

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 132 of 2005

SAMSON MAITAI.....PLAINTIFF

VERSUS

DAVID LIVINGSTONE RESORT.....DEFENDANT

RULING

The applicant filed an application by way of a chamber summons brought under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. He prayed for an order of interlocutory injunction to restrain the defendant, their agents, servants and/or authorised persons from trespassing, carrying on business or construction or in any other way dealing with a parcel of land known as **CIS-MARA/LEMEK/172** (hereinafter referred to as “*the suit premises*”) pending the hearing and disposal of a suit which he had filed against the defendant. He also prayed for an order to compel the respondent to pay him rent at the rate of Kshs.50,000/- per month from the time of the defendant’s occupation of the suit premises until final determination of the suit, mesne profits and royalty in the sum of Kshs.500,000/-. I must however point out that all these other prayers were wrongly sought in an application for an injunction and I will not therefore consider them. In his affidavit in support of the application, the applicant deposed that he was the registered proprietor of the suit premises which measures 164.4 hectares. He annexed to his affidavit a copy of the Title Deed and a certificate of official search. He deposed that since July 2004 the defendant trespassed into his property aforesaid and constructed an airstrip, feeder roads and a big signboard. The defendant began to operate the airstrip with two to three aircrafts landing or taking off on a daily basis. He said that he tried to stop the defendant from trespassing upon his property but it did not heed his plea. He was aggrieved by the defendant’s unlawful use and occupation of his property, he stated.

The defendant filed a replying affidavit sworn by Mr. Dilip Shah, a director of the defendant company. He stated that in July 2004 the defendant sub-leased a portion of land title number **CIS-MARA/LEMEK/189 & 190** from M/S Sahkah Limited who are the head tenants of the said portion of land from one John Tupenet Ole Murero for a period of 35 years from 1989. He annexed to his affidavit a copy of the lease document. Mr. Shah further deposed that the defendant had not done any improvements to the leased parcel of land. He said that the airstrip, feeder roads and signboards were all constructed by M/S Sahkar Limited in the year 1989 on the leased parcel of land and did not extend to any other parcel of land and in particular the suit premises as claimed. He therefore urged the court to dismiss the applicant’s application.

When the said application came up for hearing on 6th July, 2005 the advocates for the parties herein agreed by consent that the Narok District Land Surveyor accompanied by Land Surveyors appointed by both parties would visit the suit land and determine the correct boundary between **L.R.NO. CIS-MARA/LEMEK/172** and **CIS-MARA/LEMEK/189 and 190** and file a report within 30 days thereafter.

The Narok District Land Surveyor was to determine whether there was any encroachment by the defendant into the suit premises. On 22nd and 23rd July, 2005, the Narok District Land Surveyor accompanied by both advocates for the parties, Mr. Charles Saina Sena and Mr. William Kiptoo, the

applicant and his surveyor, Mr. Deiter, a manager of the defendant company and Mr. William Raketa Ole Mulero, son of the registered proprietor of **CIS-MARA/LEMEK/189** visited the disputed area to carry out the orders as by consent agreed upon. The surveyor established that a part of the airstrip had encroached into the applicant's parcel of land by 679 metres. He filed a report dated 4th August, 2005 and attached thereto a sketch drawing of the airstrip which was shown to be constructed on three parcels of land, **CIS-MARA/LEMEK/172, 189 and 190**. The defendant's counsel was supplied with a copy of the said report but he did not respond to the same. The defendant's counsel was also served with a hearing notice indicating that the application was to be heard on 15/11/2005 but on the said date he did not attend court and the hearing of the application proceeded ex parte.

In light of the very clear report by the Narok District Land Surveyor, I am satisfied that the applicant has established that there has been encroachment into his parcel of land by the airstrip. However, the defendant stated in the affidavit sworn by one of its directors that the airstrip was constructed by M/S Sahkah Limited from whom it leased parcels numbers **CIS-MARA/LEMEK/189 and 190** on which the airstrip partly lies. The defendant is the one who is currently using the airstrip and is benefiting from the same at the expense of the applicant. The defendant should have taken the necessary steps to ensure that it was acquiring a good leasehold interest in respect of the said parcels of land from the lessor.

It is upto the defendant and M/S Sahkah Limited to sort out the issues raised by the appellant but it would be unjust to deny the applicant the injunctive orders sought when it is clear beyond peradventure that his property is being used unlawfully by the defendant. In the circumstances, I hereby issue an order of injunction restraining the defendant, its servants and/or agents from trespassing into the plaintiff's parcel of land known as **CIS-MARA/LEMEK/172** and in particular against using that part of the airstrip or feeder roads that are lying on the plaintiff's aforesaid parcel of land. The said orders shall remain in force until the plaintiff's suit is heard and determined or until further orders of this court.

The applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED at Nakuru this 9th day of December, 2005.

D. MUSINGA

JUDGE

9/12/2005