



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 2959 OF 1996

Hassan & 4 others

v

Kenya Wildlife Service

Injunction – temporary injunction – principles that guide the court in granting an injunction – grant of injunction against removal of a rare and endangered species from its natural habitat - preservation of wild animals in their natural habitat.

Wildlife – statutory powers of Kenya Wildlife Service – Wildlife (Conservation & Management) Act (cap 386) section 3A (d) (e) (f) The applicants sought orders to restrain the respondent from removing and or dislocating a rare and endangered animal called the Hirola from its natural habitat in Arawale to the Tsavo National Park on the grounds that it was a gift to the people of the area and should be left there. The respondent contended that the application was seeking to curtail the respondent from carrying out its express statutory mandate.

Held:

1. Section 3A (d) (e) (f) of the Wildlife (Conservation & Management) Act empowers the respondents to conserve wild animals in their natural habitat.
2. The respondents would be acting outside its powers if it were to move the animals away from their natural habitat without the express consent of those entitled to the fruits of the land which includes flora and fauna
3. If the animals were to be moved to a new habitat it was not known whether they would survive so as to be returned to their natural habitat in case this suit was successful.

Temporary injunction granted.

Cases

Giella v Cassman Brown and Co Ltd [1973] EA 358

Statutes

1. Constitution of Kenya section 115 (1)

2. Wildlife (Conservation and Management) Act (Cap 376) section 3A (d), (e), (f)

August 29, 1996, **Mbito J** delivered the following Ruling. By this application filed on 19th August, 1996, the plaintiffs seek orders restraining the defendant from removing, dislocating and/or distreslocating or in any other way moving a rare and endangered animal called “the Hirola” from its natural habitat in Arawale to the Tsavo National Park or any other place or destination on the grounds inter alia that it is a gift to the people of the area and should be left there. The defendant however contends that the injunction should not be granted and/or should be lifted as inter alia the application was seeking to curtail the respondent from carrying out its express statutory mandate.

The principles on which the court acts in such applications are now well settled. According to the case of *Giella vs Cassman Brown and Co Ltd* [1973] EA 358, in dealing with such applications, first the applicant should show prima facie case with a likelihood of success. Secondly, it should be shown that the applicant is likely to suffer an injury which cannot be adequately compensated by damages if the injunction is not granted.

Finally that if there is some doubt, the court should act on balance of convenience. On the first principle on which the court acts, it is observed that according to common law and/or customary law of the inhabitants of this country, those entitled to the use of the land are also entitled to the fruits thereof which include the fauna and flora unless this has been negated by law. A perusal of the Constitution, which is the supreme law of this country, only shows that minerals and oils are excluded from the ownership of those entitled to use of any given land. See section 115(1) of the constitution. A perusal of the Wildlife (Conservation and Management)

Act as amended by Act 16 of 1989 shows that the defendant by virtue of s3A and in particular 3A (d) (e) (f) when read together or separately hereby entitle the respondent to conserve the wild animals in their natural state. It does not entitle it to translocate them. It would therefore appear that the respondent would be acting outside its powers if it were to move any animals or plants away from their natural habitat without the express consent of those entitled to the fruits of the earth on which the animals live. Consequently in this court’s view, as the respondent is trying to deplete through translocation the applicants heritage of fruits of the land of which they are entitled to through the County Council trust, they are entitled to maintain this suit and have shown a prima facie case with a likelihood of success.

On injury and/or balance of convenience, I need not really be labour the point. If the animals are removed to a new habitat which they are not used to, it is not known if they would survive so as to be returned to their natural habitat if the case is successful. On the other hand if they are conserved at their natural habitat until the suit is heard, they would still be available for translocation to the proposed new habitat if it is found that the case is misconceived. In view of the above findings, I am satisfied that the applicants have made out a case for grant of an injunction. I therefore hereby grant prayers 4 and 5 of the chamber summons filed herein on 19th August, 1996 in so far as they relate to translocation of the Hirolas from their natural habitat of Arawale nature reserve of Garissa District.

The costs hereof shall be in the cause. Orders accordingly.

Delivered on the August 29, 1996

Mbito J