



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 335 OF 2009

LEISURE LODGES LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

DR. ABDUL KARIM ALI ABDALLAH.....1ST DEFENDANT/RESPONDENT
HAMISI NYUNDO.....2ND DEFENDANT/RESPONDENT

RULING

The plaintiff moved the Court by Chamber Summons dated 24th September, 2009 and brought under Order XXXIX, rules 1,2,3,5 and 9 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The substantive prayer in the application was set out as follows:

“THAT pending the hearing and final determination of the suit filed herein, the plaintiff be allowed to demolish and remove all the structures illegally constructed by the defendants upon its Land Parcel KWALE/DIANI BEACH BLOCK/856 or over any part or portion of land excised or sub-divided from KWALE/DIANI BEACH BLOCK/856 howsoever described and/or registered.”

In the supporting affidavit, **John K. Mutua** the Chief Executive Officer of the plaintiff depones that the plaintiff is the registered proprietor of all that piece of leasehold land known as KWALE/DIANI BEACH BLOCK/856, more commonly known as DARAD FARM which is a large parcel measuring 58.28.ha. The deponent deposes that the plaintiff was registered as the proprietor of the said leasehold on 3rd September, 1991, a title deed being duly issued to the plaintiff.

The deponent depones that sometime in 2009 and on other subsequent dates, the defendants by themselves, their workmen, servants or agents, without the plaintiff’s authority, wrongfully entered the parcel of land known as KWALE/DIANI BEACH BLOCK/856, and commenced various acts of waste such as cutting down the plaintiff’s trees, fences and sign-posts, digging up and damaging the plaintiff’s water pipes and electricity cables, digging holes and trenches, fencing off portions of the suit land, clearing the ground, and laying foundations in preparation to construct walls, buildings or houses thereon.

The deponent states that the said activities by the defendants on the suit land, fall within the area where the plaintiff has sunk several large boreholes, and installed underground tanks, water pumps, electricity cables, and large water pipes which carry

water from the boreholes to the plaintiff's five-star establishment known as Leisure Lodges Golf and Beach Resort.

The deponent deposes that the defendants have cut and broken the plaintiff's underground water pipes and electric cables, thus causing a severe water shortage which is likely to interfere with the plaintiff's operations at its tourist establishment.

The deponent deposes that if the defendants continue their activities on the suit land, the plaintiff will be compelled to seek an alternative source of water and to relocate its installations at great expense. It is deposed that the defendant's said activities will deprive the plaintiff of the benefits of the suit land, and of the right to fully develop and utilise the plaintiff's prime property.

The deponent deposes that the plaintiff has already sought, and has been granted, planning permission to re-develop the suit land and the plaintiff has initiated plans to expand its eighteen-hole golf-course which shares part of its plot boundary with the suit parcel of land.

The defendants elected in their response, to file "grounds of objection," in which they contended thus:

(i) that, the plaintiff's application is "an abuse of the process of the Court";

(ii) that, the application involves a material non-disclosure – "as L.R. No. KWALE/DIANI BEACH BLOCK/856 is res sub judice vide NAIROBI HCCC NO. 188 OF 2008, LEISURE LODGES LIMITED v. (1) THE COMMISSIONER OF LANDS (2) THE CHIEF LANDS REGISTRAR (3) THE LAND REGISTRAR KWALE (4) THE ATTORNEY-GENERAL – which is pending;

(iii) that, the orders sought are in respect of wrong parties;

(iv) that, 1st defendant is a registered proprietor of parcel No. KWALE/DIANI COMPLEX/1460, and the orders sought by the plaintiff infringe on his constitutional rights to property;

(v) that, 2nd defendant is wrongly enjoined in this suit, as he owns no property in the area;

(vi) that the applicant ought to furnish security for costs.

Counsel for the plaintiff submitted that the land parcel, KWALE/DIANI BEACH BLOCK/856 is registered in the name of the plaintiff and is not lawfully alienated by the plaintiff; so that the purported excision of parts or portions of the said land, is null and void.

Counsel urged that the applicant has shown that it has a good case, with a probability of success, in that it is the registered owner of a 99-year leasehold over the suit land; and that the plaintiff's affidavits left no doubts that "the defendants are physically in the plaintiff's land and that their activities are interfering with the plaintiff's operations in its beach resort." Relying on the evidence tendered for the plaintiff, learned counsel submitted that the defendant was not a *bona fide* purchaser for value of any portion at all of the suit premises. Counsel submitted that it was the responsibility of 1st defendant to take heed of the *caveat emptor* maxim, and so he ought not to have purchased from any vendor any portion of the suit land without inquiring into the origins of the title being held out to him. Counsel urged: "Indeed [the 1st defendant] must have seen the [plaintiff's notice boards] and other installations, as [he] proceeded to buy the land which was obviously not owned by the person who sold it to him, otherwise he would have claimed ownership of the said installations and sign boards."

With regard to NAIROBI HCCC No. 188 of 2008 referred to in the defendants grounds of opposition, learned counsel stated, on the basis of the evidence on record, as follows:

“The plaintiff further states that it has filed a suit in an attempt to enforce its rights to the suit premises as a result of illegal attempts by Government officers to forcibly re-survey and alienate its land, which suit has been concluded in its favour as shown by the decree issued on 27th July, 2009...in which such titles as are held by 1st defendant were declared null and void....”

Counsel submitted that the plaintiff holds a lease for the suit land, in respect of which it has a certificate of lease issued in 1986; and that, therefore, the plaintiff is entitled to occupy the suit land without interference from the defendants or anyone else.

Counsel urged that since the plaintiff has essential installations on the suit land, the basic conditions for the grant of injunctive relief were satisfied; that the plaintiff is entitled to protect its land from being wasted, and its installations thereon from being damaged.

It was submitted for the applicant that the charge of non-disclosure, made by the respondents, had no basis; for the plaintiff had disclosed that the Nairobi suit in HCCC No. 188 of 2008 had been concluded.

Counsel for the defendants, however, contended that the plaintiff had not satisfied the tests for the grant of injunctive relief, as set out in *Giella v. Cassman Brown & Co. Ltd.* [1973] E.A. 358. It was urged that 1st defendant had a title deed showing he had purchased Plot No. KWALE/DIANI COMPLEX/1460 – but that it had not been shown that that plot was part of the plaintiff’s land, being KWALE/DIANI BEACH BLOCK/856.

Counsel’s final submission was that “the 1st defendant’s plot No. KWALE/DIANI COMPLEX/1460 is not in any way similar [to] the plaintiff’s Plot No. KWALE/DIANI BEACH BLOCK/856. Therefore [the] orders sought should not be granted....”

On the face of it, the applicant, in my opinion, brings before the Court a serious case which has not been successfully challenged. However, there are matters of fact touching on the respective claims, which could not be resolved with finality, by way of affidavit evidence. The claim by the 1st defendant that the land parcel No. KWALE/DIANI BEACH BLOCK/856 is entirely in a separate location from Plot No. KWALE/DIANI COMPLEX/1460 must be resolved by evidence in the form of testimony, as the *prima facie* evidence at this stage is that the two plots, if the second one indeed exists, converge on property much earlier registered, which belongs to the plaintiff.

I will make orders as follows:

- (1)The plaintiff may restore its structures on the suit land which have been destroyed in the course of activities and/or constructions by the defendants; and the costs of such reconstructions shall be costs in the cause.
- (2) The defendants are hereby restrained from further destroying, damaging or constructing anything at all on the suit land, until the main cause is heard and determined.
- (3) The main suit shall be listed for hearing on the basis of priority.

(4)The costs of this application shall be in the cause.

DATED and **DELIVERED** at **MOMBASA** this 12th day of March, 2010.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ibrahim

For the Applicant:

For the Respondents: