



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL CASE NO. 40 OF 2014

SMOKY HILL LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

KENNETH KARISA BAYA.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. Before me is the Plaintiff's Notice of Motion dated 10th March 2014. In the Applications the Plaintiff's is seeking for the following orders:
 - a. The Defendant, its agents, servants and employees be restrained from interfering in any manner with the Plaintiff's right to sell mapandes/off-cuts from the suit premises pending the hearing and determination of this suit.
 - b. The Defendant, its agents, servants and employees be restrained from interfering in any manner with the mining by the Plaintiff of coral blocks and the Plaintiff's disposal of the offcuts in plot No. Mtondia/Roka/194 (the suit property) pending the hearing and determination of this suit.
 - c. The Defendant, by himself, his agents, servants and employees be restrained from collecting any coral blocks of any description and off-cuts/mapandes or any other by product of coral from the suit premises and for that purpose be barred from entering the suit premises whether by himself, servants, employees, agents, drivers, transporters or customers with any trucks or vehicles of any description for any purpose pending the hearing of the suit.
 - d. Because of the Defendant's propensity to violence and violent threats and for purposes of maintaining peace and security in the suit premises the officers commanding police division and police station Kilifi be and are hereby ordered and directed to enforce this order.
 - e. Costs of this application be provided for.

2. The Application has been opposed by the Defendant.

The Plaintiff's/Applicant`s case;-

3. According to the averments of the Plaintiff, the Plaintiff is a lessee of the Defendant with regard to the suit premises for the purpose of mining Coral blocks. The lease is for a period of 20

years.

4. It is the Plaintiff's case that under the terms of the lease, the Plaintiff has no obligation to pay any royalties to the Defendant with regard to the off cuts commonly referred to as Mapandes; that the Defendant has been collecting the said Mapandes and selling them and when he was stopped from collecting the same, he ordered all the operations at the suit premises to be stopped.
5. The Plaintiff finally deponed that it has financial obligations to meet for the sale of coral blocks including paying 38 employees in the suit premises.

The Defendant's case:

6. In his Replying Affidavit filed on 25th March, 2014, the Defendant deponed that while it was true that the lease is for 20 years, it was not true that the Lease does not permit him to interfere with the Plaintiff's activities. According to the Defendant, he must be on site to be able to ascertain the number of blocks produced and the mapandes or the off-cuts from the coral.
7. The Defendant deponed that clause 5(c) of the Lease is illegal and exploitative; that in fact, he has not been selling the mapandes but releasing them as charity to schools and churches and that the said mapandes are selling faster than the grade 1 and 2 of the blocks.
8. The Defendant finally deponed that he had an oral agreement with the Plaintiff on the issue of the mapandes; that the Plaintiff destroyed all his trees and was only compensated with 4,000 blocks and that the Plaintiff went ahead to build an office on his foundation.
9. The parties' advocates appeared before me on 25th March, 2014 and made oral submission.
10. The Plaintiff's advocate submitted that the Lease stipulates the Plaintiff's and the Defendant's obligations. Counsel took the court through clause 5 which provides for the Defendant's obligations in respect to the suit property.
11. Counsel submitted that once a Lease has been signed, it cannot be changed orally. According to counsel, it is too late in the day for the Defendant to state that some of the clauses in the Lease are unacceptable to him.
12. The Defendant's counsel submitted that although the Defendant signed the Lease, the same had been overtaken by events because the Plaintiff has agreed that it is the Defendant who has been collecting the "mapandes" According to Counsel, this averment by the Plaintiff affirms the Defendant's deposition that there was an oral agreement that allowed the Defendant to collect the mapandes from the suit property.
13. The Defendant's counsel further submitted that if his client is restrained from being on the suit property, he will not be able to take the account of the number of blocks being mined contrary to the provisions of the Lease; that it was not true that the Defendant is a violent man and that this court cannot determine how much the Defendant has earned from the "Mapandes" at this stage.
14. The Defendant's counsel finally submitted that the Lease is biased and has illegal clauses which are only beneficial to the Plaintiff.

Analysis and findings:

15. It is not in dispute that on 13th August, 2010, the Plaintiff and the Defendant entered into a Lease Agreement in respect to land known as Mtondia/Roka/194 (the suit property).
16. According to clause 4 of the Lease, the Plaintiff agreed to pay to the Defendant royalty for the mining of quarries, beds, strata and deposits of coral stones within and under the suit property.

The royalty payable was Kshs. 2 for each first grade coral block and Kshs.1.50 for each second grade coral block payable weekly in arrears on the last day of the following week.

17. It was a term of the Lease that the Plaintiff will allow the Defendant or his agents at all times to enter upon and inspect the coral block and to keep accurate accounts showing the qualities of first grade coral blocks and second grade coral blocks.

18. According to clause 5 (c) of the Lease, the Defendant was required not to demand any payment of any royalty in respect of the broken demised coral blocks or pieces (off cuts/mapandes) or sound waste.

19. The Lease period was for 20 years. The Lease further provided at clause 6(a) that on exhaustion of all commercially workable reserves of the demised coral block in or under the land, the Plaintiff was entitled to serve one months' notice in writing of its desire to terminate the Lease.

20. The Lease has a certificate signed by both the Plaintiff and the Defendant. According to the certificate, the Defendant and the Plaintiff's representative appeared before Nyamata Cleophas Bichanga on 13th August 2010 and signed the Lease having understood its content.

21. The Plaintiff's complaint is that contrary to the terms of the Lease, the Defendant has been collecting and selling the off-cuts/mapandes from the suit property. According to the Plaintiff, the Defendant has so far earned kshs. 1,632,500 from the said "mapandes" which he is not entitled to. The Plaintiff is claiming for this amount in the suit.

22. The Defendant has not denied that he has been collecting the "Mapandes" from the suit property. However, according to the Defendant, clause 5(c) of the Lease which prohibits him from collecting the said "mapandes" is illegal and exploitative. It is his case that subsequent to the signing of the Lease, the Plaintiff herein orally agreed to allow the Defendant to pick the mapandes from the suit property.

23. It is trite law that where an owner of land creates a lease in favour of another person, the terms of the lease are in effect contractual obligations. These terms are enforceable by both parties because there is privity between them.

24. Where a party to a written agreement tries to show that the written document did not fully reflect the actual agreement, he would come up against the "*parole evidence rule*". By this rule, oral or other evidence that a party tries to introduce would not be admissible if its purpose is to add to, vary or contradict the terms contained in the written contract.

25. The rule can easily be justified. Firstly, if the contract had been reduced to writing then it was only logical to suppose that things omitted from the written document actually formed no part of the agreement. Secondly, the danger is that adding terms in after the written agreement leads to uncertainty.

26. Clause 5(c) of the Lease clearly states that the Defendant shall not demand any payment of any royalty in respect of the broken demised blocks or pieces (mapandes) removed from the demised land.

27. The only thing that the Defendant is entitled to, according to the Lease, is the royalties for each first grade coral block and second grade coral block and nothing else. The Defendant is also allowed by the Lease either by himself or agent to ascertain the number of blocks being mined from the suit property.

28. I have gone through the Defendant's Replying Affidavit. The Defendant has not complained in his affidavit that the said royalties have not been paid.

29. The mere fact that the Plaintiff allowed the Defendant to collect the “mapandes” from the suit property does not in itself amount to an admission by the Plaintiff that he had waived his right to keep the “mapandes.” It is the obligation of this court to enforce the terms of the Lease and not to speculate as to what the parties had orally agreed upon after the signing of the Lease.

30. In view of the terms of the Lease, I find and hold that the Plaintiff has shown that it has a *prima face* case with chances of success. The continual collection of the “mapandes” by the defendant from the suit property will lead to losses and delays which is likely to cause the Plaintiff irreparable loss that might not be compensated by way of damages.

31. For the reasons I have given above, I allow the Plaintiff's Application dated 10th March 2014 in the following terms:

- a. The Defendant, his agents, servants and employees be and are hereby restrained from interfering in any manner with the Plaintiff right of mining of coral blocks and the Plaintiff's right to sell mapandes/off-cuts from the suit premises pending the hearing and determination of this suit.
- b. The Defendant, by himself, his agents, servants and employees be and are hereby restrained from collecting any coral blocks of any description and off-cuts/mapandes or any other by product of coral from the suit premises pending the hearing and determination of this suit.
- c. The Defendant or his agents are hereby allowed to enter the suit property only for the purpose of taking accounts in respect to the mined first grade coral blocks and second grade coral blocks and not for any other purpose pending the hearing and determination of the suit.
- d. The Defendant to pay for the costs of this Application.

Dated and delivered in Malindi this 16th day of May, 2014.

O. A. Angote

Judge