



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

Civil Case 171 of 2004

SHIVA MOMBASA LIMITED PLAINTIFF

- Versus -

KENYA REVENUE AUTHORITY DEFENDANT

Coram: Before Hon. Justice Mwera

Kassim S. for plaintiff/applicant

Mutuku for defendant

Mrs. Umara for 3rd party

Court clerk – Kazungu

R U L I N G

The plaintiff company's prayers sought under Order 39 rules 1, 2, Civil Procedure Rules and section 3A Civil Procedure Act are that the defendant authority be restrained from interfering with the plaintiff's access to the suit premises known as L.R. No. MN/1/9594 at Mombasa. And that a mandatory order be directed to the defendant to demolish its wall round the subject plot which, in essence excludes the plaintiff from entering it, with a view to build a business depot thereon. That is what Mr. Shah told the court.

Mr. Shah went over the history of how his client acquired the land by way of purchase from one Francis Wanjohi who initially got a 99 years lease from the Government of Kenya on 1/7/1995. The land was then sold to Sheikh Ali Taib who in turn sold it to the plaintiff on 5/9/2003. The plaintiff charged the land to Akiba Bank Limited and procured a loan which, Mr. Shah said, the plaintiff was servicing at a very high interest rate yet it cannot develop the subject land and use it to generate funds to repay the loan.

Mr. Matuku on his part told the court that since the days of the East African Community which ceased in 1977, the land in question was occupied by the present authority's predecessor, the East African Customs and Excise Department. It had a training facility there and had fenced the whole plot. When the present authority succeeded the East African Customs & Excise Department, it inherited the facility and continued to use the place. The defendant had no title to the land except a letter of reservation dated 23/7/1979 from the Commissioner of Lands. That the portion in question is actually not built up, but it is intended for future expansion of the defendant's training facility. That the defendant has since paid due fees and it awaits processing the transaction so that in the end it gets a title. That the plaintiff should or

ought to know that all the time the defendant was in occupation of the plot having fenced it off.

Having heard both sides this court is satisfied that the plaintiff has made out a prima facie case with probabilities of success. It is the 3rd owner of the subject land which was first given to Francis Wanjohi by the Commissioner of Lands who is represented by the Hon. The Attorney General here (2nd defendant, in subsequent pleadings and proceedings). The plaintiff bought the land in 2003. It has a title which has been charged.

The (1st defendant) Kenya Revenue Authority only holds a letter of reservation/allotment from the very Commissioner of Lands (strange!) but as we all know, such letters do not signify having a registrative interest in land. It is no matter that the defendant has been in occupation for a long time by utilising a section of the fenced larger property. The plaintiff's portion though enclosed in that wall is not built up.

In sum the plaintiff company has made out a case to warrant not only a temporary injunction but in the circumstances of the case, also a limited mandatory injunction. It is no good just to restrain the defendant from preventing the plaintiff from accessing its land. The defendant having built a wall around that land can, only give meaningful access by demolishing that part of the wall directly barring the plaintiff from its land. This appears a special circumstance requiring the mandatory order.

Accordingly the defendant should not interfere with the plaintiff's access to its land No. 9594 and it must demolish that part of its wall directly enclosing the said land. The rest of the wall may await the outcome of the suit. In case the defendant does not demolish the said part of the wall in the next 30 days, the plaintiff may itself do so for there is no reason why the defendant authority should exclude it from its property.

Orders to hold until this suit is finally determined or further orders.

Costs to the plaintiff.

Delivered on 30/11/2005.

J.W. MWERA

JUDGE