



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO 20 OF 2020**

**AFRICA KIVULINI MANAGEMENT LIMITED.....PLAINTIFF**

**VERSUS**

**DAVID PIUS MUIRURI**

**SUNPALM LIMITED**

**MOHAMED SHAIBU SHOSI.....DEFENDANTS**

**RULING**

1. Before me for determination are two applications. By the first Application dated and filed herein on 27<sup>th</sup> February 2020, Africa Kivulini Ltd (the Plaintiff) prays for Orders: -

***2. That an Order of temporary injunction be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, employees, servants and/or representatives from evicting the Plaintiff from the management, operation, running and/or trading in the hotel premises known as Sunpalm Beach Resort Watamu in Watamu standing on Plot No. Kilifi/Jimba/408 and/or in any other manner howsoever and whatsoever demanding, distraining, and/or proclaiming for rent and/or interfering with the Plaintiff's quiet use, possession, management and operation of Sunpalm Beach Resort Watamu pending the hearing and final determination of this suit;***

***3. That all future rent payable by the Plaintiff to the 2<sup>nd</sup> Defendant with respect to the management, occupation, use, operation and running of the hotel premises known as Sunpalm Beach Resort Watamu be deposited in this Court until the final determination of this suit; and***

***4. That the costs of this application be provided for and be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.***

2. The application which is supported by an affidavit sworn by the Applicant is premised on the grounds that: -

***i) By an agreement dated 26<sup>th</sup> April 2016 between the 2<sup>nd</sup> Defendant and the Plaintiff, the 2<sup>nd</sup> Defendant let and leased to the Plaintiff all those hotel premises known as Sunpalm Beach Resort Watamu standing on Plot No. Kilifi/Jimba/408 for a term of eleven (11) years upto September 2027;***

***ii) The Plaintiff has faithfully paid the 2<sup>nd</sup> Defendant all the lawful rent reserved for the leased premises;***

***iii) The 1<sup>st</sup> Defendant by a notice dated 10<sup>th</sup> February 2020 notified the Plaintiff that the hotel premises belong to him and that they stand on his Plot No Kilifi/Jimba/669. The 1<sup>st</sup> Defendant also offered the premises for sale to the Plaintiff at us Dollars 12.5 Million and asked the Plaintiff to henceforth pay him rent arrears in default of which he would evict the Plaintiff from the premises;***

***iv) On the other hand and despite being paid all the rent for the premises, the 2<sup>nd</sup> Defendant has threatened and endeavoured to evict the Plaintiff from the hotel premises using orders obtained from a Court without jurisdiction in Nairobi;***

***v) The manner in which the 1<sup>st</sup> Defendant has now become the alleged owner of the Plot No. Kilifi/Jimba/669 smacks of illegalities, unprofessionalism and fraudulent conduct. Investigations by the Plaintiff shows that the ownership was granted to the 1<sup>st</sup> Defendant in breach of the Lis Pendens doctrine due to ongoing litigation in Court without the knowledge and***

*participation of the 3<sup>rd</sup> Defendant hence making the transfer to the 1<sup>st</sup> Defendant illegal and wrongful;*

*vi) Until this Court determines who between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is the lawful owner of the hotel premises, it is prudent that all future rents payable for the management of the hotel premises be deposited into this Court to protect the interests of the Plaintiff and to ensure that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do not interfere with the Plaintiff's operations of the said hotel;*

*vii) There is no prejudice to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants if the Court grants the orders sought herein in exercise of this Court's equitable jurisdiction; and*

*viii) Unless the orders sought herein are granted, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants will illegally interfere with the operation of the hotel premises which is full of guests and thus occasioning the Plaintiff irreparable loss and damages.*

3. In response to the said application, David Pius Mugambi (the 1<sup>st</sup> Respondent) avers vide a Replying Affidavit filed herein on 5<sup>th</sup> March 2020 that the agreement between the Plaintiff and the 2<sup>nd</sup> Defendant does not indicate the part where the Sunpalm Beach Hotel is erected. He asserts that the hotel is built on land parcel Number Kilifi/Jimba/669 which is registered in his name.

4. The 1<sup>st</sup> Respondent further avers that the ownership of the said Parcel No. Kilifi/Jimba/669 has been determined by the Court of Appeal and that the land Parcel No. Kilifi/Jimba/408 does not exist in the land records. He concedes that as the lawful owner of the suit premises, he did give the notice complained about to the Plaintiff to either purchase the property or vacate the premises.

5. Sunpalm Ltd (the 2<sup>nd</sup> Defendant) is equally opposed to the application. In a Replying Affidavit sworn by its director Eleonora Cozzi as filed herein on 4<sup>th</sup> March 2020, the 2<sup>nd</sup> Defendant denies letting the premises known as Sunpalm Beach Resort to the Plaintiff. On the contrary, the 2<sup>nd</sup> Defendant asserts that by a Management Contract dated 26<sup>th</sup> April 2016, the Plaintiff was appointed the Manager of the said Resort with the responsibility of managing its operations.

6. The 2<sup>nd</sup> Defendant hence denies that the Plaintiff is its tenant and that there are any issues of rent pending between them. The 2<sup>nd</sup> Defendant further avers that although the 1<sup>st</sup> Defendant is presently registered as the owner of land parcel number Kilifi/Jimba/669, his registration is contested as the same was acquired illegally and fraudulently in breach of the doctrine of *lis pendens* and the Law of Succession Act.

7. The 2<sup>nd</sup> Defendant denies that the Plaintiff has been paying rent as stated in the Supporting Affidavit. On the contrary, it avers that the Plaintiff has failed to perform its obligations, conditions and stipulations expressly provided in the Management Contract. In particular, the Plaintiff has failed to pay the management fees since January 2020 and has made unauthorized structural alterations to the premises as a result whereof the 2<sup>nd</sup> Defendant proceeded to terminate the contract.

8. The 2<sup>nd</sup> Defendant conceded that it did obtain orders of eviction against the Plaintiff but the said orders were later set aside and the proceedings were stayed pending the hearing and determination of ***Nairobi High Court Miscellaneous Application No. 31 of 2020; Sunpalm Ltd –vs- Afrika Kivulini Management Ltd.***

9. The 2<sup>nd</sup> Defendant further avers that in view of the fact that there is no dispute as to who owns the Sun Palm Beach Resort Watamu, and in view of the Plaintiff's breach of the express terms of the Management Contract, the Plaintiff is not entitled to the orders sought in the application. The 2<sup>nd</sup> Defendant further avers that the alleged dispute between itself and the 1<sup>st</sup> Defendant as regards the situation and location of the Sun Palm Beach Resort Watamu does not absolve the Plaintiff from paying to the 2<sup>nd</sup> Defendant the Management fees agreed.

10. In addition to that response and by a Notice of Preliminary Objection dated and filed herein on 5<sup>th</sup> March 2020, the 2<sup>nd</sup> Defendant objected to the jurisdiction of this Court to hear the disputes on the grounds that: -

***1. The dispute on payment of the Management fees as between the Plaintiff and the 2<sup>nd</sup> Defendant is a commercial dispute within the unlimited original jurisdiction of the High Court of Kenya as provided for under Article 165(3) (a) of the Constitution of Kenya and not a dispute relating to the environment, the use and occupation of and title to land as provided in Article 162(b) of the Constitution of Kenya as read with the provisions of Section 13(1) of the Environment & Land Court Act No. 19 of 2011.***

***2. That this Court does not also have the jurisdiction to entertain the alleged dispute between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant with respect to the location and situation of the resort known as Sun Palm Beach Resort, that is whether it is situated within the boundaries of Title No. Kilifi/Jimba/669 or within the boundaries of Title No. Kilifi/Jimba/408 as the same amounts to a boundary dispute which is not within the jurisdiction of this Court in view of the provisions of Section 18(2) of the Land Registration Act No. 3 of 2012;***

11. Mohamed Shaibu Shosi (the 3<sup>rd</sup> Defendant) is equally opposed to the Plaintiff's application. In his Replying Affidavit sworn and filed herein on 11<sup>th</sup> March 2021, the 3<sup>rd</sup> Defendant avers that sometime in the year 2005, his father Mohamed Salim Ali instituted ***Nairobi ELC Case No. 663 of 2005*** in respect of LR No. Kilifi/Jimba/669. As it turned out, his father passed away before the conclusion of the case and the 3<sup>rd</sup> Defendant was thereafter substituted as the Legal Representative.

12. The 3<sup>rd</sup> Defendant asserts that Judgment was finally delivered in his favour in the said case on 31<sup>st</sup> February 2015 whereupon the Court ordered the cancellation of LR No. Kilifi/Jimba/669 in the 2<sup>nd</sup> Defendant's name and ordered that the 3<sup>rd</sup> Defendant be registered as the

owner thereof. The 3<sup>rd</sup> Defendant further avers that the 2<sup>nd</sup> Defendant appealed the decision but lost the appeal.

13. The 3<sup>rd</sup> Defendant further asserts that prior to the institution of the said suits, the 2<sup>nd</sup> Defendant had constructed a hotel on the said parcel of land known as Sun Palm Beach Resort Watamu which it had now leased to the Plaintiff.

14. The 3<sup>rd</sup> Defendant further avers that the said LR No. Kilifi/Jimba/669 does not legally belong to the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant acquired his registration through fraud after acting for him as his Advocate in the said **Nairobi ELC Case No. 663 of 2005; Mohamed Salim Ali –vs- Sun Palm Ltd & 2 Others** as well as in the Court of Appeal. The 3<sup>rd</sup> Defendant asserts that while **Nairobi Civil Appeal No. 240 of 2015; Sun Palm Ltd –vs- Mohamed Siaka Ali and 3 Others** was pending, the 1<sup>st</sup> Defendant fraudulently caused himself to be registered as the proprietor thereof.

15. Be that as it may, when the said application came up for hearing on 29<sup>th</sup> October 2020, the Plaintiff as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant recorded a consent in Court as follows: -

**1. That the 2<sup>nd</sup> Defendant's Preliminary Objection dated 5<sup>th</sup> March 2020 be and is hereby marked as withdrawn with no orders as to costs.**

**2. That an order of temporary injunction be and is hereby issued against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their agents, employees, servants and/or representatives from evicting the Plaintiff from the management operations, running and/or trading in the hotel premises known as Sunpalm Beach Resort Watamu standing on Plot No. Kilifi/Jimba/408 and or in any manner howsoever and whatsoever demanding, disturbing and/or interfering with the Plaintiff's quiet use, possession, management and operations of the Sunpalm Beach Resort Watamu pending the hearing of this suit.**

**3. That an order be and is hereby issued directing the Plaintiff/Applicant to deposit in Court all the outstanding rent within Fourteen (14) days from the date hereof and/or deposit in Court any future rent payable in respect of the hotel premises known as Sunpalm Beach Resort Watamu until the suit is heard and determined and/or until further orders from the Court.**

**4. That an order be and is hereby issued directing the County Surveyor Kilifi County to undertake a survey and file a report to Court as in respect of the following: -**

**a) The exact location of Sunpalm Beach Resort Watamu;**

**b) Whether the said Hotel is built on Plot No. Kilifi/Jimba/408 or Kilifi/Jimba/669;**

**5. That an order be and is hereby issued that the Plaintiff/Applicant to settle all the outstanding water and electricity bills in Court and file a report in Court within Fourteen (14) days from the date of this consent;**

**6. That parties are at liberty to apply;**

**7. That (there are) no orders as to costs;**

**8. That the application to proceed as between the Plaintiff and the 1<sup>st</sup> Defendant.**

16. Subsequently and as the matter was pending a ruling on the Plaintiff's application vis-a-vis the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant moved to Court and filed the second application herein dated 18<sup>th</sup> January 2021 seeking the following orders: -

**4. That pending the hearing and determination of the main suit, this Honourable Court be pleased to review, discharge and/or set aside the consent order made on 29<sup>th</sup> October 2020 and any other consequential order thereto.**

**5. That pending the hearing and determination of the main suit, this Honourable Court be pleased to issue an injunction restraining the Plaintiff either by itself, directors, officers or agents from carrying away, hiring-off or taking from Sunpalm Beach Resort Watamu any equipment, furniture and fixtures therein.**

**6. That the Police Officers Commanding or in-charge of Watamu Police Station to enforce the orders of this Honourable Court.**

17. The second application which is supported by an affidavit sworn again by the 2<sup>nd</sup> Defendant's director Eleonora Cozzi is premised on the grounds that: -

**a) On 29<sup>th</sup> October 2020 parties herein entered into a consent barring the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from evicting the Plaintiff or interfering with the Plaintiff's management, operations and running of the hotel known as Sunpalm Beach Resort in Watamu;**

**b) In return to enjoying peaceful occupation, use and possession of the hotel, it was also agreed in the consent order that the Plaintiff shall deposit in Court all the outstanding rent within 14 days from the date of the consent, and further deposit in Court all future rent until the suit is heard and determined;**

c) *Despite the express provisions of the consent order, the Plaintiff has not made any deposit of the outstanding rent. As a result of the non-payment, the outstanding rent has now accrued to Kshs 22,943,937/- and continues to accrue at the rate of Kshs 950,000/- every month;*

d) *The Plaintiff has also stopped paying electricity and water bills which have accumulated to Kshs 921,585/- and Kshs 1,381,414/- respectively;*

e) *The 2<sup>nd</sup> Defendant has also been reliably informed by the Plaintiff's staff in the Hotel that the Plaintiff has not paid their salaries for last nine months, is in so much debt with the suppliers and is no longer able to manage or operate the Hotel;*

f) *On 7<sup>th</sup> January 2021, the Plaintiff's agents discreetly entered the Hotel with trucks and have started carrying away equipment, furniture and fixtures;*

g) *The actions of the Plaintiff of disobeying the Court's orders and discreetly removing equipment, furniture and fixtures are deliberate and are aimed at defeating this suit and making it completely impossible for the 2<sup>nd</sup> Defendant to recover the rent owing to date; and*

h) *It is therefore in the interest of justice that this Court intervenes in the manner sought herein to safeguard the dignity of this Honourable court and to also protect the Hotel from being wasted.*

18. In response to the second application, the 1<sup>st</sup> Defendant avers that the application was made in bad faith as it was pre-emptive of the consent made between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants where it was agreed that the Land Registrar Kilifi determines the boundaries of Kilifi/Jimba/699 and Kilifi/Jimba/408. In his Replying Affidavit filed herein on 18<sup>th</sup> February 2021, the 1<sup>st</sup> Defendant further avers that it has now been confirmed that 99.9 % of the Sunpalm Beach Hotel encroaches on his Plot No. Kilifi/Jimba/699.

19. Similarly opposed to the second application is the Plaintiff herein. In a Replying Affidavit sworn on its behalf by its director Raffaele Coniglio and also filed herein on 18<sup>th</sup> February 2021, the Plaintiff avers that the application as filed is baseless, misconceived and a total abuse of this Court's process as it does not raise any legal or factual issues to warrant the grant of the orders sought.

20. The Plaintiff avers that pursuant to the agreement dated 26<sup>th</sup> April 2016, the Sunpalm Beach Resort was let to itself at the sum of Kshs 750,000/- per month. In addition, the Plaintiff paid Euros 50,000/- which is equivalent to Kshs 6,250,000/- as a deposit which sum was to act as security for the 2<sup>nd</sup> Defendant and is refundable to the Plaintiff upon termination of the Management Contract.

21. The Plaintiff denies that the rent owing stands at Kshs 22,943,937/- as stated by the 2<sup>nd</sup> Defendant. On the contrary, the Plaintiff asserts that it is only indebted to the 2<sup>nd</sup> Defendant for the sum of Kshs 900,000/- being rent due for the 12 months running from February 2020 to January 2021. It is further the Plaintiff's case that the parties herein recorded the consent order dated 29<sup>th</sup> October 2020 and that there is no material placed before this Court to warrant vacating the said orders.

22. The Plaintiff further avers that under Clause 4 of the Management Contract, the same could be suspended in the event of a *force majeure* and during a civil war, tsunami, natural calamities like a hurricane or an outbreak. It is the Plaintiff's case that such reasons also include international travel advisories affecting tourism in Kenya. In this respect, the Plaintiff asserts that due to the Covid-19 pandemic, it has been facing difficulty paying the rent and that position had been communicated and explained to the 2<sup>nd</sup> Defendant. The Plaintiff asserts that it has now invoked the provisions of the said Clause 4 until such a time that the situation will stabilize in the tourism industry.

23. The Plaintiff further avers that it has not refused to pay rent, water and electricity bills and that the failure to pay the same was occasioned by the fact that the hotel was closed since March 2020 due to the Covid-19 pandemic which had adversely affected the tourism industry in the Country and the world at large.

24. The Plaintiff admits that it did remove some of its property from the hotel but asserts that the reason for so doing was to take them to a more safer place after the security guards at the hotel were reduced. The Plaintiff avers that all that is removed from the hotel was its own property and not that of the Defendant.

25. I have perused and considered the two applications and the various responses thereto. I have also perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

26. It is not in dispute that the Plaintiff and the 2<sup>nd</sup> Defendant herein entered into what was called a Management Contract dated 26<sup>th</sup> April 2016. By the said contract, the 2<sup>nd</sup> Defendant agreed to let and lease all those premises known as Sunpalm Beach Resort Watamu for a period of eleven years running from 1<sup>st</sup> May 2016 to 31<sup>st</sup> December 2027. The contract also provided for payment of a refundable deposit of 50,000/- Euros and the payment of monthly rents varying from year to year until the last date of the contract.

27. Some four years after entering into the contract, the parties appear to have fallen out as regards the fulfillment of the terms of the contract. Accordingly and by a Notice of Motion application dated 10<sup>th</sup> January 2020, filed before the Chief Magistrates Court at Nairobi being *Milimani Commercial Courts Civil Case No. 74 of 2020*, the 2<sup>nd</sup> Defendant obtained orders against the Plaintiff extracted as follows:

**"IT IS HEREBY ORDERED:**

1. *That the Notice of Motion Application filed on 10<sup>th</sup> January 2020 is certified as urgent.*
2. *That pending the hearing of this application, the defendant whether by themselves through their agents, servants and/or anyone purporting to act under them or under their instructions be restrained from in any way managing, operating, interfering, accessing into and/or conducting any formal business on behalf of all that business concern identified as Sunpalm Beach Resort registered in the names of the Plaintiff pending inter-partes hearing on 24/1/2020 before Hon. G.A. Mmasi (Mrs) Senior Principal Magistrate.*
3. *That the National Police Officers be forthwith mandated to maintain law, order and compliance of the orders herein above;*
4. *That the applicant to serve the application upon the respondent.”*

28. While the said Orders were subsequently stayed, the Plaintiff consequently received a letter dated 10<sup>th</sup> February 2020 from the 1<sup>st</sup> Defendant stating in the relevant part as follows: -

**“RE: Sunpalm Ltd Kilifi/Jimba/669 Owner- David Pius Mugambi**

*Refer to our meetings at Malindi Baobab hotel when we discussed about buying the hotel mentioned above. The hotel is built on my Plot Kilifi/Jimba/669 as indicated in the ownership documents given to you by your advocates. During the meeting I indicated that the entire hotel is valued at US Dollars 12.5 Million and that I had an offer of US Dollars 10 Million. Enclosed herewith is the said offer for your reference. If you can give me a better offer I am ready and willing to sell the property to you. The Court of Appeal on 7<sup>th</sup> February 2020 dismissed the appeal filed by Sunpalm Ltd. Enclosed find a Photostat copy of the said Judgment. I also made it clear that even if you purchase the hotel, you have to pay me all the arrears (of) rent which you have been paying Eleonora Cozzi despite me informing you that the property is mine.*

*This offer is valid for fourteen (14) days from the date of this letter and at the expiry of the notice you must vacate the hotel. As discussed we shall have the District Surveyor Malindi to re-survey and fix the boundaries of Kilifi/Jimba/669 where the hotel is built. I further wish to inform you that we shall take possession of the property in accordance with the order of Justice Nyakundi.”*

29. It is these two events which according to the Plaintiff caused it apprehension that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were intent on evicting it from the suit premises and hence the institution of these proceedings. It is the Plaintiff’s case that the Defendants want to illegally take over the management of the hotel premises from itself without due regard to the existing Lease Agreement and before the expiry of the contractual period.

30. It was not immediately clear to me from the Plaintiff’s claim why the 3<sup>rd</sup> Defendant had been enjoined in the suit. The reasons for such joinder however became clear upon the perusal of the 3<sup>rd</sup> Defendant’s response to the Plaintiff’s application.

31. From the material placed before me, it is apparent that the 2<sup>nd</sup> Defendant herein has for some time been laying claim to the two parcels of land referred to by the Plaintiff being LR Nos. Kilifi/Jimba/408 and Kilifi/Jimba/669. Indeed, for some period between 1996 and 31<sup>st</sup> July 2015, both parcels of land were registered in the name of the 2<sup>nd</sup> Defendant.

32. Before the year 1996 however, LR No. Kilifi/Jimba/669 was registered in the name of one Mohamed Siaka Ali who was the father to the 3<sup>rd</sup> Defendant herein. It is also apparent that by an agreement dated 22<sup>nd</sup> October 1996, the 2<sup>nd</sup> Defendant had purported to purchase the said LR No. Kilifi/Jimba/669 from the said Mohamed Siaka Ali and that the two disagreed over the purchase price and the acreage of the property that was being sold.

33. Before his death on 5<sup>th</sup> August 2005, the 3<sup>rd</sup> Defendant’s father instituted *Nairobi ELC Case No. 663 of 2005; Mohamed Siaka Ali –vs- Sunpalm Ltd and 3 Others*. The 3<sup>rd</sup> Defendant would subsequently be substituted as the legal representative in place of the father.

34. It was also apparent to me that upon entering into the Agreement with the 3<sup>rd</sup> Defendant’s father, and despite the on-going dispute, the 2<sup>nd</sup> Defendant went on to construct the development now known as the Sunpalm Beach Resort Watamu on what the 2<sup>nd</sup> Defendant considered to be LR No. Kilifi/Jimba/408. That is the hotel which the 2<sup>nd</sup> Defendant let and leased to the Plaintiff herein by the Management Contract dated 26<sup>th</sup> April 2016.

35. In a Judgment rendered in favour of the 3<sup>rd</sup> Defendant in the said *Nairobi ELC 663 of 2005* a year before the 2<sup>nd</sup> Defendant leased the premises, the Honourable Justice JM Mutungi ordered on 31<sup>st</sup> July 2015 as follows: -

**(1) That the registration of Land Parcel Kilifi/Jimba/669 in favour of Sunpalm Limited be and is hereby declared null and void and is ordered to be cancelled forthwith.**

**(2) That the Chief Land Registrar through the Land Registrar Kilifi be and is hereby ordered to register Mohamed Shaibu Shosi the personal legal representative of Mohamed Siaka Ali (deceased) as the owner of the land parcel Kilifi/Jimba/669 in place of Sunpalm Limited, the 1<sup>st</sup> Defendant herein;**

(3) .....

36. The 2<sup>nd</sup> Defendant being dissatisfied with the said Judgment lodged *Nairobi Civil Appeal No. 240 of 2015; Sunpalm Ltd –vs- Mohamed Siaka Ali and 3 Others*. But in a Judgment rendered on 7<sup>th</sup> February 2020, the Court of Appeal agreed with the Judgment of the Environment and Land Court and dismissed the appeal.

37. That being the case it was clear to me that the Plaintiff entered the suit premises on the authority of the 2<sup>nd</sup> Defendant pursuant to the Management Contract. There was indeed no dispute that it is the 2<sup>nd</sup> Defendant that put up the development known as Sunpalm Beach Resort Watamu as the 1<sup>st</sup> and 3<sup>rd</sup> Defendants were not in the picture when the facility was put up.

38. I say so because the 3<sup>rd</sup> Defendant himself states at paragraph 7 of his Replying Affidavit filed herein on 11<sup>th</sup> March 2020 that the 2<sup>nd</sup> Respondent constructed the hotel on LR No. Kilifi/Jimba/669 before his late father filed the *said Nairobi ELC No. 663 of 2005*. It was also clear to me that the 1<sup>st</sup> Defendant could not have built the hotel as he was the Advocate representing the 3<sup>rd</sup> Defendant in both the Environment and Land Court and in the Court of Appeal. The Title Deed he has annexed to his Replying Affidavit shows it was issued to him on 18<sup>th</sup> July 2017 during the pendency of the matter in the Court of Appeal and he does not make any claim to have put up the hotel.

39. At the same time, while the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had claimed that the hotel was entirely on LR No. Kilifi/Jimba/669, it is evident from the Boundary Dispute Report dated 18<sup>th</sup> January 2021 attached to 1<sup>st</sup> Defendant's Replying Affidavit that that is not the case. While the Report by the Chief Land Registrar points to encroachment of the hotel onto the said plot, it is her finding that the extent of the encroachment is difficult to determine because there is no existing external boundary for the hotel on the disputed side. That is however a matter in my view that will require determination as between the 2<sup>nd</sup> Defendant and the person who will be determined between the 1<sup>st</sup> and the 3<sup>rd</sup> Defendant as the rightful owner of Plot No. 669.

40. Otherwise a perusal of the not-so-well drafted Management Contract reveals that the Plaintiff was required to pay the monthly rent before the seventh(7<sup>th</sup>) day of every month. Clause 10(c) thereof on the Plaintiff's obligations reads as follows: -

***“C. Not to delay the payment of the management fee at the agreed time. It been (sic) understood that the late or non-payment of the instalment lead (sic) to the application of default interest corresponding to the rate of 5% (five percent) on annual basis. If the arrears were to continue for a period of 60(sixty) days, the Owner may exercise the right of termination of this Management Contract by written instrument of formal notice with an invitation to make payment of principal and interests within the next 90(ninety) days. In case of failure to pay, the Manager, in addition to payment of arrears and the immediate release of the property, will have to pay as damages to the Owner of three months of Management fees for the cancellation of the contract. In the event that the Owner terminates this agreement for non-payment of management fees, the manager shall not be entitled to a refund of investment.”***

41. While this Clause was certainly not clearly drafted, it was evident to me that the parties envisaged an earlier termination of the Management Contract where the Plaintiff was unable to pay rent for some 90 days. There would accordingly be nothing wrong with the 2<sup>nd</sup> Defendant seeking to terminate the contract earlier than the agreed cumulative term where the Plaintiff was unable to meet its obligations.

42. By the Consent Order recorded herein on 29<sup>th</sup> October 2020, the 2<sup>nd</sup> Defendant was restrained from evicting the Plaintiff from the management and operations of the hotel on the agreement that he would within 14 days deposit here in Court all outstanding rent and to so-deposit any subsequent rent due until such a time that the suit is heard and determined. The Plaintiff was also directed to settle all outstanding water and electricity bills within 14 days.

43. The Plaintiff has failed to abide by the said Orders and directions of the Court. Indeed, it admits to be in arrears of rent for 12 months and now purports to invoke the provisions of Clause 4 of the contract on the suspension thereof due to a force majeure as the reason for his failure to make payments. The Plaintiff cites the on-going Covid-19 pandemic and the resultant disruptions of tourism activities as the basis for the failure to meet its obligations.

44. It was however not lost on this Court that the said pandemic was in force as at the time the Consent Orders were recorded by the parties. Unfortunately for the Plaintiff, that order has a contractual effect and is now binding upon itself. It was not conditional upon any occurrence and the Plaintiff did not itself try to set it aside on the basis of any hardship on its part. They cannot continue remaining in the premises pursuant to the consent order while they are in actual fact in disobedience of the orders allowing them to remain therein.

45. In the premises, I did not find any merit in the Plaintiff's application dated 27<sup>th</sup> February 2020 and I disallow the same. On the other hand, I did find great merit in the 2<sup>nd</sup> Defendant's application dated 18<sup>th</sup> January 2021 and I allow the same as prayed.

46. The Plaintiff shall bear the costs of the two applications.

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of May, 2021.**

**J.O. OLOLA**

**JUDGE**