



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ELC CAUSE NO. 588 OF 2017**

**OLONANA LIMITED.....PLAINTIFF**

**VERSUS**

**MARA RAFIKI LIMITED.....DEFENDANT**

**RULING**

The Application before me is the Plaintiff's/Applicant's Notice of Motion dated 20<sup>th</sup> December, 2017 which was brought under order 40 Rule (1), (2), (3) and (4) Order 51 Rule 1,3 and 4 of the Civil Procedure Rules. The Applicant seeks a mandatory injunction against the Defendant to remove construction materials deposited on the banks of River Mara and structures erected thereon and an injunction restraining the Defendant from trespassing or interfering with the Applicants occupation and possession of LR Trans Mara/Kimintet "D"/479 pending the hearing and determination of the suit.

The Application was based on the grounds that the Applicant had leased from Landlords of LR No. Trans Mara/Kimantet "D"/479 about 100 acres to set up a Tourist Camp known as Camp Olonana Sanctuary and that one of the Trustee had illegally leased 20 acres to the Respondent which land is situated along the Mara River and the Respondent is ignoring a moratorium issued by the County Government of Narok in 2010 to commence the construction of a Lodge on the contested parcel of land.

The Application was further based on the ground that the Principal Magistrate Court Narok had vide Civil Suit No. 147 of 2017 restrained the Defendant from dealing with or constructing structures on the suit land after 8 of the Directors of the Landlord contested the lease of 20 acres of land to the Respondent.

The Applicant further contends that the illegal construction is about 300 metres from its establishment an area which the Applicant designated for Bush dinners for the past 20 years and that the Respondent continue to ferry its building materials through the Applicant's land and thus disrupting its quiet and peaceful occupation of the land.

The Application was further supported by the Affidavit of Muriu Waiganjo who is a Director of the Applicant which affidavit was basically expounding on the grounds upon which the Application was based and to the Affidavit the Applicant annexed an order dated 6<sup>th</sup> November, 2017 issued by the Principal Magistrate's Court Narok, a lease agreement between Enkutoto Eco Tourism trust who are the Landlords and the Applicant and 2 photographs of the suit land.

The Application was opposed by the Respondent who had filed a Replying Affidavit sworn by Gideon Kimaai a Defendant of the Respondent Company. The Deponent had briefly stated how the Respondent identified the suit land after the guidance by the Kenya Investment Authority.

The Deponent deponed that the suit land was leased to them by Enkutoto Eco Tourism Trust and they entered into a formal lease agreement after the conduct of due diligence by the Respondent and it is the Respondent's contention that the assertion that they acquired the land illegally is far-fetched and afterthought.

The Respondent further avers that there cannot exist two leases in respect of the same parcel of land to both the Applicant and the Respondent.

The Respondent further averred that the project is situated outside the Maasai Mara Game Reserve and will thus not interfere with wildlife migration as alleged and in any event he had carried out an environmental impact assessment on the project and it is only the fear of competition that the Applicant has filed the suit hereof.

I have read the Application before me and I have heard submissions made by counsel and the issue for determination before me is whether the Applicant has established a prima facie case for the grant of orders sought and if damages will be adequate compensation and on whose favour does the balance of convenience tilts.

The above grounds have been well settled in the case of **Giella –Versus- Cassman Brown & Company Limited (1973)E.A. 358**. In the instant case the Applicant has produced a lease agreement and which is also the same as for the Respondent there are two leases to the same land and which is conflicting. This is an issue that can only be determined at a full hearing where evidence will be heard and the Landlords position of both the leases known. However since the Applicant has been in occupation of the suit land for a period of 20 years running a hotel establishment and the Respondent not showing evidence of its termination, I find that the Applicant has established a prima facie case with a probability of success and will thus benefit from the discretion of the court.

Secondly, on the issue of damage though the Applicant have not given any undertaking to damages, I find that the Respondent can adequately be compensated by way of damages.

From the above therefore, I find that the Application dated 20<sup>th</sup> December, 2017 has merit and I thus allow the Application in terms of prayers 5, 6 and 7. Costs in the cause.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **9<sup>th</sup> day of August, 2018**.

**Mohamed N. Kullow**

**Judge**

**9/8/18**

In the presence of:

Mr Mingati for Kemboi for the Plaintiff/Applicant

Mr Jaoko holding brief for Ochieng for the Defendant/respondent

CA:Chuma

**Mohamed N. Kullow**

**Judge**

**9/8/18**