REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.313 OF 2003

LEISURE LODGES LIMITED………………………………..………………………………. PLAINTIFF

VERSUS

DR. LALIT D. KOTAK……………………………………………………………………… DEFENDANT

Coram: Before Hon. Justice Mwera
Miss Kibe for Plaintiff
Asige for Defendant/Applicant
Court Clerk – Sango

R U L I N G

Under review is the defendant's application dated 13.2.04 and brought under O 39 r.4 Civil Procedure Rules and S.3A Civil Procedure Act. The main prayer therein is:

1. That the court be pleased to discharge the order of temporary injunction issued on 30.12.2002 (it must be 2003)

The grounds on which this application was based included one to the effect that the plaintiffs application dated 15.12.03 upon which the orders sought to be discharged are based was heard during vacation without the plaintiff/applicant first getting the court order to that effect. Mr. Asige however did not argue this point. Another ground that was not pressed much or at all was that on 30.12.03 the court heard the said plaintiff's injunction application as if it was ex-parte while the defendant had filed a replying affidavit to it. It was heard and not disputed that that date 30.12.03 was known to the defendant but he or his lawyers did not appear during the arguments on the application dated 15.12.03, on the basis that the lawyers had closed over Christmas holidays.

Mr. Asige however argued two of the grounds in the application forcefully, and this was basically on points of jurisdiction and the law governing the land in dispute KWALE/DIANI BEACH BLOCK/856. Referring to S.21 Registered Land Act (Cap.300RLA, the court was told that because the plaintiff had not placed before the court material to show that the boundaries of that land had been determined and fixed, any dispute over it could not be entertained in court. That accordingly the injunction orders sought to be discharged were made without jurisdiction and so must discharged. And that the defendant applicant in fact occupied and enjoyed the freehold rights over 2 plots: KWALE/DIANI COMPLEX/992 and 999, and if he were to obey the injunction orders in question he

would in effect be hindered from enjoying his property which is not No.856 and that they are not subject to this or any litigation. Mr. Asige thus contended that the injunction order could not be enforced and should be discharged. And that the plaintiff should not have filed grounds of opposition and also a replying affidavit to oppose this application.

Miss Kibe was of the view that with the defence and the replying affidavit to her clients' injunction application dated 15.12.03 on record, even when the hearing of the same went on ex parte because the defendant who knew of the hearing dated of 30.12.03 did not show up, the judge did have benefit of to the defendant's pleadings. They were on record.

It was from that the plaintiff's stand, that jurisdiction was never raised in the earlier pleadings and papers and or that jurisdiction was not denied. Mr. Asige argued and properly so that jurisdiction is fundamental to any proceedings in court and can be raised at any time. However the defence filed on 22.12.03 did state that even if the plaintiff had not pleaded that this court had jurisdiction, that defendant would still submit to it.

So should the orders in question have been given? First, had the defendant availed on 30/12/03 to oppose the injunction herein, whether S.21 Registered Land Act was contravened or not would have featured. It was not so to feature and it is not suggested that the plaintiff withheld that aspect of law from the court. Second, and this court did refer to it at some stage, the defendant having come up with this S.21 Registered Land Act probably he would have gone by way of review before Khaminwa J who gave the orders of 30.12.03 for orders. However both sides intimated that they were happy to come as they did and that orders from this court would do. There was even a suggestion that an appeal against the orders of 30.12.03 would have been put in place. Even with all that, this court's decision is as follows.

The filling of grounds of opposition as well as replying affidavit (see O.50 r. 16 (2) CPR does not prejudice any party and in fact it enhances interests of justice. To this Court's mind a respondent can file either or both. The provision of law reads:

> ***"16 (1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, n ot less than three clear days before the date of hearing."***

This does not appear to mean that the respondent may either file a replying affidavit or grounds of opposition in order to oppose an application. Indeed while a replying affidavit deals with matters of fact raised in any application, under the grounds of opposition, if any, usually matters of law and procedure are dealt with. Both sides of an application are thus canvassed and a decision follows. In fact and in practice a respondent may choose to oppose an application by filing either a statement of grounds of opposition or relying on a replying affidavit only. Either path leads to the same end i.e. enabling a court to arrive at a decision. Accordingly this court maintains a position that a respondent may oppose an application by filing and serving a replying affidavit ora statement of grounds of opposition or both.

As regards S.21 RLA this court reproduces its pertinent parts and then follows it with its decision:

> *"21 (1) Except where under section 22 of this Act, it is noted in the register that the boundaries of a parcel of land have been fixed, the registry map and any field plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (2) ---------------------- (3) --------------------- (4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section."*

Mr. Asige argued that boundaries of Plot No.856 (in dispute) had not been determined and fixed or that the plaintiff did not place such information before the court when it moved to get injunction orders. As remarked above, had the defendant attended court on 30.12.03 he would have woven this piece of law in his arguments, but he did not. The plaintiff would not say at this point if the boundaries of plot 856 have been determined/fixed, save that on its part the defendant is in fact and physically occupying the

plaintiff's land on which he has commenced to construct. That the plaint sought prayers in trespass and orders to evict the defendant from that site.

The court's view at this point is thus: The status quo should hold. In the next 21 days the parties to approach the land registrar who will in turn get the local land surveyor and both of them to accompany the litigants to the physical place in question to determine the actual locations of plots No.856claimed by the plaintiff and 992 and 999 of the defendant. The registrar to note whether the boundaries of Plot 856 had been fixed. Their joint report to be availed in the next 14 days from the date of the meeting. Each party to meet half the expenses of that visit by the two officials. The report should be able to help this court in giving final orders pursuant to the present application. The date of mention to be fixed.

It is so ordered.

Delivered on 31st March, 2003.

J.W. MWERA

JUDGE