



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 686 OF 2001

COUNCILLOR DANIEL LATON

& 19 OTHERS.....APPLICANT

VERSUS

TRANSMARA COUNTY

COUNCIL.....RESPONDENT

RULING

This is an application by Transmara County council dated 2.7.2001 for an order that order No. 4 of the Orders given on 27.6.2001 that the grant of leave do operate as a stay of decision of Transmara County Council until the determination of the application be set aside.

On 27.6.2001 I granted leave to the twenty councilors to apply inter alia, for an order of certiorari to remove into the High Court and quash the decision of Trans Mara Council purportedly made on 21.5.2001 to enter into an agreement with M/S mara Conservancy for the management of Mara Triangle.

The present application was filed on 3.7.2001. The notice of motion for orders of certiorari prohibition and mandamus pursuant to leave was filed on 11.7.2001 when the hearing of the present application was in progress.

The applicant does not seek an order to set aside the order granting leave. They only seek an order to set aside the order of stay pending the hearing of the Notice of motion filed on 11.7.2001.

In the minutes of the purported meeting of Transmara County council held on 21.5.2001, the council resolved to enter into an agreement with Mara Conservancy for the management of Mara Triangle on the terms stated in the minutes.

The legality of that resolution is vehemently challenged by the twenty councilors. Mr. Mwenesi learned counsel for Mara conservancy has brought to the attention of the court the provisions of section 81 of the Local Government Act, which provides:

“Whenever the minutes of the proceedings of a meeting of a local authority have been recorded and confirmed such meeting shall until the contrary is proved be deemed to have been duly convened and held and all members present at such meetings shall be deemed to have been duly qualified:”

The Notice of motion pursuant to leave was filed on 11.7.2001. The orders of certiorari prohibition and mandamus are sought.

It is clear from the statement and from the Notice of motion that the legality of the meeting of the council and of the award of the management contract to Mara Conservancy is the basis of the application for orders of certiorari, prohibition and mandamus.

Counsels for the applicant and for the Respondent in the present application have raised matters which are disputed and which no doubt will be raised during the hearing of the Notice of motion filed on 11.7.2001. It should also be remembered that the Notice of motion filed on 11.7.2001 also seeks an order of prohibition to prohibit the Transmara county council from giving effect to its decision purportedly made on 21.5.2001 and from entering into a contract with Mara Conservancy. Issues such as how many councilors have filed the present application and whether or not the Mara conservancy have taken over the management of mara Triangle can only be decided at the hearing of the Notice of motion. It would be pre emptory for the court to deal with issues which are the subject of the pending application.

Consequently I refrain from dealing with grounds nos (a) (b) (c) (d) and (e) of the present application. I will consider the present application in relation to ground (f) of the application and s. 81 of the Local Government Act. Ground (f) of the application is that the order of stay has created a vacuum in the running management and operation of the Mara Triangle of collection of revenue from and provision of security and other essential services to the tourists visiting the reserve.

Starting with S. 81 of the Local Government Act., the minutes of the meeting of the Transmara County Council of 21.5.2001 have been recorded and confirmed. By virtue of section 81, there is a rebuttable presumption of the validity of the meeting until the contrary is proved. It is only at the hearing of the pending application that the applicants can show that the meeting was not legally valid.

The mara conservancy entered into a management agreement with Transmara County Council as a result of the resolution in the meeting of 21.5.2001. As there is a presumption of legal validity of that meeting the resolution to give a contract to mara Conservancy is deemed as valid until the contrary is proved at the hearing of the Notice of motion. Thus the contract between Transmara county council and Mara conservancy is at this stage protected by s. 81 of the Local Government Act. The applicants have applied for an order of prohibition to prohibit the Transmara county council from giving effect to it's d decision. If the pending application succeeds then the applicants will be entitled to an order of prohibition. The order of stay given on 27.6.2001 infact operates as a temporary order of prohibition It would be wrong to stay a decision which s. 81 presumes to be valid until the decision is proved to have been illegal. The order of stay was given in ignorance of the provisions of s. 81 of the Local government Act. The order of stay cannot validly stand in view of s, 81 of the local government Act.

Regarding ground (f) of the application, there is dispute as to whether or not Mara Conservancy has effectively taken over the management of the Mara Triangle. This is a 5 year management contract and all the matters covered by the management contract cannot be implemented at once. Mr. Brian Heath states in his affidavit that mara conservancy took over the management on 12.6.2001 and that it is already on the ground. The report of the Chief Executive to Mara Conservancy Board dated 28.6.2001 (Ex BH3) and the minutes of the Board meeting held on 28.6.2001 show that Mara conservancy has legally taken over and has been implementing the management agreement.

The trans mara Council has not been managing the Mara Triangle Angle since 1998 as it awarded the management contract to KATO. That agreement with Kato has been terminated. KATO has accepted the termination and has been appointed a member of the Board of Mara Conservancy. The fact that Kato was managing the Mara Triangle before Mara Conservancy was awarded the management contract was not brought to the attention of the court at the time court granted an order of stay. Further the fact that the Agreement between KATO and the council had been terminated was not also brought to the attention of the court. In fact the picture portrayed by the statement particularly para 32 and the supporting affidavit in that the council through the council employees has been managing the mara Triangle.

As the management agreement between KATO and the Council has been terminated the Mara Triangle has to be managed by either the council or Mara Triangle pending the determination of the application. The council does not wish to manage the Mara Triangle hence the present application. It has lifted the

management to Mara Conservancy. The court cannot force the council to manage the mara Triangle. In any case there is no evidence that the council has the capability including competent professional staff to manage such an important Tourist Destination. It is apparent that if the order of stay remains there will be a vacuum as neither KATO nor the council in managing the Mara Triangle. Such and importance tourist destination cannot be left without a legal guardian - a central authority directing the management.

The order of stay has changed the status quo and brought uncertainty and anarchy in the management of Mara Triangle. The order of stay was granted in the ignorance of material facts now contained in the affidavit of Brian Heath relating to the management of Mara Triangle.

For the foregoing reasons I allow the application with costs in the cause and set aside the order of stay in terms of prayer no. 2 of the application.

E. M. Githinji

Judge

30.7.2001

Mr. Tobiko & Mr. Munari present

Miss Karai holding brief for Mr. Mwenesi present

Mr. Ombati present

Mr. Koyonko holding brief for Wangari present

Mr. Ombati

Give as a priority hearing date of the Notice of motion.

Mr. Tobiko

I have not been served with notice of motion. We have not filed the replying affidavit.

E. M. Githinji

Judge

Order: By consent respondents and interested parties to file replying affidavits on or before 17.9.20012.

Thereafter the Deputy Registrar to give parties a hearing date of the notice of motion on priority basis

E. M. Githinji

Judge