



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 39 OF 2015**

**MARA NORTH HOLDINGS LIMITED .....PLAINTIFF**

**VERSUS**

**SANAET OLE MASEK.....1<sup>ST</sup> DEFENDANT**

**PARSEEN OLE RAKWA.....2<sup>ND</sup> DEFENDANT**

**MONARCHS LODGE SAFARI LTD .....3<sup>RD</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR**

**NAROK COUNTY .....4<sup>TH</sup> DEFENDANT**

**MARA NORTH CONSERVANCY .....5<sup>TH</sup> DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; plaintiff having held a lease over property; lease surrendered in circumstances that appear suspicious; property sub-divided after the said surrender and three new titles created; one property transferred to a company owned by foreigners and a freehold title issued; Constitution not permitting company owned by foreigners to hold freehold title; prima facie case established; property could be prone to wastage causing loss to plaintiff; application for injunction allowed)***

1. The application before me is that dated 13 February 2015. It is an application for injunction which was filed contemporaneously with the suit. The application is opposed.
2. The case of the plaintiff, a limited liability company, is discernible from the pleadings, the application and affidavits in support. Its case as pleaded is as follows :-
3. That through a lease dated 20 March 2012 and registered on 5 April 2012, it did lease from the 1st defendant the land parcel CIS-Mara/Koiyaki-Dagugurueti/785 (parcel No. 785) for a term of 13 years. It is averred that the plaintiff honoured its obligations as contained in the lease. However, in the month of April 2014, it is averred that the 1st defendant in collusion with the District Land Registrar, Narok, named herein as 4th defendant, fraudulently and illegally prepared and proceeded to register a surrender of lease dated 9 April 2014, thus causing to be vacated the lease registered in favour of the plaintiff. It is averred that the surrender of lease was not executed by the plaintiff or its directors and that the plaintiff did not

pass any resolution to surrender the said lease. It is pleaded that the surrender was executed by a separate entity known as Mara North Conservancy, the 5th defendant herein.

4. After the surrender of lease, the parcel No. 785 was sub-divided by the 1st defendant into three parcels, namely CIS-Mara/Koiyaki-Dagugurueti/4316, CIS-Mara/Koiyaki-Dagugurueti/4317, and CIS-Mara/Koiyaki-Dagugurueti/4318 (parcels No. 4316, 4317 and 4318). Parcel No. 4316 was registered in the name of Monarchs Lodge Safaris, the 3rd defendant; parcel No. 4317, in the name of Sanaet Ole Masek, the 1st defendant; and parcel No. 4318 in the name of Parseen Ole Rakwa, the 2nd defendant. It is said that the shareholders of the 3rd defendant are all of Canadian nationality and that the consent of the Land Control Board was therefore procured illegally. It is averred that the defendants are now developing the property despite warnings and demands by the plaintiff. In the suit, the plaintiff has asked for the following orders :-

(a) *A permanent injunction against the 1st, 2nd and 3rd defendants restraining them, their agents and/or servants from developing, constructing, using, occupying, and/or in any manner interfering with land references number CIS-Mara/Koiyaki-Dagugurueti/4316, 4317, and 4318 sub-divided from land reference number CIS-Mara/Koiyaki-Dagugurueti/785 situate within Narok County.*

(b) *A declaration that the surrender of lease over parcel CIS-Mara/Koiyaki-Dagugurueti/785 dated 9th April, 2014, is uncontractual, fraudulent, and illegal and therefore null and void.*

(c) *An order of mandatory injunction compelling the 4th defendant to rescind and/or reverse the registration of the Surrender of Lease dated 9th April 2014.*

(d) *A declaration that the sub-division of parcel CIS-Mara/Koiyaki-Dagugurueti/785 into parcels numbers CIS-Mara/Koiyaki-Dagugurueti/4316, 4317, and 4318 is uncontractual, fraudulent, and illegal and therefore null and void.*

(e) *An order of mandatory injunction compelling the 4th defendant to rescind and/or reverse the sub-division of parcel numbers CIS-Mara/Koiyaki-Dagugurueti/785 into parcels numbers CIS-Mara/Koiyaki-Dagugurueti/4316, 4317, and 4318.*

(f) *A declaration that the Land Control Board consent issued in favour of the 3rd defendant, allowing it to acquire agricultural land parcel No. CIS-Mara/Koiyaki-Dagugurueti/4316, originally parcel Number CIS-Mara/Koiyaki-Dagugurueti/785, was illegal, fraudulent, and unprocedural.*

(g) *A declaration that the 3rd defendant cannot acquire, own or be the proprietors of any agricultural land including CIS-Mara/Koiyaki-Dagugurueti/4316, originally parcel Number CIS-Mara/Koiyaki-Dagugurueti/785, as it is a foreign company.*

(h) *A declaration that the plaintiff's registered lease dated 20th March 2012, over parcel number CIS-Mara/Koiyaki-Dagugurueti/785, is still legally valid and in force.*

(i) *Damages against the defendants for breach of lease.*

(j) *Costs of this suit jointly and severally against the defendants.*

(k) *Any such other or further relief as this Honourable Court may deem fit to grant.*

5. The supporting affidavit is sworn by David Muli who has described himself as a director of the plaintiff company. He has annexed copies of the lease, the official searches of the titles herein, and a search from the Companies Registry showing the directors and shareholders of the 3rd defendant.

6. Only the 3rd defendant has so far entered appearance and they have opposed the application for injunction through the affidavits of John Lesinka Lengeny, the 3rd respondent's manager. They have also raised a preliminary objection. The preliminary objection is as follows :-

1. *That this Honourable Court lacks jurisdiction pursuant to clause 18:1 and 18:4 of the lease dated 20/3/2012 to hear and determine the main suit.*
2. *That the Director Mara North Holdings Ltd Mr. Daniels Muli has not filed a written authority to plead, act and appear for the plaintiff.*
3. *That there is no privity of contract between the plaintiff and the 3rd defendant.*
4. *That preliminary injunctive relief can only be granted pending the decision or award of an arbitrator.*
5. *That the lease did not specify the period and is ambiguous.*
6. *That the plaintiff is praying for damages so he is not entitled to an injunction.*
7. *Further grounds shall be adduced.*

7. In the replying affidavit, it is inter alia deposed that the 3rd respondent purchased the land parcel No. 4316. It is averred that at the time of the transaction, the suit land was not encumbered and that the 3rd respondent is an innocent purchaser for value without notice. It is stated that the 3rd defendant has no contractual relation with the plaintiff or any obligation; that the 3rd defendant is in occupation but has not commenced construction; that construction is in the parcel No. 3932 which is also registered in the name of the 3rd defendant; that the 3rd defendant has not committed any fraud and that it is the mandate of the National Land Commission to determine land ownership by foreign and Kenyan citizens after audit of all title deeds issued by the Ministry of Lands; that the 3rd defendant is not party to the lease agreement between the plaintiff and 1st defendant and has no legal obligation towards the plaintiff; that the lease is no longer in existence and the plaintiff can only claim damages against the 1st defendant; and that the lease agreement provided for arbitration. To the affidavit is annexed a copy of the title deed to the land parcel No.4316 and parcel No. 3932.

8. The plaintiff filed a further affidavit through the same Daniel Muli. He contested the raising of the preliminary objection which in his view comprised of matters of fact. He further averred inter alia that the issues raised in this case are beyond the realm of the arbitration clause; that he is a director of the plaintiff and thus authorized to swear affidavits on behalf of the plaintiff and that written proof is only required when a person who is not a director appears or acts on behalf of the company; that the 3rd respondent is beneficiary of an illegality; and that consent of the Land Control Board cannot be issued to persons who are non-citizens.

9. The 3rd defendant also filed a further affidavit. In it, it is deposed inter alia, that the plaintiff deliberately misled the court in stating that there was ongoing construction in the parcel No. 4316; that construction is in the parcel No. 3932; that the plaintiff has misled the court that the land parcel No. 4316 is agricultural land whereas its user was changed from agricultural to camps and lodges without any objection and that both the Lease and surrender of Lease were executed by a Mr. Nabala. It is averred that full disclosure was not made and therefore the plaintiff does not deserve the injunction sought as it has come to court with unclean hands. It is also pointed out that the plaintiff has sought damages in its plaint and it is argued that for that reason it does not deserve an injunction. It is also averred that an injunction will adversely affect the 3rd defendant who stands to suffer irreparable loss; that the 3rd defendant is a significant investor and that the injunction will ultimately discredit Kenya as a favourable investment destination. It is also averred that in an exercise of forum shopping, the plaintiff instituted a suit before the National Environmental Tribunal, being appeal No. 14 of 2015, on 4 March 2015, and obtained other injunctive orders against the 3rd defendant.

10. In further response, the plaintiff swore a supplementary affidavit. It is deposed inter alia, that the 3rd respondent cannot by dint of Article 65 of the Constitution hold a freehold title; that the applications for change of user of the land parcel No. 4316 were made after the illegal transactions; that the plaintiff was not privy to the application for change of user and only became aware after being served with the replying

affidavit; that the 3rd defendant is developing both parcels No. 4316 and 3932 as a block and the two cannot be differentiated; that the issues raised before the National Environmental Tribunal are separate and distinct as it challenged the issuance of an Environmental Impact Assessment Licence; that the surrender of lease was not executed by any of its directors; and that even foreign investment must be done within the ambit of the Constitution and all Kenyan laws. An investment certificate is attached to the affidavit to demonstrate that the 3rd defendant wishes to invest jointly in the parcel No. 4316 and 3932.

11. I directed the parties to file written submissions to support their respective positions which was done. I also took in the oral submissions of Mr. Alex Muchemi of M/s Oyomba & Company Advocates for the plaintiff, and Mr. Ahmednassir, Senior Counsel, leading Mr. K. Kiptoo for the 3rd defendant.

12. Mr. Muchemi for the applicant inter alia argued that the plaintiff's lease was obliterated through a fraudulent surrender. He submitted that Article 65 of the Constitution provides that non-citizens can only hold land on the basis of a leasehold tenure not exceeding 99 years yet the title of the 3rd defendant is a freehold title. He was of the view that the plaintiff has demonstrated a prima facie case. He relied on the principles in the case of **Giella vs Cassman Brown (1973) EA 358** and the case of **Wainaina Kenyanjui & 2 Others vs Andrew Nganga (2013) eKLR**.

Mr. Ahmednassir for the 3rd respondent, submitted that the applicant is not deserving of an injunction. With reference to the case of **Giella v Cassman Brown**, he was of the opinion that no prima facie case has been established. On this point he also relied on the cases of **Mrao vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** and **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others (2014) eKLR**. It was argued that the 3rd respondent purchased the land parcel No. 4316 after the alleged fraud and therefore the plaintiff has not established a prima facie case against the 3rd respondent. It was also averred that an application for change of user was made and advertised in the local dailies but no objection was raised by the plaintiff. It was further submitted that no irreparable loss has been demonstrated by the plaintiff and that injustice will be occasioned to the 3rd respondent by any order of injunction. It was the view of counsel that the claim is one which can be compensated by damages. On the balance of probabilities, it was submitted that the same tilts in favour of the 3rd respondent. It was submitted that the plaintiff is undeserving of the remedy of injunction owing to material non-disclosures and reliance was made on the cases of the **Owners of the Motor Vessel Lillian S vs Caltex Oil (K) Ltd (1989) KLR 1**, and **Armstrong vs Sheppard & Short Ltd (1959) 2 All ER 651**. It was submitted that the applicant misled the court in alleging that construction was on the land parcel No. 4316 yet the same is in the parcel No. 3932 and that the property is no longer agricultural.

13. I have considered the pleadings, the affidavits on record and the submissions of counsel. This is an application for injunction and I do not see the need of departing from the time tested principles laid down in the case of **Giella vs Cassman Brown**. In the said case, it was held that for an applicant to deserve an order of injunction, he needs to demonstrate a prima facie case and also show that he stands to suffer irreparable loss. If in doubt, the court will decide the matter on the balance of convenience.

14. A prima facie case as stated in the case of **Mrao vs First American Bank** is "*... a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.*"

15. In the case of **Nguruman vs Nielsen & 2 Others**, it was stated that "*The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.*"

16. I have no serious problem with the above dicta, only to add that when dealing with an application for injunction, what essentially the court is being called to do, is to make a decision on how the subject matter of the suit ought to be preserved pending hearing of the suit. The core purpose of an injunction is to ensure that a person who has, on the face of it, demonstrated that his rights have been infringed, does not

end up with a paper judgment because the subject matter of the case will have been destroyed, or even if not destroyed, the loss that he will suffer by not granting the order of injunction will be substantial.

17. In assessing whether an applicant has made out a prima facie case, the court inevitably has to make a preliminary assessment of the case as presented by the applicant. Where the respondents have replied, this assessment has to be made in light of the rebuttals made by the respondents. At the end of it, the court needs to decide whether, on the face of it, the applicant has shown that his rights over the subject matter of the suit have been or may be infringed, or that the actions of the respondents, if not stopped, will so adversely alter the character of the subject matter of the suit to the detriment of the applicant. It must always be borne in mind, that what the court does in assessing whether a prima facie case has been established, is only a preliminary assessment, based on the material tabled before the court by the parties, at that preliminary stage of the proceedings. That preliminary assessment does not necessarily mean that the party in favour of whom it is made, must succeed at the trial, for such determination must await the final conclusion of the matter. But it is a determination which assists the court in making the decision on how best to have the subject matter of the suit preserved.

18. I have assessed the material presented by the plaintiff and the 3rd respondent, for none of the other respondents filed any response to the application. I have seen that the plaintiff held a lease which was registered against the title No. 785. The lease is dated 20 March 2012 and was registered in the register of the land parcel No. 785 on 5 April 2012. This is shown in the certificate of official search annexed to the plaintiff's affidavit. The term of the lease, from the lease instrument, is 13 years and 4 months and the instrument noted that it was to run upto 31 May 2025. It follows that the plaintiff was granted by the then owner of the land parcel No. 785, the 1st defendant, exclusive use and possession of the land comprised in the land parcel No. 785 until the expiry of the term of the lease or unless the plaintiff surrendered the lease.

19. There is a surrender of lease dated and registered on 9 April 2014 but the plaintiff has been categorical that it never executed any surrender of lease. The surrender of lease is executed by an entity called Mara North Conservancy. It is apparent that Mara North Conservancy was not the beneficiary of the lease, and on my part, at least at this stage of the proceedings, I do not see how an entity which is not the beneficiary of a lease can purport to surrender it. It was stated that the person who executed the surrender of lease is also a director of the plaintiff company. That may be so, but that does not change the fact that the lease was in favour of the plaintiff company, and not Mara North Conservancy, and following the principles of corporate identity laid down in the old common law case of **Salomon v Salomon**, it is difficult to argue that the two entities are the same, merely because they share common directorship.

20. On the face of it, I am of the opinion, that the plaintiff has shown that the surrender of lease is suspect. That in itself is a demonstration of a prima facie case.

21. All other transactions that took place thereafter, presumed that there was a proper surrender of lease. If it is demonstrated that the surrender of lease was unlawful, then all other further transactions may stand to be nullified, and this includes the certificate of title held by the 3rd respondent, and indeed the other respondents to the sub-divisions that came about from the land parcel No. 785. This is because such transactions will be founded on a fraudulent surrender of lease and may not be allowed to stand following the provisions of Section 26 of the Land Registration Act, which are drawn as follows :-

26. (1) *The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

- (a) *on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- (b) *where the certificate of title has been acquired illegally, unprocedurally or through a corrupt*

scheme.

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

22. The 3rd respondent has argued that it is innocent of any fraudulent transaction and therefore its title ought not to be impeached. That may be so, but Section 26 (1) (b) does give leeway for the cancellation of a title that has been acquired illegally, unprocedurally, or through a corrupt scheme irrespective of any foul play on the part of the title holder. The idea behind Section 26 (1) (b) is to ensure that a person deprived of title, does not fail to recover it, merely because there have been downstream dealings involving innocent parties. In essence, it prevents cleansing of title by subsequent dealings.

23. I do not think it is necessary, having held that the surrender of the lease is suspect, for me to dwell into the other transactions, such as the grant of consent of the land control board, or the sale to the 3rd respondents or indeed the other respondents. These are already subsumed in the holding that the surrender of lease is suspect.

24. There is also the other question of how the 3rd respondent, which is wholly owned by foreigners (Canadians) managed to get a freehold title. That may need some explanation for the Constitution of Kenya, 2010, which is the supreme law of the land, does at Article 65, bar the issuance of anything more than a 99 year old lease to foreigners. The said provision is couched as follows :-

*65. (1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.*

*(2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.*

*(3) For purposes of this Article—*

*(a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and*

*(b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.*

*(4) Parliament may enact legislation to make further provision for the operation of this Article.*

25. Unless a company is fully owned by citizens, it is to be regarded as a foreign entity for purposes of Article 65 of the Constitution. The 3rd respondent is fully owned by foreigners and this brings to question the freehold title that they hold.

26. It was argued that no nexus has been demonstrated between the plaintiff and the 3rd respondent. There may not be a nexus in the form of a contract between the two, or a tortious action, but there is a connection in that the plaintiff claims the same land that the 3rd defendant claims. That to me is sufficient connection between the two parties. It was further laid down in the preliminary objection that this court has no jurisdiction owing to the arbitration clause in the lease agreement entered into between the plaintiff and the 1st defendant. On my part, I do not see how the 3rd respondent can purport to take the benefit or enforce the terms of a contract for which she is not a party. That issue can only be raised by the 1st defendant owing to the doctrine of privity of contract. I have also not seen any problem with Mr. Muli swearing the supporting affidavit. He is a director of the company, and directors in law are considered as agents of corporate bodies; on my part, I am unable to insist on an authority to swear the affidavits. The other issues in the preliminary objection are really matters to be determined at the trial and are not pure questions of law.

27. I do not see the necessity of going any further than what I have set out above as a demonstration that the plaintiff has shown a prima facie case with a probability of success.

28. Will the plaintiff suffer irreparable loss ? If I do not issue an injunction, the subject property may stand to be wasted to the detriment of the plaintiff. We will not know how the respondents may deal with the property, and this may destroy the very purpose for which the plaintiff acquired its lease. This will no doubt cause the plaintiff irreparable loss. It was argued that damages will be sufficient compensation but I do not agree with this argument. I am also not a strong believer in the argument that just because there may be some monetary compensation, then an injunction should never issue. This may lead to a financially strong party running roughshod over the rights of the other, merely because of its financial muscle and the proposition that it is able to make good any loss in form of monetary compensation. That in my view would be a glaring injustice.

29. If I am wrong on all the above, and I have to consider the balance of convenience, I have no doubt in my mind that the balance of convenience tilts in favour of maintaining and preserving the suit properties so that they are not wasted or disposed of by the respondents. They need to be preserved, so that in the event the plaintiff succeeds, it does not end up with a worthless paper judgment.

30. There was the argument that the plaintiff has failed to make full disclosure so as to disentitle the plaintiff to the remedy of injunction. I have considered this argument but I think the plaintiff disclosed what was within its knowledge and I am unable to find any fault in the manner in which the application was presented.

31. The upshot of the above is that I do find merit in this application. I allow it and make the following orders.

*That pending the hearing and determination of this suit :-*

*i The 1st, 2nd , 3rd and 5th respondents are hereby stopped from making any development or construction or being in occupation of the land parcels CIS- Mara/Koiyaki-Dagurugurueti/4316, 4317, and 4318.*

*(ii) The said land parcels CIS-Mara/Koiyaki- Dagugurueti/ 4316, 4317 and 4318 be left in the manner that they currently are, and there be no further interference with the same by any of the parties.*

*(iii) The respondents are hereby barred from offering for sale, selling, leasing, charging or in any other way enter into any dealings in the land parcels CIS-Mara/Koiyaki- Dagugurueti/ 4316, 4317 and 4318.*

*(iv) There is hereby issued an order of inhibition, restricting the registration of any disposition in the register of the land parcels CIS-Mara/Koiyaki- Dagurugurueti/ 4316, 4317 and 4318.*

32. As to costs, same shall abide the outcome of the suit.

It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 16th day of June 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr Kibet holding brief for Mr Muchemi for plaintiff/applicant.

MR K Kiptoo for 3<sup>rd</sup> defendant/respondent. W

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**