



**Olonana Limited v Mara Rafiki Limited (Environment & Land Case
34 of 2021) [2023] KEELC 20182 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 34 OF 2021
EM WASHE, J
SEPTEMBER 20, 2023
FORMERLY NAROK ELC CASE NO.588 OF 2017**

BETWEEN

OLONANA LIMITED PLAINTIFF

AND

MARA RAFIKI LIMITED DEFENDANT

JUDGMENT

1. In this suit, Olonana Limited (hereinafter referred to as “the Plaintiff”) filed a Complaint dated 20th December 2017 (hereinafter referred to as “the Complaint”) seeking for the following Orders against Mara Rafiki Limited (hereinafter referred to as “the Defendants”):-
 - i. A permanent injunction restraining the Defendant by itself, its agents and/or servants whatsoever from encroaching onto, trespassing onto or otherwise interfering in any manner whatsoever with the Plaintiff’s use, quiet and peaceful entitlement, occupation and use of part of all that parcel of land and/or any of all that parcel of land known as Land Reference Number Transmara/Kimintet “D”/497.
 - ii. A permanent injunction restraining the Defendant by itself, its agents and/or servants whatsoever from dealing with, constructing any structures thereon on the Plaintiff’s parcel of land and/or any of all that Parcel of Land Reference Number Transmara/Kimintet “D”/497.
 - iii. A mandatory injunction directing the Defendant by itself, its agents and/or servants or otherwise howsoever to forthwith remove the construction material deposited on the banks of the Mara River and any structures erected thereon failing which the same be removed by the Plaintiff at the Defendants costs and expense.
 - iv. The Defendant be ordered to pay the Plaintiff damages for the trespass.



- v. The Defendant be ordered to pay the Plaintiff's costs on this suit.
2. The Plaintiff was duly served on the Defendant who opposed the same by filing an initial Statement of Defence and Counter-Claim dated 25th of April 2018 and thereafter an Amended Defence and Counter-Claim dated 7th August 2019.
3. The Counter-Claim filed by the Defendant sought for the following Orders against the Plaintiff herein;
 - i. Special Damages of KShs 221,310,201/-.
 - ii. Exemplary/punitive damages.
 - iii. General Damages.
 - iv. Costs
 - v. Interest on (a) from the date of the filing of the suit until full payment.
4. The Plaintiff upon being served with the Defendant's Counter-Claim filed a Reply to the Amended Defence and Defence to Counter-Claim on the 17th of August 2018 and sought the said Counter-Claim to be dismissed.
5. Various interlocutory applications were filed and dispensed with before this Honourable Court certified the substantive suit ready for hearing.

Plaintiff's Case.

6. The hearing of this suit began on the 9th of February 2022 with the Plaintiff's 1st Witness known as Mr. Muriu Waigango (who is hereinafter referred to as "PW1")
7. PW1 introduced himself as a director of the Plaintiff company who have filed this proceeding.
8. PW 1 thereafter informed the Court that he entirely relies upon the witness statement prepared by himself dated 20th of December 2017 and thereafter adopted the same as his testimony in chief.
9. PW 1 further clarified that the property known as L.R.No. Transmara/Kimintet "D"/479 was approximately 336.236 Acres and not 236.07 Acres as pleaded in the Plaintiff.
10. Thereafter, the PW 1 produced a number of exhibits which were marked as follows;-
11. PW 1- Exhibit 1- A certified Copy of a Court Order issued in NAROK CMCC NO. 147 OF 2017 dated 6th November 2017.
12. PW 1- Exhibit 2- A copy of an executed Lease Agreement between Enkutoto Eco Tourist Trust and the Plaintiff dated 1st June 2017.
13. PW 1- Exhibit 3- A bundle of photographs of an illegal road created through the Plaintiff's portion of land.
14. Thereafter, PW 1 closed his evidence in chief and was placed for cross-examination by the Defence Counsel.
15. In cross-examination, PW 1 reiterated that he was a lawful director of the Plaintiff company.
16. PW 1 informed the Court that on the 1st September 1997, Enkutoto Eco-Tourism Trust executed a Lease Agreement with the Plaintiff Company for a portion of 100 acres within the property known as L.R.No. Transmara/Kimintet "D"/479.



17. This Lease dated 1st September 1997 had since lapsed in December 2016 and no copy had been produced before this Honourable Court.
18. The second Lease between Enkutoto Eco-Tourism Trust and the Plaintiff was executed on 1st June 2017 which was for another portion of approximately 216.236 Acres.
19. PW 1 therefore stated that the total acreage of the property known as L.R.No. Transmara/Kimintet “D”/479 leased to the Plaintiff by Enkutoto Eco-Tourism Trust was 316.236 Acres.
20. According to PW1- the only portion which was not leased to the Plaintiff was approximately 20 Acres.
21. Unknown to the Plaintiff, some members of Enkutoto Eco-Tourism Trust offered the remaining 20 acres to the Defendants.
22. The Plaintiff on discovering this intention by some members of Enkutoto Eco-Tourism Trust to lease the remaining portion of approximately 20 acres to the Defendant raised a number of objections against the leasing of the 20 acres to the Defendant.
23. The objections were identified as follows;-
 - a. The Defendant has created an access road which is within the portions leased by the Plaintiff.
 - b. The Construction of the Defendant’s Camp had created and/or resulted to massive movement of material in and out of the construction site thereby creating a lot of noise pollution.
 - c. The Plaintiff which was already running a 5-star Lodge which was hosting tourists from all over the world could not offer the quiet and serene environment which they had previously enjoyed.
 - d. The newly opened access road compromised the entire security of the Plaintiff’s Camp.
 - e. The construction of the Defendant’s camp was being done using materials collected from the Mara River and therefore causing degradation of this important river.
 - f. The Defendant’s Camp was being built approximately 300 meters which was very close to the Mara River and which area was being used by the Plaintiff as a site for bush dinners.
 - g. The Plaintiff’s also expressed their concern that the Defendant’s Camp was being constructed within established animal crossing paths and hippo docking sites.
 - h. The Plaintiff also raised an issue that they were not consulted and/or given an opportunity to participate in the Environment Impact Assessment exercise undertaken by the Defendant before the appropriate approvals were issued.
 - i. Lastly, the Plaintiff informed the Honourable Court that at the time the Defendant was developing his Camp, there was a Moratorium stopping any construction of new lodges and/or camps along the Mara River.
24. PW 1 informed the Honourable Court that based on these above objections, it was their view that the Defendant was violating various laws and regulations during its construction of its Camp.
25. PW 1 clarified that the Lease between Ekutoto Eco-Tourism Trust and the Plaintiff was for a period of 25 years from 1st June 2017 and the Defendant was not a party to the same.



26. PW 1 confirmed to the Court that the title known as L.R.No. Transmara/Kimintet "D"/479 was a freehold and was not aware if the Lease executed on the 1st of June 2017 had been accompanied with a Consent from the Land Control Board or registered by their lawyers.
27. PW 1 stated that although the Defendant's camp was 300 metres from Mara River, the same was not within the portions they had leased.
28. PW 1 further stated that the animal crossing paths and the hippo docking sites had not been marked but had been preserved due to the repeated use by the wildlife.
29. PW 1 however, did not have any written report from either Kenya Wildlife Services or the National Environmental Management Authority confirming this animal crossing paths or hippo docking sites within the property known as L.R.No. Transmara/Kimintet "D"/479.
30. PW 1 did not also produce the Moratorium purportedly issued by the Narok County Government stopping any new developments within the Mara River during the hearing thereof.
31. PW 1 however insisted that the Defendant was breaching well established norms by hoteliers within the Mara River although he failed to produce any documents establishing the alleged norms.
32. PW 1 informed the Honourable Court that he had not seen the registered Lease Agreement between Enkutoto Eco-Tourism Trust and the Defendant but in his view, the Defendant was trespassing on the Plaintiff's leased portion.
33. PW 1 reiterated that the access road created by the Defendant was within leased portion of 316 Acres which was not lawful.
34. PW 1 testified that the Defendant started construction on its leased portion in either May or June 2017 at which time, the Plaintiff had not executed a Lease Agreement with Enkutoto Eco-Tourism Trust.
35. PW 1 confirmed that as Lessee, they had an access road to their camp and it was proper for the Defendant to also have such an access road to their leased portion.
36. However, PW 1 stated that such an access road by the Defendant should not trespass in the portion that was leased to the Plaintiff.
37. PW 1 informed the Honourable Court he was not present when the Plaintiff executed first the Lease Agreement in the year 1996 but took over the said Lease when he acquired ownership of the Plaintiff.
38. PW 1 testified that the Plaintiff's Leased portion of 316 acres had been demarcated by Surveyors using fixed beacons and left out the portion of 20 acres leased to the Defendant.
39. PW 1 further testified that in the year 2017 when the Plaintiff herein was filed, a Temporary injunctive Order was issued against the Defendant on the 21st of December 2017.
40. The Temporary Injunctive Order issued on the 21st of December 2017 was directing the Defendant to remove the construction site and if they failed, refused and/or neglected to do so, the Plaintiff was at liberty to remove the same.
41. PW 1 however could not confirm to the Honourable Court if the said Temporary Injunctive Orders were served on the Defendants.
42. What PW 1 was very much aware was that the Defendant's Camp was subsequently removed.
43. In Re-examination, PW 1 indicated that there was no dispute between the Plaintiff, Defendant and Enkutoto Eco-Tourism Trust regarding the 100 acres.



44. PW 1 stated that it was not true that the Plaintiff had been kicked out of the 100 acres which it had initially leased out.
45. PW 1 reiterated that he was not aware if the Lease Agreement dated 1st June 2017 was registered and an appropriate Land Control Board Consent obtained.
46. PW 1 testified that the Defendant's Camp was being constructed about 300 meters from the Plaintiff's Camp.
47. As regards the animal crossing paths and hippo docking points, PW 1 informed the Honourable Court that such paths and docking points were well established by the behaviour and use of the wild animals and one does not necessarily require a Report from a Government agency to identify the same.
48. PW 1 alleged that the Defendant has not disputed the existence of the moratorium from the Narok County Government.
49. PW 1 stated that the moratorium by the Narok County Government was to preserve the ecosystem and decongest the Mara area in general.
50. PW 1 also informed the Court that the Defendant's camp was demolished using another Court Order and not the one issued by this Honourable Court.
51. PW1 reiterated that the creation of norms by the hoteliers within Mara River was for good behaviours.
52. PW 1 also acknowledged the further Affidavit sworn on the 8th of March 2017 which was to address various issues raised by the Defendant.
53. In conclusion thereof, the PW 1 sought the Honourable Court to grant the prayers sought in the Plaint filed herein.
54. The Plaintiff's Second witness was one Sitato Ololmambali (hereinafter referred to as "PW 2").
55. PW 2 introduced himself as a member and chairman of Enkutoto Eco-Tourism Trust.
56. PW 2 stated that he knew the Plaintiff very well and proceeded to adopt his witness statement dated 4th of March 2019 as his evidence in chief.
57. In cross-examination, PW 2 confirmed that he was a member of Enkutoto Eco-Tourism Trust and therefore a landlord to the Plaintiff herein.
58. According to PW 2, Enkutoto Eco-tourism Trust had leased a portion of 100 acres within the property known as L.R.No. Transmara/Kimintet "D"/479 which was much bigger.
59. PW 2 confirmed that an appropriate Lease Agreement was duly executed for a period which was around 30 years.
60. PW 2 acknowledged being familiar with the Defendant who had approached Enkutoto Eco-Tourism Trust to lease some land to establish a Camp.
61. PW 2 informed the Honourable Court that a Lease Agreement between Enkutoto Eco-Tourism Trust and the Defendant was executed for a portion of 20 acres on the 30th of March 2017.
62. On the other hand, Enkutoto Eco-tourism Trust also executed another lease of 100 acres with the Plaintiff herein on the 1st of June 2017.



63. According to the PW 2 testimony, both the Plaintiff and the Defendant were tenants in the property known as L.R.No. Transmara/Kimintet “D”/479.
64. PW 2 stated that the portions leased to the Plaintiff and the Defendant were not adjacent to each other and therefore disputed the allegation that the Plaintiff’s camp and the Defendant’s camp had been built within 300 meters from one another.
65. PW 2 was of the view that the Plaintiff’s Camp and the Defendant’s Camp were about 1 Kilometre away from each other.
66. PW 2 further denied that Enkutoto Eco-Tourism Trust did not require the Consent of Defendant to enter into any new lease with the Plaintiff.
67. PW 2 confirmed that the portion leased to Defendant was approximately 20 acres although he was not sure if the same had been demarcated by a Surveyor or not.
68. PW 2 stated that at the time the Plaintiff approached them for a Lease of 116 Acres, the Defendant had already signed a Lease of 20 acres and was in possession thereof.
69. PW 2 indicated that the access road to the Defendant’s leased portion was within the portion of 20 acres but traversed through a small portion of the Plaintiff’s leased portion.
70. The portion within which the Defendant’s access road traversed was within the portion leased to the Plaintiff on 1st of June 2017.
71. PW 2 however informed the Court that the Defendant constructed his camp at a different spot from the one Enkutoto Eco-Tourism Trust had approved.
72. The new spot which the Defendant constructed its Camp was facing the Plaintiff’s camp and that is what brought the disagreement.
73. PW 2 indicated that before this matter escalated to Court, there were various efforts to reconcile the parties herein but it was not successful.
74. PW 2 informed the Honourable Court that although there were animal crossing paths and hippo docking points in the property known as L.R.No.Transmara/Kimintet “D”/479, none was in existence within the portion of 20 acres leased to the Defendant.
75. Further to that, PW 2 confirmed that the Lease Agreement between Enkutoto Eco-Tourism Trust and the Defendant was still valid and binding as the same had never been cancelled.
76. In re-examination, PW 2 stated that the Defendant did not construct on the leased portion of 20 acres.
77. PW 2 further stated that the Defendant’s Camp was constructed within natural animal paths facing the Plaintiff’s Camp.
78. PW 2 indicated that the Defendant Camp was being constructed within 200 metres from where the Plaintiff’s Camp was located.
79. As regards the access road, PW 2 stated that when they saw where the Defendant was constructing the access road, Enkutoto Eco-Tourism Trust stopped him because it was outside the leased portion of 20 acres.
80. PW 2 reiterated that the officials of Enkutoto Eco-Tourism Trust pointed out the area within which he was allowed to construct even before the Lease was executed.



81. PW 2 stated that the Defendant's portion of 20 acres was at the edge of the property and not in the middle although no sketch map was drawn to identify the different portions leased out to the Plaintiff and the Defendant.
82. PW 2 indicated that according to Enkutoto Eco-Tourism Trust, each tenant was to create an access road within their leased portions.
83. PW 2 concluded his evidence by informing the Honourable Court that the Defendant was clearly shown the animal crossing paths and hippo docking points although the same were not covered in the Lease Agreement executed therein.
84. The third witness was Leshuru Ole Muntui (hereinafter referred to as "PW3").
85. PW 3 informed the Honourable Court that he was a member of Enkutoto Eco-Tourism Trust having taken over the membership of his deceased father.
86. PW 3 confirmed that he had prepared, signed and filed a written witness statement dated 5th May 2022 which he relied upon as his evidence in chief.
87. According to PW 3, the Plaintiff had two existing Leases with Enkutoto Eco Tourism Trust comprising of an Initial Lease of 100 Acres and a second Lease of 216 Acres making a total of 316 Acres.
88. On the other hand, the Defendant had been leased a portion of approximately 20 acres on the same property owned by Enkutoto Eco Tourism Trust.
89. PW 3 testified before the Honourable Court that both the Plaintiff and the Defendant were shown their respective portions of land.
90. PW 3 referred the Honourable Court to a Sketch Map contained in the Plaintiff's Supplementary Documents dated 05/05/2022.
91. PW 3 identified the Plaintiff's original portion of 100 acres to be the one marked in Red while the second leased portion was the one marked in Green.
92. PW 3 also identified the Defendant's Leased Portion on the same Sketch Map.
93. However, PW 3 informed the Honourable Court that the Defendant did not build on the authorised area within the Lease Portion of 20 acres.
94. According to PW 3, the development of the Defendant's Camp was to be in the middle of the Leased Portion of 20 Acres.
95. PW 3 stated that he was one of the members who had visited the Lawyer who prepared the Lease Agreement regarding the 20 Acres leased to the Defendant and had executed the same.
96. On the day of executing the said Lease Agreement with the Defendant, 5 members were present but ultimately, 9 members executed the same.
97. On cross-examination, PW 3 reiterated that he was a member of Enkutoto Eco-Tourism Trust but did not have any document to confirm his membership thereof.
98. PW 3 indicated that Enkutoto Eco-Tourism Trust had leased a total of 316 acres to the Plaintiff pursuant to a Lease Agreement dated 01/01/2017.
99. PW 3 stated that the Lease Agreement dated 01/01/2017 was executed by all members of Enkutoto Eco-Tourism Trust in their Lawyers office.



100. PW 3 informed the Honourable Court that 01/01/2017 was a Sunday and was the new year's day.
101. On being referred to the Lease Agreement dated 01/01/2017, PW 3 indicated that his name was not among the members of Enkutoto Eco-Tourism Trust that signed the said Lease Agreement.
102. PW 3 could also not remember the term of the said Lease Agreement dated 01/01/2017 or whether it had been registered.
103. PW 3 acknowledged that in the Lease Agreement with the Defendant, there was a clause that required Enkutoto Eco-Tourism Trust to notify the existing Tenant of any intention to lease to a new Tenant.
104. However, PW 3 stated that Enkutoto Eco-Tourism Trust could still lease any portion of their property without giving notice to anyone.
105. PW 3 informed the Honourable Court that the Defendant during construction of his camp placed building materials on Hippo docking sites which were on the river.
106. PW 3 admitted that the Hippo Docking sites had not been marked although they could be identified through their continued use.
107. PW 3 confirmed that both the Plaintiff and the Defendant had access to the River banks which are usually used by the Hippo.
108. PW 3 stated that Hippos usually swim through the Plaintiff's Camp but some stay on the Defendant's Leased portion.
109. PW 3 reiterated that Enkutoto Eco-Tourism Trust had executed two Lease Agreement dated 01/01/2017 and another 01/06/2017 for approximately 100 acres and 216 Acres respectively.
110. PW 3 confirmed that Enkutoto Eco-Tourism Trust leased a portion of 20 Acres to the Defendant.
111. In Re-examination, PW 3 stated that his father was Muntui Ole Kima.
112. PW 3 clarified that although his name did not appear on the Lease Agreements, he executed the same in the name of his father who was a member of Enkutoto Eco-Tourism Trust.
113. Referring to the Plaintiff's supplementary List of Documents dated 05/05/2022, PW 3 identified the place where the Hippo live and usually cross from the Plaintiff's camp to the Defendant's camp.
114. The fourth Plaintiff's Witness was Charles Shartuki Parkutire (hereinafter referred as "PW4").
115. PW 4 introduced himself as a member of Enkutoto Eco-Tourism Trust and confirmed that he had prepared, signed and filed a witness statement dated 5th May 2022.
116. PW 4 informed the Honourable Court that he would like to adopt the said witness statement dated 5th May 2022 as his evidence in chief.
117. Further to that, PW 4 relied on the documents contained in the Supplementary List of Documents dated 5th May 2022 which he sought to produce as Plaintiff's Exhibits 4, 5 and 6.
118. PW 4 confirmed that the Plaintiff had leased a portion of approximately 316 Acres from the Enkutoto Eco-Tourism Trust.
119. According to PW 4, the first Lease Agreement between Enkutoto Eco-Tourism Trust and the Plaintiff was in the year 1996 for a period of 33 years.



120. Then the second Lease Agreement was for a Leased portion of approximately 216 acres making a total of 316 acres.
121. PW 4 also admitted that Enkutoto Eco-Tourism Trust had leased a portion of 20 acres to the Defendant herein.
122. PW 4 informed the Honourable Court that he was introduced to the directors of the Defendant by one Gideon who was also a son to one of the members of Enkutoto Eco-Tourism Trust.
123. PW 4 stated that upon introduction of the Defendants directors, Enkutoto Eco-Tourism Trust visited the proposed portion to be leased to them.
124. PW 4 identified the portion leased to the Defendant as the one sharing a boundary with Parcel No. 480.
125. Referring to the Plaintiff's Exhibit 5, PW 4 identified the portion marked in Red to be where the Plaintiff's Camp.
126. Referring to a Letter dated 18th April 2019, the letter only identified the Defendant's portion but no beacons were duly placed on the ground.
127. However, according to PW 4, the Defendant did not set up the Camp where the members of Enkutoto Eco-Tourism Trust had identified for them.
128. PW 4 informed the Honourable Court that the Defendant set up his camp in the middle of the Leased Portion and not the initial proposed site.
129. PW 4 confirmed that indeed a Lease Agreement was duly executed between Enkutoto Eco-Tourism Trust and the Defendant.
130. PW 4 stated that he did not executed the Lease Agreement with the Defendant on the date indicated in the said Lease Agreement but signed the same later.
131. PW 4 informed the Honourable Court that there was no one who explained to him the contents of the Lease Agreement in favour of the Defendant.
132. PW 4 indicated to the Honourable Court that the Plaintiff's Exhibit 5 was a copy of a Court Order relating to a Judicial Review Application challenging the cancellation of the Defendant's building permits.
133. In cross-examination, PW 4 stated that Enkutoto Eco-Tourism Trust was not a party to the proceedings known as Narok Judicial Review No. 23 OF 2017.
134. PW 4 further stated that he was not aware of the outcome of those proceedings initiated in Narok.
135. PW 4 confirmed that there was an existing Lease Agreement between the Enkutoto Eco-Tourism Trust and the Defendant.
136. PW 4 further confirmed that he had signed the Lease Agreement with the Defendant which was indeed registered with the Lands Department according to the Official Search dated 1/10/2019.
137. PW 4 informed the Honourable Court that there are two Lease Agreements with the Plaintiff which are in existence.
138. PW 4 stated that he executed the Lease Agreement dated 01/01/2017 in favour of the Plaintiff but not on the 01/01/2017 as dated.



139. Referring to a Report dated 18/04/2019, PW 4 testified that there was no visit to the Defendant's Leased portion with a surveyor to mark it out.
140. PW 4 stated that when members of Enkutoto Eco-Tourism Camp pointed out the portion to be leased to the Defendant, there was no access road to the said portion.
141. PW 4 emphasized that the portion leased to the Defendant was bordering Parcel 480 and the purported access road shown in the Sketch Map produced by the Plaintiff did not exist.
142. According to PW 4's recollection, when Gideon came to make a request for a portion of 20 acres to be leased to the Defendant, the members of Enkutoto Eco-Tourism Trust simply went and identified the area measuring 20 acres.
143. Unfortunately, the Defendant while taking possession demarcated another area that Enkutoto Eco-Tourism Trust had not shown him.
144. PW 4 indicated that once the Defendant demarcated the wrong place, they went further to create a road through the Plaintiff's Lease portion.
145. PW 4 confirmed to the Honourable Court that in the Lease Agreement with the Defendant, there was no express term forbidding the construction of the Defendant's camp facing Tangulia Mara Camp.
146. PW 4 could not also point out any clause that provided for the distance which should be observed and/or maintained between the Plaintiff's Camp and the Defendant's Camp.
147. PW 4 however testified that there were various Hippo points which traversed both the Plaintiff's Camp and the Defendant's camp.
148. PW 4 admitted that Enkutoto Eco-Tourism Trust had not made any complaints against the Defendant interfering with the hippo docking points to either the National Environmental Management Authority (NEMA) or Kenya Wildlife Services (KWS).
149. PW 4 referring to the Sketch Map indicated that the Plaintiff's Camp was duly marked.
150. PW 4 also identified the portion originally proposed to be the Defendant's Lease portion.
151. Then PW 4 indicated that the Road running parallel to Parcel 480 was what should have been put up as the access road.
152. However, the Road shown in the Sketch Map was what was created by the Defendant.
153. PW 4 informed the Honourable Court that the road shown on the Sketch Map traversed through an animal crossing path.
154. In conclusion, PW 4 acknowledged the existence and signing of the Defendant's Lease Agreement dated 01/06/2017.
155. At the end of PW 4 testimony, the Plaintiff closed their case.

Defence Case.

156. The first Defence witness was Uwe Heerdes (hereinafter referred as "DW1")
157. DW 1 introduced himself as an Engineer in information Technology and director of the Defendant herein.



158. DW 1 informed the Court that he had duly prepared, signed and filed a witness statement dated 24/10/2019.
159. Consequently therefore, DW 1 sought the said witness statement dated 24/10/2019 to be adopted as his evidence in chief.
160. Thereafter, DW 1 referred to the List of Documents dated 28/10/2019 and requested the Honourable Court to admit the documents therein as Defence Exhibits 1-25.
161. The Honourable Court then admitted the said documents as Defence Exhibit 1 (i-xxv).
162. In addition to the List of Documents dated 28/10/2019, the DW 1 also sought to have the documents contained in the Supplementary List of Documents dated 14/11/2019 as Defence Exhibit 2.
163. Indeed, the Honourable Court duly admitted the Supplementary List of Documents dated 14/11/2019 as Defence Exhibits 2.
164. Lastly, DW 1 also requested to rely on the documents contained in the Further List of Documents dated 13/05/2022.
165. The Honourable Court then admitted the Further List of Documents dated 13/05/2022 as Defence Exhibit 3.
166. DW 1 informed the Honourable Court that in the year 2017, he decided to invest in Kenya after having retired from gainful employment.
167. As a result of this decision, DW 1 had incorporated the company Mara Rafiki Limited which then established Mara Rafiki Camp in the Mara area.
168. DW 1 stated that at the time of demolition, the Mara Rafiki Camp was 85 % constructed.
169. DW1 further stated that before commencing the construction of Mara Rafiki Camp, the Plaintiff obtained all the necessary permits required.
170. DW 1 confirmed that Enkutoto Eco-Tourism Trust had granted a Lease of 20 acres to the Defendant which was signed and duly registered at the Lands office.
171. DW 1 testified that the Mara Rafiki Camp was to include a main building, kitchen building, dining room, servant quarters, drivers' homes, five tented camps and other amenities.
172. DW 1 informed the Honourable Court that Mara Rafiki Camp was to host about 12 guests at one given time and the opening was to be on 1st March 2018.
173. DW 1 stated that the Plaintiff's projection was to charge approximately 750 Euros per night per person in the high season while in the low season, it was to charge 350 Euros per night.
174. DW 1 further stated that in essence, the Plaintiff's projection was an average of 500 Euros per person for about 175 days every year.
175. Unfortunately, DW 1 informed the Honourable Court that these projections never came to pass as the said Mara Rafiki Camp was demolished.
176. DW 1 testified that the demolition of the Mara Rafiki Camp was undertaken through Ex-parte Orders which did not give him an opportunity to defend himself or an opportunity to be heard.
177. DW 1 denied constructing the Mara Rafiki Camp on any animal crossing paths or Hippo docking points as alleged by the Plaintiff's witnesses.



178. DW 1 reiterated that the Defendant had procured all the necessary building permits from the relevant authorities.
179. DW 1 further indicated that the Lease Agreement between Enkutoto Eco-Tourism Trust and the Defendant did not have any form of restrictions of the area to construct within the 20 acres leased portion.
180. DW 1 thereafter closed his evidence in chief.
181. In cross-examination, DW 1 reiterated that he was an Information Technology Engineer who first came to Kenya in the year 2012.
182. Thereafter, DW 1 incorporated the Defendant company on the 08/12/2016.
183. DW 1 stated that the directors of the Defendant Company were two namely the deceased wife and himself.
184. DW 1 informed the Honourable Court that when he decided to invest in Kenya, he approached the Kenya Investment Authority who assisted him to register the Defendant Company.
185. DW 1 then testified that he was introduced to Gideon Kimai who he appointed as a manager of the Defendant Company.
186. The Defendant Company Manager then sourced for various suitable location for the establishment of the Mara Rafiki Camp.
187. DW 1 confirmed that indeed various locations were shown to the Directors of the Defendant Company and finally a resolution was made that the location shown by Enkutoto Eco-Tourism Trust was the most ideal.
188. The Defendant Company manager then introduced the directors to the members of Enkutoto Eco-Tourism Trust who were well known to him as he was a son to one of the members as well.
189. DW 1 informed the Honourable Court that in the first meeting, there were 6 members of Enkutoto Eco-Tourism Trust.
190. However, DW 1 clarified to the Honourable Court that during the search of a suitable location and the initial visit on the portion leased by Enkutoto Eco-Tourism Trust, the Defendant Company was still under registration.
191. DW 1 confirmed to the Honourable Court that he visited the proposed Lease portion of 20 acres on Enkutoto Eco-Tourism Trust and at that time, the Plaintiff's Camp was already in existence.
192. Referring to the Sketch Map produced by the Plaintiff, DW1 informed the Honourable Court that it was not reflective of the actual position on the ground.
193. DW 1 pointed out that the position of the portion leased to the Defendant and the manner the river was running were misrepresented.
194. DW 1 instead referred the Honourable Court to a Sketch Map contained in the Defendant's List of Documents dated 28/10/2019 which had marked the River in blue to be the correct position.
195. DW 1 testified that Tangulia Camp is located on the right side on the river in both the Plaintiff's Map and the Defendant's Map.



196. DW 1 then referred to the Defendant's Sketch Map and indicated that the correct position of the Defendant's Camp was the spot marked in Red.
197. The spot marked in Red is directly opposite Tangulia Camp across the river and this is the correct situation on the ground.
198. On the Sketch Map produced by the Plaintiff, the location of Tangulia Camp is directly opposite each other which is true.
199. In reference to Sketch Map produced by the Defendant, the area known as Olonana Kenya Sanctuary is not in the position that the DW 1 was shown as the leased area by Enkutoto Eco-Tourism Trust.
200. DW 1 stated that the point marked as Olonana Lodge is actually where the Plaintiff has built its camp.
201. DW 1 referring to the Defence Sketch Map identified the access road to the Defendant's Leased portion as that marked with arrows on the map.
202. However, DW 1 admitted that at the time this access road was being identified, he was not present on the ground.
203. DW 1 informed the Honourable Court that the people on the ground on the day of mapping out the access road to the Defendant's portion was his deceased wife and the Manager.
204. DW 1 further stated that even at the time of identifying the Leased portion to be occupied by the Defendant, he was also not present.
205. DW 1 then referred to the Lease Agreement dated 30/03/2017 which was between Enkutoto Eco-Tourism Trust and the Defendant.
206. DW 1 confirmed that at the time of executing the Lease Agreement dated 30/03/2017, the Plaintiff had already built his Camp on the ground.
207. According to DW 1, at the time of Leasing the 20 acres, the only portion which had been leased to the Plaintiff was approximately 100 acres.
208. The balance of 216 Acres within Enkutoto Eco-Tourism Trust was still not leased out to anyone.
209. Consequently therefore, according to DW 1, the access road to the Defendant's Leased portion was not within the Plaintiff's Leased portion of land.
210. Unfortunately, Enkutoto Eco-Tourism Trust had not demarcated the 100 acres leased to the Plaintiff on the ground.
211. DW 1 testified that the Lease Agreement dated 30/03/2017 was executed by a number of Members of Enkutoto Eco-Tourism Trust on the 28/03/2017 and others on various dates thereafter.
212. DW 1 then referred to Page 40-41 of his Exhibits to show the members of Enkutoto Eco-Tourism Trust that were present on 28/03/2017.
213. DW 1 stated that before the Lease Agreement dated 28/03/2017 was executed, an advance copy was supplied to the members of Enkutoto Eco-Tourism Trust although he did not have evidence to that effect.
214. DW 1 further testified that the mutual advocate handling the said transaction duly explained the contents of the Lease Agreement dated 30/03/2017 before the members of Enkutoto Eco-Tourism Trust executed the same.



215. Consequently therefore, the allegation by PW 2 that they were told to just sign was not true of the manner the Lease Agreement was executed.
216. DW 1 informed the Honourable Court that according to mutual advocates position was that although the members of Enkutoto Eco-Tourism Trust were nine, only five of them were the Trustees and it was mandatory for them to sign.
217. DW 1 referred to Clause 4.4. in the Lease Agreement dated 30/03/2017 which specifically required Enkutoto Eco-Tourism Trust to provide an access road to the Defendant's camp.
218. Further to that, Clause 6 in the Lease Agreement dated 30/03/2017 granted permission to the Defendant to develop an airstrip within the 20 acres leased.
219. According to DW 1, Clause 8 of the Lease Agreement dated 30/03/2017 did not affect the area Leased by the Plaintiff and the two camps were not adjacent to each other.
220. DW 1 informed the Honourable Court that at the time of negotiating for the Lease with Enkutoto Eco-Tourism Trust, the entire property have a caution registered on it.
221. It is only after the cancellation of the caution on the entire property which was in April 2017 that the Defendant paid its rental premium.
222. DW 1 confirmed to the Honourable Court that a payment of Kshs 275,000/- was paid to Enkutoto Eco-Tourism Trust on the 07/04/2017 and no other payment has ever been made thereafter.
223. DW 1 referred to the Land Control Board Application and Consent permitting the Leasing of the 20 acres portion to the Defendant from the property known as Transmara/Kimintet "D"/479.
224. DW 1 informed the Honourable Court that the said Consent was obtained before execution of the Lease Agreement on the 30/03/2017.
225. Further to that, DW 1 stated that the Defendant was required to obtain various approvals from Kenya Wildlife Services, the National Environmental Management Authority and the County Government of Narok before construction began.
226. All these approvals were obtained by the Defendant with the one from the County Government of Narok issued on 27/07/2017 being on page 66 of the Defendant's documents.
227. Unfortunately, the Building Permit from the County Government of Narok issued on the 27/07/2017 was withdrawn without proper justifications.
228. DW 1 informed the Honourable Court that due to this unlawful withdrawal of the County Government of Narok permit, the Defendant filed a suit in Narok known as Narok Judicial Review Application No. 23 Of 2017.
229. DW 1 stated that the outcome of this Application known as Narok Judicial Review Application No. 23 Of 2017 was that the withdrawal was lawful and I thereafter stopped construction.
230. As regards the Environmental Impact Assessment, DW 1 confirmed that the process of obtaining the same began sometime in March 2017 which was before the execution of the Lease Agreement between the Defendant and Enkutoto Eco-Tourism Trust.
231. DW 1 stated that this process was undertaken by the deceased Director and the manager as shown in the minutes of the stakeholders meetings dated 27/03/2017 and 28/03/2017.



232. However, the said Environmental Impact Assessment Report does not indicate whether or not members of Enkutoto Eco-Tourism Trust participated as well as the other neighbouring lodges participated thereof.
233. DW 1 also referred to the Valuation Report produced on Page 197 to 207 of the Defendant's documents.
234. DW 1 stated that a Valuation Report was done in January 2018 after the demolition of the Defendant's camp.
235. According to the Valuation Report commissioned by the Defendant, at the time of demolition, there were 5 tents with concrete foundations, shower, bathtubs, employees' accommodation which comprised of one house with 5 rooms as well as toilets and showers.
236. In addition to the above, there was also the main house which had a kitchen, office room, restaurant and a honeymoon suite as well as the director's house.
237. Around the Mara Rafiki Camp, there was a fence and a gate at the entrance and all this work signifies 85 % completion rate of the said camp.
238. DW 1 then relied upon the Building Quotation contained in the Valuation Report and requested the Honourable Court to consider the values therein as the costs of the construction undertaken at the time of demolition.
239. DW 1 in prosecution of the Counter-Claim dated 07/08/2019 sought the Honourable Court to hold the Plaintiff liable for the costs of the damages caused by the demolition.
240. DW 1 claim against the Plaintiff was for a sum of KShs 221,310,201/- which included the costs of the demolished camp and other costs thereof.
241. DW 1 reiterated his evidence that he indeed constructed the Mara Rafiki Camp in line with the norms and practices within the Mara Reserve and even produced an Inspection Report dated 26/07/2019 on Page 216 of the Defendant's bundle of exhibits.
242. DW 1 stated that construction of the Defendant's camp had began before 26/07/2022.
243. According to DW 1, the demolition of the Defendant's camp was done after complains from the Plaintiff to the County Executive Committee Member were made.
244. Referring to Page 177 and 178, DW 1 informed the Honourable Court that the Plaintiff herein, Enkutoto Eco-Tourism Trust and Tangulia Camp had all filed complains against the Defendant herein.
245. In re-examination, DW 1 reiterated that a Lease Agreement was done before 28/03/2022.
246. DW 1 stated that on the 28/02/2022, parties were just to execute the same only.
247. DW 1 informed the Honourable Court that the exercise of executing the Lease Agreement was to be undertaken by the advocate who was acting for the parties.
248. DW 1 further stated that the Plaintiff was not mentioned to be in occupation of any portion of the property known as L.R.No.Transmara/Kimintet "D"/497 in the Lease Agreement dated 28/03/2022.
249. DW 1 stated that he did not do any due diligence of the Green Card of L.R.No. Transmara/Kimintet "D"/497 to ascertain if the Plaintiff had any property interested over the property.



250. DW 1 indicated that none of the members of Enkutoto Eco-Tourism Trust had raised any issue with the Defendant's Lease and therefore the same still stands binding up to date.
251. DW 1 confirmed to the Honourable Court that the rental premium of KShs 275,000/- paid to the Enkutoto Eco-Tourism Trust was only for one year and no more premiums have been paid.
252. DW 1 further insisted that all building approvals were duly obtained and no letter was ever received from either Kenya Wildlife Services and/or the National Environment Management Authority citing any interference with nature or wildlife.
253. In concluding his re-examination, DW 1 stated that all the travel expenses incurred in this file was solely for the purposes of handling this case and not any other reason.
254. The second Defence witness was Jackson Koitomet (hereinafter referred to as "DW 2")
255. DW 2 introduced himself as the Executive Director of Ole Sugut Conservation Limited which was a consortium of various land owners including Enkutoto Eco-Tourism Trust who are the registered owners of the property known L.R.No.Transmara/Kimintet "D"/479.
256. DW 2 began his testimony by indicating that the property known as L.R.No. Transmara/Kimintet "D"/479 was not within the Mara Game Reserve.
257. DW 2 further stated that he had prepared, signed and filed a witness statement dated 20/10/2019 and adopted the same as his evidence in chief.
258. DW 2 confirmed that he knew the Defendant after it approached this office to consult on ways of developing a lodge within its area.
259. DW 2 stated that some questionnaires requesting for comments on the anticipated project to be undertaken by the Defendant were served in his office as part of an Environmental Impact Assessment report.
260. DW 2 then consulted the other land owners within Ole Sugut Conservation Limited including Enkutoto Eco-tourism Trust and after discussions thereof, there was an objection for the Defendant to continue construction of the proposed site.
261. DW 2 concluded that he had no personal interest in the Defendant Company or its operations therein.
262. In cross-examination, DW 2 reiterated that he was the executive director of Ole Sugut Conservation Limited with a mandate of ensuring that the properties within the conservancy follow established guidelines on tourism, conservation and income generating activities.
263. DW 2 indicated that Ole Sugut Conservation Limited had Articles of Association, Management Plans and policies which were binding on all land owners as well as investors therein.
264. DW 2 informed the Honourable Court that indeed if a land owner or an investor did not follow the rules and regulations of the conservancy, then a report would be made to the technical committee which after deliberations would compel the land owner or investor in breach to rectify such a breach.
265. If the land owner or investor failed to rectify the potential or existing breach, then such an issue would be escalated to the Management committee for further directions.



266. DW 2 confirmed knowledge of the Plaintiff and confirmed that they had been operating a camp within the property known as L.R.No. Transmara/Kimintet "D"/479 owned by Enkutoto Eco-Tourism Trust since the year 1993.
267. DW 2 testified that he came to know about the Defendant when Questionnaires were presented in their offices during the Environmental Impact Assessment studies by their consultants.
268. DW 2 recollected that the Defendant's Consultant visited their offices all alone on the 26/07/2017.
269. Thereafter, DW 2 again met the Defendant's Consultants when there was a validation meeting of the Environment Impact Assessment Report in the same year.
270. The exercise of validating of the Environmental Impact Assessment Report is confirmation of what stakeholders within the area have commented on the project as contained in a draft Report.
271. DW 2 confirmed that the Validation meeting was undertaken in the suit property known as L.R.No. Transmara/Kimintet "D"/479 and there was no meeting in Narok.
272. DW 2 denied ever attending any meeting in Narok on the 27/03/2017 and further stated that he was not Jackson Ole Mpano who is discussed in the said Minutes.
273. DW 2 reiterated that he had received the Questionnaire and attended the validation meeting.
274. DW 2 referring to the Environmental Impact Assessment Report explained that the Consultants did not disclose the nature of development to be done on the ground.
275. However, DW 2 confirmed to have received the development plans from the Defendant himself.
276. During the answering of the Questionnaire presented by the Defendant's Consultant, DW 2 personally called one Sitato Ole Monkuli Enkolet who was one of the members of Enkutoto Eco-Tourism Trust and he confirmed that a portion of 20 acres within L.R.No. Transmara/Kimintet "D"/479 had been leased to the Defendant.
277. DW 2 informed the Honourable Court that at the time of filling the Questionnaire and validation meeting, the Defendant had not developed any structures on the leased portion.
278. DW 2 confirmed to the Honourable Court that as a Conservancy, they did not have any objection regarding the Defendant's development plans.
279. DW 2 further stated that at the time of filing the Questionnaire, the Defendants had not presented the development plans but the members of Enkutoto Eco-Tourism Trust informed him that it was a camp being developed.
280. DW 2 informed the Honourable Court that at the time of discussing the Questionnaire, the members of Enkutoto Eco-Tourism Trust had informed him that the Plaintiff had only rights over a portion 100 acres and the rest of the land within L.R.No. Transmara/Kimintet "D"/479 was available for further lease.
281. DW 2 confirmed he personally visited the leased portion to the Defendant which was identified by the members of Enkutoto Eco-Tourism Trust.
282. According to the Defendant's sketch map, the Defendant's camp was located as the point marked in red dot.



283. DW 2 stated before the Honourable Court that he made various visits on the Defendant's construction site before and after demolition and confirmed that it was at the same location the members of Enkutoto Eco-Tourist Trust had shown him.
284. DW 2 informed the Honourable Court that Defendant's Camp was demolished because of differences between Enkutoto Eco-Tourism Trust and the Defendant over the location of where the development should be done.
285. DW 2 insisted that the Defendant had undertaken construction within the area as was shown by the members of Enkutoto Eco-Tourism Trust but there was an issue that his reception was visible from the Plaintiff's camp.
286. DW 2 stated that this dispute was notified to his office but despite mediation, the parties did not agree.
287. DW 2 indicated after this failed mediation, the Defendant relocated the reception to another location but the members of Enkutoto Eco-Tourist Trust filed a suit against him of which particulars were not within his knowledge.
288. DW 2 further stated that after the relocation of the Defendant's reception, Tangulia Lodge and members of Enkutoto Eco-Tourism Trust lodged a complaint that the Defendant was building at a wrong spot and the County Government of Narok issued a stop order.
289. Thereafter, DW 2 informed the Honourable Court that the Defendant stopped construction and visited the County Government of Narok offices to explain his side of the story.
290. According to DW 2, the Stop Order was thereafter lifted and the Defendant continued to develop his camp although there was no evidence of the Stop order being lifted.
291. DW 2 confirmed that the Defendant had obtained a Letter of Authority to Build issued on 27/07/2017.
292. DW 2 reiterated that all construction permits had been obtained including from Kenya Wildlife Services although he did not have any evidence to that effect.
293. According to DW 2 opinion, the Plaintiff's herein had leased only 100 acres on the property known as L.R.No.Transmara/Kimintet "D"/479 but did not want the landlord to lease the remaining land to other investors.
294. Consequently therefore, when the Defendant leased the portion of 20 acres, the Plaintiff developed an interest to lease the remaining portion to lock out any other investor.
295. In re-examination, DW 2 referred to the Authorisation Letter issued by the Department of Physical Planning which was copied to the Department of Tourism.
296. DW 2 also referred to the Letter stopping the development from the Department of Tourism and Wildlife.
297. DW 2 pointed out that the Letter stopping the development from the Department of Tourism and Wildlife was never copied to the Department of Physical Planning.
298. DW 2 indicated that both Kenya Wildlife Services and National Environmental Management Authority gave written consent for the construction of the Defendant's Camp.
299. DW 2 further stated that the description of the development by the Defendant was in the Environmental Impact Assessment Report.



300. In conclusion thereof, DW 2 informed the Honourable Court that the Environmental Impact Assessment Report was good and covered all the required specifications therein.
301. The third Defence Witness was Gideon Kimai (hereinafter referred to as “DW 3”).
302. DW 3 introduced himself as a Manager of the Defendant Company.
303. DW 3 informed the Honourable Court that he had prepared, signed and filed a Witness statement dated 30/10/2019 which he adopted as his evidence in chief thereof.
304. DW 3 confirmed that indeed Mara Rafiki Camp was demolished although there was no notice to vacate the leased portion by the landlords Enkutoto Eco-Tourism Trust.
305. DW 3 stated that the demolition of the Mara Rafiki Camp was done by local rangers from County Government of Narok.
306. DW 3 further stated that after the demolition, the Defendant was served with a demolition order which had been obtained by the Plaintiff herein.
307. DW 3 confirmed that at the time of demolition, there were about 8 structures on the construction site which included the main structure, five tents near the river but within the allowed distance by the National Environmental Management Authority.
308. The other structures were far away from the river bank but all the structures were demolished including the power house and main gate.
309. DW 3 indicated that the Defendant had a valid lease agreement which was registered against the mother Title known as L.R.No. Transmara/Kimintet “D”/479 and he was not aware of any other registered Lease on the said property.
310. In cross-examination, DW 3 reiterated that he is the manager of the Defendant company.
311. DW 3 outlined his duties as a manager to include supervision of all the developments on the construction site.
312. DW 3 denied having any relationship with the Plaintiff currently although he admitted to have worked for the Plaintiff as a housekeeper in its Camp.
313. DW 3 stated that at the time he worked for the Plaintiff, the portion which had been leased to them was only 100 acres within the property known as L.R.No. Transmara/Kimintet “D”/479.
314. DW 3 informed the Honourable Court that his father was Paul Koiyanto Kimai who was also a member of Enkutoto Eco-tourism Trust and therefore one of the Landlords.
315. DW 3 confirmed to the Honourable Court that he was the person that introduced the Defendant to the members of Enkutoto Eco-Tourism Trust and assisted the in identification of the Leased portion measuring 20 acres.
316. DW 3 denied knowledge of any information to the effect that the Plaintiff herein was in negotiation with the members of Enkutoto Eco-Tourism Trust over the remaining portion of L.R.No.Transmara/Kimintet “D”/479 at the time the Defendant was negotiating and executing the Lease Agreement for the portion of 20 acres.
317. DW 3 could not with certainty confirm when the Defendant first expressed its interested to lease a portion of the property known as L.R.No.Transmara/Kimintet “D”/479 but believed it was in 2015 or 2016.



318. DW 3 admitted being familiar with one William Abongo who he said was not a relative but a friend.
319. DW 3 informed the Honourable Court he was the one that had approached William Abongo to help in the construction of the Defendant's camp which was around 2015.
320. DW 3 also testified to the effect that the directors of the Defendant together with the contractors had visited the construction site many times before it actually began.
321. DW 3 confirmed that he was the one that had identified the Advocate who prepared and executed the Lease Agreement between Enkutoto Eco-Tourism Trust and the Defendant.
322. DW 3 indicated that at the time of execution of the Lease Agreement between Enkutoto Eco-Tourism Trust and the Defendant, most of the Landlords were present.
323. DW 3 then referred to a number of photographs which were taken during the execution process undertaken by some of the members of Enkutoto Eco-Tourism Trust.
324. DW 3 confirmed to the Honourable Court that the executed Lease Agreement was thereafter registered upon payment of the relevant stamp duty.
325. DW 3 informed the Honourable Court that the Advocate handling the Lease Agreement duly read and explained the contents to the members of Enkutoto Eco-Tourism Trust before they executed the same.
326. DW 3 indicated that at the time the Lease Agreement dated 30/03/2017 was being executed, the exact location of where the Defendant's Camp could be built had already been identified.
327. DW 3 admitted being familiar with Patrick Opiyo but could not remember if a survey had been undertaken in the report dated 22/07/2017.
328. DW 3 stated that after the execution of the Lease Agreement dated 30/03/2017, construction on the Defendant's construction site began once the Bills of Quantity were approved.
329. DW 3 also confirmed that the Defendant had obtained the relevant Environmental Impact Assessment Report and a license from the National Environment Management Authority on the 06/07/2017.
330. DW 3 indicated that before the demolition was done, there was a letter received from the Department of Tourism stopping the construction of the Defendant's Camp.
331. The main issue in the said letter from the Department of Tourism was to avail our documents including building permits and approvals.
332. DW 3 confirmed that the Defendant's building permits and approvals were then supplied to the Department of Tourism who approved the carrying on of the Defendant's Camp.
333. During this period of supplying documents to the Department of Tourism, the contractor William Abongo and DW 3 were arrested and thereafter released.
334. DW 3 further indicated that the Court gave an order on the 23/11/2017 that the Defendant could continue with construction of the camp.
335. DW 3 testified that the Defendant was not given any letter withdrawing the Stop Order before proceeding with construction.
336. DW 3 stated that the main reason the Defendant filed the proceeding known as Narok Judicial Review No. 23 Of 2017 was because the County Government of Narok officials kept disturbing them on the construction site.



337. DW 3 confirmed that he had participated in the Environmental Impact assessment as a resident and his particulars appears on the Participants list.
338. DW 3 informed the Honourable Court that the caution on L.R.No.Transmara/Kimintet “D”/479 had been registered by his father but the same was ultimately removed.
339. DW 3 denied the allegation that the Defendant’s construction site was next to Governor’s Balls because the property known as L.R.No.Transmara/Kimintet “D”/479 is not located near the property occupied by Governor’s Ball.
340. DW 3 in reference to the Defendant’s Sketch Map confirmed that the Defendant’s Camp was as drawn therein while the Plaintiff was also marked as it exists on the ground.
341. DW 3 stated that he was aware that some of the members of Enkutoto Eco-Tourism Trust filed a suit against the Defendant on the allegation that he had built on the wrong place but was not aware of the outcome therein.
342. DW 3 insisted that the demolition orders were served after the demolition had actually happened and also their lawyer was not aware of the existing case that issued the said orders.
343. In re-examination, DW 3 reiterated that the Defendant’s Sketch Map was the true reflection of the ground.
344. DW 3 confirmed that the Defendant’s camp was to be built where it was marked in red on the Defendant’s Sketch Map.
345. DW 3 disputed the Landlords allegations that the Defendant built on the wrong place as provided in the Lease Agreement dated 30/03/2017.
346. At the end of DW 3 testimony, the Defence also closed its case thereof and parties were then directed to prepare, file and serve their submissions thereof.
347. The Honourable Court has indeed perused the parties pleadings, the numerous witness statements, the voluminous bundles of documents and the written submissions thereof and hereby outline the issues for determination as follows;-

Issue No.1- What Amount Of Acreage Is The Plaintiff Entitled In The Property Known As L.R.No.Transmara/Kimintet “D”/479?

Issue No. 2- Is The Plaintiff Entitled To The Reliefs Sought In The Plaint Dated 20th Of December 2017?

Issue No.3- Is The Defendant’s Lease Agreement Dated 30/03/2017 Lawful And Binding?

Issue No. 4- Was The Demolition Of The Defendant’s Construction Within Its Leased Area Lawful?

Issue No. 5- Is The Defendant Entitled To The Reliefs Sought In The Counter-claim?

Issue No. 6- Who Bears The Costs Of The Plaint And Counter-claim Herein?

348. The Honourable Court having duly identified the core issues for determination, then it shall proceed to evaluate the same against the pleadings and evidence provided by the witnesses herein and arrive at its determinations thereof.



Issue No.1- What Amount Of Acreage Is The Plaintiff Entitled In The Property Known As L.R.No.Transmara/Kimintet “D”/479?

349. The Plaintiff instituted this suit through a Plaint filed on the 21st December 2017 seeking the following Orders;-
- vi. A permanent injunction restraining the Defendant by itself, its agents and/or servants whatsoever from encroaching onto, trespassing onto or otherwise interfering in any manner whatsoever with the Plaintiff’s use, quiet and peaceful entitlement, occupation and use of part of all that parcel of land and/or any of all that parcel of land known as Land Reference Number Transmara/Kimintet “D”/497.
 - vii. A permanent injunction restraining the Defendant by itself, its agents and/or servants whatsoever from dealing with, constructing any structures thereon on the Plaintiff’s parcel of land and/or any of all that Parcel of Land Reference Number Transmara/Kimintet “D”/497.
 - viii. A mandatory injunction directing the Defendant by itself, its agents and/or servants or otherwise howsoever to forthwith remove the construction material deposited on the banks of the Mara River and any structures erected thereon failing which the same be removed by the Plaintiff at the Defendants costs and expense.
 - ix. The Defendant be ordered to pay the Plaintiff damages for the trespass.
 - x. The Defendant be ordered to pay the Plaintiff’s costs on this suit.
350. The understanding of this Honourable Court as regards the Plaintiff’s prayers (a), (b), (c) is that the entire property known as L.R.No.Transmara/Kimintet “D”/479 is exclusively leased, possessed and/or utilised by the Plaintiff to the exclusion of the Defendant herein.
351. The Defendant on the other hand has opposed the said prayers by claiming Tenancy Rights over a portion of 20 acres within the property known as L.R.No.Transmara/Kimintet “D”/479 pursuant to a Lease Agreement dated 30/03/2017.
352. The evidence of the Plaintiff’s witnesses began with the creation of a Lease Agreement between Enkutoto Eco-Tourism Trust and the Plaintiff in the year 1997 for a portion of 100 Acres for a period of approximately 30 years.
353. Based on this Lease Agreement entered into in the year 1997, the Plaintiff entered the portion measuring approximately 100 Acres, established a Tented Camp and has all through enjoyed exclusive possession of the said lease area.
354. On the other hand, the Defendant in the years between 2015 and 2017 approached Enkutoto Eco-Tourism Trust with an intention of Leasing a portion of 20 acres within the remaining portion of property known as L.R.No.Transmara/Kimintet “D”/479.
355. This expression of interest was followed with an offer from Enkutoto Eco-Tourism Trust and upon the Defendant accepting the said offer, a Lease Agreement dated 30/03/2017 was duly executed and registered on the mother title of L.R.No. Transmara/Kimintet “D”/479.
356. The Plaintiff’s director as well as representatives of Enkutoto Eco-Tourism Trust who testified stated that the total acreage which had since been Leased to the Plaintiff was a total of 316 acres out of the total 336 acres which is contained in the title L.R.No. Transmara/Kimintet “D”/479.



357. The amount of acreage claimed by the Plaintiff is the initial 100 acres Leased in 1997 added to the 216 acres Leased on the 1st of June 2017.
358. Similarly, the Plaintiff's Director and the various witness from Enkutoto eco-Tourism Trust testified in Court and wrote in their witness statements that the Defendant expressed an interest to Lease a portion of 20 acres within the property known as L.R.No. Transmara/Kimintet "D"/479 which intention was accepted and a Lease Agreement dated 30/03/2017 executed.
359. The Defendant has indeed produced the executed and registered Lease Agreement dated 30/03/2017 for the portion of 20 acres on the property known as L.R.No. Transmara/Kimintet "D"/479.
360. Further to this, the Defendant also provided various approvals from relevant Government entities including the National Environmental Management Authority as well as the County Government of Narok authorising the construction of a Tourist Camp on the portion of 20 areas with L.R.No. Transmara/Kimintet "D"/479.
361. The Plaintiff witnesses in their evidence and statements produced various documents from the County Government of Narok seeking to stop the Defendant's construction on the portion of 20 acres on the property known as L.R.No. Transmara/Kimintet "D"/479.
362. Looking at all this evidence before the Honourable Court, it is clear that the Defendant had taken possession of the Leased portion of 20 Acres within the property known as L.R.No. Transmara/Kimintet "D"/479.
363. Consequently therefore, it is the Honourable Court's considered view that the Plaintiff did not and does not have exclusive ownership rights in the form of either a Lease or Leases for the entire L.R.No. Transmara/Kimintet "D"/479.
364. The Defendant in their Bundle of Documents as Page 211 has produced an Official Search for the property known as L.R.No. Transmara/Kimintet "D"/479 confirming that the Lease Agreement between Enkutoto Eco-Tourism Trust and the Defendant was and is still recognised as legitimate on the mother title.
365. The evidence placed before this Honourable Court further confirms the position that the Plaintiff is not the only tenant over the property known as L.R.No. Transmara/Kimintet "D"/479 as depicted in the prayers sought in the Plaintiff.
366. The next question in the mind of the Honourable Court is if the Plaintiff is not entitled to the entire property known as L.R.No. Transmara/Kimintet "D"/279 measuring 336 acres, then what is the lawful acreage for the exclusive possession and/or use by the Plaintiff?
367. The Plaintiff's director as well as their witnesses have all testified that the Plaintiff was granted a Lease Agreement over a portion of 100 acres within L.R.No. Transmara/Kimintet "D"/279 on or about 1st September 1997 for a period of approximately 30 years.
368. This initial Lease executed on 1st September 1997 was never produced as evidence in Court by the Plaintiff and/or Enkutoto Eco-Tourism Trust officials.
369. However, there was a confirmation by the Plaintiff's Director as well as the Enkutoto Eco-Tourism Trust officials that the Lease Agreement executed in the year 1997 had since lapsed.
370. The Lease Agreement produced by the Plaintiff's witness before the Honourable Court was the one executed on the 1st of June 2017 for a portion of 216 acres within the property known as L.R.No. Transmara/Kimintet "D"/479.



371. The Honourable Court has indeed thoroughly perused the Lease Agreement dated 1st June 2017 and would like to point out some crucial details in the said document.

372. Paragraph 3 of the Lease Agreement dated 1st June 2017 provides as follows;-

“The land acreage is Eighty-seven Decimal Nought Five One (87.51) Hectares (two Hundred And Sixteen Nought Two Three Six (216.236 Acres) which is subject to confirmation by a surveyor appointed by both parties and also subject to the provisional RIM or Survey Map.”

373. Paragraph 4 of the same Lease Agreement dated 1st June 2017 further provided as follows;-

“By a Lease Agreement dated 1st September One Hundred Nine Hundred and Ninety Seven between the Tenant and the Trust’s predecessors in title to the land therein named and described the Tenant and was allowed to develop a tourist accommodation facility comprising of a lodge together with other ancillary recreation and hospitality structures known as Sanctuary Olonana (hereinafter referred to as “the camp”).”

374. Lastly, the Honourable Court would like to highlight the provisions of Paragraph 5 of the Lease Agreement dated 1st June 2017 which states as follows;-

“The Trust has agreed with the Tenant to grant to the Tenant a Lease of the Land subject as is hereinafter provided for the consideration at the rent and on the terms and conditions hereinafter appearing, now this instrument of lease witnesseth as follows;-

In consideration of the rent hereinafter reserved and the covenants by the tenant hereinafter contained in the trust hereby demise unto the tenant Eighty Seven Decimal Nought Five One (87.51) Hectares (two Hundred And Sixteen Nought Two Three Six (216.236) thereabout of all that land hereinbefore described together with the buildings and improvements erected and being thereon and together also with the right at all times for the tenants its servants agents and visitors to use in common with all other persons having like rights the roads across and on the land and also on any other property of the Trust adjacent to the land for the purposes of ingress to and egress from the land

375. The Honourable Court’s understanding of the portion Leased to the Plaintiff in the Lease Agreement was that the building and improvements erected and being thereof were within the area measuring 216 acres and not in a separate Lease as alleged by the Plaintiff’s Director and the members of Enkutoto Eco-Tourism Trust.

376. In essence therefore, the Honourable Court is of the considered view that the only portion which the Plaintiff has a valid Lease with Enkutoto Eco-Tourism Trust is 216 Acres on the property known as L.R.No.Transmara/Kimintet “D”/479 which is approximately 336 acres.

377. There is no evidence placed before the Honourable Court to show that the initial Lease Agreement dated 01/07/1997 for a portion of 100 acres was renewed and or its term extended to create proprietary rights in favour of the Plaintiff herein as claimed in their testimony during the hearing of this suit.



Issue No. 2- Is The Plaintiff Entitled To The Reliefs Sought In The Plaint Dated 20th Of December 2017?

378. The prayers in the Plaint dated 20th December 2017 are premised on the ground that the entire property known as L.R.No. Transmara/Kimintet “D”/479 is lawfully leased to the Plaintiff herein.
379. Unfortunately, the finding of the Honourable Court is that the only evidence placed before it by the Plaintiff is the Lease Agreement dated 01/07/2017 which alienates ownership rights over a portion of 216 Acres only out of the 336 Acres within the property known as L.R.No.Transmara/Kimintet “D”/479.
380. In essence therefore, the Plaintiff’s orders seeking to permanently injunct the Defendant from accessing, using and/or developing of the remaining portion of the property known as L.R.No.Transmara/Kimintet “D”/479 as prayed under Prayer A and B cannot be granted.
381. Further to that, the Plaintiff’s Prayer C which is a mandatory Order against the Defendant to remove any construction material deposited on the banks of the Mara River and/or any structures erected thereon failing to which the same be removed by the Plaintiff has since been overtaken by events as the Defendant’s construction was demolished way back in the 2018.
382. As regards Prayer D, the Plaintiff is seeking any order of damages for an alleged trespass by the Defendant.
383. The Honourable Court has duly noted that the Plaintiff is only entitled to a portion of 216 Acres out of the 336 Acres within the property known as L.R.No.Transmara/Kimintet “D”/479.
384. There is no evidence placed before the Honourable Court that the Defendant’s construction was being undertaken within the portion of 216 Acres leased to the Plaintiff based on the Lease Agreement dated 1/06/2017.
385. The evidence on record point to the Defendant’s entry and/or occupation of the property known as L.R.No.Transmara/Kimintet “D”/479 to be by virtue of the Lease Agreement executed on the 30/03/2017 and duly registered with the Land Department thereof.
386. The Plaintiff’s Director confirmed this fact during the cross examination by stating that there was no trespass on to the portion Leased to the Plaintiff by the Defendant.
387. In conclusion therefore, the Plaintiff’s Prayer D is also denied thereof.

Issue No.3- Is The Defendant’s Lease Agreement Dated 30/03/2017 Lawful And Binding?

388. The Defendant in his evidence in chief informed the Court that he was granted a Lease Agreement dated 30/03/2017 over a portion of 20 acres within the property known as L.R.No.Transmara/Kimintet “D”/479.
389. This testimony was also confirmed by all the Defendants witnesses and also all the witnesses called by the Plaintiff.
390. The Plaintiff in their Defence to the Counter-Claim as well as their cross-examination of the Defendant’s director and the Manager raised issues on whether or not the said Lease Agreement dated 30/03/2017 was properly executed by the members of Enkutoto Eco-Tourism Trust.



391. Based on the evidence placed before the Honourable Court by the Defendant's director and the Manager, it is clear that most of the members of Enkutoto Eco-Tourism Trust signed the said Lease Agreement dated 30/03/2017 voluntarily and even consented to be taken photographs while doing so.
392. The said Lease Agreement dated 30/03/2017 was then duly registered with the Lands Department on the same day 30/03/2017.
393. So far, there is no evidence that Enkutoto Eco-Tourism Trust has terminated the said Lease Agreement dated 30/03/2017 which was to last for a period of 15 years.
394. This fact was clearly expressed through the evidence of one Sitato Oloimambali who at the conclusion of his evidence in chief stated that the Defendant's Lease Agreement dated 30/03/2017 had not been cancelled by Enkutoto Eco-Tourism Trust.
395. In essence therefore, the Honourable Court hereby makes a finding that the Defendant's Lease Agreement dated 30/03/2017 over a portion of 20 acres within L.R.No.Transmara/Kimintet "D"/479 owned by Enkutoto Eco-Tourism Trust is lawful and binding.

Issue No. 4- Was The Plaintiff Responsible For The Demolition Of The Defendant's Camp As Alleged In The Counter-claim?

396. The Defendant in its Amended Statement of Defence dated 7th August 2019 has raised a Counter-Claim against the Plaintiff seeking for the following Orders;-
 - a. Special Damages of KShs 221,310,201/-
 - b. Exemplary/Punitive damages
 - c. General damages
 - d. Costs
 - e. Interest on (a) from the date of the filing of the suit until full payment.
397. The grounds upon which the Defendant is seeking the prayers in the Counter Claim against the Plaintiff are outlined from Paragraph 21,22, 23 and most importantly in Paragraph 24.
398. The Defendant in Paragraph 21 states that the Plaintiff in seeking the Mandatory Orders issued on the 20th of December 2017 did not disclose to the Honourable Judge of the existence of another suit known as Judicial Review Misc Application No. 23 Of 2017 which was between Mara Rafiki Limited(Ex-parte Applicant)-versus- Narok County Executive Of Lands, Housing & Physical Planning & Korinko Ole Koisamou (1st & 2Nd Respondent) And Camp Olonana Sanctuary, Enkutoto Eco-tourism Trust And Tangulia Camp (1st , 2Nd And 3Rd Interested Parties.)
399. According to the Defendant's pleadings, the Honourable Court had issued a Stay Order on the 23rd November 2017 prohibiting the 1st Respondent from implementing and/or executing the contents of the letter dated 5th day of October 2017 which in essence would stop the construction of the approved developments on the land known as L.R.No. Transmara/Kimintet "D"/479.
400. Consequently therefore, it was necessary that the Plaintiff while instituting this present suit and seeking the mandatory orders issued 20th December 2017 should have disclosed to the Honourable Court the existence of the Orders issued on the 5th October 2017 in JUDICIAL REVIEW Misc.application No. 23 Of 2017.



401. The Defendant position is that if such a disclosure would have been made to the Honourable Court in this present suit, then the mandatory orders issued on the 20th of December 2017 would not have been issued and/or any demolitions occurred.
402. In essence therefore, the Defendant seeks this Honourable Court to hold the Plaintiff liable for the said demolition of their structures on the property known as L.R.No.Transmara/Kimintet “D”/479.
403. The Plaintiff in the Defence to the Counter-Claim dated 17th August 2018 denied the allegations of misrepresentation in this suit and in particular the Application seeking for Mandatory Orders dated 20th of December 2017.
404. The Plaintiff’s position was that the Application dated 20th of December 2017 was not seeking to demolish the Defendant’s structures on the property known as L.R.No.Transmara/Kimintet “D”/479 but to remove various materials which had been placed on the banks of the Mara River by the Defendant.
405. The Plaintiff is of the view that the Orders issued on the 20th of December 2017 were lawful and valid having been issued upon full disclosure to the Honourable Court and specifically to reserve the Mara River.
406. Further to that, the Plaintiff pleaded that the Defendant should be barred from drawing this Honourable Court to make findings and/or determine the validity of the orders issued on the 20th December 2017 as against those issued on the 23rd of November 2017 in Judicial Review Application No. 23 Of 2017 as the later orders have since been vacated.
407. Indeed, the fundamental question in evaluating the success of the Counter-Claim is who actually demolished the Defendant’s structures on the property known as L.R.No. Transmara/Kimintet “D”/479.
408. The Defendant in their Counter-Claim are stating that the Orders issued on the 20th of December 2017 to the Plaintiff in this proceedings are the ones used to demolish their structures on the property known as L.R.No.Transmara/Kimintet “D”/479.
409. The Mandatory Orders issued on the 20th of December 2017 in this suit read as follows:-
- “A mandatory injunction be and is hereby issued against the Defendant whether by itself, its agents and/or servants or otherwise howsoever to forthwith remove the construction material deposited on the banks of the Mara River and any structure erected thereon failing which the same be removed by the Plaintiff at the Defendant’s Costs and expense.”
410. A plain reading of this Mandatory Order issued on 20th December 2017 provides two salient directions by the Honourable Court.
- a. The things to be removed from the Defendant’s portion of land are construction materials and/or any structures that have been deposited and/or erected on the banks of the Mara River.
- b. In the event the said Order is served on the Defendant and there is no compliance, then the Plaintiff was at liberty to execute the said order and all costs are passed to the Defendant.
411. Turning to the evidence produced during the trial of this suit, the Defendant called a total of 4 witnesses.
412. However, the important witnesses for the purpose of determining the issue at hand are principally two witnesses namely Uwe Herdes and William Ambila Abongo.



413. The first witness Uwe Herdes who is also a director of the Defendant company prepared and filed a witness statement dated 24th October 2019 which he adopted during the hearing of this proceedings as his evidence in chief.

414. The witness statement by Uwe Herdes dated 24th October 2019 stated as follows;-

“The Plaintiff, acting in cohorts with the neighbouring camps, were not satisfied with the outcome of the meeting and subsequently approached the County Executive Committee Member for Lands and Physical Planning who then purported to stop the project. This led to a County Ranger attack, none the less without any Court order, to remove all tools and materials from the site. The onsite constructor and 4 persons were arrested and locked up in the cells. The said rangers were clearly on a destruction mission, for they stole and destroyed the belongings of the works.”

415. The second witness of interest is William Ambila Abongo who was the person given the construction work of the Defendant’s tented camp.

416. This witness also prepared and filed a witness statement dated 2nd April 2009 which was then adopted as his evidence in chief during the trial.

417. The witness statement dated 2nd April 2009 read as follows;-

“We then proceeded to start work on the building of the tent. One of the County Rangers came with their commander and they ordered us to stop construction. They were armed. I told them that I was not going to stop the construction. During the confrontation the Maa community came in numbers demanding to know what was going on.

They (rangers) left and informed us that the site manager should collect a letter from their offices. Gedion went and collected the letter. On the 6th of October 2017 another contingent of rangers and police came and arrested all the workers. They were taken to Mararianda A.P Camp. Gedion and I followed them and upon reaching the camp we were arrested and the workers were released.

We spent a night at Narok Police station and we were released the next day with cash bail. We resumed construction. In the meantime, I became aware of the existence of a Court Order in favour of Mara Rafiki Camp. On the 22nd day of December 2017 when the construction was on 85 % complete, the camp was demolished under the command of the County Government Rangers, Administration Police Officers were providing cover to the County Government Workers.”

They used heavy machinery and equipment and the camp was completely demolished and burnt down in a space of two hours. We were not given time to salvage anything and we were chased out of the site at gun-point.....”

418. The Honourable Court has indeed considered the contents of the Defence witnesses’ statements and is of the considered opinion that the demolition of the Defendant’s structures and/or tented camp was undertaken by the County Government of Narok officials.

419. There is clear evidence and admission by the Defendant’s director and the Contractor of the existence of a different dispute between the Defendants and the County Executive Committee Member of Lands and Physical Planning in County Government of Narok which the Defendant had been told to stop any further construction but failed whether lawfully or unlawfully to act as directed.



420. Consequently, the liability caused by the demolition of the Defendant's structures on the property known as L.R.No.Transmara/Kimintet "D"/479 undertaken by the County Government of Narok on the 22nd of December 2017 can not be directly attributed with the Plaintiff without proper evidence that the same was done in execution of the Orders issued on the 20th December 2017 obtained with misrepresentation or not.
421. In essence therefore, this Honourable Court respectively declines to hold the Plaintiff liable for any losses occasioned to the Defendant by the officials of the County Government of Narok emanating from the said demolition.
422. On the issue of whether the Plaintiff herein obtained the Ex-parte Orders through misrepresentation or not, this Honourable Court is of the considered view that such an issue is one that was to be canvassed in the interlocutory application dated 20th December 2017 and not in this judgement.
423. The Interlocutory Application dated 20th December 2017 having been dispensed off, then for this Honourable Court to adjudicate on this issue again would be to re-open prosecution of the said Application and prejudicial to the Plaintiff herein.

Conclusion

424. In conclusion to this suit, the Honourable Court hereby makes the following Orders appertaining to the Plaint dated 20th December 2017 and the Counter-Claim dated 7th August 2019;-
- a. The plaint dated 20th December 2017 be and is hereby dismissed.
 - b. The Lease agreement dated 30th March 2017 between enkutoto eco-tourism trust & mara rafiki limited is legal and binding.
 - c. The Defendant Is Hereby Entitled To Quite & Exclusive Possession Of Approximately 20 Acres Within The Property Known As L.R.No.TRansmara/Kimintet "D"/479 In Line With The Leas Agreement Dated 30Th March 2017.
 - d. The defendant's counter-claim dated 7th August 2019 be and is hereby dismissed.
 - e. Each party to bear its own costs.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 20TH SEPTEMBER 2023.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Mr. Ngeno

Advocates For The Plaintiff: Mr.Kere

Advocates For The Defendant: Mr.Okiro

