

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 113 of 2008

LEISURE LODGES LIMITED PLAINTIFF

V E R S U S

GABRIELE HIGA

DEFENDANT

R U L I N G

This application is brought by a Chamber Summons dated 6th May, 2008, and taken out under O. XXXIX rules 1, 2, 3, 5 and 9 of the Civil procedure Rules, and Section 3A of the Civil procedure Act. The applicant seeks one main order-

“THAT the defendant by herself, her servants and or agents or otherwise howsoever, be restrained by temporary injunction from further entering upon and or performing any further acts of construction of any structures or committing further acts of waste howsoever upon land parcel Kwale/Diani Beach Block/856 or any part or portion of land excised therefrom howsoever described and or registered and or interfering with the plaintiff’s proprietary rights over any part or portion of land excised or sub-divided from Kwale/Diani Beach Block /856 howsoever described and or registered initially pending the inter partes hearing of this application and after the inter partes hearing pending the hearing and final determination of the suit filed herein.”

The application is supported by the annexed affidavit of John K. Mutua, the plaintiff’s Chief Executive Officer, and is based on the grounds that the plaintiff is the registered proprietor of the parcel of land known as Kwale/Diani Beach Block/856, a leasehold to which the plaintiff holds a valid title issued in 1991. In a nutshell, it is the plaintiff’s case that the defendant has, without any authority from the plaintiff, unlawfully and illegally entered into the plaintiff’s aforesaid parcel of land and has started exercising proprietary rights on the land including construction of structures which is inconsistent with the plaintiff’s lawful title to the land. In support of this contention is a copy of a certificate of lease issued to the plaintiffs on 3rd September, 1991.

On her part, by a replying affidavit sworn on 3rd June, 2008, the defendant denies having whatsoever encroached or trespassed upon Plot No. Kwale/Diani Beach Block/856 as alleged by the plaintiff. Instead, she maintains that she is the registered proprietor of all that piece or parcel of land known as Kwale/Diani Complex/1151 which she purchased from one Juma Swaleh Mwaranjira. Before purchasing the said property, she had caused a search of the register to be carried out and established that the said Juma Swaleh Mwaranjira was the registered proprietor of the same and there was no encumbrance ie caution or restriction whatsoever registered against the title. She further contends that the plot aforesaid is situated within Kwale/Diani Complex registration section while the applicant’s premises is situated within a separate registration section, namely Kwale/Diani Beach Block. Although the defendant does not say it explicitly, she maintains that the applicant is not entitled to the relief of an injunction.

At the hearing of the application, Mr. Kibe appeared for the applicant while Mr. Omollo appeared for the respondent. Mr. Kibe submitted that the maps annexed to the application show that the portion claimed by the defendant is inside plot No. Kwale/Diani Beach Block/856 which belongs to the plaintiff, and that

calls for an injunction against her in order to protect the plaintiff's interests as there has been a recent incursion into the plaintiff's plot. He submitted that the defendant's title is dated 24th April, 2008, which was after service on the Land Registrar, Kwale, of a court order on 22nd April, 2008, restraining him from surveying, subdividing, allotting and or issuing any letters of allotment and or title deeds to any person or any party of the whole or any portion of land derived from, excised from and or subdivided from land parcel Kwale/Diani Beach Block/856 howsoever subsequently described and or registered. Counsel submitted that the defendant cannot be an innocent purchaser for value in good faith and the doctrine of buyer beware applies to her. He then asked for orders as prayed.

In his response, Mr. Omollo for the defendant submitted that the defendant purchased Kwale/Diani Complex/1151 from a third party who had acquired it in 2006. He argued that the defendant's plot was in Diani Complex registration section whereas the plaintiff's plot was in Diani Beach Block registration section and therefore the defendant's plot was not inside plot No. 856 as alleged by the plaintiffs. He then referred to Section 27 of the Registered Land Act and submitted that this section had the effect of vesting in the defendant absolute ownership of Kwale/Diani Complex /1151, and further that Section 28 of the said Act protects rights acquired for valuable consideration. Finally, Mr. Omollo contended that the plaintiff has not asked the court to rectify the register if the title had been obtained fraudulently and the court cannot grant an injunction unless and until the title is cancelled.

On the face of the record, each party to this case holds a title to what seem to be separate parcels of land, in different registration sections. However, the plaintiff has made a very serious allegation against the defendant by claiming that the defendant's parcel No. Kwale/Diani Complex/1151 is inside the plaintiff's parcel No. Kwale/Diani Beach Block/856. If that is proved as a fact on the ground, it would be difficult for the defendant to counter the plaintiff's accusation that she has encroached upon the plaintiff's land, and in that case I don't think that Section 27 of the Registered Land Act would be of much assistance to her, especially as this is not a first registration. That section is subject to the Act, and Section 143 of the Act empowers the court to order a rectification of the register where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

The key to solving the problem in this matter once and for all is to seek the services of a surveyor so that the beacons and boundaries for Kwale/Diani Beach Block/856 may be determined. If Kwale/Diani Complex/1151 is outside those boundaries, then the plaintiff would have no claim whatsoever against the defendant. But should it turn out that Kwale/Diani Complex/1151 is, indeed, within the boundaries of Kwale/Diani Beach Block/856, or should it have been excised from Kwale/Diani Beach Block/856, then the defendant will not be able to resist the plaintiff's claim, as it would then come out clearly that Diani Beach Block and Diani Complex are one and the same registration section.

Pending any reference for a surveyor's report, I note that in paragraphs 6, 7 and 8 of the plaintiff's supporting affidavit, the plaintiff alleges that some serious acts of waste have been and continue to be committed on the disputed parcel of land. These include cutting, breaking and interfering with the said water pipes and underground electricity cables, thereby causing a severe water shortage that has seriously interfered with the plaintiff's operations at the plaintiff's Beach and Golf Resort. Although the defendant counters this by arguing that the plaintiff has not shown any evidence of the existence of the pipes, cables and underground water tanks by way of a map or otherwise, the statements were made on oath and the plaintiff did attach some maps and photographs. I therefore find that the plaintiff has made a prima facie case, and if the electric cables come into contact with water, even human life would not be spared. It will also be at risk and loss of life is irreparable. In the circumstances of this case, the balance of convenience demands that the status quo be maintained.

For these reasons, and noting that the plaintiff has filed an undertaking as to damages, I grant an interlocutory injunction in terms of prayer 2 of the application by Chamber Summons dated 6th May, 2008.

Costs in the cause.

Dated and delivered at Mombasa this 27th day of March, 2009.

L. NJAGI

JUDGE