

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 437 of 2005

TOTAL KENYA LIMITED1ST PLAINTIFF

CARMAX LIMITED2ND PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY1ST DEFENDANT

UCHUMI SUPERMARKETS LIMITED2ND DEFENDANT

RULING

1st Plaintiff's Chamber Summons dated 5th August, 2005 is brought under Order XXXIX Rule 1(a), 2, 3(1) and 9 of the Civil Procedure Rules. The Plaintiff seeks in one prayer a temporary injunction restraining the defendants by themselves, their servants or agents from demolishing or otherwise interfering with the Plaintiff's ownership, or possession or right of use of Plot No.LR.209/14443 until hearing and determination of this suit. The affidavit in support of that application is sworn by the 1st Plaintiff's legal manager. The facts that come out of that affidavit are that the Plaintiff on being notified of a sale of a property along Lang'ata road namely Plot No.LR. 209/14443 which property was being sold by TPS Limited entered into negotiations for the purchase of the same. The Plaintiff being aware of the Government's position with regard to illegal or irregularly allocated public land wrote a letter to Commissioner of Lands and copied the same to the Minister for Lands and Settlement requesting that they be informed whether there was objection in the aforesaid transaction. There was no objection raised and the purchase price was finally settled at Kshs. 11 million. The Plaintiff paid the purchase price and the stamp duty together with necessary legal fees for that transaction. The transfer in favour of the Plaintiff was finally registered on 29th July, 2003. The property is situated along Lang'ata road dual carriage way fronting the Uchumi hypermarket. The Plaintiff intended to put a service station on the said plot and accordingly sought and obtained the approval of the National Environmental Management Authority. The Plaintiff also submitted the actual drawing plans to the Ministry of Roads and Public Works which drawings were approved. The Plaintiff thereafter entered into a lease agreement with the 2nd Plaintiff whereby the 2nd Plaintiff was going to carry out sales of motor vehicles on the said property. That agreement was to last for one year. The 2nd Plaintiff in furtherance of that agreement moved on the property and began to construct temporary structures for offices and also fencing. On 3rd August, 2005 Plaintiff received a copy of the letter dated 2nd August, 2005 written by the Manager of Uchumi Supermarkets Ltd which had been written to the Minister for Local Governments and copied to the Minister for Lands and Housing, also to the Minister for Roads and Public Works, Commissioner of Lands, Director General of Anti Corruption Unit amongst other people. The letter was requesting the stoppage of the development being carried out by the Plaintiff on the suit plot. Further on 4th August, 2005 the 1st Plaintiff received a letter from 1st Defendant which letter stated that the Plot belonged to the 1st Defendant. That letter also demanded that further construction should stop because it was hindering the approach of aircrafts. By the time those letters were being received by the Plaintiff the amount of Kshs. 3 million and US\$28,000 had been spent in the construction on that suit plot. It was deponed on behalf of the Plaintiff that the Defendants demand to stop construction was unjustifiable and illegal. Further it was deponed that the suit plot does not appear on the list of illegally or irregularly allocated land set out in the report of the Commission of Inquiry into illegal/irregular allocation of public land dated June, 2004. It was further deponed that the suit plot is not on a road by-pass or reserve. It was therefore, concluded in the Plaintiffs' supporting affidavit that the defendants attempt to stop the Plaintiff's construction was illegal for the defendants did not have locus to deny the Plaintiffs their use or ownership of the suit plot. The application was opposed. The 1st defendant's opposition was on the basis that the Plaintiffs had not shown a prima facie case with a probability of success. That the Plaintiffs had failed to show that the acts complained of are acts that cannot be compensated by damages. The 1st Defendant's counsel submitted that the balance of convenience lay in favour of 1st Defendant. 1st Defendant's contention is that the Plaintiffs in bringing this present action did not demand the withdrawal by the 1st defendant of its objection to the construction on the suit plot. The 1st Defendant's advocate stated that the 2nd Plaintiff is presently in possession of the suit plot and there was no evidence that the 1st Defendant was interfering with such possession. The 1st Defendant therefore sought that the plaintiffs' application for injunction be dismissed. The 2nd Defendant in opposition to the application began by saying that the dispute herein is between the Plaintiffs' and 1st Defendant. That there had been no expression of title by the 2nd Defendant. On that basis the 2nd Defendant was of the view that the Plaintiff has not proven a prima facie case with probability of success. 2nd Defendant's counsel further stated that the allegation of trespass against the 2nd Defendant had not been established by the Plaintiff. That the 2nd Defendant was querying the Plaintiffs' occupation of the suit on the basis that they believed that it was a road reserve.

I have considered the application before court. The Plaintiff indeed has only shown that the only acts the Defendants did was to write letters to Ministers and other bodies with a view to questioning the construction that was going on the suit plot. The 2nd Defendant did state in his letter that the suit plot belonged to it and further that any construction being carried out was a hindrance to approaching aircrafts. Other than those letters the Plaintiff has not shown any acts that were carried by the Defendants which would merit an injunction to be issued. It cannot be that every time a letter is written threatening one act or another an injunction would automatically issue. There are no acts that can be attributed to the Defendants that would move this court to issue an injunction. The Plaintiff in its claim sought a declaration that the suit plot belong to it, that damages be awarded for trespass on the suit plot by the Defendants and finally that an injunction would issue against the defendants from interfering or using threats to the Plaintiff in regard to the suit plot. As stated before the Plaintiff did not show this court that

the defendants had done more than write letters of demand. On that basis the court does indeed find the Plaintiff has not shown a prima facie case with a probability of success and therefore the application for injunction cannot be granted. The order of the court is that the Chamber Summons dated 5th August, 2005 is hereby dismissed with regard to prayer No.4 with costs to the Defendants.

MARY KASANGO

JUDGE

Dated and delivered this 25th October, 2006.

MARY KASANGO

JUDGE