



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC MISC. APPLICATION NO. 16 OF 2019

LEOPARD ROCK MICO LIMITED APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MERU RESPONDENT

RULING

1. This matter emanates from a Notice of Motion dated 14th March 2019 brought pursuant to **Section 7 of the Arbitration Act of 1995 and the inherent jurisdiction of the High Court**. The applicant seeks the following orders:

- a) *THAT the Honorable Court issues a temporary injunction restraining the County Government of Meru, its appointed agents, officials and employees from making alterations, demolishing buildings and structures at the Leopard Rock Lodge located at Meru National Park pending the determination of Meru Misc Application No. 24 of 2019 Leopard Rock Mico Limited versus County Government of Meru, commencement and determination of the arbitration between the parties as provided for in the Lease Agreement dated 3rd October 2008.*
- b) *THAT the Honorable Court issues an order compelling the County Government of Meru to allow the directors of the applicant and its employees to access the lodge and take their personal property that includes paintings.*
- c) *THAT cost of this application be provided for.*

2. The grounds in support of the application are set out on the face of the application and the supporting affidavit of Michael Dechauffour sworn on 14th March 2019. It is argued that on 3rd October 2008, the applicant entered into a lease agreement with Nyambane County Council, of which the respondent is the successor, over a piece of land in order to construct and operate Leopard Rock Lodge at Meru National Park for a period of 25 years. The respondent has now terminated the lease and wants to take over the lodge. On 5th July 2018, the applicant was issued with a notice to vacate the premises.

3. The applicant avers that he is not opposed to the takeover of the suit premises but contends that the agreement provides for financial compensation upon termination of the lease. Applicant avers that on 8th March 2019 the respondent evicted the workers and forcefully took over the lodge. He therefore states that it is important for the lodge to be preserved pending the commencement and determination of the arbitration matter.

4. The application was opposed by the respondent through its grounds of opposition dated 1st April 2019 and the replying affidavit of Sharon Koskei Chepkorir, who is the Legal Officer of the Respondent, sworn on 3rd May 2019, and a further affidavit of Irah Nkuubi who is the ag. Chief legal officer of the respondent sworn on 16.7.2019. The respondent claims that the only complaint of the applicant is based on the allegation that the applicant has improved the premises at a big cost to itself.

5. The respondent contends that the suit premises was in existence even before the applicant became a tenant hence it would be against public policy to issue an order which would have the effect of rendering the property idle and of no benefit to the public. Respondent avers that the orders sought would prevent it from using the property even after a valuation has been made.

6. The applicant has submitted that they have met the threshold for granting a temporary injunction as set out in **Giella v Cassman Brown Co. Ltd [1973] EA 358**. The applicants have also relied on the case of **Aniello Storeli v. Damaris Mwongeli & Another (2019) eKLR**, **Noormolhammed Janmohammed v. Kassam Ali Virji Madhani (1953)20 IRK**, and the case of **Safaricom limited v. Ocean view Beach Hotel limited & 2 others (2010) eKLR**.

7. As to whether the applicant should be allowed to take personal properties, it is submitted that the lease agreement did not prohibit them from accessing their personal properties. On this point, the applicant has cited the provisions of **Section 65(1) of the Land Act, No. 6 of 2012**.

8. The respondents have not filed submissions.

9. The issues of determination are *whether the applicant has met the criterion for the grant of a temporary injunction* and *whether the applicant should be allowed to access the lodge and take its personal property*.

10. With regard to the first issue, *Section 7 of the Arbitration Act* stipulates that:

“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

11. The case of *Giella v Cassman Brown Co. Ltd [1973] EA 358* sets the threshold for granting of an injunction. The principles set out therein are: *prima facie* case, irreparable loss and when in doubt the determination be on a balance of convenience. The application of these three were elaborated by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR* where it was held:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

12. The applicant has submitted that it has a valid lease agreement of which the respondent’s seek to compulsorily take over the suit premises without any financial compensation whose financial interest is equivalent to the developments made on the lodge. The applicant therefore urges the court to preserve the suit property till determination of the arbitration.

13. It is not in contention that there is (or was) a lease agreement between the parties herein. Clause 3 c) on page 7 of the lease agreement provided for the reference to arbitration in case of a dispute, while clause 4 on page 8 of the said agreement provided for the termination of the lease. Without pre-empting the outcome of the arbitration decision, I must point out that these two issues (arbitration and termination of the lease) are clearly provided for in the agreement.

14. Going by the averments set out in prayer 2 and ground no. 5 of the application, the respondent has already evicted the applicant out of the suit premises. Further, it is not disputed that the applicant had sought to have the dispute referred for arbitration vide Meru misc. application no. 24 of 2019. The respondent (via replying affidavit of Sharon Koskei) avers that the high court Misc. application no 24 of 2019 was concluded on 2.5.2019 where an order for appointment of an arbitrator was made. These averments have not been counter-challenged by the applicant. It is against this back ground that the court proceeds to make its analysis.

15. In the case of *Aniello Storelli v Damaris Mwangeli & another [2019] eKLR* C. K Yano J referred to the case of *Noormolhammed Janmohammed –v- Kassam Ali Virji Madhani (1953)20 IRK 8* where the court held that:

“Temporary Injunctions are granted where there is evidence of immediate danger to the property by sale or other disposition. The purpose of temporary injunction is to preserve the status quo.”

16. The status quo in respect of the suit premises is that the respondent has taken over the premises. The applicant has not demonstrated the manner in which the suit premises will be in danger.

17. Further, I note that ground 4 of the application states that;

“Leopard Rock Mico limited has since filed Meru misc. application no. 24 of 2019.....for the High court to appoint an arbitrator to determine the issue of compensation as agreed by the parties.” (emphasize added)

Thus the issue of compensation must be playing a central role in the arbitration process. If that be the case, why then didn’t the applicant seek the prayers herein in the other Misc Application No.24/2019. Filing this application separately yet the issues are intertwined in the two matters only convolutes the dispute.

18. I however take note that no sooner was this matter filed did the parties enter into a consent of 6.5.2019 to deal with the issue of valuation. The gist of that consent was that the parties were to file a joint valuation within 14 days from 6.5.2019 and in the event of a disagreement, each party was at liberty to file a separate independent report within 14 days from the date of the lapse of the joint valuation report. This means that the valuation reports were to be filed by the 28th day from 6.5.2019 which date falls on 3 .7. 2019. This matter was mentioned before me on 8.7.2019 and the parties did not indicate the extent of the compliance (or non-compliance) with their consent order of 6.5.2019. The respondent vide the replying affidavit of Irah Nkuubi has however stated that the applicant had opted to use an earlier report, while the respondent has filed their own report. If valuation on the property has been done, and the applicant has conceded that he is not opposing the takeover of the premises provided there is compensation, then I find that the orders of injunction sought are unwarranted.

19. On the second issue as to whether the applicant should be allowed to access the lodge and take its personal property, I find that applicant has not particularized these personal belongings save the paintings. What are these personal belongings? What was difficult in tabulating the same? Considering that this court has not been moved by way of a suit, then I cannot purport to determine the extent of applicant’s entitlement in the suit property and whatever is inside the property. I will therefore give an order that the applicant be allowed to take its paintings, and any other personal belongings which are not contested.

20. **Final Orders;**

a) The Application dated 14.3.2019 is dismissed save for the order compelling the respondent to allow the directors of the applicant to access the lodge and take their paintings and uncontested personal belongings.

b) Each party to bear their own costs of the application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 9TH DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Manyange for applicant

Nyenyire holding brief for Kibanga for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE