



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 132 of 2008

LEISURE LODGES LIMITED.....PLAINTIFF

VERSUS

1. CHIEF IBRAHIM MAKANZU.....1ST DEFENDANT
2. ATHUMAN K. MWACHOTEA.....2ND DEFENDANT
3. MOHAMED MWACHIDZO.....3RD DEFENDANT
4. HAMISI NYUNDO.....4TH DEFENDANT
5. JUMA KAMONDE ALIAS MKIKUYU.....5TH DEFENDANT
6. SHEE MWAMWINDI.....6TH DEFENDANT
7. ALI MWAPISHI.....7TH DEFENDANT

RULING

In its plaint dated 26th May 2008, the plaintiff prays for one primary order of the court that land parcel number Kwale/Diani Beach Block/856 is not lawfully alienated by the plaintiff and the purported excision of parts or portions of land therefrom howsoever described and or registered is null and void *ab initio* and the defendants jointly and severally, their servants and or agents or otherwise howsoever be evicted therefrom together with all their properties and all structures erected by them be demolished.

The plaintiff simultaneously filed the application which is now before me. The application has been brought under the provisions of Order XXXIX Rules 1, 2, 3, 5 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application seeks one main order of the court expressed as follows:-

“2. That the defendants jointly and severally.....be restrained by temporary injunction from further entering upon and or performing any further acts of re-surveying the same, uprooting existing beacons, planting new beacons and interfering with existing beacons, cutting down trees, fences and sign posts, digging trenches, fencing off portions, clearing the ground, laying foundations, constructing any structures thereon and 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 or sub division from Kwale/Diani Beach Block/856 howsoever described and or registered initially pending the inter partes hearing of this application and after.

The application is based on the following principal grounds:

- 1) That the plaintiff is the registered proprietor of the said parcel of land and holds a valid title issued in 1991.
- 2) That the 2nd to 7th defendants led by the 1st defendant have without any authority or consent of the plaintiff

unlawfully and illegally entered into the said parcel of land and have started exercising proprietary rights over the said parcel of land.

3) That the defendants may sub-divide the said land into smaller plots thus making the same commercially unviable, build permanent structures and buildings thereon thus interfere with the plaintiff's intended use of the same and if the defendants continue committing further acts of waste upon the same the plaintiff may eventually be unable to use the land for the purpose for which it is intended or may lose its whole value and benefit as a result of which the plaintiff will suffer irreparable loss and damage.

4) That the plaintiff has not entered into any agreement with the defendants or any other person to part with possession of its land to the defendants or otherwise nor has any portion of the said land been lawfully subdivided or excised therefrom and any acts in such purport are irregular, illegal and unlawful.

The application is supported by an affidavit sworn by one John K. Mutua, the plaintiff's Chief Executive Officer. The affidavit elaborates the above grounds. In paragraph 5, it is deposed that on the 18th March 2008, 12th April 2008 and 15th April 2008, the defendants led a group of unruly mob of youths and together illegally and wrongfully chased away the plaintiff's security guards, entered into the said land and went round uprooting the plaintiff's signs and fences erected thereon while pointing out various portions of the said land. It is further deposed in paragraph 7 of the affidavit that on 22nd May 2008, the defendants without the authority of the plaintiff entered into the plaintiff's said land and illegally and wrongfully uprooted some of the plaintiff's existing beacons erected on the said land and commenced a resurvey of a portion of the said land into smaller plots and erected thereon some new beacons. It is also deposed in paragraph 10 of the affidavit that the defendants returned to the said land on the 23rd May 2008 in the company of a Government Surveyor and some armed Administrative Police Officers and again on 24th May 2008, and continued the resurvey in the company of Administrative Police Officers and regular police officers who shot in the air to scare away a crowd of villagers who had confronted the defendants. It is further deposed in paragraph 11 of the affidavit that the defendants are intending to carve out the plaintiff's said land into smaller portions and construct therein various permanent houses or buildings in an attempt to defeat the plaintiff's right to utilize the same viably.

The plaintiff further filed another affidavit on 19th June 2008, which was in response to the affidavits filed in reply to the application by the 6th and 7th defendants. In the said replying affidavits, the 3rd to 7th defendants deny committing the acts complained of by the plaintiff. The 6th defendant, Shee Mwamwidi who has sworn the affidavit for himself and on the authority of the 3rd to 5th defendants has deposed that if there are any buildings or constructions going on then the same are on parcels owned and registered but not on the plaintiffs land. The 3rd to 7th defendants depone to other suits filed by the plaintiff over the same land and contend that the matter is sub judice.

In the further affidavit filed by the plaintiff on 19th June 2008, although it is titled a supporting affidavit, the plaintiff deposes that the other suits referred in the replying affidavits relate to different causes of action.

The 1st and 2nd defendant have not opposed this application in a replying affidavit, grounds of opposition or in any other manner. When the plaintiff appeared ex-parte on 26th May 2008, it persuaded Hon. Sergon J. of the prima facie merits of the application and the Learned Judge granted the interim injunction sought in prayer two (2) of the Chamber Summons pending hearing inter partes.

The application was debated before me on 19th June 2008 by Ms. Kibe, Learned counsel for the plaintiff and Mr. Ouma, Learned counsel for the 3rd to 7th defendants. Counsel reiterated the averments of their clients in their respective affidavits and urged me to agree with those positions.

I have considered the application, the affidavits filed both for and in opposition to the application and the submissions of counsel. Having done so, I take the following view of the matter. The Law on the grant of a prohibitory interim injunction has been settled. The pre-requisites were laid down in the precedent setting case of **Giella – v – Cassman Brown & Co. Ltd. [1973] EA 358.** These are that:

1. An applicant must show a prima facie case with a probability of success at the trial.
2. An interlocutory injunction will not normally be granted unless an applicant can show that he would suffer irreparable loss if the interlocutory injunction is not granted.
3. If the court is in doubt it should decide the application on a balance of convenience.

The plaintiff states that it is the registered proprietor as lessee of parcel number Kwale/Diani Beach Block/856

(hereinafter the suit land). The leasehold interest is for 99 years from 3rd September 1991. In support of that contention the plaintiff has exhibited a Certificate of Lease as “JKM 1.” The Lease was granted to the plaintiff by the Government of Kenya. The plaintiff’s title to the suit land is not challenged by the defendants. The 7th defendant avers that he was no where near the plaintiff’s land on the dates stated in the supporting affidavits. The 3rd to 6th defendants swear that if there are any buildings or constructions going on, then the same are going on on parcels duly owned and registered (sic) but not part of the land complained of. The 1st and 2nd defendants have not opposed the plaintiff’s application. So the allegations made against them must be deemed to be true. It is not necessary at this stage to make definitive findings of fact or Law on this application. That will be the function of the trial court. But whatever the trial court will finally determine, there is no doubt that the plaintiff’s title is unassailable as none of the defendants are laying claim upon it. As the registered proprietor, the plaintiff is entitled to the use of its title to the exclusion of all others including the defendants. The acts complained of obviously interfere adversely with the plaintiff’s rights as such proprietor. As has been held before, where there is a conflict between a registered proprietor of land and a trespasser, the latter must give way. See **Jai Super Power Cash and Carry Ltd – v – Nairobi City Council and 2 others CA No. 111 of 2002 (UR)**.

On the material available to the court, I am satisfied that the plaintiff has shown a prima facie case with a probability of success at the trial. The second necessary condition to consider is whether the plaintiff’s injury could adequately be compensated in damages if an injunction were not granted at this stage. The plaintiff has sworn that the defendants are intending to carve out its land into smaller portions, and construct thereon various permanent houses or buildings in an attempt to defeat the plaintiff’s right to utilize the same viably. There is also a deposition that the defendants are involved in a stealthily calculated plot to grab its property and the said actions and especially those of the 1st defendant may precipitate the invasion of its land by members of the public to the detriment of the plaintiff. In my view there is no doubt that unless the injunction sought is granted, the plaintiff will suffer irreparable loss which may not be compensated in damages. The property is a prime property adjacent to the plaintiff’s already developed property. Loss of such a property cannot be measured in shillings and cents. I therefore find and hold that the plaintiff has satisfied the second condition for the grant of an interlocutory injunction.

Having found for the plaintiff on the first two conditions for the grant of an interlocutory injunction, I need not consider the balance of convenience.

Before concluding this matter I will briefly comment on the existence of the other suits. In my view those other suits cannot defeat the plaintiff’s present action as every act of trespass constitutes a separate cause of action. It is not alleged that the acts complained of here are the same acts complained of in the earlier suits. The plaintiff has in this action specifically identified the various actions complained of and when they occurred.

In the end, I allow the plaintiff’s application dated 26th May 2008 in terms of prayer 2 thereof.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF JULY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Kibe Ms for the Applicant.

F. AZANGALALA

JUDGE

15TH JULY 2008