**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT 214 OF 2004**

**FAHIM YASIN TWAHA &ANO.. ……..……..PLAINTTIFF**

**VERSUS**

**KENYA PORTS AUTHORITY ……..…..……DEFENDANT**

**Coram:** Mwera, J.
Waithera for plaintiff
Ms Kanaban for defendant

**JUDGEMENT**

On 16th September, 2004 the two (2) plaintiffs filed this suit against the defendant corporation. They pleaded that while the 1st plaintiff was the registered proprietor of land parcels No. LAMU/BLOCK IV/126, 127, 189 and 282, the 2nd plaintiff owned plot No. LAMU/BLOCK IV/128 at a place called Shella, Lamu. After obtaining due authorities as required by law the two (2) plaintiffs started construction on their respective plots with effect from January 2004.

That the defendant operated and maintained sea navigational and beacons including light houses and sea buoys off the plaintiffs' plots and other adjacent plots.

On 6th September, 2002 the defendant by letter requested the Commissioner of Lands to nullify the registration of the plaintiffs over their said plots and in turn hand them over to the defendant so that it could maintain its stated equipment. The Commissioner advised the defendant to approach the plaintiffs with that proposal and that resulted in many meetings and correspondences that did not bear fruit, since the private/public valuations of the properties were considered exorbitant by the defendant. There was even a move for the Commissioner to compulsorily acquire the plaintiffs' plots or to prohibit them from building on them.

And by his letter dated 30th September, 2002 that Commissioner of Lands informed the defendant that the subject plots were private property. On 27th February, 2004 the defendant by letter approached the local District Commissioner to repossess the subject plots or place restrictions on developments going on there. Then on 30th July, 2004 the defendant got police and its own guards to stop the on-going

construction on the ground that that was interfering with the defendant's sea navigational aids. The plaintiffs' saw that act as illegal. So even with demands and statutory notices of intention to sue having gone forth, the defendant did not desist and so this suit was brought with the prayers for:

**a) declarations that the defendant's actions to stop the plaintiffs from developing their plots were illegal, unwarranted/unjustified and that the plaintiff's titles were indefeasible, sacrosanct and free of encumbrances.**

**b) a temporary injunction to bar the defendant from interfering with the plaintiff's enjoyment/utilization of their plots.**

On 29th October, 2004 a written statement of defence was filed. The defendant pleaded that it's primary concern was with PLOT NO. 189 on which construction had started. So far it had no interest in the other plots. The defendant then denied that it canvassed to have any of the plaintiff's property transferred to it or compulsorily acquired. The valuations carried out of the subject plots were exorbitant and in any event the defendant was only interested in plot 189. The defendant added that besides the local council approval to commence building, the plaintiffs were also required to have similar authorities from the Ministry of Environment and the National Museums of Kenya which the plaintiffs did not have. So the construction was unlawful. The defendant denied deploying guards to the site to stop construction and it did not complain about he interferance with sea navigational aids. It was further averred that the defendant would invoke the provisions of S. 15 (3) of the Kenya Ports Authority Act and that only plot 189 was close enough to the defendants' aids and construction there could interfere with light being seen (picked up?) by incoming ships. And that the terms of sale offered by the plaintiffs were unconscionable and unfair. There was apparently no reply to this defence. On 8th June, 2005 the court granted an injunction order in favour of the plaintiffs as regards Plot No. 189.

The hearing opened before Sergon Judge on 31st March, 2009 with the 1st plaintiff (PW 1) in the witness box.

He told the court that he was a Member of Parliament (Lamu West) and the registered lease holder of land parcel No. 189 (Exh. P1). It had no encumbrances. He had had a house on it built following a local council approval (Exh. P2) dated 15th July, 2003. The plaintiff once wrote to the provincial environment officer ( Exh P3 ) who replied that his project did not require an impact assessment report. On 25th November, 2002 Engineer Shamalla invited the plaintiff to a meeting held in the defendant's offices where he was informed that restrictions had been intended to be put against his and other owners plots as to the height of their buildings. PW 1 protested by letter (Exh. P4). The defendant's managing director then sought the Commissioner of Lands to place a restriction on his plot which was done (Exh. P 7) on 30th September, 2002. Then on 27th November, 2002 the defendant requested for compulsory acquisition of the plaintiff's land (Exh P 8). The plot was valued and a report dated 4th December, 2003(02?) issued (Exh P 9). On 13th February, 2003 the Government Chief Valuer furnished another valuation report to the defendant (Exh.P10). The managing director of the defendant protested that the valuation (by the government valuer?) was too high and then requested the Commissioner of Lands to acquire the suit property compulsorily ( Exh. P 11). The managing director also wrote to the local District Commissioner asking that the plaintiff's plot be repossessed (Exh. P 12). With no success foreseeable between the 2 litigant's negotiations the plaintiff decided to resume his building but then his contractor was harassed by the defendant. The plaintiffs' advocate protested against the same on 2nd August, 2004 (Exh. P 13). The acts did not stop and Khaminwa Judge had to accordingly issue an injunction on 8th June, 2005 (Exh. P 14). The plaintiff's building did not obstruct the defendant's sea navigational aids. Judge Sergon then adjourned the trial generally before the plaintiff was cross-examined. Fresh dates had to be taken on priority basis.

On 23rd April, 2009 the parties took fresh hearing dates – 15th July, 2009. Come, that day and Azangala Judge presiding directed that the proceedings so far recorded could be typed with a view for another judge to resume hearing from where Sergon Judge left off.

On the next hearing date, 1st December, 2010 taken **ex parte** by the plaintiff, Ibrahim Judge, as he was then recorded a consent order to stand over the matter generally. Other dates fell in between with nothing much going on. And particularly on 10th November, 2011 Kasango Judge noted that the plaintiff's case was still going on waiting his cross – examination. That was repeated on 14th March, 2012 before the undersigned. On that day Mr. Waithera told the court that his client (the plaintiff) would show up in the afternoon for cross-examination. Mr. Shah for the defendant had two witnesses ready.

At 2:41 p.m. that afternoon only Mr. Shah was present in court. He informed the court that the time for the afternoon session (2:30 p.m.) had been agreed on by both sides. But because neither the plaintiff nor his advocate was present, his case was to be marked closed to allow for the defence to open. The court did that and Mr. Shah called his first witness, Hussein Hapipha Mamo (DW 1).

DW 1 told the court that he was a senior land surveyor with the defendant corporation and therefore well-versed with the dispute in court. The witness produced a bundle of documents (Exh. D1) and told the court that the plaintiffs were allocated five (5) plots in the subject area in December 2002 when Daniel Arap Moi was about to exit office. Without stating the source of his information, DW 1 testified that the plaintiffs wrote a letter to the President requesting for allocation of the plots whose sketch plans they attached.

These plots covered water catchment areas and a locality for navigation aids. The stated premiums for the five plots totaled sh. 30,000/=. Two years down the line, and the plaintiffs were offering to sell those plots at sh. 30 Million each to the defendant. But only one plot No. 189 was affecting the defendant's installations in that building on it blocked navigation aids – the facilities that guided ships into habour. And more particularly the lighthouse which stood at 30 feet high. That was the only complaint that the defendant had with the plaintiffs. The objection has grown more in intensity and concern now that Lamu port has been earmarked for very large infrastructural development. DW 1 told the court that the plaintiffs' valuation sum they demanded from the defendant was exorbitant. Indeed it had never been the defendant's intention that the plaintiffs do not enjoy their property. Thus a declaration sought in that regard was meaningless. That the defendant was not involved in the process by which titles of lease were processed and then issued to the plaintiffs. That legally, that should have been the way to go about it.

At 3:08 p.m. Waithera for the plaintiffs walked into court. He asked the court to resume the plaintiffs' case but after cross examining DW1. The court granted that and DW 1 resumed his testimony.

He emphasized that the defendant was not interested in other plots of the plaintiffs except Plot No. 189 on which buildings interfered with it's navigational aids. The court heard that a government valuation for all the plots was sh. 235,341,100/= (Exh p 1- 11). The building plans (Exh p 2) showed that the house intended could be as high as 12 metres (36 feet) high. That house was blocking the defendants navigational facility which faced the sea. It could stand in the way of ships coming into port. DW 1 then referred to the private valuers report (Exh p 9) M/s Fairlane which gave the value of sh. 150 Million and the government one put that at sh. 235 Million. For DW1, a surveyor well-acquinted with valuation of properties, he saw the large difference as signaling that something wrong transpired. The moves to acquire the subject land compulsorily was for the safety of shipping. The defendant would avail its valuation for the court if so directed. It did not interfere or instruct interference with the building on plot 189. But the court gave an injunction order (Exh. P 14). It was not disregarded or ignored. That was what was partly heard in cross-examination and the defendant closed its case.

Mr. Waithera then stood up and stated that he came to court late because when PW 1 arrived at Mombasa he had been taken ill and admitted at Aga Khan Hospital. There was no medical evidence to that effect. However, if Mr. Shah insisted on cross- examining PW 1, he would himself then re-examine and then submit in writing. Mr. Shah did not wish to cross-examine PW1. The trial closed. The defendant did not wish to file submissions but the defendant did.

The defendant went over the pleadings before court plus the evidence with particular focus on the documentary exhibits. The court was urged to find as per evidence that all the plots in issue were the property of the plaintiffs. That had not been denied. That the defendant's interest only lay in plot 189 on

which building could interfere with the operations of the defendant's navigational aids for incoming ships. Establishment and maintenance of those facilities was in line with international instruments for the safety of life at sea as mandated by the United Nations Law of the Sea. That the Commissioner of Lands recommended to the defendant to seek compulsory acquisition of particularly plot 189 under the relevant law. Private negotiations made no headway because the plaintiffs put forth exorbitant valuations. Now the determination.

To answer the prayers in the plaint, this court directs its mind to plot No. 189 only. The plaintiff testified about that plot alone and DW1 told the court that that is the only plot (not the other four) on which on-going building did block the operations of its navigational aids. DW1 denied interfering with or instructing any agents to stop the plaintiffs' building on this plot and that it did not ignore/breach the injunction order the court gave. PW1 told the court:

**" I am the registered owner of plot No. 189 …. Presently the land has my house …….. My house is fully constructed and I currently occupy (it)".**

With the foregoing and the defendant having denied interfering with construction, it is clear that no construction is still going on. Or if it was, the defendant was not interfering with it. The house if fully constructed and so there is no purpose for the declaration (a) asked in the plaint.

The defendant does not impreach the lease title PW 1 holds over plot 189. Similarly there is nothing to be served with a declaration sought in that regard.

The defendant's evidence is that it has not interfered with or restricted the plaintiffs ownership/enjoyment of plot No. 189 and no such thing was proved here. The plaintiffs prayed that such could not be justified unless they were paid full market value for their property or there was acquisition under the Land Acquisition Act, which also would mean government compensating the plaintiffs. In the circumstances of this case, this court opines that the parties employ independent valuers, or if possible one agreed upon, to give reports that they can use to negotiate a private transaction over plot No. 189. In default and for the national and international importance to shipping into and out of Lamu port, the defendant ought to approach the government to acquire plot 189 on that account. The plaintiffs will still have 4 plots in the locality anyway and be paid compensation for plot No. 189.

An interim injunction was sought and granted even as it appeared it was superfluous with the claim by the defendant that it did not interfere with the construction going on plot 189. It did not disobey the order either. No more need be said about it.

In the end it does not appear as if this suit ought to have been instituted. There were no disputes shown to have existed. It is dismissed with costs.

**Delivered on 22nd May, 2012.**

**J. W. MWERA**

**JUDGE**