



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC NO. 18 OF 2019

AFRICA ECO CAMPS LTD.....PLAINTIFF

-VERSUS-

LERIONKA OLE KOSHAL & 3 OTHERS.....DEFENDANTS

RULING

By a notice of motion dated 26/2/2019 the applicant sought for orders of injunction restraining the defendants by themselves, agents or whomsoever acting on their instructions from interfering with or disrupting the plaintiff business of providing ecofriendly tourism products on land parcel No. Cis Mara/Talek/96 pending the hearing and determination of the application herein and the suit, and from encroaching or trespassing on the aforesaid suit land and the cost of the application.

The Application was based on the grounds that the applicant is engaged in the business of viewing tourist facilities on the suit property in which the 1st Defendant had leased the same to the applicant for a period of 25 years which lease is still subsisting but which could not be registered as the 1st Defendant had refused to avail the original title at the time the lease was entered into.

It is the Applicants contention that on or about 2018, he learnt that the suit property was transferred to the 2nd and 3rd defendants contrary to the terms of the lease and thus the actions of the 1st defendant is in contravention of the terms of the lease thus denying the plaintiff its rights under the said lease and the same has disrupted its operation and will cause it severe injury.

The Application was opposed by the 1st, 2nd and 3rd respondents who filed a replying affidavit. The respondents though conceding that they leased the suit property to the applicant contend that the lease was for a term of 10 years and not 25 years as alleged by the applicant. The 1st Respondent avers that the applicant took advantage of his inability to read and write and made him sign a document whose contents he did not understand and thus there was misrepresentation made to him therefore the entire lease document is fraud.

The 4th Defendant in opposing the application contends that it has only demarcated an area of 10 acres which it has constructed tourist camps and that before leasing the same they had conducted its due diligence and the 2nd and 3rd defendant had obtained consent to lease the land from the Land Control Board, it obtained change of use of the land from the Narok County Government and it is an E.I.A and was granted licence by NEMA.

It is the 4th Respondent's averment that the 10 acres which it leased were undisputed as the Narok County Government and the NEMA would not have granted their approvals if the land was occupied by another entity and further that there was no caution or lease which was registered against the title.

The 4th Respondent further contend that it has invested heavily on the land to put up tourists' camps, carried out marketing and will be prejudiced in the event that the orders sought are granted.

I have considered the application before me and the submissions filed by the parties. This is an application in which the applicants seek the equitable remedy of injunction. The grounds upon which the orders of injunction can be granted is now well settled as whether the applicant has established a prima facie case with probability of success whether damages will not be adequate compensation and on whose side the balance of convenience tilts.

It is the applicant's contention that it had leased the suit property for a period of 25 years but it did not register their interest on the title as the 1st respondent refused to avail the original title for the registration of their interest.

The 1st respondent contends that though he leased the land it was for a period of 10 years and the 25 years is allegedly a fraud. The 4th respondent is caught up in the tussle and had a lease of 10 acres to the land which it obtained the necessary consent from the Land Control Board, and Narok County Government and NEMA.

The above before being the position between the parties the applicant must establish that it has a prima facie case with a probability of success. It is only point of contention that it has a lease but its interest was not registered. From the pleadings I have not seen any comparison between it and the 1st respondent requesting him to avail the original title to have its interest registered. Furthermore, the applicant had the opportunity to place a caution or such other restrictions on the title to protect its interest. It never did so. The 1st respondent alleges fraud in the part of the applicant when he signed documents whose contents he did not understand. The allegation of fraud is a serious one that can only be proved at a final hearing and when evidence is taken and the party alleging fraud is put through cross examination. However, since the plaintiff has not shown why it could not register its interest and/or secure the same through other means I find that it has failed the threshold to establish a prima facie case with a probability of success and therefore I find that the applicant having failed the above tests lacks sufficient merit and on whether damages will be adequate compensation it is my finding that the applicant will have the opportunity to seek for damages for breach of the lease terms.

Lastly since the 4th respondents lease is not contested and it has made substantial investment on the 10 acre it leased, I find that the balance of convenience tilts in its favour.

The upshot of the above is that the application dated 20/3/19 lacks merit and I therefore dismiss the same with costs.

DATED, SIGNED and DELIVERED in open court at NAROK on this 5TH day of MARCH, 2020

Mohammed Kullow

Judge

5/3/2020

In the presence of:-

CA:Chuma/Kimiriny

Parties and advocates absent

Mohammed Kullow

Judge

5/3/2020