



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 72 of 2008

LEISURE LODGE LIMITED ..... PLAINTIFF

V E R S U S

DR. PAWAN KUMAR ..... DEFENDANT

RULING

- 1) The Plaintiff, Leisure Lodges Limited (hereinafter '**Leisure Lodge**') has sued Dr. Pawan Kumar (hereinafter '**Kumar**') seeking, amongst other prayers, that Kumar be evicted from Kwale/Diani Beach Block/856 (hereinafter the '**suit property**'). This suit was filed on **2<sup>nd</sup> April 2008**. That date is significant for purposes of determining this application.
- 2) Kumar filed a Defence to Leisure Lodge's claim. It is a general denial. About 4 years after close of pleadings Kumar filed a Motion dated 17<sup>th</sup> April 2012 asking the Court to strike out the suit as failing to disclose a reasonable cause of action. This decision answers that motion. The application is premised on the following 3 main grounds produced word for word-
  - (a) **The Plaintiff filed this suit seeking proprietary and eviction orders over the suit property known as KWALE/DIANI BEACH/BLOCK 856 (hereinafter referred to as the suit property) against the Defendant in this suit. The Plaintiff has not filed any supporting documents to support his claim.**
  - (b) **The Defendant in his Defence and Statement filed in court denies ever owning and or curving and or being related in any manner to the above mentioned suit property. The Defendant has no interest whatsoever in the outcome of the suit.**
  - (c) **That it is clear that the suit against the Defendant is misconceived and discloses no reasonable course of action against the Defendant. Furthermore, the suit clearly offends the express provisions of Order 4 Rule 5 of The Civil Procedure Rules.**
- 3) This application is for disallowing. Kumar says that the Leisure Lodge has not filed any supporting documents to support his claim. What documents were to be filed alongside the Plaint on **2<sup>nd</sup> April 2008** when this matter commenced? The requirement that a list of witnesses, their statements and copies of documents to be relied on at trial accompany the plaint was introduced by The Civil Procedure Rules, 2010 which came into effect on 17<sup>th</sup> December 2010. So how would the plaint be in breach of rules that did not exist on 2<sup>nd</sup> April 2008 when it was filed?
- 4) The Transitional provisions of The Civil Procedure Rules 2010 do not invalidate anything done prior to their coming into effect. That is my understanding of Order 54 Rule 2 which provides-

**2. In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done:**

**Provided that:**

**(a) If, and in so far as it is impracticable in any such proceedings to apply the provisions of these Rules, the practice and procedure**

**heretofore obtaining shall be followed;**

**(b) In any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted. (my emphasis)**

It is open to Kumar to now seek that a list of witnesses, statements and copies of documents to be relied on at trial be furnished but he cannot attack the validity of the plaint on the basis of the new rules.

5) And I would be surprised if Kumar were to expect Leisure Lodge to plead evidence. That is unnecessary. See the provisions of Order VI Rule 3(1) of the Former Civil Procedure Rules (now Order 2 Rule 3(1)) which provides-

**“Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.” (my emphasis)**

Save in the very limited circumstances under Sub Rule 2 of the above provisions (which is not relevant here), issues of evidence must be left for trial.

6) The other contention by the Plaintiff is that the suit offends the provisions of Order 4 Rule 5 of The Civil Procedure Rules. This Rule reads-

**“The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff’s demand.”**

Paragraph 5 and 6 of the plaint reveals the complaint of the Plaintiff in the following terms-

**“5. The Plaintiff avers that the Defendant without any authority from the Plaintiff has illegally and wrongfully entered into and trespassed onto the said parcel of land while claiming to be the registered proprietor of a portion excised, subdivided and or carved from Kwale/Diani Beach Block/856.**

**6. The Plaintiff avers that the Defendant has by**

**himself, his servants and or agents erected structures upon the said parcel of land and has persistently remained thereupon and continued to perform acts of waste in derogation of the Plaintiff’s lawful title.”**

The allegation is that Kumar has trespassed on the suitland. This allegation of trespass by Leisure Lodge is an allegation that Kumar is unlawfully on the suitland. Surely this is an allegation Kumar is liable to answer and in fact denied in his defence of 8<sup>th</sup> May 2008.

7) The application dated 17<sup>th</sup> April 2012 must fail even without the Court considering the evidence presented by the Leisure Lodge through the affidavit of John K. Mutua sworn on 5<sup>th</sup> October 2012. That application is dismissed with costs to Leisure Lodge.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of November, 2012.**

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**No appearance for Plaintiff  
Umara for Defendant  
Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**