



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 3 OF 2004

ANGELO PALOMBO1ST PLAINTIFF

**MANCIOCCHI FRANCA IN CAPOGNA (*Suing as administrator to
the Estate of PIETRO CAPOGNA*)2ND PLAINTIFF**

FIGRELLA MANGALE.....3RD PLAINTIFF

VERSUS

ANTONIO CAZZATODEFENDANT

JUDGMENT

1. In the Plaint dated 11th February, 2004 which was subsequently amended, the Plaintiffs averred that he is one of the registered proprietors of a portion of land known as 5583 Malindi; that in the year 1992, him, together with his co-owners obtained the approval of the then Local Authority and implemented a uniform building scheme for residential houses on the suit land and that all the houses were similar in all respects.

2. It is the 1st Plaintiff's averment that in the year 2001, he purchased $\frac{1}{4}$ undivided shares from Delle Chiale Francesco; that he sold this share to the Defendant on 11th October, 2002 and that it was an implied term of the Agreement to have a uniform design of houses which could not be unilaterally changed by any of the property owners.

3. It is the Plaintiffs' case that when he came back to Kenya in January, 2004, he found the Defendant had redesigned his house by: increasing the service area occupied by his house horizontally to approximately 218M²; added a first floor and changed the character of the house by removing the makuti roof and replaced it with a flat concrete roof.

4. The Plaintiffs averred that the Defendant's actions constitute a breach of contract and that the Defendant's actions constitute a nuisance.

5. The prayers that the Plaintiffs are seeking are a declaration that the Defendant's acts amount to a breach of contract and a mandatory injunction requiring the Defendant to remove all the additions to his house and return the house to the condition it was before the illegal acts complained of and general damages.

6. In his Defence, the Defendant admitted having purchased $\frac{1}{4}$ undivided shares of the jointly owned property from the Plaintiffs. According to the Defendant, he did not purchase the suit land based on any

conditions neither was he made aware of any such conditions prior to the purchase of the house.

7. It is the Defendant's case that the alteration he made to his house was to his taste and requirements and that the same were not in breach of any contract.

The Plaintiffs' case:

8. The 1st Plaintiff, PW1, informed the court that him, together with the other two Plaintiffs, bought the suit property from an African; that his house was the one near the beach and that the four houses were similar in design.

9. It was the evidence of PW1 that they obtained from the then Local Authority approvals and implemented the uniform building scheme for residential houses and that the individual units shared among other features the initial floor area of 160M² with the ground floor structure having a high pitched makuti roof.

10. After purchasing $\frac{1}{4}$ undivided share from his co-owner, PW1 stated that he sold it to the Defendant and that by buying into the existing scheme, the Defendant was bound to adhere to the terms and conditions of the scheme subject of which he held the sold property.

11. According to PW1, it was an implied term of the Agreement to create a uniform design that will not be changed and that when he came back to the country in the year 2004, he found the Defendant had changed the design of the house without getting the approval of all the Plaintiffs and without the Local Authority's approval.

12. PW1 informed the court that the Defendant unilaterally changed the design of his house by increasing the service area to 218M² and also added a first floor on his property with an equivalent occupation area with the ground floor. It was the evidence of PW1 that the Defendant further changed the character of his house by removing the makuti roof and replaced it with a flat concrete roof.

13. PW1 stated that the house he sold to the Defendant, being the last house towards the sea, the raising of the house had blocked his view of the sea and restricted the free flow of air.

14. The 2nd Plaintiff, PW2, informed the court that all the Plaintiffs obtained a consent to put up a uniform building scheme for residential houses on the suit land for individual occupation.

15. PW2 stated that the houses were similar in all respect and that each house owner was bound to adhere to the terms and conditions subject to which their predecessors in title held the same.

16. It was the evidence of PW2 that in breach of those terms, the Defendant increased the service area of his house horizontally to approximately 218M² and also added a first floor with an equivalent occupation area with the ground floor. It is the 2nd Plaintiff's case that the Defendant's actions constitute a breach of contract.

17. In cross-examination, PW2 stated that there was no written agreement amongst themselves on how the houses were to be built; that the agreement was oral and that due to the changes the Defendant made to his house, she cannot clearly view the sea from her house.

18. The Surveyor, PW3, informed the court that he was instructed to conduct a typographical survey to determine if there were any alterations made in respect to the Defendant's house; that the initial area of all the houses on the suit land was 160M² and that the Defendant increased the surface area of his unit to 218M² with an equivalent increase of the ground floor.

The Defence case:

19. DW1 informed the court that she lives with the Defendant in Italy; that she was present when the Defendant purchased the suit land and that it is the 1st Plaintiff who informed the Defendant that he could extend the area of the house that the Defendant was buying from him.

20. According to DW1, it was the 1st Plaintiff who gave to the Defendant the plan for the extended house and that the Defendant agreed to purchase the house on the basis of the plan showing the extension of the house.

21. After purchasing the house, DW1 stated that the Defendant prepared a plan which was duly approved by the then Local Authority; that he also built a garage with the approval of the 1st Plaintiff and that there was no agreement that the Defendant breached.

Submissions:

22. The Plaintiffs' advocate submitted that it is well known that condominium units are based on conditions and share certain amenities; that all the owners have a responsibility to pay their shares and that it was an implied term of the agreement to create a uniform design.

23. Counsel submitted that the Defendant's actions were against the collective interests of the co-owners and that the wall put up by the Defendant has blocked the free flow of air and the sea view from the Plaintiffs' houses.

24. The Plaintiffs' advocate submitted that the Defendant's unilateral acts amounted to a breach of contract.

25. The Plaintiffs' counsel finally submitted that a mandatory order of injunction should issue to aid the law and that where a building is erected in breach of the law due to want of approval by the Local Authority, the development would be illegal and would be removed. Counsel relied on several authorities which I have considered.

26. The Defendant's advocate submitted that the Indenture of 11th October, 2002 was between the 1st Plaintiff and the Defendant; that the other Plaintiffs were neither parties to it nor did they give their consent to the 1st Plaintiff to sale his portion and that a restrictive agreement only applies in a leasehold interest where the owner of the land owns a freehold and the other party a leasehold interest.

27. Counsel submitted that it cannot be implied that being tenants in common, the Defendant was restricted in the use of his portion of land in any manner.

Analysis and findings:

28. It is not in dispute that the Plaintiffs obtained from the Local Authority approval to put up a uniform building scheme for residential houses on land known as 5583 Malindi. The individual units shared among other features the initial floor area of 160M² with a high pitched makuti roof.

29. On 11th October, 2002, the 1st Plaintiff, vide an Indenture registered on 15th October, 2002, sold to the Defendant his ¼ undivided shares in the suit land. The said ¼ undivided share that the Defendant purchased had a house with is similar in design with the other three houses owned by the other Plaintiffs.

30. After purchasing the house, the Defendant changed the character of the house by increasing the service area occupied by the house horizontally to approximately 218M². He also added a first floor on his property with an equivalent occupation area with the ground floor. These changes, according to the Plaintiffs, have impeded their view of the sea and the free circulation of air.

31. The Defendant's representative informed the court that the Defendant purchased the suit premises after getting an assurance from the 1st Plaintiff that he can make the impugned changes and that he

obtained the consent of the Local Authority.

32. I have perused the Indenture of 11th October, 2002 which constitutes the agreement between the 1st Plaintiff and the Defendant. The Indenture shows that the 1st Plaintiff sold to the Defendant all his interest in the suit land, which is an estate in fee simple free from all encumbrances.

33. The Indenture that was entered into between the 1st Plaintiff and the Defendant did not have any express or implied covenants restricting the Defendant, after obtaining the necessary consents from the Local Authority, from changing the character of his house.

34. I am in agreement with the Defendant's advocate's submissions that a restrictive agreement only applies in a leasehold interest where the owner of the land owns a free hold and the other party the leasehold interest thereof, or where the parties have entered into an express agreement, limiting the usages of their respective parcels of land.

35. There being no claim of breach of any statute or agreement, I find that the Plaintiffs have not proved their case on a balance of probabilities. I therefore dismiss the Amended Plaint dated 11th February, 2004 with costs.

DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF APRIL, 2018.

J.O. OLOLA

JUDGE