



Sea Star Malindi Limited v County Government of Kilifi (Environment & Land Case 47 of 2006) [2023] KEELC 20329 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 47 OF 2006**

**MAO ODENY, J
OCTOBER 4, 2023**

BETWEEN

SEA STAR MALINDI LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF KILIFI DEFENDANT

JUDGMENT

1. By a Plaint dated 17th May 2005 which was initially filed against four defendants in Nairobi vide HCC No. 595 of 2005 whereby there were several amendments to the Plaint and a subsequent transfer to Malindi.
2. The suit was heard and determined but the Plaintiff being aggrieved by the entire Judgment and decree of this court Honourable (Hon. J. Olola) delivered on 29th May 2019 appealed to the Court of Appeal.
3. Vide a judgment delivered on 21st January 2022, the Court of Appeal remitted this suit back to this Honourable Court for the purposes of hearing the parties, and determination of the reliefs to which the appellant (Plaintiff herein) may be entitled.
4. Counsel agreed to canvas the case vide written submissions, which were duly filed.

Plaintiff's Submissions

5. Counsel for the Plaintiff submitted that the only issue for determination is for damages as the Court of Appeal observed that that the Plaintiff was

“...certainly entitled to compensation...it would not only be fair but also just that the Defendant covers the cost of reconstruction of the Plaintiff’s project as well as the income that would consequently be lost by the Plaintiff during the intervening period.”



6. Counsel submitted on the justification of the damages that the Plaintiff was the bona fide owner of the suit property known as Portion No. 3170 Malindi and that predecessor to the Defendant, the Municipal Council of Malindi, had given its unequivocal approval for the construction to proceed, having looked at all the architectural plans and design of the project, vide a report dated 7th September 1998 which affirmed the legitimacy of the building permits and approvals issued by the Municipal Council of Malindi on or around 15th August 1996.
7. It was counsel's further submission that approximately nine (9) years after the Defendant gave the Plaintiff the requisite Building Permit and approvals the Defendant through its agents on 15th January 2005 invaded and destroyed the structures and developments that the Plaintiff had constructed up until then which the Plaintiff had developed up to about 90% completion.
8. Counsel stated that the Plaintiff itemized the claim as follows:
 - a) Expenses incurred by the Plaintiff's directors in pursuit of this claim from January 2005 – January 2007 amounting to - Kshs. 11,440,521/= plus interest payable at bank rates until payment in full.
 - b) Cost of reconstruction including professional fees – Kshs. 167,682,926.50 plus interest payable at bank rates until payment in full.
 - c) The optimistic scenario for loss of expected revenue and profits from 2005 – 2014 - Kshs. 1,004,874,489/= plus interest payable at bank rates until payment in full.
9. On the issue on damages, counsel submitted that what a Court awards as damages, is based on what the parties adduce in support of their individual cases, and a matter of judicial discretion. Further that special damages are awarded to compensate a claimant for actual out-of-pocket expenses that have been incurred as a direct result of the Respondents' actions or behavior and relied on the case of Okulu Gondi v South Nyanza Sugar Company Limited [2018] eKLR.
10. Counsel finally submitted that the court should relook and award damages that were proven through evidence and testimony provide for the difference between what was pled and proven and what was granted in Malindi ELC 56 of 2016.
11. Counsel urged the court to consider the testimony of PW2 and PW3 and award damages as follows:
 - a) Reconstruction costs to be awarded - Kshs. 167,682,926.50 – Kshs. 90,000,000.00 = Kshs. 77,682,926.50.
 - b) General damages/Loss of Income based on a realistic scenario -Kshs. 650,705,519.00 – Kshs. 30,000,000.00 = Kshs. 620,705,519.00.
 - c) Proposed Total Award - Kshs. 77,682,926.50 + Kshs. 620,705,519.00 = Kshs. 698,388,445.50

Defendant's Submissions

12. Counsel gave a brief background to the case and submitted on the following issues:
 - a) Whether the Plaintiff has proved his legal and factual entitlement to the damages sought and pleaded.
 - b) Whether the Plaintiff has proved his legal and factual entitlement to the interest sought;
 - c) Whether the judgment in Malindi ELC 56 of 2016 affects the judgment in this case.



- d) What dispositive orders ought to be made, including those relating to costs and/or interests?
13. Counsel relied on the Quantity Surveyor's testimony that the cost of construction in the year 2005, would have been KShs. 102,339,460.10/-, but given the fact that the Quantity Surveyor only went to the property site in 2014, and his estimates were based on the remnants of the structures in place, the court awarded the Plaintiff KShs. 90,000,000/- as the cost of the reconstruction and KShs. 30,000,000/- as general damages to cover expenses incurred during the period which construction was interrupted.
 14. It was counsel's submission that damages must not only be specifically pleaded but also specifically proved and it is the position of the Defendant that in any event, the Plaintiff has neither established a proper basis for the assessment of its damages nor proved entitlement to the same. That there was no documentary evidence that the directors actually travelled.
 15. Counsel further submitted that damages are not payable to the plaintiff as there were no lawful approvals and therefore no legal basis upon which the Defendant can be directed to grant development approval outside the legal procedures in force.
 16. On professional fees payable, counsel submitted that it was confirmed by the Plaintiff that no licensed professionals were engaged during the construction hence the assessment of damages ought to have been on an indemnity basis against proof of payment of fees for professional services rendered.
 17. According to counsel, the Plaintiff cannot now seek a sum of KShs. 17,309,748/- (being 13.5% of the reconstruction costs as professional fees for architectural, quantity surveying, civil and structural engineering etc) because this would not be restitutive in nature but an unjustified windfall.
 18. On the issue of loss of business, counsel submitted that it is trite law that while an exact calculation of lost profits is not necessary for the recovery of damages, a plaintiff should provide enough definite proof of the amount to "afford a sufficient basis for estimating" the amount of lost profits being claimed.
 19. Counsel blamed the plaintiff for failure to mitigate the losses and submitted that the failure to carry on with the constructions or to show efforts taken to reconstruct, goes against the principle of mitigation of losses. Further that the Plaintiff did not show that it exhausted the available appeal mechanisms if it was denied approvals and relied on the cases of David Murithi Githaiga v CFC Stanbic Bank Limited (2019) eKLR and African Highland Produce v John Kisorio (2001) eKLR which dealt with the principle of mitigation of losses.
 20. On the issue of interest at Bank lending rates, counsel submitted that the same were nether pleaded nor any evidence lead to support this claim, therefore the court should reject it.
 21. Finally, counsel submitted that the suit should be dismissed with costs to the defendant.

Analysis And Conclusion

22. This case was heard and determined and the Plaintiff being aggrieved by the verdict appealed to the Court of Appeal who remitted it back to this court for hearing and determination of the reliefs to which the Appellant may be entitled to.
23. The issue for determination is whether the Plaintiff is entitled to damages and what amount is payable.
24. As per the Court of Appeal Judgment in Civil Appeal No. 121 of 2019 which arose from two appeals by the plaintiff and the defendant, the ELC Court dismissed the Plaintiff's against the County government of Kilifi for alleged wrongful demolition of it's property but the latter was condemned to pay costs.



25. The two appeals were consolidated by consent of the parties with Civil Appeal No.121 of 2019 being the lead filed which was heard and determined and the Appellant's appeal was allowed and the Respondent dismissed and the same remitted for fresh hearing.
26. From the facts and the evidence adduced by the parties, it is evident the Plaintiff called witnesses who adduced evidence in support of the case which were not controverted as the defendant never tendered any evidence.
27. PW2 a Quantity Surveyor testified that due to the wear and tear the structures on the suit property needed to be demolished and as at 2016 the cost of demolition and reconstruction stood at Kenya Shillings One Hundred and Sixty –Seven Million and Eighty-two Thousand Nine Hundred and Twenty- six and Fifty Cents (Kshs. 167,682,926.50) This evidence was not challenged or countered with any other evidence to disprove the same.
28. It is further on record that PW3 an Actuary gave evidence and stated that he did an assessment for loss of income for the period between 1st October 2005 and 31st December 2014 when he prepared the report which provided three scenarios, optimistic, realistic and pessimistic in assessing the loss. The realistic scenario of the loss incurred by the Plaintiff proposed in the report was that as at December 2014 to be Kenya Shillings Six Hundred and Fifty Million Seven Hundred and Five Thousand Five Hundred and Nineteen (Kshs. 650, 705,519.00)
29. It should be noted that the Court of Appeal in its Judgment settled the issue of the award in Malindi ELC No 56 of 2016 between the Plaintiff and a Third party should not affect the calculation of quantum of damages. The Court of Appeal found that the matter of award in Malindi ELC No 56 of 2016 had not been raised by either party at the trial or in their respective submissions before the Judge. The court concluded that the parties were denied an opportunity to be heard on the question whether the appellant was entitled to the awards claimed.
30. In the case of *Raticliffe vs Evans* (1892) QB 524 explained the issue of damages, and the Court stated that;

“ ...The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pendency...”
31. The Court of Appeal stated at para 15 of the Judgment in Civil Appeal No 121 of 2019 as follows :

As the Learned trial Judge correctly stated in the impugned judgment, the respondent offered no evidence at all to challenge or controvert the appellant's case that despite approval having been given for the development and construction of the hotel on the appellant's property, the defunct Municipal Council of Malindi mobilized the demolition of the hotel the construction of which was in progress. In that regard the learned Judge found as a fact that “ on 15th August 1996, the Council approved the building plans and granted the (Appellant) a building permit ”but “ around 15th January 2005 , the Council turned around and proceeded to destroy and pull down the structures on the (appellant's) property”



32. Even after remittance back to the trial court for hearing and determination as to whether the plaintiff is entitled to the relief sought in the plaint the situation remains the same as the parties opted to canvas the case through written submissions.
33. Written submissions cannot replace evidence, which is to be tendered orally or through affidavit evidence. The parties were given an opportunity to be heard afresh on the contested matters by the Court of Appeal through remittance back to the court but they never took heed especially the defendant who had not tendered any evidence to controvert the plaintiff's case.
34. The court is therefore left with the task of assessing the damages payable to the plaintiff and the special damage of the professional fees incurred.
35. Counsel submitted that the Plaintiff had proved its case vide expert witnesses who gave a report to court on the expected amounts to be paid to the plaintiff. It was in evidence that the Plaintiff's directors gave itemized list of expenses incurred since 2007 that were verified by credible Audit Firms PKF Kenya and the same has not been controverted or given an alternative figure. I therefore find that the amount claimed of Kenya Shillings Eleven Million Four Hundred and Forty –Five Thousand Five Hundred and Twenty -One (Kshs. 11, 440,521/=)
36. It is trite law that special damage must be specifically pleaded and strictly proved as was held in the case of Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
37. On the issue of damages awardable to the Plaintiff, counsel submitted that the total award that the plaintiff is entitled to is as follows:
- a) Reconstruction costs to be awarded - Kshs. 167,682,926.50 – Kshs. 90,000,000.00 = Kshs. 77,682,926.50
 - b) General damages/Loss of Income based on a realistic scenario -Kshs. 650,705,519.00 – Kshs. 30,000,000.00 = Kshs. 620,705,519.00
 - c) Proposed Total Award - Kshs. 77,682,926.50 + Kshs. 620,705,519.00 = Kshs. 698,388,445.50
38. These amounts were not controverted but even if the same is not challenged, the court must make a decision vide its discretion to a figure that is reasonable in the circumstances.
39. In the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 Justice Lessit stated that:
- “Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”



40. In the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned Judge citing the same decision stated that

“it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

41. I have considered the pleading the submissions by counsel and find that the damages payable to the plaintiff is Kenya Shillings Seven Hundred and Nine Million, Eight Hundred and Twenty- Eight Thousand, Nine Hundred and Sixty-six (Kshs. 709, 828,966/) being reconstruction costs, general damages /loss of income and professional fees incurred by the plaintiff plus costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF OCTOBER, 2023.

M.A. ODENY

JUDGE

