REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 42 OF 2002
AMINA OMARI

FREDRICK SUTER KILIMO ……
PLAINTIFFS

VERSUS

LONRHO AGRI. BUSINESS

KENYA AIRPORTS AUTHORITY ….....……..……
DEFENDANTS

J U D G M E N T

Amina Omari and Fredrick Suter Kilimo entered into an agreement with Lonrho Agribusiness E.A. Ltd Lonrho (hereinafter referred to as "Lonrho"), on 9/1/2001, by virtue of which, the two would acquire from Lonrho a ten acre parcel of land, known as PIONEER/NGERIA BLOCK 1 (EATEC) 3538 (hereinafter called 'the subject property'), situate within the Airport area in Eldoret.

The two who were desirous of developing the subject property with a private members club and their residence proceeded with their proposals and started the development soon after the acquisition. Their efforts appear to have been interfered with, for they claim that on 12/1/2001 Lonhro, falsely accused them of having fenced off and encroached into it's neighboring plots, which were then allegedly on sale to third parties. The two also claim that subsequently thereto officials of Kenya Airports Authority (hereinafter referred to as 'KAA'), forcefully confiscated their proposed building plans, which it is their contention, was interference with their quiet and peaceful enjoyment of their property and the proposed development. They aver that the interference is unlawful.

The two therefore filed this suit in which they seek inter alia, a permanent injunction to restrain Lonhro and KAA, who are the 1st and 2nd defendants herein respectively, their agents and/or servants from trespassing on the subject property. They also seek the return of the site plan, and damages for the said interference.

Lonhro not only denied the plaintiffs allegations, but it also counterclaimed against the two claiming that though they had acquired only a 10 acre parcel of land, they had nevertheless trespassed onto its 2.26 acres of land, which was already on sale to a third party.

KAA, which denies all the allegations against it and in particular any involvement in the aforesaid actions, however maintains that the suit against it is premature for lack of the relevant statutory notices. It therefore pleads the Kenya Airports Authority Act Cap 395 of the Laws of Kenya ('KAA Act') and

especially sections 33 and 34 thereof, which stipulate that:

"*33. (1) 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 suffers 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.*

(2) Nothing in this section shall be construed as entitling any person to compensation-

(a) for any damage suffered unless he would have been entitled thereto otherwise than under this section; or

(b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.

34. Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall effect -

(a) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the 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 agent;

(b) the action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of continuing injury or damage, within six months after the cessation thereof."

This case was originally heard by my learned brother the Hon. Justice Omondi Tunya who allowed the initial application by the two plaintiffs for temporary orders of injunction against the two defendants, after which he proceeded to take the evidence and ordered that parties file written submissions, which they did. My role in this matter has therefore been the preparation of this judgment.

There is no doubt that these two plaintiffs are the registered proprietors of the subject land. It was the submission for them, that the fact that KAA had returned the site map to them after they had obtained the initial restraining orders against both defendants, was a clear admission that they were guilty of trespass. They thus urged the court to find that the two defendants are therefore liable for costs and damages for the loss and inconvenience caused to them. It was also their submission that both the defendants had no locus standi in the matter, as the land between the subject property and Kipkaren Dam, which they had allegedly encroached upon, was then owned by National Water Conservation Corporation ('NWCC'), which had authorized the them to utilize the dam subject to various conditions. NWCC is not party to this suit, and there was no evidence to that effect on record.

Apart from the prayer for a permanent injunction to restrain Lonrho, the plaintiff therefore claims damages for loss suffered due to the delay caused by Lonrho and KAA who interfered with their intended development. Unfortunately, no submissions were made regarding the quantum of damages which the court would be expected to award.

KAA is however of the view that the claim against it lacks in merit, as the dispute relates to their relationship with Lonrho. It also maintains that there is no proof that the land, which it allegedly encroached upon, belongs to them, and it therefore challenges the prayer for damages, as the claim was never proven on a balance of probability and avers that in any event, relevant approvals by were never obtained in line with Section 14 and 15 of KAA Act, which stipulate that:

"*14(1) Any authorized employee of the authority may, for the purposes of this Act, enter upon any land –*

(a) to survey such land or any portion thereof; or

(b) to remove or cause to be removed any obstruction, materials, structures or buildings including slaughterhouses, which are likely to attract birds that may be hazardous to aircraft operations.

(2) Any costs incurred by the Authority in pursuance of the provisions of the subsection (1) (b) shall be wholly recoverable form the person responsible for such obstructions, materials, structures or buildings.

(3) Where any damage to land is occasioned by reason of the exercise of the powers conferred by subsection (1) (a), the owner or occupier of the land shall be entitled to compensation in accordance with this Act.

15. (1) Any authorized employee of the Authority may for the purposes of this Act, enter upon land and-

(a) cut down or remove any tree or other obstruction, not being a building; or

(b) execute such other works as may be necessary to prevent the occurrence of any accident or to repair any damage caused as a result of any accident.

(2) If any tree or other obstruction cut down or removed under subsection (1) (a) came into existence subsequent to the construction of any aerodromes or to the service being provided thereafter, no compensation shall be payable in respect of such entry or the cutting down or removal of such tree or other obstruction.

(3) Where any person erects any building which in any way interferes with the operation of any service provided by the Authority under this Act, the Authority, may, unless such person has previously obtained the approval of the managing director to the erection of such building, or has modified it to the satisfaction of the managing director, apply to the High Court for an order for the demolition or modification of such building, or, as the case may require, for the payment of the Authority of the cost incurred in the resetting or replacement necessary to prevent such obstruction or danger and the court at its discretion may grant such order as it may deem fit as to the payment of compensation and costs."

A look at the pleadings reveals that Kilimo who appeared as the 2nd plaintiff did not file a verifying affidavit at the time when the plaint was filed, which was in direct contravention of the mandatory provisions of Order VII rule 1 (2) and (3) of the Civil Procedure Rules, which require that " *the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint*", and further that "*the court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply…"* . Unfortunately Kilimo who had been on notice since the day when they obtained the restraining orders against the two defendants, did not seem it fit to regularize the position, an omission which will prove fatal to his case. A plaint, which is not so accompanied, is defective and it cannot be sustained. I do in the circumstance order that his suit against both the defendants be struck out with costs for want of compliance, which in effect leaves Omari as the sole plaintiff.

Be that as it may, it is a requirement that a party who wishes to institute proceedings against KAA do issue relevant notices in line with section 34 aforementioned. That requirement is couched in mandatory terms. It was incumbent upon the Omari to provide proof of compliance, but she did not do so. It being a mandatory requirement, which was not complied with, since it now transpires that notices were never issued, it therefore means that this suit as filed contravenes the said provisions of the law, which in turn renders her suit against KAA fatally defective and incompetent. It cannot be maintained and it stands dismissed with costs.

In any event, and even if I am wrong in the above finding, this suit was filed in direct contravention of the aforementioned section 33(1) of the KAA Act, which demands that a party who claims to have suffered damage at the hands of KAA, shall not take out any action or institute a suit, before seeking to negotiate

the matter with the matter KAA or, if no agreement is reached, the matter shall be referred to a single arbitrator appointed by the Chief Justice. There is no evidence that the plaintiff sought to negotiate the matter with KAA, or even then to refer the matter to arbitration. It is therefore my humble opinion that this suit against KAA is misconceived and premature. It cannot be maintained against KAA as it is a nullity and stands struck out with costs, which now leaves me with Omari's suit against Lonhro.

It is important that I point out at this stage, that sometimes in 1989, the Government of Kenya (GOK) compulsorily acquired through NWCC', a piece of 73.38 hectares of land from Lonrho in Eldoret. Despite the fact that NWCC had yet to compensate Lonhro, it nevertheless proceeded to construct a dam on the said land. Being aggrieved by the said action, Lonhro instituted a civil suit against the Attorney General, on behalf NWCC, to wit H.C.C.C (Eld) 81 of 1993, and it managed to obtain an order for compensation, as well as costs of the suit. The court also ordered that upon payment of the decretal sum, Lonrho would see to the subdivision and transfer of the said 73.38 hectares to NWCC, who would in turn bear the resultant costs for the said subdivision and transfers. The said decision still remains a valid order of this court, as no appeal has ever been preferred against it.

Nevertheless, Lonrho, which relies on the aforementioned decision claims that though it had received the said compensation, it had however not transferred the land to NWCC because it had noted encroachment upon the land by these plaintiffs, and it is on this basis that it filed a counterclaim against them.

The pleadings before me and the evidence on record, and especially the aforementioned judgment against NWCC is in my mind sufficient to show that Lonrho has a locus standi in this matter by virtue of it being the owner of the land which adjoins the plaintiffs parcel.

The encroachment was confirmed by the Deputy Registrar of this Court who following an order of this court visited the scene, and established that the plaintiffs land adjoined Lonhro's parcel and that though the relevant boundary beacons were still in place, indeed it was the plaintiffs who had encroached into Lonhro's by 3.8 meters, where the two had started developing a permanent building structure; that they had also put up a temporary wooden structure or shade whose slab lay across the boundaries thereby covering 5.6 meters of Lonhro's land, and further that they had also put a septic tank outside the beacon lines, which was an encroachment on the Lonhro's land by 20.5 meters.

The upshot of all this is that I find that Omari has not been able to prove her case against Lonhro on a balance of probability and I do dismiss her suit with costs.

On the other hand, Lonhro has been able to prove its case against Omari and Kilimo on a balance of probability, as it is they who had actually encroached into its land. I do therefore grant it judgment as prayed against them jointly and severally, and do in the circumstances grant it an order of permanent injunction in line with its prayer (a). It is also ordered that the plaintiffs do confine themselves to the boundaries of their parcel of land, namely PIONEER/ NGERIA BLOCK 1 (EATEC) 3538.

Lonhro shall also have the costs of the counterclaim.

Interest shall accrue at court rates until payment in full.

Dated and delivered in Eldoret this 24th day of February 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of: