REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 56 OF 2016

SEA STAR MALINDI LTD.....PLAINTIFF

VERSUS

KENYA WILDLIFE SERVICES.....1ST DEFENDANT

DR DAVID WESTERN.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. This suit was initially filed at the Milimani Commercial Court Nairobi on or about 15th day of August 1998. The Plaint herein was subsequently amended on 9th November 1998 and re-amended on 3rd February 1999. What is currently before me is the claim as Further Re-Amended on 27th March 2006.

2. By the Further Re-Amended Plaint filed herein on 28th March 2006, the Plaintiff Sea Star Malindi Ltd dropped its claim against J.M Mburungu and BK Mwakau who were initially named respectively as the 3rd and 4th Defendants and retained the claim against Kenya Wildlife Service (1st Defendant) and Dr. David Western (2nd Defendant).

3. The Plaint as further re-amended prays for Judgment, declarations, rulings and orders against the remaining Defendants jointly and severally as follows:-

> ***A) (An) Order (be issued) restraining the Defendants permanently either by themselves, servants, agents and/or employees from interfering with the Plaintiff's construction of its intended hotel or use of its land in (the) manner it wishes within the Survey beacons of LR No. 3170 Malindi as permitted by Malindi Municipality Building By-Laws in accordance with the approved building Plan No. 63 of 1996.***
>
> ***A(1) That the area where the suitland LR No. 3170 Malindi is situated has at all material times from 25.3.1958 to the date of the orders being prayed for, been private land, it was private land on 26/3/1968 and LR No. 99 of 1968 did not apply to any part of the suitland unsub-divided LR No. 850 Malindi which is now sub-divided into LR 3170 Malindi and LR 3169 Malindi and which is approximately 1.5 Kilometres away from the boundaries of the area referred to by L.N. 99 of 1968.***
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> ***A (2) That consent of the Minister for Land and Settlement as the one referred to by L.N 99 of 1968 only apply to the Government land as defined by the Government Lands Act Cap 280 Section 2 and no other land, the suit land is land referred to by Section 20 of the Constitution of Kenya (Amended) Act No 28 of 1964 and Section 8B of Cap 280.***
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> ***A(3) That the area where the Suitland is situated was at 26/3/1968 registered as freehold parcel LR 850 Malindi in the name of Helen Mclaren Gartskell and the Competent authority in accordance with the National Park of Kenya Act Cap 377(1962 Ed) as amended by LN 743 of 1963, LN 303 of 1964 and Act No. 21 of 1968 was Helen Mclaren Graitskell and not (the) Minister for Lands and Settlement who was the only competent authority consulted before L.N. 99 of 1968 was published on 26/3/1968.***
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> ***A (4) The decision of Kenya Wildlife Services dated 20th August 1997 and 9th November 1997 to physically and using armed Game Wardens to prevent further construction which was going on in LR 3170 Malindi was unconstitutional, illegal and null and void*** ab initio ***and the Defendants are jointly and severally liable for all the damages and losses incurred by the Plaintiff from 20th August 1997 to the date when the reconstruction shall be completed. Quantum based on (the) Quantity Surveyor's Report to be determined in Court.***

A(5) Orders that the Defendants do pay the Plaintiff the difference between the costs of constructing and completing the development in LR 3170 Malindi in November 1997 and the date when the work of construction shall be completed which shall be eighteen months from the date of full payment of compensation depending on the date of full payment of compensation plus the loss of income as prayed in the pleadings of US$ 75,000/- per month from 1.12 1997 until when the construction shall be completed and interest calculated on monthly rests until when paid in full. Actual quantum to be determined in accordance with Quantity Surveyor Report by the Court.

B. General and exemplary damages quantum to be assessed by the Honourable Court from 20/8/1997 plus interest at Bank over-draft rates calculated on monthly rests from the date of Judgment.

C) Costs of this suit plus interest at Commercial bank over-draft rates of 35% from the date of filing this suit calculated on monthly rests until when the total sum shall be paid in full.

D) Interest on A(4) and A(5) herein above from 20/8/1997 calculated on monthly rests at an ineptest rate of 35% p.a. of Commercial Bank Overdraft lending rates prevailing from time to time until when the payment shall be paid(sic) in full.

E) Any other relief this Honourable Court may deem fit and just to grant.

4. The Plaintiff's prayers are premised on its contention that it is the registered proprietor of LR No 3170 Malindi. But on or about 9th November 1997, the Defendants jointly and severally did order armed game wardens who in compliance with the orders did physically take possession of the whole of LR No. 3170 Malindi, stopped an on-going construction thereon and proceeded to bar any further construction in the suitland. It is further the Plaintiff's contention that the said armed wardens have since kept guard over the premises to make sure that no activities take place thereon and were still there upto the date of institution of this suit.

5. The Plaintiff avers that it was in the process of constructing a tourist hotel on the suit premises which was due for completion on 1/12/1997 and the activities of the Defendants have occasioned heavy financial losses as the Plaintiff has been unable to complete the hotel which was already half-way built and/or to repay the loans borrowed for purposes of carrying out the construction. Despite demand made and notice of intention to sue by the Plaintiff, the Defendants persisted in their occupation of the suit premises hence making it necessary for the Plaintiff to file this suit seeking the redress as indicated in the prayers.

6. At the commencement of the trial hereof however, the Plaintiff stated that there have been other cases with the Defendant herein including Nairobi Judicial Review Application No. 982 of 1997; **Sea Star Malindi –vs- Kenya Wildlife Services**, in which some of the prayers sought herein more particularly, Prayer No. A; A (1) and A (3) as listed in the Further Re-Amended Plaint have now been settled. Accordingly the Plaintiff now only seeks prayers A (4) A (5) as well as 'B', 'C' and E of the said Plaint.

7. In response to the Plaintiff's claim, the 1st Defendant filed a Statement of Defence herein dated 3rd November 1998 in which it inter alia, affirmed that the suit property is public land and that it was therefore justified to stop the construction that was being undertaken by the Plaintiff.

8. At paragraph 5 of the Defence, the 1st Defendant rendered the basis for its stoppage of the construction stating that it did so in exercise of the powers and authority delegated to and conferred upon it by the relevant Statutory Provisions. It is the 1st Defendant's contention that it directed that part of the construction being undertaken on the suit property encroached on a statutorily protected area.

9. In this regard, the 1st Defendant averred that Plot LR No. 3170 Malindi is an area adjacent to the Malindi Marine National Reserve and Park and the construction of a hotel by the Plaintiff in the legally protected area was being undertaken contrary to the provisions of the Wildlife (Conservation and Management) Act, Cap 376 in that parts of the construction encroached on the area along the Coastline which constitutes the park as delineated and described by the relevant Statutory Instruments and Legal Notices. The 1st Defendant was thus lawfully entitled to prohibit any such activity as the construction works were or were likely to be injurious or harmful to the ecosystem of the adjoining Marine Park.

10. The 2nd Defendant Dr. David Western equally filed a Written Statement of Defence dated and filed herein on 3rd November 1998. In the said Defence, the 2nd Defendant stated that he was nolonger the Director of the 1st Defendant as he had been described in the Plaint.

11. In regard to the acts complained of, the 2nd Defendant contends that the said acts occurred when he was the Director of the 1st Defendant. In his capacity as such Director, he was a public officer and hence in terms of Section 3(1) of the Public Authorities Limitation Act, no proceedings founded on tort may be brought in connection with any acts of his after the expiry of 12 months from the date on which the cause of action accrues. Accordingly, it was his case that this suit as framed against him is statute barred.

12. In the alternative, the 2nd Defendant contends that all acts done by him or on his authority or direction were done in good faith and in discharge of Statutory duties and he is therefore not personally liable in respect of such acts or omissions. It was in the exercise of those Statutory Powers that he had prohibited the further execution of building works upon that area of land surface within 100ft of the High Water Mark contiguous to the Malindi Marine National Reserve and Park which construction works he considered to imperil the marine life of the adjacent Marine Park and destructive of the ecosystem of the Park.

EVIDENCE ADDUCED AT THE TRIAL

13. In support of its case, the Plaintiff called two witnesses.

14. Pw1- Gianluigi Cernuci told the Court that he is an Italian citizen residing in Watamu, Malindi. It was his testimony that he had incorporated the Plaintiff company with his co-director one Pizzigoni Mania on 7th June 1994. The purpose was to put up a hotel in Malindi at a place called Casuarina. Being an Architect, PW1 prepared the architectural designs for the hotel and sent them to the then Municipal Council of Malindi for approval. All the architectural and structural drawings were approved.

15. PW1 further told the Court that on or about 10th August 1994 the Plaintiff Company purchased Plot No. 3170 in Casuarina Malindi measuring 0.5783 ha for Kshs 4 Million from one Gaetano Bortoloth. Shortly after receiving approval from the Municipal Council, they commenced construction. It did not however take long before they started receiving correspondence from the 1st Defendant objecting to the construction.

16. Having obtained confirmation from the Council that the building was within their land, the Plaintiff resisted the 1st Defendant's intervention and continued with the building. However, on or about 9th November 1997, the 1st Defendant sent armed wardens to stop the construction. They could therefore not continue with the building. PW1 told the Court that at the time of stoppage, they had engaged workers on contract and other professionals and further that they had engaged security and insured the premises.

17. It was PW1's testimony that arising from the losses they were suffering, they moved to Court seeking Judicial Review Orders in Nairobi HCC Misc Application No. 982 of 1997; ***Sea Star Malindi –vs- Kenya Wildlife Service & 2 Others.*** On 8th November 2002, the Court gave orders in their favour and quashed the 1st Defendants decision.

18. Before the decision, the Plaintiff had filed another case being Nairobi HCCC No. 579 of 1998 seeking inter alia, damages occasioned by the Stoppage of works which according to PW1 had made the cost of construction go up due to inflation. The Plaintiff also filed another case after some people they considered to be the Defendnats' servants and agents demolished their building structures in January 2006. The case Malindi HCCC No. 47 of 2008 was filed against the Malindi Municipal Council to claim damages occasioned by the demolition.

19. PW1 told the Court that the Plaintiff incurred huge expenses as a result of the disruptions hence their various claims for special and general damages as contained in various Reports and Documents that they produced as exhibits herein. They also engaged a Quantity Surveyor who prepared a Bill of Quantities (PEX 5). The Plaintiff accordingly prays for damages, interest at Commercial rates and the costs of the suit.

20. On his part PW2- Wambua Alloys Nzalu told the Court that he is a Quantity Surveyor practicing as such under Gichuhi & Associates Quantity Surveyors in Mombasa. PW2 told the Court that the Plaintiff engaged him to carry out measurements of quantities for the reconstruction of its Sea Star Hotel.

21. PW2 testified that he proceeded to the Plaintiff's premises situated on LR No. 3170-Malindi where he did sketches on the building, carried out measurements and prepared quantities of whatever was required for the structures that were still standing on the parcel of land. Thereafter he prepared his Report (PEX 5) in which he found that the cost of completed construction as at 1996 would have been Kshs 68,688,341.58. The figures according to PW2 would vary as construction costs would continue increasing. As a result, as at 2005 when he was engaged, the cost would be Kshs 128,778,693.66/=

22. As it were the Defendants neither recorded a Witness Statement nor did they testify before this Court in support of the respective statements of defence filed herein.

23. I have keenly considered the Plaintiffs case and the various exhibits placed before me. I have also considered the two Statements of Defence filed by both Defendants herein. In addition, I have taken into account the written submissions placed before me by both sides of the dispute as well as the numerous authorities to which their Learned Advocate referred me.

ANALYSIS AND DETERMINATION

24. From the material placed before me, it is not contested that the Plaintiff is the registered proprietor of all that parcel of land known as Plot No. 3170 Malindi. The Plaintiff bought the parcel of land measuring approximately 0.5783 from one Gaetano Bortoloti for a sum of Kshs 4,000,000/- on or about 10th August 1994. It is also apparent from the record that the said parcel of land is adjacent to an area designated by the 1st Defendant as the Malindi Marine National Reserve and Park.

25. PW1- Gianluigi Cernuci, a director of the Plaintiff told this Court that the Plaintiff bought the parcel of land for the sole purpose of putting up a hotel. Accordingly they sought the necessary approvals from the relevant agencies including the then Municipal Council of Malindi. Thereafter, the Plaintiff commenced the construction of the hotel sometime in 1996.

26. The Plaintiff did not however get very far with the construction. By a letter dated 21st April 1997, the 1st Defendant warned them that the hotel building was within the 100ft from the Indian Ocean High water mark which, according to the 1st Respondent, is a Government exclusive zone under the 1st Defendant's jurisdiction. The Plaintiff responded to the letter stating that it was constructing the hotel within the beacons of Plot No. 3170 Malindi and denied any encroachment on any other land.

27. After several correspondences, the 1st Defendant allowed the Plaintiff to proceed with the building but on condition, inter alia, that only the construction already started would be completed and that the Plaintiff would not be allowed to undertake any new construction. Subsequently on 20th August 1997, the Plaintiff received a letter from Dr. David Western (the 2nd Defendant) who was then the Director of the 1st Defendant advising the Plaintiff to stop any construction within the 100 feet zone from the high water mark. The letter dated the same day read in the relevant part as follows:-

"August 20, 1997

Sea Star Malindi Limited

P.O. Box 484

MALINDI

Dear Sir

HOTEL CONSTRUCTION ON PLOT NO. 3170 IN MALINDI MARINE NATIONAL RESERVE

Further to our letter reference….dated June 1997 through which we gave you "Special permission under very exceptional circumstances to complete only the already started but incomplete construction (sic)". Subject to very strict clearly spelt out condition, it has come to our notice that you proceeded, in contradiction of that special permission to construct waste disposal facilities including a septic tank on porous coral reefs in the fragile cliff which the above hotel construction is located, hence endangering the protected areas ecosystem.

When you realised that your irregular works had come to our notice, you covered the excavated areas, further endangering the ecosystem. You did not refer to or seek authorization from KWS before undertaking these clearly irregular works into a legally protected area which falls within 100 feet from the high water mark.

In view of the above, it has been decided that in order to ensure the protection of the fragile ecosystem of the area that falls under our legal jurisdiction, the special permission that was granted to you be withdrawn with immediate effect and the prohibition that was issued earlier on be reinstated. Please note that no development shall be allowed within 100 feet from the high water mark, as this has to be conserved for the benefit of present and future generations.

By copies of this letter, other relevant Government authorities are informed of the decision and requested to take further necessary action to ensure full compliance.

Signed:

Dr. David Western

DIRECTOR"

28. Feeling aggrieved by the above decision, the Plaintiff proceeded to file Judicial review proceedings seeking to quash the same vide Nairobi HCC Misc Application No. 982 of 1997; ***Sea Star Malindi Ltd –vs- Kenya Wildlife Services & 2 Others***. From the material placed before this Court, it is evident that the Judicial review application was heard and concluded before Onyango Otieno J(as he then was) who in a decision rendered on 8th November 2002 proceeded to quash the Defendant's decision restricting, banning and/or restraining the Plaintiff from constructing the hotel on the suitland.

29. In quashing the Defendants' decision the Learned Judge observed at page 19 of his Ruling as follows:-

> ***"From what I have stated above, it will be clear that the evidence adduced in this matter by way of affidavits, and exhibits is sufficient to convince me that the decision by the 1st Respondent/Defendant was ultra vires its powers. It was manifestly unjust and presented in my considered opinion an undue interference with the Applicant (Plaintiff) in the enjoyment of (its) property. If such is allowed to continue, ownership of any immovable property would cease to have any meaning at all and the same properties would have no value at all as they would be subject to the whims of those in power and as such no bank or any loans body would put any reliance on them."***

30. The Judicial Review Application was decided during the pendency of this suit. Nevertheless it did in my humble view, settle the issue of liability as far as the dispute herein is concerned. In the words of Onyango Otieno J, there was no dispute in regard to the fact that the suit property is owned by the Plaintiff; it was not in dispute that the suit land extends to the High Water mark; it is not in dispute that the Legal Notice No. 99 of 1978 that was relied on as giving the Defendants jurisdiction did not apply to the suit land; and there was no dispute that the suitland was never compulsorily acquired.

31. As it were, that decision was neither appealed nor reviewed. In the matter before me, the Defendant did not adduce any new facts and/or additional evidence that may impeach and/or cast doubt on the findings made on 8th November 2002 when the Ruling was delivered. In essence the findings that the 1st Defendant was liable for the wrongful stoppage of the construction of the Plaintiff's hotel stands. That being the case, my task is then solely to assess the quantum of damages based on the evidence presented before me by the parties.

THE QUANTUM OF DAMAGES

32. According to the Plaintiff, the Defendant maliciously and deliberately stalled the hotel project and they should be condemned to pay aggravated and exemplary damages. It is their case that as at the time of the stoppage, they had secured credit facilities in the sum of Kshs 70 Million to finance the same.

33. As for the quantum of special and other damages payable, the Plaintiff relied largely on the expert opinion of PW2, the Quantity Surveyor whom they commissioned to assess and prepare a Report on the Bills of quantities required to put back the premises in the condition that they could be usable as a hotel. His Report(PEX 5) comprised in 4 volumes respectively for the period 1996, 2002, 2005 and 2016 gives various estimates in regard to the possible cost of reconstruction of the hotel depending on the construction costs which according to him vary from one year to the other on the basis of the prevailing costs of materials in the Open Market.

34. According to PW2's testimony the cost of construction as of 1996 was Kshs 69 Million. Assuming that due to tear and wear the already constructed portions were to be demolished first and reconstructed, he assessed the cost at Kshs 90,000,000/= PW2 further testified that as of the year 2016, the cost of construction would be the sum of Kshs 129,000,000/=. Assuming that due to tear and wear the portion already constructed had to be demolished first and reconstructed, as of that year, the Plaintiff would require the sum of Kshs 168,000,000/=

35. I have considered the Report and the assessments of the various Bills of Quantities.

36. As it were it is an undisputed fact that the Plaintiff bears the burden of propounding its case against the Defendant. In the matter before me, the defence did not call any evidence to rebut the testimony of the Plaintiff and its witness. That does not however in my view imply that the claim as stated by the Plaintiff should suffice as proof of its entitlement. In ***Charter house Bank Ltd –vs- Frank N. Kamau (2016)eKLR,*** the Court of Appeal observed that:-

> ***"The suggestion, however, implicit in some of the decisions…., that in all and sundry civil cases the failure by the Defendant to adduce evidence in support of his defence means that the Plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the Plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequences for the defence where the onus is on the Plaintiff to prove his claim on a balance of probabilities."***

37. As Mativo J stated in ***Stephen Kinini Wang'ondu –vs- The Ark Limited (Civil Appeal No. 2 of 2014(2016)eKLR:-***

> ***"The fundamental characteristic of expert evidence is that it is opinion evidence…Except testimony, like any other evidence, must be given the appropriate weight. It must be influential in the overall decision-making process as it deserves; nothing more, nothing less. To my mind the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However there is nothing to prevent reports for Court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the Court agrees to the evidence being called."***

38. Arising from the foregoing, even though the Defendants herein did not testify, I am unprepared to accept the figures as stated in the Quantity Surveyor's Report as the Gospel truth. Those figures are, as it is, were estimates and not the actual sums of money expended by the Plaintiff. Indeed in this regard it is to be noted that during cross-examination, PW2 stated that he only visited the suit property in 2014. By then, much of the building earlier on constructed had been demolished and his estimates were based only on the remnants of the structures that were still in place. He could not tell the percentage of the structures that were covered by bushes and he admitted that if another Quantity Surveyor was to prepare a report, there was a possibility that the figures cited in his report could be slightly different.

39. Similarly, in my considered view, there was nothing placed before me to suggest that in writing the letters and/or giving instructions to the game wardens, the 2nd Defendant acted in any manner other than as the Director of the 1st Defendant herein. The Plaintiff did not demonstrate to me that the 2nd Defendant acted outside his authority and/or that he was actuated by any ill motive in the discharge of his duties. Accordingly, as a public officer, I did not find that the 2nd Defendant is personally liable for any of the acts or omissions complained of herein.

40. I also take note that the Judicial Review application filed vide Nairobi HC Misc Application No. 982 of 1997 was conclusively determined on 8th November 2002 and since then there was nothing really that stopped the Plaintiff from continuing with the project in question and thereby mitigate the losses that have been claimed to-date.

41. By the time the Judicial Review decision was made, the project had been interrupted by some five years. Granted that the disruption had occasioned losses and probably disoriented the Plaintiff in its pursuit of the Project, I think it should have taken them no more than three years after to re-organize themselves and continue as they planned with the project.

42. If my arithmetic is right, the additional three years after that Judgment would take us to the year 2005. According to PW2 the cost of reconstruction in the year 2005 would have been Kshs 102,239.460.10/=. Given my reservations as expressed above on the estimates, I think an award of Kshs 90,000,000/= would suffice as the cost of reconstruction due to the Plaintiff as sought under Prayers A4 and A5 of the Plaint.

43. Under paragraph B of the Further Re-Amended Plaint, the Plaintiff also prays for an award of General and exemplary Damages. In ***Ruxley Electronics & Construction Ltd –vs- Forsyth (1995) 3 All ER 268***; the English Court stated that:-

> ***"Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party, from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the***

need to reinstate….the qualification of reasonableness was the extent of the loss, thereby treating reasonableness as a factor to be considered in determining what was the loss rather than, as the respondent argued, merely a factor in determining which of two alternative remedies were appropriate for a loss once established….What constitutes the aggrieved party's loss is in every case a question of fact and degree."

44. In the circumstances of this case, I am prepared to accept that the Plaintiff is entitled to an award of general damages. As to the principles that govern the award of general damages, the Court of Appeal observed in ***Paul Kipsang Koech & Another –vs- Titus Osule Osore (2013)eKLR*** as follows:-

"It is a well -established law that, assessment of quantum of damages in a claim for general damages, is a discretionary exercise. The law has, however, set the dimensions for the exercise of discretion…(it) must be exercised Judicially, with wise circumspect and upon some defined legal principle…"

45. At paragraph 14 of the Plaint, the Plaintiff claims a sum of US$ 75,000/- as loss of profits from 1st December 1997 until the time of completion of the construction. While there was no basis for the figures cited, the Plaintiff also produced as Pex 4 various reports of shareholder expenses which indicate that they incurred certain expenses in the period the construction of the hotel was interrupted. Taking the totality of the circumstances of this case into consideration, it is my view that a global sum of Kshs 30,000,000/= would suffice as general damages.

46. In the end, I am satisfied that the Plaintiff has proved its case against the 1st Defendant in the required standard. The 1st Defendant is accordingly hereby condemned to immediately pay the sum outlined below to the Plaintiff:-

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.

d) Costs of this suit.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

J.O. OLOLA

JUDGE