



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO. 3 OF 2011

SEKANDI HOLDINGS LIMITEDPLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITYDEFENDANTS

RULING

By dint of a plaint dated 30th December, 2010 and filed on 4th January, 2011 the plaintiff sued the defendant in respect of parcels of land known as Grant IR 108144 (LR NO. 9800) and Grant IR 108146 (LR NO. 9799) situate in Langata, Nairobi. It is the plaintiff's case that it is the lawful and exclusive registered owner of the said suit properties and that the defendant and its agents have trespassed thereon with the intention of evicting the plaintiff and or destroying the plaintiff's property therein. In so doing, the defendant has totally destroyed the improvements thereon and stolen materials and tools therefrom. As a result the plaintiff has suffered loss and damage amounting to a sum of Kshs. 3,000.000/=

The plaintiff now seeks a permanent injunction against the defendant, its agents, servants and or employees restraining it from interfering, trespassing, alienating, damaging or evicting the plaintiff from the suit properties. The plaintiff also claims special damages and interest at court rates. Alongside the plaint the plaintiff filed an application by way of Chamber Summons under Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 and Sections 3A and 63 (e) of the Civil Procedure Act for temporary injunction orders pending the hearing of the main suit.

This application should have been by way of Notice of Motion under the new rules but no issue has been raised in respect of the title used. On 4th January, 2011 Ochieng J, granted interim orders in favour of the plaintiff and listed the matter for inter partes hearing on 17th January, 2011. The status quo has remained in place to date.

The defendant filed a Notice of Preliminary Objection to the main suit to the effect that,

1. That this Honourable Court has no jurisdiction to entertain this suit pursuant to the provisions of Section 33 of the Kenya Airport Authority Act Chapter 395 Laws of Kenya.
2. That this suit is premature before this honourable court as it offends the provisions of Section 34 of the Airport Authority Act Chapter 395 Laws of Kenya.

Learned counsel for the parties have filed submissions to address the said Notice of Preliminary Objection. I have to observe at this stage that, some of the submissions advanced by both learned counsel are factual and evidential which, if addressed at this stage may, prejudice either the present or future

positions of both parties. Accordingly, I shall confine myself to the issues of law raised in the said Notice of Preliminary objection.

Section 33 of the Kenya Airports Authority Act Cap 395 aforesaid provides that in the exercise of the powers conferred by Sections 12,14,15 and 16 the Authority shall do as little damage as possible. Where any person suffers damage no action or suit shall lie but shall be entitled to such compensation therefor as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.

Section 34 provides inter alia that, any action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Managing Director by the plaintiff or his agents.

The plaintiff's claim, going by paragraph 5 of the plaint and prayer 2 of the same plaint, is for compensation for loss allegedly inflicted by the defendant's agents. In that case therefore, the Act provides that, compensation should have been agreed between the parties and in default, be determined by a single arbitrator appointed by the Chief Justice. There is no evidence that this step was ever taken by the plaintiff before the commencement of this suit.

Paragraph 11 of the plaint states that Notice of intention to sue has been given. The Act as set in Section 34 above provides that the plaintiff's suit should have been filed at least one month after a written notice. There is annexure "ATS 11" to the affidavit of Dr. ATS Kaddu – Mukasa who is said to be the Managing Director of the plaintiff and which appears to be the Notice under the said Act. That Notice is dated 29th December, 2010 and this suit was filed on 4th January, 2011. Clearly the said notice does not meet the requirements of Section 34 of the Act.

The Notice aforesaid is a prerequisite step that confers jurisdiction upon the High Court. Any default related thereto denied this court the jurisdiction to hear this matter. On that point alone, this court declines jurisdiction. Additionally, the arbitration provision provided under Section 33 of the Act ought to have been explored first, and only after any disagreement should the plaintiff move to this court. I know that this court has original jurisdiction under the Constitution to deal with such matters. However, there is no conflict whatsoever between the Kenya Airport Authority Act aforesaid and the Constitution and therefore the provisions of this Act remain mandatory in respect of the said procedures.

I also know that the striking out of any pleading is a draconian measure which should be invoked very cautiously and in clear cases. However, where there is justification to invoke the same, the courts should not shy away from doing so. In the instant case, I find that the plaintiff has not complied with both Sections 33 and 34 of the Kenya Airports Authority Act and therefore this suit is misplaced. Accordingly the same is hereby struck out with costs to the defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 6th Day of July, 2011

A. MBOGHOLI MSAGHA
JUDGE