Papiyo Investment Limited & another v Maasai Mara Lemek Landowners Conservancy Limited & another (Environment & Land Case E005 of 2024) [2024] KEELC 4807 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4807 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE E005 OF 2024

CG MBOGO, J

JUNE 20, 2024

BETWEEN

PAPIYO INVESTMENT LIMITED ..... 1ST PLAINTIFF

DAVID LIVINGSTONE LIMITED ..... 2ND PLAINTIFF

AND

MAASAI MARA LEMEK LANDOWNERS CONSERVANCY LIMITED ..... 1ST DEFENDANT

OLD BOMA LIMITED ..... 2ND DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion Application dated 26th March, 2024 expressed to be brought under Articles 40, 159 & 165 of the *Constitution*, Sections 1A, 1B, 3A & 63 of the *Civil Procedure Act* and Orders 40 and 51 of the Civil Procedure Rules seeking the following orders: -

    1. Spent.

    2. Spent.

    3. That pending the hearing and determination of the suit a temporary injunction do issue preventing the closure, manning and operationalization of the barriers set up by the respondents in Lemek Conservancy.

    4. That the court be pleased to order the respondents to provide audited accounts for the conservancy fees collected at Lemek Conservancy from 2007 to date;

    5. That the costs of the application be provided for.

2. The application is premised on the grounds *inter alia* that the plaintiffs/ applicants are the registered proprietors of Mara River lodge operated in Lemek Conservancy since the year 2000.

3. The application was supported by the affidavit of Harilal Patel, the director of the 2nd plaintiff/ applicant sworn on 27th March, 2024. The 2nd plaintiff/ applicant deposed that Mara River Lodge joined Lemek Conservancy organization in the year 2007, and it has been a member of the organization to date without receiving dividends. The 2nd plaintiff/ applicant deposed that in the year 2022, they started receiving letters from the defendants/ respondents' advocates instructed by the 2nd defendant/ respondent with regards to the conservancy.

4. The 2nd plaintiff/ applicant deposed that the letters were threatening in nature, and intent to terminate their access and that of their visitors to the conservancy. Further, it was deposed that the final letter informed them that they would be terminating gaming on the conservancy with effect from 22nd March, 2024. He further deposed that on 25th March, 2023, they learnt that the defendants/ respondents had set up barriers at various entry points which actions are based on no known right to the conservancy. He deposed that the said actions will render their lodge inaccessible and cripple their operations.

5. The 2nd defendant/ respondent filed its replying affidavit in opposition to the application sworn on 5th April, 2024 by Jeremiah Mutisya. The 2nd defendant/ respondent deposed that the plaintiffs/ applicants are neither shareholders nor directors of the 1st defendant/ respondent, and no dividends are payable since membership of the 1st defendant/ respondent is dependent on signing of leases which the plaintiffs/ applicants have not executed with the 1st defendant/ respondent.

6. The 2nd defendant/ respondent further deposed that Lemek Conservancy is one of the 24 conservancies within the Mara ecosystem, and outside the government protected area in which tourism activities are undertaken. He deposed that majority of land owners within the conservancy have leased their properties to the 1st defendant/ respondent for a period of 25 years subject to payment of a guaranteed monthly rent for purposes of wildlife conservation and tourism activities. He further deposed that the 1st defendant/ respondent sought for investors in accordance with the terms of the lease agreement it has with land owners and engaged the 2nd defendant/ respondent as the manager for the conservancy in July 2022.

7. The 2nd defendant/ respondent deposed that pursuant to the management agreement entered by the respondents on 20th July, 2022 they assumed the cost of running the conservancy including payment of the monthly rent to the land owners for the 1st defendant/ respondent. Further, it was deposed that for the 2nd defendant/ respondent to generate income, and to meet the cost monthly, they resorted to assess the number of cars that can access the conservancy at any given time and allocated the various lodges and camps within the conservancy the number of cars allowed at any given time. He further deposed that the plaintiffs/ applicants ignored the invitation as regards the operations of the conservancy while trespassing on the 1st defendant's/ respondents leased parcels from over 300 landowners who have leased to the 1st defendant/ respondent, but were unwilling to reach an understanding with the defendants/ respondents leading to their termination of grant of access of their leased parcels of land within the conservancy.

8. The 2nd defendant/ respondent deposed that they have not denied access to the plaintiffs/ applicants to their property but they have denied them opportunities to do gaming activities in the larger conservancy. Further, he deposed that the plaintiffs/ applicants have trespassed on the leased properties without express authority, and as such, the plaintiffs/ applicants are seeking court orders to enable them trespass on the 1st defendant's/ respondent's leased parcels without the defendants/ respondents

enjoying any benefits from them in breach of its right to property under Article 40 of the *Constitution*. The 2nd defendant/ respondent deposed that the barriers have been in existence, and the purpose of the same is to ensure that the 2nd defendant/ respondent monitors the activities in the conservancy. It was also deposed that the plaintiffs/ applicants are free to utilize the easements within the conservancy to access their property to move in and out.

9. The 2nd defendant/ respondent deposed that the allegation that they have failed to remit the plaintiffs/ applicants portion of necessary conservancy fees is misconceived and if anything, they are required to pay fees to be able to access the parcels under conservation.

10. The 1st defendant/ respondent filed a replying affidavit sworn on 8th April, 2024 by Saningo Ole Koriata. The averments raised by the 1st defendant/ respondent are similar to the averments raised by the 2nd defendant/ respondent. The 1st defendant/ respondent deposed that upon embracing the model by the land owners as to community conservancy, it instructed its advocates to write to the plaintiffs/ applicants and others inviting them several times to discuss on a working arrangement, but the plaintiffs/ applicants were adamant and continued to trespass on the 1st defendant's/ respondent's leased properties for their gaming activities and have refused to negotiate with the defendants on the same.

11. The plaintiffs/ applicants filed a supplementary affidavit in response to the replying affidavit which was sworn on 15th April, 2024 by Gopal D. Patel. He deposed that the defendants/ respondents admit that the plaintiffs/ applicants camp is situated in the larger area known as Lemek Conservancy, and it is apparent that they have intimated that there are special purpose, and unclassified public roads that criss-cross the conservancy which their servants use to access the premises. He deposed that the defendants/ respondents have not indicated any government or statutory body consent to set up barriers on these public access roads. He also deposed that there is no evidence to support the allegations of trespass as no demand, complaint or suit has been lodged against the plaintiffs/ applicants for the alleged trespass.

12. The plaintiff/ applicant deposed that while the defendants/ respondents have produced a purported lease for a Cis-Mara/ Lemek/ 5939, the same is without the consent of the Land Control Board which is a nullity.

13. The application was canvassed by way of written submissions. The plaintiffs/ applicants filed their written submissions dated 13th May, 2024. While relying on the cases of *Mrao Limited versus First American Bank of Kenya Limited* [2003] eKLR, *Amir Suleiman versus Amboseli Resort Limited* [2004] eKLR, the plaintiffs/ applicants submitted that they have clearly indicated that its right to property and access has been violated by the setting up of barriers to entry points in the conservancy, which barriers are on public access roads leading to areas including the plaintiffs/ applicants lodge. They submitted that the existence of one particular lease cannot form the basis for the disruption of their access to their premises. They further relied on the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 Others* [2014] eKLR.

14. On irreparable damage, the plaintiffs/ applicants urged the court to note that the defendants/ respondents have admitted to setting up barriers on the access road and unless the orders are granted, they will suffer irreparably. On balance of convenience, the plaintiffs/ applicants submitted that the present case as viewed under the lens of the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tanai* [2018] eKLR, the respondents have not indicated any inconvenience they will suffer if the injunctive orders are issued.

15. The defendants/ respondents filed their written submissions dated 30th May, 2024, where they raised one issue for determination which is whether the applicant has met the threshold to be granted temporary injunction orders.

16. The defendants/ respondents submitted that the plaintiffs/ applicants have not demonstrated that they have a prima facie case. They relied on the case of *Mrao Limited versus First American Bank of Kenya & 2 Others* [2003] KLR 125 and submitted that the plaintiffs/ applicants have not presented evidence to show that they have been denied access to their property. It was further submitted that the barriers are not to deny access to the occupants of the conservancy, but for the defendants/ respondents to monitor activities within the conservancy and guarantee security to the visitors and occupants of the conservancy. It was also submitted that the applicants have not provided a registered map of the conservancy showing that the barriers are on a public road, and that the easement enjoyed by the plaintiffs/ applicants is also enjoyed by other occupants within Lemek Conservancy save to undertake gaming activities.

17. On whether the plaintiffs/ applicants will suffer irreparable damage incapable of being compensated by damages, the defendants/ respondents submitted that the plaintiffs/ applicants are not informing the court that they want to benefit by undertaking gaming activities in other people's private property without incurring any costs. The defendants/respondents submitted that since the loss has not been disclosed, by indicating the number of visitors booked with them but were denied access, the plaintiffs/ applicants have not suffered loss.

18. The defendants/ respondents while relying on the case of *Chebii Kipkoech versus Barnabas Tuitoek Bargoria & Another* [2019] eKLR submitted that the allegations that they have not stated the inconvenience they would suffer is misleading. They went on to submit that under Sections 40 and 41 of the Wildlife (Conservation and Management) Act, wildlife conservation associations and wildlife managers are under obligation to provide security within the conservancy by hiring wildlife scouts and rangers, and that erection of the barriers on the conservancy is solely for the purpose of manning the activities within the conservancy.

19. I have considered the application, the replies thereof and the written submissions filed by both parties. In my view, the issue for determination is whether the plaintiffs/ applicants are entitled to the orders of temporary injunction.

20. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the celebrated case of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> "In an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially."

21. On whether the plaintiffs/ applicants have established a prima facie case, it is not disputed that the plaintiffs/ applicants operate Mara River Lodges within Lemek Conservancy. This is a fact agreed upon by the defendants/ respondents. However, the dispute herein is on access of their business premises which they argue has been curtailed by the defendants/ respondents setting up of barriers with no known right to the conservancy. The plaintiffs/ applicants also deposed that they have been operating the lodge since the year 2007 or thereabout and they have over this time, had access without the barriers, a fact which the defendants/ respondents have not refuted. In the case of *Dr. Simon Waiharo Chege v. Paramount Bank of Kenya Ltd. Nairobi* (Milimani) HCCC No. 360 of 2001: it was held,

> " The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

22. On this issue, the plaintiffs/ applicants have established a prima facie case. On whether irreparable damage would occur that cannot be compensated by damages, I place reliance in the the Court of Appeal decision in *Esso Kenya Limited versus Mark Makwata Okiya* Civil Appeal No. 69 of 1991:

> " The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

23. Having said the above, and upon analysis of this case, it is my finding that the balance of convenience tilts in favour of granting the orders of injunction as there is less prejudiced to be suffered by the defendants/ respondents as opposed to the plaintiffs/ applicants. In this case, I find merit in the Notice of Motion Application dated 26th March, 2024 and I proceed to grant a temporary order of injunction preventing the closure, manning and operationalization of the barriers set up by the respondents in Lemek Conservancy pending the hearing and determination of the suit. Costs in the cause. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 20TH DAY OF JUNE, 2024.

HON. MBOGO C.G.

JUDGE

20/6/2024

In the presence of: -

Mr. Meyoki Pere – C. A