



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1314 Of 2005

SHEVA HOTELS LIMITEDPLAINTIFF

VERSUS

AMINA HASSAN YAADEFENDANT

RULING

Sheva Hotels Ltd. (“Sheva Hotels”) the Plaintiff, is the registered owner of a piece or parcel of land known as L.R. No.609/Watamu in Kilifi District (“the suit land”). According to the Certificate of Title, Sheva Hotels was registered as proprietor of the suit land way back on the 21st August 1988.

On the 1st November 2005, Sheva Hotels filed this suit against Amina Hassan Yaa (“Amina”), the Defendant, alleging that in August 2005, the Defendant without the consent of the Plaintiff wrongfully entered upon a portion of the suit land and started constructing a residential house thereon. Amina has ignored the Plaintiff’s request to her to stop building but the Defendant has refused.

On the same date the Plaintiff applied by Chamber Summons under Order 39 rules 1 and 2 of the Civil Procedure Rules for a temporary injunction to restrain the Defendant from trespassing on the suit land and continuing with construction. The application is supported by an affidavit sworn by Mr. Vittorio Veneziani who is the Managing Director of the Plaintiff. In the affidavit dated the 1st November 2005, Mr. Veneziani repeats and amplifies the averments contained in the Plaintiff. An interim injunction was granted by the court on the 2nd November 2004, which has since been extended from time to time.

The Defendant has yet to file a Defence but on the 25th November 2005, Amina filed a Replying Affidavit in opposition to the Plaintiff’s application. She also filed Grounds of Opposition and a Notice of Preliminary Objection.

When the Plaintiff’s application came up for hearing on the 1st February 2006, I allowed the Defendant’s Advocate to raise the objection. The objection is that the suit is defective and cannot be maintained because the provisions of Section 21(4) of the Registered Land Act [Cap. 300] have not been complied with and by reason **THEREFORE**, this court has no jurisdiction to entertain this suit.

Section 21(4) of the Registered Land Act on which the objection is based sets out the mechanism for settling boundary disputes.

Mr. Albert Khaminwa, learned counsel for the Defendant, contends that this being a boundary dispute, it has to be dealt with in accordance with that Section.

Ms. Machio, learned counsel for the Plaintiff, submitted that Section 21(2) of the Registered Land Act applies only to titles registered under the provisions of that Act and that in any case, it cannot apply to the suit land which is registered under the provisions of the Registration of Titles Act [Cap. 281]. Secondly, Ms. Machio submitted that the Plaintiff's claim is based on trespass and there is no allegation or an averment by the Plaintiff that there is a boundary dispute between the Plaintiff and the Defendant.

Having considered the submissions of both learned counsel, I have come to the conclusion that the objection is misconceived for a number of reasons. First, the Plaintiff's claim is based on trespass. There is no allegation by the Plaintiff that its boundary has been violated by the Defendant. Secondly, Amina herself confirms in paragraph 4 of her Replying Affidavit made on the 24th November 2005 —

“4. THAT I am not the registered owner of all that parcel of land known as L.R. No. 609 WATAMU/ KILIFI DISTRICT nor do I claim any portion in the same and I have not trespassed on the said parcel of land and I put the Plaintiff to strict proof thereof.”

The Defendant herself has stated on oath that she has no interest in the suit land. And she has challenged the Plaintiff to prove that Amina has trespassed on the Plaintiff's land (the suit land). The Plaintiff says that the Defendant has entered into the suit land and is erecting a residential house thereon. That being a complaint of trespass, which goes to title, and not a boundary dispute, the court most certainly has jurisdiction to deal with it.

It must follow from the foregoing that the Preliminary Objection notice of which was filed on the 25th November 2005 fails and it is hereby dismissed with costs to the Plaintiff assessed at Kshs.10,000/= to be paid within the next thirty (30) days of the date hereof and in default execution to issue.

Orders accordingly.

Dated and delivered at Nairobi 24 day of February 2006.

P. Kihara Kariuki

Judge