



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 47 OF 2016

SEA STAR MALINDI LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KILIFI.....DEFENDANT

JUDGMENT

BACKGROUND

1. The suit before me was initially filed against four Defendants as Nairobi HCCC No. 595 of 2005 vide a Plaint dated 17th May 2005. Following various amendments and the transfer of the suit to Malindi, the Plaintiff herein Messrs Sea Star Malindi Ltd pursued its claim on the basis of a Further Amended Plaint dated 26th October 2015 as filed herein on 27th October 2015.

2. In its Claim as amended, the Plaintiff prays for Judgment against the sole remaining Defendant-the County Government of Kilifi(as successor in title to the Municipal Council of Malindi) for various categories of special damages on account of the demolition of a hotel that was erected on Land Portion No. 3170(Original No. 850/3) pleaded thereon as follows:-

a) Costs of reconstruction including Professional Fee Kshs 129,923,240.00/-

b) Loss of expected revenue and profits from when hotel was expected to be opened to 31/12/2014.....Kshs 558,448,457.00/-

c) Expenses incurred by the Plaintiff's Directors from January 2005 to January 2007 in visiting Kenya from Italy in connection with the demolition of their hotel...Euros, 102,624.82

d) Interest at Bank Lending rates

e) Costs of this suit plus interest at Bank overdraft rates of interest.

f) Any other relevant relief the Honourable Court may deem fit to grant.

3. The basis of the Plaintiff's claim is its contention that at all times material to this suit, it was the registered proprietor of a beach property registered as LR No. 3170 Malindi. Sometimes in or about 1996, the Plaintiff applied to the Defendant's predecessor-the Municipal Council of Malindi for a permit to construct a 5-Star hotel thereon.

4. Upon receipt of the permit and necessary approvals, the Plaintiff commenced construction of the hotel. It is however its case that sometime in the year 1998, the Kenya Wildlife Service ordered it to stop the construction purportedly because the development was within 100 feet from the high water mark of the Indian Ocean and hence government land.

5. On or about 15th January 2005 until 26th January 2005 the Defendants proceeded to demolish and destroy the hotel the Plaintiff had put up on the premises hence leading to the losses that the Plaintiff claims herein.

6. In its Defence to the Further Amended Plaint dated 25th November 2015 as filed herein on 27th November 2015, the Defendant County Government of Kilifi denies that the Plaintiff is and/or remains the registered owner of the suit property. The Defendant further denies that the Plaintiff submitted an application for development approval and/or that the Plaintiff received the approvals as alleged or at ll.

7. In the alternative, the Defendant pleads that if indeed any approval was obtained, it was a matter within the Plaintiff's knowledge that the

paragraphs 6 and 8 of the Further Amended Plaint dated 26th October 2015, they accuse the predecessor of the Defendant herein-the defunct Municipal Council of Malindi of maliciously authorizing the construction and then turning around to demolish the hotel.

21. On its part, the Defendant denies the Plaintiff's claim in totality. While they did not bring any oral testimony in support of their case, they aver in their Defence to the Further Amended Plaint dated 25th November 2015 that the Plaintiff's cause of action is underpinned by a myriad of illegalities, including open disregard of the law on the limits to its title in regard to the abutting Indian Ocean high watermark as well as illegalities pertaining to the approval obtained for the construction of the hotel.

22. It is thus the Defendant's position that the Plaintiff's claim is unenforceable and any resultant relief that may be due to the Plaintiff would be a violation of and contrary to the law and public policy.

23. From the material placed before me, it was not disputed that the Plaintiff is the registered proprietor of the parcel of land known as Portion No. 3170 Malindi. According to PW1, they purchased the said parcel of land in 1994 with a view to constructing a 5-star hotel thereon. Accordingly, sometime in 1996, they presented the drawings of their proposed hotel to the Municipal Council of Malindi. On 15th August 1996, the Council approved the building plans and granted the Plaintiff a building permit.

24. It was the Plaintiff's case that on or around 20th August 1997 shortly after they had commenced construction of the hotel, the Kenya Wildlife Service(KWS) issued them with notice to stop construction on the site on the purport that the construction was being undertaken within the statutorily protected 100 feet of the Indian Ocean high water mark.

25. The dispute with the KWS was apparently escalated to the Council and on 7th September 1998, the Council issued a comprehensive Report in which they concluded, inter alia that the project should be allowed to continue as planned and designed as there existed in the Council's view, no lawful reasons to revoke the same. It was the Plaintiff's case that based on the Council's re-assurance, they continued with the construction.

26. To the Plaintiff's surprise however, on or around 15th January 2005, the Council turned around and proceeded to destroy and pull down the structures erected on the Plaintiff's property. It is the Plaintiff's case that the Council's actions were actuated by ill-will and that same were indefensible as it is the Council which had given approval to the Plaintiff to build in the first place.

27. Indeed, a perusal of the correspondence emanating from the Council at the time depicts an institution that was more than eager to approve and support the Plaintiff's project. However, in their letter dated 20th January 2005 that appears to have precipitated the demolition complained about, the then Town Clerk Patrick L. Ouya addressed the Plaintiff as follows:-

“RE: ILLEGAL DEVELOPMENT ON PLOT NO 707/1

It has been established that you erected a structure outside your plot limits fronting the beach.

This is to give you seven(7) days notice from the date of this letter to remove the said structure failure to which the Council will proceed to take appropriate action it deems fit without any further reference to you.”

28. As it turned out, the Defendant did not testify in these proceedings and it remains unclear what structure if any, had been erected by the Plaintiff outside the said Plot limits. According to the Plaintiff, shortly before they even received the said letter dated 20th January 2005, the Defendant proceeded to destroy and pull down their hotel.

29. As a result, the Plaintiff claims from the Defendant a total sum of Kshs 658,371,697.00/- being the cost of reconstruction, professional fees and loss of expected revenue. In addition, the Plaintiff claims a sum of Kshs 1,004,874,489/- as damages suffered and incurred as a result of the disruption occasioned by the Defendant from 2005 to-date.

30. As it were the Defendant did not do anything much to challenge and/or controvert the Plaintiff's claim herein. If indeed the Defendant demolished the Plaintiff's structures as indicated herein then the Plaintiff is certainly entitled to compensation. In that regard 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.

31. This Court however takes judicial notice of the fact that arising from the same circumstances, the Plaintiff herein had also instituted Nairobi HCCC No. 579 of 1998 seeking inter alia damages for stoppage of the construction of the hotel from the Kenya Wildlife Service and its then Director one Dr. David Western. That suit was later transferred to Malindi as ELC No. 56 of 2016.

32. In a Judgement delivered by this Court in regard to the said suit on 31st July 2018, this Court entered Judgment and awarded the Plaintiff costs as follows:-

a) Kshs 90,000,000/- being the cost of reconstruction of the hotel.

b) Kshs 30, 000, 000/- as general damages.

c) Interest on 'a' and 'b' at commercial bank rates until payment in full.

33. In the said case, the Plaintiff had claimed among others general and exemplary damages for disruption of their construction from 20th August 1997 when the Kenya Wildlife Service was said to have stopped the construction of the hotel. They also claimed for a sum of US \$ 75,000/= as loss of profits from 1st December 1997 until the time of completion of the construction.

34. Having considered the various awards made in my Judgment in the said case, I did not think that the Plaintiffs are entitled to a separate award against the Defendant in the sums claimed herein. As it were, I was not satisfied that the Plaintiff had put up another hotel in 2005 which the Municipal Council of Malindi demolished and/or that the structures demolished would be of the amount which is similar to what the Plaintiff claimed from the Defendants in Malindi ECL Case No. 56 of 2016. In my view these claims were intertwined and related and should have at best been pursued as one claim albeit against different defendants.

35. Accordingly and for the reasons given, I did not find merit in the Plaintiff's entire claim as I did not also find any evidence that the Plaintiff's directors incurred the alleged or any travel expenses resulting from the demolition of the hotel. In the result, the Plaintiff's suit is dismissed.

36. In the unique circumstances of this case and given the role of the Defendant herein however, I think the Defendant shall be condemned to pay the costs of this suit.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE