



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 131 of 2006

MBWARAHAJI ALI MOHAMEDPLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....1ST DEFENDANT

COMMISSIONER OF LANDS2ND DEFENDANT

RULING

By a plaint dated 15th June 2006, Mbwarahaji Ali Mohamed the plaintiff herein, sued the Kenya Airports Authority and Commissioner of Lands the 1st and 2nd Defendants respectively and prayed for the following orders inter alia:

- (a) *A declaration that the 1st defendant's encroachment into the suit property measuring 4.5. acres situate in Manda Airstrip within Lamu District is lawful*
- (b) *An order of injunction restraining the 1st Defendant from occupying the suit land and further compelling it to restore the plaintiff's house by an order of mandatory injunction.*
- (c) *An order of mandatory injunction compelling the 2nd Defendant to commence an adjudication process in Lamu district.*
- (d) *Costs.*

The plaintiff at the time of filing the plaint also took out a summons under order XXXIX rule 2 of the Civil procedure rules in which he sought for temporary orders of injunction similar to those sought in the plaint pending the hearing and determination of the main suit.

When the plaint plus the summons to enter appearance and the chamber summons were served upon the 1st defendant it filed a defence and a replying affidavit to contest the plaintiff's allegations. The 1st defendant also filed a preliminary objection against the entire suit.

When the Chamber summons came up for interpartes hearing, Mr. Mwaura learned advocate for the 1st defendant argued two preliminary points of law in a bid to convince this court to strike out the entire suit. The first point he argued was to the effect that the plaintiff did not give the 1st Defendant the mandatory thirty days notice before filing the suit. Mr. Hamza, the learned advocate for the plaintiff on his part urged this court to reject the submission on the ground that he had evidence that his client had given the 1st defendant 30 days notice as required under Section 34(a) of the Kenya Airports Authority Act (Cap.395 Laws of Kenya). Mr. Hamza adduced from the bar copies of the demand notice and the reply thereto. This court was satisfied that notice of 30 days was given in compliance with section 34(a) of the aforesaid Act hence the first objection must fail.

The second issue raised by the 1st defendant's advocate, is to the effect that the suit was incompetently and prematurely before this court in contravention of Section 33(1) of the Kenya Airports Authority. Mr. Mwaura beseeched this court to strike out the suit on that account. It is argued that the suit should have first been referred to an arbitrator to be appointed by the Chief Justice pursuant to that section.

Mr. Hamza on his part urged this court to reject such a submission on the basis that his client's claim was not based on the provisions of section 34 of the aforesaid Act but instead arose out of an action under Section 13 of the Kenya airports Authority Act. It is his argument that the 1st Defendant in disregard of section 13 of the aforesaid Act purported to expand the airport. This submission was resisted by Mr. Mwaura on the basis that the 1st Defendant is in possession of the title to the land hence Section 13 did not apply to it.

I have considered the two rivaling submissions. There is a dispute as to whether or not the suit falls within the provisions of Section 13 of the Act. The basis of the preliminary point is section 33(I) which provides as follows:-

“In the exercise of the powers conferred by Sections 12,14,15 and 16, the authority shall do as little damage as possible and where any person suffer damage no action or suit shall lie but he shall be entitled to such compensation therefore 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.”

It is clear from the above provisions that the objection can only be sustained if the dispute fell under sections 12,14,15 and 16 of the aforesaid Act. It is the averment of the plaintiff that he has been in occupation of the land in dispute for over 18 years. It is also his submission that the land has not been adjudicated and that the 2nd defendant had even been directed by a court order in 1999 to carry out an adjudication process. There are minutes of the County Council of Lamu of 15th March 2005 which indicates that the 1st defendant had requested the County council of Lamu for an additional Land measuring 50 acres to expand the Manda Airstrip. It was noted in those Minutes that the exercise will displace some farmers on the ground. There were recommendations that farmers affected to be compensated for lost land. From the annexures attached to the affidavits of John Joseph Tito and Mbwarahaji Ali Mohamed, I am convinced that the suit before me does only relate to the issues raised in Sections 12,14,15 and 16 of Cap 395 Laws of Kenya. Issues will arise as to how the 1st Defendant acquired the land. I have perused the title annexed to the affidavit of John Joseph Tito. The title was issued to the 1st Defendant on 15th March 2002. The Minutes referred to are Minutes of 2005 in which the 1st Defendant was still asking for more land. In view of the above contentious issues I am of the view that the weighty matters cannot be decided on the basis of a preliminary objection. The issues can only be dealt with in a substantive application or through a hearing. In the end I find the preliminary objection without merit. The same is dismissed with costs to the plaintiff.

Dated and delivered at Mombasa this 17th day of May 2007.

J.K. SERGON

JUDGE

In open court in the absence of the parties with notice.