an interest that can found a basis for the actions it admits to have done.

The upshot of the above is that the plaintiff has established the 1<sup>st</sup> condition necessary for the grant of

a temporary injunction as set out in the precedent setting case of **Giella – vs – Cassman Brown & Company Limited [1973] 358**. I am also persuaded that the 2<sup>nd</sup> necessary condition for the grant of an interlocutory injunction has been shown. Acts of trespass against a registered proprietor particularly the type complained of by the plaintiff cannot in my view be easily quantified. The plaintiff has also stated that its construction schedules have not been met with the result that it has missed the peak tourism bookings for this year and will lose out entirely on next years projected revenue. On a prima basis I am persuaded that the violations of the plaintiff's rights would not be adequately compensated in damages unless the interlocutory injunction sought is granted. It is in any event settled that where there is a dispute between the registered proprietor and a trespasser, the trespasser should give way (**see Jaj Super Power Cash and Cary Ltd – vs – Nairobi City Council and 2 others: Nairobi Civil Appeal No.111 of 2002 {UR} at page 8.**

In the end the plaintiff's application is allowed in terms of prayers 3 and 4 of the application.

The orders are granted on condition that the plaintiff files an undertaking under its seal as to damages. Such undertaking to be fortified by a similar undertaking under oath of one of its directors. The undertakings to be filed within the next 7 days from the date hereof.

Costs shall be in the Cause. Orders accordingly.

**DATED at NAIROBI this 8<sup>th</sup> day of DECEMBER, 2006.**

**F. AZANGALALA**

**JUDGE**

**8/12/06**

**MARY KASANGO**

**JUDGE**

**8/12/06**