



Mara Siana Conservancy Company Limited v Ani Investment Limited (Environment & Land Case 33 of 2019) [2022] KEELC 3600 (KLR) (11 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 33 OF 2019**

**MN KULLOW, J
JULY 11, 2022**

BETWEEN

MARA SIANA CONSERVANCY COMPANY LIMITED APPLICANT

AND

ANI INVESTMENT LIMITED RESPONDENT

RULING

INTRODUCTION

1. By a notice of motion dated May 29, 2019 the plaintiff/ applicant sought for the following orders: -
 - a) Spent.
 - b) That this honourable court be pleased to grant an order of injunction restraining the defendant whether by itself, servants, agents or otherwise howsoever from interfering with or disrupting the Plaintiff's conservation work and business of providing game drives and other tourism excursions to tourists in parcels numbers Cis- Mara/ Siana "A"/6336, 5935,6007, 6388,7307, 5803, 7108, 4931, 5823, 6304, 7126, 5458, 7136 and 5611 or any other conservancy parcels of land situate in Narok County pending the hearing and determination of this application.
 - c) That this honourable court be pleased to grant an order of injunction restraining the defendant whether by itself, servants, agents or otherwise howsoever from trespassing onto parcels numbers Cis- Mara/ Siana "A"/6336, 5935,6007, 6388,7307, 5803, 7108, 4931, 5823, 6304, 7126, 5458, 7136 and 5611 or any other conservancy parcels of land situate in Narok County pending the hearing and determination of this application.
 - d) That this honourable court be pleased to grant an order of injunction restraining the defendant whether by itself, servants, agents or otherwise howsoever from interfering with or disrupting the plaintiff's conservation work and business of providing game drives and other tourism



excursions to tourists in parcels numbers Cis- Mara/ Siana “A”/6336, 5935,6007, 6388,7307, 5803, 7108, 4931, 5823, 6304, 7126, 5458, 7136 and 5611 or any other conservancy parcels of land situate in Narok County pending the hearing and determination of this suit.

- e) That this honourable court be pleased to grant an order of injunction restraining the defendant whether by itself, servants, agents or otherwise howsoever from trespassing onto parcels numbers Cis- Mara/ Siana “A”/6336, 5935,6007, 6388,7307, 5803, 7108, 4931, 5823, 6304, 7126, 5458, 7136 and 5611 or any other conservancy parcels of land situate in Narok County pending the hearing and determination of this suit.
- f) That the costs of this application be provided for.
2. The application is based on the 13 grounds thereof and the supporting affidavit sworn by Rimoin Ole Kararei, a Director of the plaintiff on May 28, 2019 and a further affidavit sworn on July 3, 2019. He stated that the plaintiff is in the business of providing game drives and other tourism excursions to tourists in its private conservancy known as Mara Siana Conservancy situated in Narok County having been duly approved by the Narok County Wildlife Conservation and Compensation Committee.
 3. He further outlined that the said conservancy is comprised of about 1,200 parcels of land leased by several land owners and among the said parcels are title numbers; Cis-Mara/ Siana “A”/ 6336, 5935, 6007, 6388, 7307, 5803, 7108, 4931, 5823, 6304, 7126, 5458, 7136 and 5611, all situated within Narok County. He maintained that the plaintiff has continued to meet all its obligations under the leases including timely payment of rent.
 4. It is the applicant’s contention that on or about December 24, 2018 and April 20, 2019 the defendant entered onto the plaintiff’s conservancy and remained on the suit property without the plaintiff’s consent or authorization. Further, that the defendant and its agents intimidated and threatened violence against the plaintiff’s employees and clients and as a result prevented the plaintiff from carrying on its conservation work on the suit property or doing its business of providing game drives for tourists.
 5. It is his claim that the said acts by the defendant and its agents not only compromised environmental conservation work but also disrupted the plaintiff’s business thereby occasioning the plaintiff severe financial harm and losses; despite the Applicant and its partners having invested in excess of Kshs 100,000,000/= towards conservation and protection of the wildlife. The defendant’s actions thus have threatened to cause the plaintiff to lose the investment it made over the years and further threatens the employment and source of livelihood of the employees employed by the Plaintiff and its conservation partners.
 6. He maintained that the plaintiff has provided evidence to demonstrate that it has legal right and/or interest in the subject matter of the suit that ought to be protected by an order of the court and further that the plaintiff need to be permitted to continue enjoying the legal and contractual rights as entitled under the leases and the law.
 7. He also maintained that the actions by the defendant will occasion the plaintiff’s conservation work and business irreparable damage and losses which cannot be compensated by way of damages. That the balance of convenience tilts in the plaintiff’s favor to warrant the grant of the orders sought
 8. He further asserts that the defendant will not suffer any prejudice, inconvenience, or difficulties if the orders sought are granted as prayed because it does not have any interest in the suit properties or the plaintiff’s private conservancy. He thus urged the court to allow the application and grant the orders sought.



9. In his further affidavit; it was the applicant's position that he was duly authorized by the plaintiff to file the instant suit, swear affidavits and sign the documents relating the suit and he attached a copy of the resolution thereto to show that he has the requisite capacity and/or authorization.
10. In response to the previous suits outlined by the respondent in their replying affidavit, it was his contention that the instant suit seeks orders to protect the plaintiff's contractual and legal rights over the parcels of land owned and/or leased to the plaintiff and further seeks to restrain the defendant from trespassing on or unlawfully entering into the plaintiff's leased parcels of land and conservancy. It was his position that the prayers sought in the instant case & application clearly demonstrated that the subject matter and substratum of both suits is entirely different and the conduct of one proceeding should have no bearing on the other.
11. The applicant further reiterated that the acts of trespass was not by the local members of the community but by the defendant and its invitees or employees who enter into and do game drives into the plaintiff's parcel of land. He also stated that the exact size or acreage of the parcels of land on which the defendant is trespassing is immaterial. It was also his allegation that the defendant has not been strictly using the public access road to go into the national reserve but has on several occasions trespassed into the plaintiff's conservancy which has a high concentration of wildlife that the defendant's guests wish to see
12. In the end, it was his case that the defendant had not demonstrated that it had any legal or contractual rights over the suit properties and maintained that he had established a *prima facie* case, he had also demonstrated the damages likely to be suffered and urged the court to grant the orders sought.
13. The application was opposed. The defendant/ respondent filed an undated replying affidavit on June 20, 2019; sworn by one Bharat Panchal, the Finance Director of the defendant company. In response to the allegations made by the applicant, he averred that the same allegations had been raised in previous suits to wit; National Environment Tribunal, Tribunal Appeal No 003 of 2018, Constitutional Petition No 10 of 2018 at the Narok High Court seeking similar orders as the those sought in the instant case.
14. He raised an issue on the plaintiff's capacity to institute the instant case and contended that the suit as filed was incompetent for want of company resolution to file the suit. It was his claim that Rimoine Ole Kerarei had not been granted the requisite authority to swear the supporting affidavit on behalf of the plaintiff. He also alleged that in a meeting held on March 21, 2018 it was agreed that there was no objection to the defendant's project and should any dispute arise then the same would be resolved amicably.
15. In response to the allegations made on trespass and/or encroachment onto the plaintiff's land parcel, he stated that all camps in the area including the plaintiffs have access to the Masai Mara National Park through two gates namely; the Sekenani and Ololeumtik Gates, with public roads leading to the said gates and further while using the said public roads; which passes through some portions of the Mara Conservancy they do not deviate from the road thus the allegations of trespass made by the plaintiff are false, far-fetched malicious as the defendant company does not have any need to step into the said parcels of land.
16. It was also his claim that the local community has unrestricted access to the conservancy which makes it almost impossible to point out what persons have accessed the plaintiff's land and further that the plaintiffs have no license or authority to manage the conservancy as alleged.



17. The respondent further stated that by an agreement dated September 22, 2017 the defendant purchased a parcel of land known as LR No CIS Mara/ Siana "A"/ 116 from M/s Little Orerai Camp Limited at a consideration of Kshs 19,635,000/=.
18. On September 15, 2019, this court issued directions on the disposal of the application by way of written submissions. The applicant, through the firm of Oyomba Mosota & Wamwea Advocates filed their submissions dated August 28, 2019 while the defendant/ respondent, through the firm of EK Mutua & Co Advocates filed their submissions dated September 13, 2019, which I have considered and taken the same into account in arriving at my decision.

Issues for Determination

19. I have taken into account the entire application, the affidavits together with the annexures thereto and the rival submissions. Consequently, it is my considered view that the sole issue arising for determination therefrom is;
 - a) Whether the applicant has met the requirements for the grant of a temporary order of injunction sought.

Whether the Applicant has met the requirements for the grant of a temporary order of injunction sought.

20. The law relating to injunctions is provided under Order 40 (1) (2) of the [Civil Procedure Rule](#) which provides as follows: -
 1. "Where in any suit it is proved by affidavit or otherwise: -
 - (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;
 - (b),
the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."
21. Section 13 (7) (a) of the [Environment and Land Court Act](#), 2015 further mandates this court to grant interim preservation orders; including an interim order of injunction in the nature sought herein.
22. The principles guiding the grant of injunctions are well settled. An applicant seeking orders of injunction must satisfy the 3-pillar test set out in the celebrated case of [Giella v Cassman Brown and Co Ltd](#) [1973] EA 358 at 360 as follows: -
 - a). where he is required to demonstrate that he has a *prima facie* case with serious triable and arguable issues with a probability of success against the respondent. The test on *prima facie* case does not mean establishing a case beyond reasonable doubt;
 - b). He will suffer irreparable harm/injury which cannot be adequately compensated by damages;
 - c). Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.

(See also *East African Industries v Trufoods* [1972] EA 420)



23. It has also been established that all the 3 pillars indicated above are to be applied as separate, distinct and logical hurdles which an applicant for an order of injunction is expected to surmount sequentially. The existence of one pillar alone does not automatically entitle an applicant to an order of injunction without considering the other hurdles. See *Kenya Commercial Finance Co Ltd v Afraba Education Society* [2001] Vol 1 EA 86.
24. The first ground that an Applicant must establish is that he has a *prima facie* case which raises arguable and triable issues with a probability of success. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2* (Supra) explained what amounts to a *prima facie* case and stated as follows:
- “a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
25. The applicant contends that conservancy is comprised of about 1,200 parcels of land leased by several land owners and among the leased parcels are title numbers; Cis-Mara/ Siana “A”/ 6336, 5935, 6007, 6388, 7307, 5803, 7108, 4931, 5823, 6304, 7126, 5458, 7136 and 5611, the subject matter of this suit. It is his claim that he provided a list showing the parcels leased to it, names of its lessors, map of its conservancy showing the location of each parcel of land leased to it and the approval page of its conservancy management plan.
26. It is the applicant’s case that sometimes around December 24, 2018 and April 20, 2019 the respondent trespassed into the said 14 parcels of land and remained therein without its consent or authorization thereby infringing on the plaintiff’s legal, proprietary and contractual rights as to warrant an explanation or rebuttal by the defendant. He also described with specificity the acts and dates of incidents of disruption of the conservation works & business and the acts of trespass.
27. The respondent on the other hand contends that the applicant has not established a *prima facie* case for the reason that it has not shown that it has an interest on the properties in question; that the leases produced as evidence by the applicant have not been registered nor has stamp duty been paid in respect thereof. It is therefore his claim that without a show of interest on the properties in question, the plaintiff cannot be said to have established a *prima facie* case. He further stated that the claims of trespass are farfetched since all the nearby camps use the public access roads which traverse the applicant’s land parcels. He therefore urged the court to dismiss the application.
28. From the above illustration it is clear that the plaintiff/ applicant is in possession and use of the 14 parcels of land outlined, having been lawfully leased and it has been carrying out its obligation as per the said lease. The applicant has further demonstrated outlined the nature of its business and how the respondent’s acts has greatly affected its business and infringed on their legal and proprietary rights to warrant protection by the grant of temporary injunction.
29. The respondent on the other hand has denied the alleged acts of trespass and challenged the validity of the said leases and maintains that the applicant has not demonstrated any interest on the said parcels. It is my considered opinion that issues touching on the validity of the leases can sufficiently be proved upon adducing some evidence at the hearing of the main suit and not at this interlocutory stage. At an interlocutory stage, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See *Airland Tours & Travel Limited v National Industrial Credit Bank* Nairobi (Milimani) HCCC No 1234 of 2002)



30. This court is mindful not to delve into the merits of the main suit however, based on the material presented before the court and the response by the respondent, I find that the applicant has proved that it has a *prima facie* case. In view of the circumstances; I find that the applicant herein has satisfactorily proved to this court that it has a *prima facie* case against the defendant/respondent for the purposes of the grant of an injunction pending the hearing and determination of the suit.
31. The second limb is that an applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by damages unless an order of injunction is granted. The burden is on the applicant to demonstrate the nature and extent of the substantial injury likely to be suffered.
32. *Halsbury's Laws of England, 3rd Edition Volume 21*, paragraph 739 page 352 defines irreparable injury as;
- “injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question.”
33. The court in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR defined what amounts to an irreparable injury as follows;
- “irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
34. The applicant's claim against the respondent is of illegal actions of business, trespass on the applicant's leased land parcels, damage, wastage, wanton destruction and degradation of the parcels of land leased to the plaintiff, damage and degradation of the environment. He contends that the defendant's illegal and unauthorized actions on the said 14 parcels of land pose serious threat to its conservation work and thus to the wildlife and plant species in the conservancy; that the commercial activities, construction works and other illegal activities will cause severe injury to the wildlife and plant species especially when done on wildlife migration corridors.
35. He further asserts that degradation and injury to the environment, wildlife and plants will no doubt amount to irreparable injury that cannot be compensated by an award of damages. According to the applicant, the said acts will also degrade the experience that the tourists going for game drives in the plaintiff's conservancy, which will in turn lead to loss of business that the plaintiff may never be able to recover from and that cannot be compensated by way of damages. He further contends that the said actions by the respondent has occasioned severe financial harm and losses; having invested in excess of Kshs 100,000,000/=towards the conservation and protection of wildlife.
36. This court has a duty to prevent grave and irreparable injury; where it is demonstrated that the same is likely to be suffered by the applicant. An injury is irreparable where there is no standard by which an amount can be measured with reasonable precision and accuracy or is in such a nature that monetary compensation, of whatever amount, will never be adequate remedy. The applicant has demonstrated that it is in possession and use of the 14 parcels of land and given its nature of business, has outlined



how the said acts by the respondent will affect its conservancy work and business. Degradation of the environment and the effect of the plant species and wildlife within the ecosystem can certainly not be quantified by damages. See *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR; Civil Appeal No 77 of 2012 (Nairobi)

37. Consequently, I find that the applicant has demonstrated the irreparable loss that he is likely to suffer that cannot be compensated by an award of damages to the required threshold.
38. The final element that must be established is on the balance of convenience. The court needs to be satisfied that the inconvenience likely to be caused to the applicant by declining the injunction is greater than that which is likely to be caused to the respondent. The court is called upon to balance the inconveniences of both parties and possible injuries to them and their properties.
(See Charter House Investment Limited v Simon K Sang and 3 Others [2010] eKLR.
39. From the above it is undisputed that the plaintiff/ applicant is in possession and occupation of the 14 suit parcels which are part of the 1200 parcels of land which comprises the conservancy; it is the applicant's claim that the defendant's actions of trespass have not only affected its business but has also affected the environment and the wildlife within the ecosystem. The applicant is apprehensive that unless the orders sought are granted, the environment, wildlife and plants and the conservation will greatly be affected and further they will continue to incur losses in its business. Therefore, it is my considered opinion that the inconvenience likely to be caused to the applicant is greater than that which is likely to be caused to the respondents in the circumstances.
40. However, in determining whether or not to grant the order of injunction, this court is also called upon to ensure that the said order of injunction is not intended to curtail the respondent's rights and interest. I have carefully noted that the applicant has not disputed and/or laid claim on the parcel of land owned by the respondent which is approx. 28 acres. What is disputed is the trespass onto portions of applicant's parcel of land which touches on the 14 parcels of land and further the nature of the respondent's business which according to the applicant degrades the conservation work done and negatively affects the environment, wildlife and plants within the said ecosystem.
41. It is worth noting that both parties herein are in the same nature of business. Both the applicant and the respondent carry out and/or operates the same business. The respondent operates a camp and its business is to host and accommodate guests at the camp and arrange for game drives at the Maasai Mara National Park. This court is therefore careful not to be used to sanction and further an agenda of the business rivals and I must restrict myself to the purpose of a temporary injunction.

Conclusion

42. In view of the foregoing, I find that the application dated May 29, 2019 is merited and I proceed to make the following orders;
 - a. An order of injunction be and is hereby issued restraining the defendant whether by itself, servants, agents or otherwise howsoever from interfering with or disrupting the plaintiff's conservation work and business of providing game drives and other tourism excursions to tourists in parcels numbers Cis- Mara/ Siana "A"/6336, 5935,6007, 6388,7307, 5803, 7108, 4931, 5823, 6304, 7126, 5458, 7136 and 5611 or any other parcel within the conservancy except on the public roads and/or access pending the hearing and determination of the suit.
 - b. That the public roads and/or access roads shall remain in use for all the parties herein, camps and/or entities within the large Mara conservancy pending the hearing and determination of the suit.



c. Costs of the application to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 11TH DAY OF JULY, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Gathari h/b for Oyombo for the Applicant

Nonappearance for the Respondent

Tom Maurice - Court Assistant

