



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

Civil Case 47 of 2006

SEA STAR MALINDI LTD.....PLAINTIFF

VERSUS

MALINDI MUNICIPALITY TOWN CLERK & 2 OTHERS.....DEFENDANTS

R U L I N G

By an application, by way of Chamber Summons, dated 12th April 2006, the applicant seeks orders pursuant to the provisions of Order VI Rule 9, 13(1) (b) (c) and (d), Order VIII Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, that:

- 1. the defendants defence filed on 25th March 2006 be struck out as being scandalous, vexatious, frivolous and an abuse of the process of the court**
- 2. interlocutory judgment as prayed for in the amended plaint be entered against the defendants jointly and severally**
- 3. this suit be set down for formal proof**
- 4. Costs of this application be in the cause.**

The application is based on the grounds:

- i) That the defendants amended defence filed on 28th March 2006 was not served in time in accordance with the Civil Procedure Rules.**
- ii) That the defendants vide building plan No. P63 of 1996 approved on 9th October 1996 by Malindi Municipality Works Town Planning Committee Minutes No. 22 of 1996, who approved the building plans of the hotel, which was to be constructed by Malindi Sea Star Limited in L.R. 3170 Malindi in accordance with the said building plans; copies of the said approved plans are annexed to the supporting affidavit and hence they cannot be heard denying the said approval.**
- iii) That the plaintiff carried out the construction as per the building plans approval No. P.63 of 1996 in 1997 and the hotel was to be ready for occupation on or about 1st December 1997, but the final touches of completion was stopped because the Kenya Wildlife Services wanted to lay claim on the plaintiff's land within 100 feet from the High water mark and where the plaintiff had already**

constructed and completed the hotel and the Kenya Wildlife Services placed its armed game wardens to the suit premises to stop further developments on 9.11.97 which made the plaintiff to stop the completion of the hotel and the plaintiff to proceed to court to challenge the Kenya Wildlife services claim that they were legal controllers of 100 feet from the High water mark inside the plaintiff's land by alleging that by law one hundred feet from the High water mark irrespective of whether the land extended to private registered land the land was Government land.

iv) That the plaintiff did file HCC Miscellaneous Applications No. 982 of 1997 which was heard and determined in the plaintiffs favour and the determination declared that the Kenya Wildlife services claim was unconstitutional and null and void ab-initio and the said judgment was delivered on 8.11.2002.

v) That the defendants' action of demolishing the building which had been build in accordance with the approved building plans No. P.63 of 1996 in January 2005 inspite of the building plans No. P. 63 of 1996 was unconstitutional and illegal and was in complete disregard of the judgment in HCCC 982 of 1997 a copy of which was supplied to the defendants before they started demolishing the plaintiff's building.

vi) That the structure which was developed in the suit premises L.R. 3170 Malindi was in accordance with the approved building plan No. P.63 of 1996 approved on 22nd October 1996 and within the legal boundaries of L.R. 3170 Malindi.

vii) That although served with a plaint and summons to enter appearance and filing defence within the prescribed time the defendants only filed a notice of appointment of advocates on 30.6.2005 after which they filed defence on 12th July 2005, but it was never served to the plaintiff's advocate as it is required by the Civil Procedure Rules which do make the said defence invalid.

The application is predicated upon the annexed affidavit of **Franco Marchioro** sworn on the 13th day of April 2006. The applicant relied wholly on the said affidavit and the aforesaid grounds.

It was argued on behalf of the applicant, that the plaintiff/applicant drew up development plans which were approved by Malindi Municipality vide their approval plan No. 63 of 2996. Thereafter, the plaintiff commenced development to almost completion stage.

By a letter dated 20th August 1997 and exhibited as "**FMI**" herein, the Kenya Wildlife Services withdrew the permission and re-instated prohibition that had earlier on been issued. The applicant was reminded to note that no development would be allowed within 100 feet from the High water mark as the area was to be conserved for present and future generations.

On 15th January 2006, the first defendant embarked on the exercise of demolishing of the hotel structure which exercise continued until 20th January 2006.

It is the plaintiff's case, that the said demolition is unlawful and the defence of the defendants that the structure was illegal and unauthorized development has no ring of truth. That the falsity of the defence is borne out by the contents of the affidavit of Franco Marchioro especially the letters from the first defendant to the plaintiff that the structures were build according to the plan and within the boundaries of the plaintiff's plot.

By a letter, annexure "**FMI**", dated 23rd April 1997 from the first defendant to the plaintiff, the first defendant asked the plaintiff to stop construction until the objection of KWS was resolved. A day later, on 24th April 1997, the first defendant wrote another letter to the plaintiff informing him that they had verified that the construction going on was legal and in conformity with Malindi Municipal By-laws and hence the construction should continue. By a letter dated 6th June 1997, from KWS the plaintiff, KWS permitted the plaintiff to proceed on with the construction.

When the dispute continued, the plaintiff filed Nairobi H C Miscellaneous application No. 982/97 in which the plaintiff was the applicant and KWS was the respondent. The application was for judicial review – certiorari – to quash the decisions of KWS by their letter of 20th August 1997 banning and/or restricting the applicant from constructing a hotel on L.R. No. 3170 Malindi in accordance with the approved plans of Malindi Municipal council.

The result was that on 8th November 2002, the decision of KWS was quashed. A copy of the ruling is exhibited as “**FM2**” in the affidavit in support.

By a letter of 7th September 1998, the Town Clerk of Malindi Municipal Council – assured the applicant of the said council’s commitment to the approval of the development as guaranteed by the Council vide its building permit No. 6/96. That the Council was going to take up the matter with relevant authorities including KWS to ensure there were no interruptions and the project was re-commenced. Annexed to the letter of 7th September 1998 is a review report on development aspects of the hotel project.

By a letter dated 22nd January 1999, addressed by the Town Clerk Malindi to the Managing Director KWS, it was confirmed that the hotel was not built within 100 feet from the High water mark. The claim thus confirmed as false. That the Council was convinced that the stoppage of the construction of the hotel was illegal. The last paragraph states that the Council had re-approved the building plans of the plaintiff and authorized. The letter warned KWS of dire consequences should they stop the construction.

On 15th January 2005, the first defendant embarked on demolishing the plaintiff’s hotel. By a letter dated 20th January 2005, the Town Clerk of the first defendant purported to give the plaintiff seven (7) days notice to remove the structure on the ground on the basis that the hotel was built outside the plaintiff’s plot fronting the beach. It was submitted, by counsel, that that letter was an afterthought. It could not cure the illegality. But even if the notice was legal, the first defendant did not give the plaintiff time to comply with it. The letter was therefore in bad faith.

That notwithstanding all the evidence as aforesaid, the first defendant has not filed any replying affidavit to controvert evidence of the applicant. Counsel submitted forcefully that the denial by the defendant that the hotel was authorized structure in the face of all the available evidence speaks volumes. The defence is therefore an abuse of the process of the court. The defence ought to be struck out and summary judgment should be entered for the plaintiff.

The respondent failed to file replying affidavit or grounds of opposition. Nevertheless, in the interest of justice, I exercised my discretion and allowed the respondent’s counsel to argue on points of law only. The defendants relied on the defence filed on 28th March 2006 and argued, inter-alia, that the development was illegal in that the construction contravened the Physical Planning Act, the Local Government Act and the Government Lands Act.

The plaintiff was served with statutory notice to remove the unauthorized developments on L.R. No. 3170 Malindi. The plaintiff failed to comply and the first defendant in exercise of its statutory duty demolished the structure. That raised a triable issue as pleaded in paragraph 5 of the defence filed on 25th March 2006. That on the premises the plaintiff is not entitled to compensation or loss of business and interest or exemplary damages. That that raises triable issues as pleaded in paragraph 8 of the defence filed on 28th March 2006. Last but not least, that this is not a clear case for invoking summary procedure. The plaintiff is not entitled to be granted Order 2 and 3. The suit should go for hearing.

I have carefully analyzed the evidence for and against the application, I have equally read and appreciated all the authorities cited before me.

By record of proceedings, the plaintiff filed a plaint dated 17th May 2005. The defendants filed a defence dated 8 July 2005. Subsequently the plaintiff amended its defence on 8th March 2006. The

defendants were entitled to and did amend its defence on 17th March 2006.

I have perused the record and find as a fact that the defendants only filed a Notice of Appointment on 30th June 2005. Thereafter the defendant filed defence on 12th July 2005 and amended defence on 25th March 2005. There is no evidence on record, that the defence and amended defence were ever served on the plaintiff's advocate as enjoined by the mandatory provisions of Order VIII Rule 1(2) of the Civil Procedure Rules. On the premises the defence and amended defence are invalid.

Accordingly, I strike out the amended, I enter interlocutory judgment in favour of the plaintiff's against the three defendants. I order that the suit be fixed for formal proof.

The application fails and is dismissed with no order as to costs.

Dated and delivered at Malindi this 17th day of July 2007.

N.R.O.OMBIJA

JUDGE

Mr.Okuto for Ritho } for plaintiff.

Mr.Opija for Mwadilo } for defendants