



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 51 of 2005**

**PEARL BEACH HOTELS LIMITED ..... PLAINTIFF**

**- V e r s u s -**

**AGRICULTURAL SOCIETY OF KENYA ..... DEFENDANT**

**Coram: Before Hon. Justice J. Mwera**

**Khanna for plaintiff**

**No appearance for defendant**

**Court clerk – Kazungu**

**JUDGEMENT**

The cause herein came up for formal proof on 7th September 2005. The suit was commenced by way of plaint filed here on 7th March 2005. It concerns all that property known as LR No. SUBDIVISION No. 6228 SECTION 1 MN Mombasa. That this land was given by a grant dated 1st June 1989 to a company called Cardiac Hospital (K) Ltd to hold on a 99 year lease. The initial purpose of the property was to build a hospital. But in 1994 the user was changed to hotel and residential purposes. Then in 1995 the property was transferred to the plaintiff company. That all along the plot owners took possession and paid land rates to the Municipality of Mombasa plus such other outgoings as were payable.

That the plaintiff in pursuit of its intention to build apartments on the said plot, got local authority approval in 2004 and its time to carry out the developments was extended to March 2006. So in 2005 it sent a contractor to clear and prepare this land for construction but the defendant unlawfully prevented it from doing that. That also the defendant encroached on the plaintiff's said land unlawfully. And that it also built a wall interfering with the plaintiff access and enjoyment of its said property. So the court was asked to declare that the plaintiff company is the lawful proprietor of the subject property and the defendant should not trespass on or interfere with the plaintiff's use of the said land. And further that the defendant be ordered to demolish any structures it has put up on the plaintiff's property or the access road.

Before the formal proof Mr. Khanna for the plaintiff told the court that summons to enter appearance, no doubt with a copy of the plaint, was served on 8th March 2005. That a date for inter partes hearing of the injunction application filed here along with the plaint, was shown on the papers served as 2nd March 2005. By that day there was no appearance entered and the injunction order was confirmed. That the orders were served on the defendants Coast Chairman and one Mr. Manyara, the branch manager.

That on 19th April 2005 M/S Madzayo Mrima & Co. Advocates filed a memorandum of appearance. It was later followed by a notice of change of advocate by M/S C-W Wanjihia & Co. Advocates – after a default judgement of 5th April 2005 had been entered. That the new advocates filed a chamber summons dated 29th April 2005 to set aside that judgement but when the presence of M/S C. W. Wanjihia & Co. Advocate was successfully challenged after hearing a preliminary objection, the application to set aside

judgement was left to be argued later and M/S C. W. Wanjihia & Co. Advocates were allowed time to regularize their appearance for the defendant. That since 15th June 2005 that regularization was not effected and the plaintiff set the suit down for hearing. That the formal proof would thus proceed and if the defendant so felt it could challenge the judgement by whatever procedure. The court being satisfied with the above heard the plaintiffs witnesses. It began with Bhanu Dhirajlal Bhatti (PW1) a director of the plaintiff company.

She told the court that the plaintiff had authorized her to testify on its behalf. PW1 went over the history of the title to the subject property and produced a certified copy of the grant (Exh P1) and change of user. The transfer of the property to the present plaintiff (Exh P2) and official certificate for search (Exh P3) was also tabled. That land rents had been paid up to 2002 (Exh P4) and the local authority had issued a certificate of registration of land (Exh P5). Rate clearance certificate was issue to the plaintiff by the local municipality and the same had been paid for (Exh P6, 7), even with Cardiac Hospital appearing as the payee. Building plans were approved in April 2005 (Exh. P8) but the plaintiff could not move onto its land to commence construction because the defendant prevented it from doing that.

That the defendant had no right to so prevent the plaintiff. It had its own land at the English Point clearly separated from the plaintiff's land by a public road. That the plaintiff's lawyers did lodge a written complaint (Exh P9) with the defendant about its acts but it persisted in preventing the plaintiff from accessing its land. That then these proceedings were commenced and even after the defendant was served with an injunction order, it did not pay heed. That to confirm the size and extent of its land, the plaintiff hired a surveyor M/S dEnis Mambaleka Associates to do the needful. That the defendant did not heed orders to demolish the structures it built on the public road between the 2 properties, thereby forcing the neighbours to use the plaintiff's property as a way. So the PW1 sought the declarations / orders as laid in the plaint.

Denis Malembeka (PW2) was the surveyor the plaintiff hired to show the exact location of the plaintiff's land as per the dispute here. He came with his report dated 23rd February 2005 (Exh. P10) and said that the plaintiff's land of about 2 acres was on the sea front. It lay opposite that of the defendant but with a public road in between. That it was all clear as per the approved part development plan of the area (Exh. P11). That the defendants land was plot No. MN/1/10280 (Exh. P12). PW2 noticed encroachments on the public access road between the 2 land owners – reducing the width of that road (Exh. P13). That these forced motorists to drive over the plaintiff's land to their own.

Mr. Khanna then submitted as per the pleadings and evidence (plus exhibits) urging this court to find for the plaintiff. The court agrees. The plaintiff company has proved its ownership of the subject plot which is distinct and separate from that of the defendant. There is no evidence to rebut this. It has also been shown that the defendant has erected structures on the common access road between these 2 landowners causing traffic to go over the plaintiffs land. The defendant has no right to prevent the plaintiff from accessing and enjoying its land. To access its property the plaintiff is entitled to demolish the structures erected by the defendant on the public road, the defendant having ignored orders to do so by itself.

Judgement accordingly with costs.

Delivered on 13th October 2005.

**J. W. MWERA**

**JUDGE**