REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 130 OF 2019

FORMERLY HCCC NO. 232 OF 2010

YARE SAFARIS LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF SAMBURU.....DEFENDANT

J U D G M E N T

1. The plaintiff commenced the present suit by way of a plaint dated 21st September 2010 which was amended on 18th June 2014. The plaintiff averred in the plaint that between the years 1986 and 1988 following representations made to the plaintiff by the defendant orally and in writing the plaintiff using its own money and resources constructed a tourist lodge and tented camp site on a portion of 3 acres of land at Rankau area that the defendant agreed to lease to the plaintiff. The plaintiff averred that the defendant had represented to and assured the plaintiff that it would be free to operate its business on the site for as long as it wished and that in the event the plaintiff was to cease operations and/or the defendant wanted to use the tourist lodge and tented camp site, the defendant would pay reasonable compensation for the improvements effected on the site by the plaintiff. The plaintiff contended that it relied on the representations made to it by the defendant and went ahead and carried out extensive development's on the parcel of land. The plaintiff asserted therefore that a proprietary estoppel was created and the defendant was barred from preventing the plaintiff to continue operating its business at the site.

2. The plaintiff stated that the defendant on 2nd October 2010 forcibly evicted the plaintiff from the site and in the process the plaintiff suffered a loss of Kshs.20,520,000/= on account of the improvements it had effected on the premises and further lost movable goods worth Kshs.893,640.00 and other essential documents. The plaintiff prays for judgment against the defendant for :-

a. A declaration that a proprietary estoppel arose when the plaintiff between 1986 and 1988 acted on the representations of the defendant and expended its money and labour in establishing the Tourist Lodge and Camp site at Rankau.

b. An order that the defendant do give the plaintiff a lease for twenty years from 31st January 2008.

c. A permanent injunction prohibiting the defendant from interfering with the plaintiff's quiet enjoyment of the Tourist Lodge and Camp site at Ranjau.

d. As an alternative to (b) above an order that the defendants takes possession of the Tourist Lodge and Camp Site at Rankau upon paying the plaintiff Kshs.20,520,000/= for the improvements made on the suit property.

e. A declaration that unreasonable, unnecessary and excessive force was used during the eviction that took place on 2nd October 2010 and was therefore unlawful.

f. Damages for unlawful eviction.

g. Damages for lost items in the sum of Kshs,893,640.00

h. The cost of the suit

i. Interest on (d), (g), and (h) above.

3. The defendant in its statement of defence dated 22nd October 2010 and filed on the same date denied the plaintiff's averments as to the

existence of any proprietary estoppel. The defendant contended that its relationship with the plaintiff was exclusively governed on the terms and conditions set out in the Lease Agreement entered into between the plaintiff and the defendant on 1st January 1988 for a term of 20 years. The defendant denied making any oral representations to the plaintiff and insisted the Lease remained the only document that governed their relationship with the defendant with the consequence that no proprietary estoppel could arise. The defendant denied it was bound to grant the plaintiff a further lease for 20 years after the expiry of the initial lease of 20 years. The defendant further stated that after the expiry of the lease the plaintiff referred the dispute to the Business Premises Tribunal vide BPRT No.5 of 2009 where the parties recorded a consent whereby the plaintiff agreed to vacate the suit premises within four (4) months of the date of the consent. The defendant thus contended the plaintiff's suit disclosed no or any reasonable cause of action and sought dismissal of the same with costs.

4. At the trial the plaintiff called a single witness one Doris Kanini Murabu in support of the case. The defendant did not offer any oral evidence but its counsel cross examined the plaintiff's witness and indicated the defendant would rely on the pleadings, the evidence on record and submissions.

5. The plaintiff's witness testified as PW1 and she relied on her witness statement dated 8th August 2011 and the plaintiff's bundle of documents dated 8th August 2011 and filed in Court on 9th August 2011. As per the witness statement PW1 affirmed that the plaintiff was a Limited Liability Company and she was the General Manager. She stated at the time of incorporation in 1986 the shareholders were Malcolm Gascoigne, Johnnson Ciira Cerere and Patrick Katamonge Leparleen. She indicated both Malcolm Gascoigne and Johnson Ciira Cerere were deceased. She explained after the plaintiff was incorporated, it proposed to the defendant that it develops a tourist facility at its own cost at Rankau area which proposal the defendant agreed to. The witness stated she was employed by Malcolm Gascoigne and his wife who were running the resort as a family company in 1991 and that after Malcolm Gascoigne died in 2003 she and Malcolm's wife Susan Magaret Maloba continued to run the company until October 2009 when the defendant forcibly evicted the plaintiff from the premises. She stated the value of the investment as at the time of the eviction amounted to Kshs20,520,000/=. She acknowledged the defendant had granted the plaintiff a 20 years lease which expired on 31st January 2008. The defendant declined to renew the lease which precipitated proceedings before the Business premises Rent Tribunal case No.5 of 2009 and now these proceedings.

6. In cross examination by Mr. Karanja advocate for the defendant the witness stated she swore the verifying affidavit to the amended plaint as the former General Manager of the plaintiff. The witness stated that the Directors of the plaintiff were Mary Maloba, Anne Maloba and Grace Maloba who were the administrators of the estate of Susan Maloba who died in 2006. The latter had taken over the operations of the plaintiff from 2003 following the death of her husband, Malcolm Gascoigne. The witness stated even though the certificate of grant to the estate of Malcolm Gascoigne exhibited at page 26 of the plaintiff's bundle of documents indicated Susan Maloba took over the plaintiffs' Bank account held at KCB. Maralal there was no indication she took up any shares of the plaintiff company.

7. The witness admitted under cross examination that the plaintiff filed a BPRT reference No.5 of 2009 where a consent order was entered and that as per the consent the plaintiff was to occupy the premises upto 30th September 2010 by which date the plaintiff was to have vacated from the premises. The plaintiff did not vacate by 30th September 2010 and was evicted by the defendant on 2nd October 2010. The witness affirmed an eviction order had been issue against the plaintiff. The witness further affirmed that under clause 4 of the lease, the plaintiff was supposed to vacate from the premises upon expiry of the term and to remove any movable assets from thereon. The witness stated she had never been a director of the plaintiff and that at the time the eviction was carried out none of the directors was present. She stated the plaintiff's goods were removed and put outside the compound. She stated operations of the plaintiff ceased as from the date of the eviction.

8. After PW1's evidence, the plaintiff closed its case and the defendant elected not to offer any evidence. The Court directed the parties to file their final written submissions. Having reviewed the pleadings, the evidence and the submissions of the parties, the following issues arise for determination by the court.

(i) Whether in the dealings between the plaintiff and the defendant the doctrine of proprietary estoppel had any application, and/or the relationship between the plaintiff and the defendant was exclusively governed on the terms of the lease agreement entered into between the parties on 26th February 1989?

(ii) Whether authority of the plaintiff to institute the present suit had been given?

(iii) Whether the plaintiff is entitled to the reliefs sought?

(iv) Who bears the costs of the suit?

9. As per the plaint and the evidence of PW1, Doris Kanini the plaintiffs' case is premised on representations and assurances the plaintiff allegedly received from the defendant before the plaintiff commenced the construction and development of the Tourist Lodge and Tented Camp at Rankau area, near Maralal Town within Samburu County. The plaintiff's contention was that it relied on the defendant's representations and assurance that the plaintiff would be permitted to operate the Tourist Lodge and Tented Camp for as long as it desired and on that basis went ahead to construct and develop the facility at enormous cost. It is on that account the plaintiff asserted a proprietary estoppel was created in its favour. The plaintiff in its submissions on the application of the doctrine of proprietary estoppel placed reliance on the case of ***Commissioner of Lands -vs- Hussein (1968) E.A 885*** where Harris J, stated thus in regard to the application of the doctrine of proprietary estoppel:-

> "—If a man, under verbal agreement a landlord for a certain interest in land; or what amounts to the same thing, under an expectation, created or encouraged by the Landlord, that he shall have certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation".

10. PW1 who testified on behalf of the plaintiff was not the one to whom representations were made by the defendant.

11. She stated she had been told by Mr. Malcolm Gascoigne, one of the initial shareholders and directors, and his wife Mary Maloba that between 1986 and1988 the defendant represented to the plaintiff both orally and in writing that if the plaintiff employed its money and labour and constructed a tourist lodge and tented camp at Rankau on a portion of about 3 acres the plaintiff would be at liberty to operate the business thereon for as long as it wished. Further in the event the project was abandoned, the understanding was that the defendant would pay a reasonable compensation for all permanent improvements made on the portion of land. PW1 stated the plaintiff relying on the oral and written representations of the defendant went ahead and constructed and developed the facility and provided all the appropriate amenities as captured in the valuation report tendered in evidence.

12. PW1 in her evidence conceded that the defendant on 26th February, 1989, granted to the plaintiff a lease for 20 years which expired on 31st January, 2008 which the defendant declined to renew. The defendant for its part, insisted the lease agreement governed its relationship with the plaintiff. It is note worth that the lease agreement was entered into after the alleged representations made by the defendant to the plaintiff between 1986 and 1988.

13. The lease agreement was signed by both the plaintiff and the defendant and notably Malcolm Gascoigne who was the main negotiator with the defendant attested the affixing of the seal by the plaintiff to the lease. The lease was for a term of 20 years from 1st January 1988 and the rent was payable in the manner provided under the preambular part (b) of the lease. The lease under clause (4) provided for incidence of expiration and under special condition (2) provided for termination before expiry thus:-

> (4) The Lessee shall maintain all building the water supply drainage, system and electrical installations in good repair and condition to the satisfaction of the lessor and shall at expiration or sooner determination of the term hereby created hand **over the demised premised to the Lessor in good tenantable repair and condition without charge SUBJECT however to the removal of any moveable property belonging to the Lessee"(emphasis added)**
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> Special condition (2) provided thus:-
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> (2) Notwithstanding anything contained herein this lease may be determined at any time by either the Lessor or the Lessee giving to the other not less than Twelve calendar months, notice in writing in that behalf expiring on the last day, of any year, but such determination shall be without prejudice to the remedies of the lessor giant the lessee in respect of any antecedent breach of the obligations of this lease.

14. Under clause 13(b) of the lease the Lessor covenanted to permit the Lessee to quietly and peacefully enjoy the full/term of the lease provided the lessee performed its obligations under the lease. Clause 13(b) provided as follows:-

> 13.(b) The Lessee paying the rent hereby reserved and performing and observing obligations herein contained or implied on its part to be observed may peacefully and quietly possess the demised premises during the said term without any interruption from the lessor or any Person lawfully claiming under it.

15. The lease agreement as observed above was signed after Mr. Malcolm Gascoigne had held discussions with the defendant about establishing a Tourist Facility. At the time the lease was signed, the implication was that the facility was up and running. Mr. Malcolm Gascoigne signed the lease and having been instrumental in the negotiations with the defendant, he must have attested the Company's execution of the lease with full knowledge of the contents of the lease. If there had been oral discussions and/or representation earlier, the same must have of necessity been aggregated an reflected in the terms and conditions of the lease. It is not lost to the court that the defendant granted to the plaintiff a long term lease (20 years) and not the usual commercial leases of 5 years to 6 years normally with an option to renew. The lease entered into between the plaintiff and the defendant did not provide for an option to renew the lease and the defendant was not obligated to grant the plaintiff a renewal. My view is that where parties hold oral discussions and/or negotiations and subsequently reduce any agreement reached into writing, the written agreement takes precedence and supersedes any oral agreement that the parties may have had. The relationship between the parties in such a situation cannot be both governed by the oral agreement and the written agreement.

16. The lease agreement dated 26th February 1989 between the plaintiff and the defendant is clear in its terms and is not ambiguous so as to invite any oral evidence to clarify any of its terms. It is therefore my determination that the relationship between the plaintiff and the defendant was governed by the lease agreement. I find and hold that in the circumstances of the present case, the doctrine of a proprietary estoppel was inapplicable. The defendant was under no obligation under the lease to grant the plaintiff a renewal of the lease. The lease had ran its full term and the plaintiff was under clause 4 of the lease obligated to vacate the demised premises and to give vacant possession to the defendant after removing any movable properties it had on the property.

17. The foregoing discussion and analysis disposes of the first issue and I now turn to consider the second issue; whether or not the plaintiff company not authorized the institution of the suit. The defendant has submitted that the plaintiff had not authorized the institution of the suit and hence there is no competent suit before the Court. The Defendant contended that the company had not authorized the commencement of the suit by any resolution of the board of directors as the law demands. The defendant submitted that PW1 had no requisite authority to swear the verifying affidavit in support of the plaintiff's suit. The defendant in support of the submissions relied on the cases of ***E.A Portland Cement Ltd –vs- Capital Market Authority & 4 others (2014) eKLR and Ibcho Trading Co. Ltd –vs- Samuel Aincha Ondora & 3 others (2017) eKLR***.

18. In the case of ***EA Portland Cement Ltd –vs- Capital Markets Authority & 4 others*** (supra) Mumbi, J cited with approval the case of **Affordable *Homes Africa Ltd - vs- Iaan Henderson & 2 others (HCCC No. 524 of 2004)*** where Njagi, J observed that a company being an artificial body, takes decisions and acts through the agency of its organs, being either the board of directors or the shareholders. In the suit ***Affordable Homes Africa Ltd*** (supra) Njagi, J observed there was no authority from the Board of Directors to institute the suit and he went on to hold as follows:-

> " The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company , the Company is not before the Court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates of the plaintiff"

19. In the case of ***Bugerere coffee Growers Ltd -vs- Sebaduka & others (1970) EA 147*** where the suit was filed without the authority of the company, the court proceeded to strike out the matter and ordered costs against the advocates who had instituted the suit on behalf of the plaintiff.

20. Similarly in the case of ***Ibacho Trading Company Ltd –vs- Samuel Hencha Ondora & 3 others*** Okwany, J dismissed the plaintiff's suit when she found it was instituted without any authorization by the company.

21. In the present suit, article 40 of the plaintiff's memo & Articles of Association provided as follows:-

> 40. The seal of the company shall not be affixed to any instrument except by authority of a resolution of the board of directors and in the presence of at least a director and of a secretary or such other person as the directors may appoint for the purposes. Such directors and secretary or other person aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.
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> Order 4 Rule 1(4) of the Civil Procedure Rules envisages that where the plaintiff is a company/corporation, the verifying affidavit accompanying the plaint, has to be authorized in writing under seal. It provides thus:-
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> 4.1(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

22. In the instant suit no written authorization was filed when the suit was initially filed on 21st September 2010 or on 18th June 2014 when the plaint was amended and a fresh verifying affidavit filed by PW1. The rationale for the requirement of appropriate authorization is not difficult to find. The incidence of commencing a suit has consequences and a company being an artificial person must have a way of sanctioning its actions. It can only do this through its organs, the board of directors or shareholders at a general meeting. Where a company has not duly authorized the institution of a suit it cannot be deemed to be before the court and that is why such a suit stands to be struck out for incompetence.

23. In the present suit in the absence of a board of directors resolution sanctioning the institution of the suit and authorizing the said Doris Kanini to swear the verifying affidavit means there is no competent suit by the Company (plaintiff) against the defendant .The company did not authorize the institution of the suit and as such it is not in court.

24. The two issues that I have discussed and determined in favour of the defendant are adequate to dispose of the suit and I do not need to discuss the issue of *locus standi* that the defendant raised. The issue of *Locus standi* would have no bearing as I have determined the suit to be incompetent for lack of the requisite authority to commence the suit by the plaintiff.

25. In the result I have come to the irresistible conclusion that the plaintiff's suit is without any merit and the plaintiff cannot be entitled to any of the reliefs sought in the plaint. The suit is ordered dismissed.

26. I am conscious that in situations where counsel file suits without the requisite authority, the tendency has been to order that costs of the suit be paid by such counsel . I am however cognizant of the fact that the defendant's counsel never raised the issue of lack of authority timeously so that it could be determined as a preliminary issue. If the issue was taken immediately the suit was filed, the suit could have been disposed of then or the plaintiff may have been afforded the opportunity to rectify the defect. Given that I cannot award the costs against the company which technically was not a party to the suit, I consider that it would be onerous to order costs against the plaintiff's advocates. The order that commends itself to me is that each party bears their own costs of the suit.

26. Orders accordingly.

Judgment dated signed and delivered virtually at Nakuru this 29th day of July 2020.

J M MUTUNGI

JUDGE