



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.49 OF 2011

(consolidated with ELC NO. 149 of 2010)

SIANI LTD.....1ST PLAINTIFF

NJEMA LTD.....2ND PLAINTIFF

=VERSUS=

GHALIB ALWIY.....1ST DEFENDANT

ERNEST JOHN HORNHILL.....2ND DEFENDANT

IN ELC NO. 149 OF 2010

GHALIB AHMED ALWY.....PLAINTIFF

=VERSUS=

MARIE PAULE PELLE.....DEFENDANT

J U D G M E N T

Introduction:

1. This matter was consolidated with Malindi ELC No. 149 of 2010.
2. In ELC Case NO. 149 of 2010, Ghalib Ahmed Alwiy, the 1st Defendant herein, sued Marie Paule Pelle, the Plaintiffs' director herein.
3. For the purpose of this Judgment, Siani Limited, Njema Limited and Marie Paule Pelle shall be referred to as the Plaintiffs while Ghalib Alwiy and Ernest John shall be referred to as the Defendants.

The pleadings:

4. In the Amended Plaint dated 17th August, 2010 and filed on 23rd August 2012, the Plaintiffs

- herein averred that the 1st Plaintiff, Siani Limited, is the registered owner of parcel of land known as Lamu/Block IV/113; that the 1st Defendant constructed a temporary beach “banda” which he eventually turned into a permanent one without the Plaintiff's' knowledge and that the Plaintiffs later on agreed with the 1st Defendant and paid him USD10,300 and a further Ksh.70,000 for the said beach “banda”.
5. The Plaintiffs averred in the Plaint that after being paid, the 1st Defendant, Ghalib Alwi, moved out of the beach “banda” but went back to the property on 20th April 2011 alleging that he was owed more money by the Plaintiffs.
 6. It is the Plaintiffs' averment that as a consequence of the said re-entry, the Plaintiffs have suffered loss amounting to Kshs.289,300. The Plaintiffs are claiming for a permanent and mandatory injunction together with special damages of Kshs.298,300. The Plaintiffs have also prayed for mense profits at the rate of Kshs.50,000 per month from the date of filing the suit until the date of Judgment.
 7. According to the 1st Defendant's Plaint in ELC No. 149 of 2010, in the year 2006, he held discussions on the sale of a beach house known as “Talking Trees” and verbally agreed that the Plaintiffs' director, Marie Paule, herein would pay him USD 20,000 together with a road worthy Land Rover Registration Number KAN 104H valued at Kshs.750,000.
 8. It is the Defendant's case that Marie Paule Pelle further agreed to pay him a monthly rent of Kshs.25,000 through her partner, Olivier, for a period of two years.
 9. When he went to pick the Land Rover, the 1st Defendant herein averred in his pleadings that he found it to be unroad worthy; that he has never sold the suit property to Njema Limited and that Marie Paule Pelle fraudulently prepared an agreement dated March 2007 and 28th September 2006 indicating that he had received a total of USD 20,000.
 10. The 1st Defendant's prayers in HCCC No. 149 of 2010 is for a declaration that the sale agreement that was entered into sometimes in September 2006 and the subsequent verbal variation should be rescinded.
 11. The 1st Defendant is also seeking in the Plaint that he filed in ELC Case No. 149 of 2010 for a declaration that he is the legal owner of the suit property.
 12. While responding to the Plaintiffs' claim in ELC NO. 49 of 2011, the 1st Defendant averred in his Defence that the USD10,300 that was paid to him was a part payment of the agreed sum of USD20,000; that he has lived on the little plot next to the Plaintiffs' suit premises and that the small plot has never been part of the Plaintiffs' property.

The Plaintiffs' case:

13. Marie Paule Pelle, PW1, informed the court that her, together with Njema Limited are directors in Siani Limited, the registered proprietor of parcel of land known as Lamu/Block IV/113.
14. It was the evidence of PW1 that a restaurant known as “Talking Tree” is on the property known as Lamu/Block IV/113 and is separated by a public way. PW1 produced the Certificate of Lease in respect of Lamu/Block IV/113 as PEXB 1.
15. PW1 informed the court that when the 1st Plaintiff acquired the suit property, it was bushy and had makuti structures. It was the evidence of PW1 that the 1st Defendant was one of the squatters on the suit property at the time the 1st Plaintiff acquired the land.
16. PW1 stated that she allowed the 1st Defendant to continue occupying the structure on the suit property and later on allowed him to operate a banda without asking him for rent.
17. The evidence of PW1 was that eventually, she agreed to buy the 1st Defendant's “banda” vide an agreement that was signed by the 1st Defendant before an advocate. The agreement was produced as PEXB 2.
18. According to PW1, the 1st Defendant was paid USD10,300 from her Swiss Bank. The bank statement was produced in evidence as PEXB3.
19. PW1 informed the court that the 1st Defendant went to her and requested for more money and she gave him Kshs.70,000 together with a car. The agreement in respect to the second payment was produced as PEXB4.

20. It was the evidence of PW1 that even after making those payments to the 1st Defendant, she still allowed the Defendant to use the suit property which he did by renting the banda to a tenant at a monthly rent of Kshs.10,000 per month.
21. Later, PW1 took over the premises and retained a contractor who repaired the structure but was prevented from taking over the repaired structure by the 1st Defendant. That is when, according to PW1, the 1st Defendant rented out the structure to the 2nd Defendant who later on abandoned the premises.
22. According to PW1, when the 2nd Defendant abandoned the property, she found the place filthy with the structure that they had repaired having broken walls. PW1 showed to the court the pictures that were taken by the valuer showing the status of the structure at different stages as PEXB 6, 7 and 8.
23. It was the evidence of PW1 that the 1st Defendant has never allowed her in the premises but has instead allowed his people to occupy the structure at her detriment.
24. In cross examination, PW1 stated that the 1st Defendant was on the suit property without the permission of the person who sold plot number 113 to Siani Limited; that she agreed to buy the 1st Defendant out although he was on the suit property illegally and that the 1st Defendant signed the agreement of 28th September 2006.
25. It was the evidence of PW1 that although the agreement of 28th September 2006 refers to plot number 109, the building was not on plot number 109; that the 1st Defendant signed the agreement before an advocate in Lamu; that the agreement of 25th April 2007 is related to the first agreement and that all the original agreements were stolen from her house by her workers.
26. The Plaintiffs' advocate, PW2, informed the court that he witnessed the 1st Defendant sign the second agreement at a hotel owned by the 1st Defendant known as "Bush Gardens."
27. According to PW2, PW1 faxed him a copy of the agreement and he printed three copies which the 1st Defendant signed in his presence. PW2 produced the agreement as PEXB10.
28. In cross examination, PW2 stated that PW1 gave him a copy of the agreement which had already been signed by the 1st Defendant. However, he insisted that 1st Defendant should sign the agreement again in his presence.
29. PW3 is the manager of Siani Farm since 2009.
30. According to PW3, Siani Farm has four parcels of land numbers 109, 110, 111, 112 and 113.
31. According to PW3, plot number 113 abuts the sea and has the premises known as "Talking Trees".
32. The evidence of PW3 was that in the year 2010, the 1st Defendant informed him that he wanted to take over "Talking Trees"; that he refused to allow him to take over "Talking Trees" and that in April 2010, the 1st Defendant forcefully took over the premises.
33. PW3 informed the court that after the 1st Defendant took over the premises, he leased it out to the 2nd Defendant who in turn used it as a garage for boats. However, the 2nd Defendant left the premises in the year 2011 and the 1st Defendant further leased the structures to school boys who vandalised it further.
34. The valuer, PW4, informed the court that he was instructed to value the premises known as "Talking Trees" by PW1 which is situated on plot number 113.
35. According to PW4, he assessed the damage on the suit premises. PW4 informed the court that the initial physical damage to the suit premises was Kshs.302,080 and loss of Kshs.50,000 per month in rentals.
36. According to PW4, the total damage that the Plaintiff has suffered, including what is required to repair the premises, is Kshs.1,352,080 and that he charged the Plaintiff's Kshs.130,000 to prepare the valuation reports. PW4 produced the valuation reports that he prepared as PEXB 2a and b and the receipts as PEXB 13 a and b and 14.

The Defendant's case:

37. Ghalib Ahmed Alwi, DW1, informed the court that PW1 acquired plot number 113 from the previous owner, Mr. Marson, who was his neighbour, in the year 2005.

38. According to DW1, he became a good friend of PW1 because she used to visit his restaurants known as “Bush Gardens” and “Talking Trees”.
39. According to DW1, he knew “Talking Trees” while growing up as a boy and that it was a public beach which he applied to be allocated.
40. The evidence of DW1 was that he lodged his application with the Allocation Committee whereafter the District Commissioner instructed the physical planner and the Town Clerk to visit the site.
41. DW1 informed the court that when they visited the site in the company of the physical planner, the Town Clerk and the Surveyor, they found the Marson family, who were the owners of Sasini farm, swimming and did not object to the land being allocated to him.
42. DW1 stated that he was allowed to build the structure in dispute by the then County Council of Lamu by way of a letter dated 9th September 1996. DW1 produced the letter as DEXB1.
43. It is the evidence of DW1 that he was allowed to put up a structure on the disputed portion of land because it belonged to the County Council of Lamu; that he ran his business for 13 years and that “Talking Trees” is different from Siani Farm.
44. According to DW1, Paule agreed to fund his campaigns when he vied for the position of a Member of Parliament for Lamu East Constituency; that she declined to give him money but told him to sell to her the beach property fronting Siani Farm and that she promised to give him USD 20,000 for the said property.
45. The evidence of DW1 was that when he told her that USD20,000 was too little, PW1 promised to give him a Land Rover in addition to the USD20,000. The agreement, according to DW1, was verbal.
46. DW1 stated that in September 2006, PW1 wired on his account USD10,000 and declined to pay him the difference.
47. The evidence of DW1 was that when a Mr. Kala Madzu handed to him the Land Rover that PW1 had promised to give him, he discovered that it was not as new as promised; that he did not believe that the Land Rover was worth Kshs.700,000 and that he declined to take the Land Rover because it did not have ownership documents. According to DW1, he decided to park the Land Rover at his sister's place.
48. DW1 denied ever signing the agreement of March 2007.
49. In cross examination, DW1 stated that “Talking Tree” restaurant is built on a public beach; that “Talking Tree” restaurant shares a fence with Siani Farm Ltd and that although the letter he was given by the Council refers to a building measuring 7.5 X 5 Meters, he build a bigger building because the ocean receded.
50. It was the evidence of DW1 that he took over the premises in the year 2009 and that he is in the process of obtaining a title deed.
51. According to DW1, he was on the land for more than 13 years and the Marson family never objected to the said occupation; that PW1 was not happy with his “banda” when she bought Siani Farm and that she agreed to buy the “banda” because she knew it was his property.

Submissions:

52. The Plaintiffs' advocate submitted that pursuant to the provisions of Article 62 of the Constitution, land between the high and low water marks is public land and vests in the National Government; that no reclamation of land from the sea is possible without the consent of the National Land Commission and that the 1st Defendant was only allowed to construct “a temporary structure for watchman and surf boat near plot number 12 and 13.”
53. Counsel submitted that the 1st Defendant has admitted that there was an agreement for 10,000 USD made in September 2006 between himself and Marie Pelle; that the contract was performed and completed when the 1st defendant gave possession of “Talking Trees” to the Plaintiffs and that if he had any complaints about inadequacy of consideration or breach of contract, he should have sued for damages.
54. The Defendant's advocate submitted that it is unclear when or which of the two Plaintiffs bought the suit property and for how much; that PW4 confirmed the existence of a permanent structure on the disputed premises and that no evidence was produced to show that those structures stand on plot number 113.

55. According to the Defendants' counsel, after PW1 paid USD10,000, she unilaterally frustrated the verbal agreement by failing to pay the balance thereof but instead forcibly entered into the premises in the year 2011.
56. Counsel submitted that in any event, no extraordinary minutes were given by the 1st or 2nd Plaintiff authorising PW1 to institute the suit on their behalf; that PW1 lacks the locus standi to bring the suit on behalf of the Plaintiffs and that no map was produced in court to prove the exact location of Talking Trees Restaurant to prove that the Defendant was a squatter on the Plaintiffs' land.

Analysis and findings:

57. Both the Plaintiffs and the 1st Defendant are seeking for a permanent injunction restraining each other from entering and taking possession of the restaurant known as "Talking Trees."
58. According to the pleadings and the evidence of Marie Paule Pelle, a director in the 1st Plaintiff's company and a Defendant in ELC No. 149 of 2010, when the 1st Plaintiff purchased parcel of land known as Lamu/Block IV/113, the Defendant had a temporary makuti structure at the edge of plot number 113 fronting the sea, otherwise known as "Talking Trees."
59. The evidence of Marie Paule, PW1, was that she allowed the 1st Defendant to convert the said temporary structure into a permanent one whereafter she bought him out.
60. It was the evidence of PW1 that she entered into an agreement with the 1st Defendant for the purchase of "Talking Trees" in writing in the year 2006 and 2007.
61. Both agreements, according to PW1, referred to the purchase price of the restaurant at USD 10,300, with USD 300 being the bank charges.
62. Other than paying the purchases price of USD 10,000, it is the Plaintiffs' position that the said restaurant is in any event part and parcel of land known as Lamu/Block IV/113.
63. The 1st Defendant's case on the other hand is that "Talking Trees" was built by himself on a public beach after being allowed to do so by the then Municipal Council of Lamu.
64. It was the evidence of DW1 that when he was allocated the said land, the then owner of Siani Farm Limited, a Mr. Marson, did not object.
65. The 1st Defendant does not deny that he agreed to sell his interest in the structure known as "Talking Trees" to Marie Paule Pelle at consideration of USD20,000 together with a Land Rover which was to be valued at Kshs.750,000.
66. In his evidence, the 1st Defendant admitted that he only received USD10,000 together with a Land Rover that was not road worthy.
67. The 1st Defendant denied that he signed any agreement(s) with the Plaintiffs' director.
68. The issues for determination in this matter are as follows:

(i) Whether "Talking Trees" restaurant is situated on parcel of land known as Lamu/Block IV/113.

(ii) Whether the 1st Defendant entered into a written agreement to sell to Marie Paule Pelle "Talking Trees" restaurant, and if so, the terms thereof.

(iii) Whether the 1st Defendant entered into an oral agreement with Marie Paule Pelle and if so the terms thereof.

(iv) Who is entitled to "Talking Trees Restaurant.

(v) Whether damages are payable in any event.

69. It is not in dispute that Siani Limited, the 1st Plaintiff, is the registered proprietor of parcel of land known as Lamu/Block IV/113 which was acquired by Marie Paule and Njambi Limited, as the new directors of Siani Limited, in the year 2005.
70. It is also not in dispute that by the time Marie Paule and Njambi Ltd acquired interests in

- Lamu/Block IV/113, the 1st Defendant was in possession of a temporary banda which was later converted into a permanent structure known as “Talking Trees” and fronting the beach.
71. Although PW1 claimed that the said structures are standing on the periphery of plot number 113, no evidence was called to prove that indeed the structure stands on the said land.
 72. Indeed, the Plaintiff should have called a surveyor to produce survey plans to show the extent of the boundaries of plot number 113 to enable the court ascertain if “Talking Trees” is within the boundaries of plot 113 or is on a public beach as alleged by the 1st Defendant.
 73. The documents produced by the 1st Defendant tends to indicate that the plot that the 1st Defendant applied for was outside the boundaries of plot number 113.
 74. According to the letter dated 27th April 1993 by the then District Physical Planner, produced as DEXB3, the 1st Defendant was allowed to put up a temporary structure for a watchman and surf boats near Block II plot 12 and 13.
 75. In the letter, the Physical Planner informed the 1st Defendant that the structure should be of a temporary nature measuring strictly 7.5 M (long) X 5 M (wide) and was to be used as a watchman's shed and for shelter of surfing boats, and not for any other purpose.
 76. Clause 5 of the letter dated 27th April 1993 further stated as follows:

“That you should not at all encroach on pedestrian ways of rights neither on property rights of the immediate neighbouring plots of Mr. Kensmith and Siani Property Limited.”

77. The above clause clearly shows that the 1st Defendant was only allowed to put up a temporary structure on the public beach to be used as a watchman's shed and for shelter of surfing boats, and not on land belonging to the 1st Plaintiff. That is what must have happened even by the time Marie Paule came into the picture in the year 2005.
78. The evidence of the 1st Defendant was that he went further to built a much bigger structure than earlier advised because he reclaimed the sea.
79. However, the 1st Defendant did not inform the court how he reclaimed the ocean with a view of building a bigger structure and whether he obtained the consent of the County Council of Lamu or NEMA to do so.
80. Whether it is true or not that the 1st Defendant reclaimed the ocean, I find and hold that the initial structure or banda was constructed by the 1st Defendant not within the boundaries of plot number 113 but on a public beach.
81. However, whether the subsequent conversion of the structure into a permanent one encroached on plot number 113 cannot be ascertained by this court for lack of evidence.
82. Consequently, this court finds and holds that the Plaintiffs in this matter and the Defendant in ELC No. 149 of 2010 have not proved that “Talking Trees” Restaurant is within plot number 113.
83. The Plaintiffs case is that they purchased the structures known as “Talking Trees” from the 1st Defendant at a consideration of USD10,000 and that the agreement was reduced into writing twice.
84. On the other hand, the 1st Defendant's case is that although he received USD10,000 from Marie Paule, he was entitled to more than that.
85. PW1 produced an agreement dated 28th September 2006 purportedly signed by herself and the 1st Defendant. In the agreement, the 1st Defendant purportedly agreed to sell to Njema Limited, represented by Marie Paule Pelle, “the 3 little buildings built by himself and located at Talking Trees spot in Lamu at plot 109 for the price of 10,300 USD”.
86. Although the 1st Defendant denied signing the agreement, there is evidence before this court to show that on 29th September 2006, USD10,350 was credited on the 1st Defendant's bank account. Indeed, the 1st Defendant produced his bank statement showing that he received the money on his account.
87. It is highly improbable that Marie Paule Pelle could have paid the 1st Defendant USD10,350 in the year 2006 after purchasing plot number 113 in the year 2005 without reducing it in writing.
88. Having admitted that he received USD10,350 which was credited in his account in Kenya Shilings

- on 4th October 2006, I am convinced that the 1st Defendant signed the agreement of 28th September 2006 where he agreed to sell the buildings known as “Talking Trees” to the 2nd Plaintiff.
89. PW2, who is an advocate of this court of long standing, informed the court that later on in the year 2007, PW1, informed him that he wanted him to witness the signatures of the 1st Defendant in respect to a second agreement.
 90. According to PW2, the handwritten agreement of March 2007 was faxed to him while already signed by both Marie Paule and the 1st Defendant.
 91. However, he insisted that the agreement should be signed again in his presence and that is when the 1st Defendant signed the said agreement a second time before him on 25th April 2007.
 92. The agreement of March, 2007 simply reiterated the contents of the Agreement of 28th September 2006, but this time witnessed by an advocate.
 93. Although the 1st Defendant denied that he signed the handwritten agreement of March 2007 in his hotel known as “Bush Garden” in the presence of PW2, I have not found any reason to disbelieve the testimony of PW2.
 94. In any event, the agreement of March 2007 simply reiterated the contents of the agreement of September 2006 which I have already found that the 1st Defendant signed.
 95. If indeed there was an oral agreement as argued by the 1st defendant, then the same was overtaken by the agreement of 25th September 2006 and March, 2007.
 96. I say so because it is trite law that when contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms cannot be considered when interpreting the agreement. In other words, one cannot use evidence made prior to the written contract to contradict a written agreement. That is what the “Parol evidence rule” is all about.
 97. In the circumstances, and for the reasons I have given above, I find and hold that the 1st Defendant agreed to sell to the 2nd Plaintiff and Marie Paule Pelle the structures known as “Talking Trees” Restaurant and he was paid the agreed sum.
 98. Indeed, in addition to the agreed sum of USD10,300, the 1st Defendant was also given a Land Rover by Marie Paule Pelle for the purposes of his campaigns.
 99. Whether the said Land Rover was or was not roadworthy is neither here nor there because it was not part of the agreement of 28th September 2006 and March 2007. In any event, the 1st Defendant never returned the Land Rover to Marie Paule.
 100. The last issue that I am supposed to deal is whether the Plaintiff is entitled to damages.
 101. Although PW1 informed the court that he took possession of “Talking Trees” immediately after paying the purchase price of USD10,300 before the 1st Defendant forcibly took back the premises in the year 2011, there was no evidence to show the status of the building before the 1st Defendant re-took the premises.
 102. I have perused the report of Basemark Valuers viz aviz the alleged damages that were caused on the suit premises.
 103. The report dated 14th July 2011 and 15th May 2015 do not show the alleged damages and more so whether the alleged damages were caused by the 1st Defendant or they were there when the 1st Defendant re-entered the building.
 104. Further more, a close look at the photographs shows that the building is suffering more from neglect than from damage caused by human intervention.
 105. Consequently, I am not satisfied that the Plaintiffs are entitled to the purported damage of the building as pleaded in the Amended Plaintiff.
 106. The Plaintiffs are however entitled to mesne profits because having sold the suit property to the Plaintiffs in the year 2006, the 1st Defendant had no right to re-enter the suit property.
 107. According to the evidence of PW4, the suit premises is a hotel with a residential unit comprising a lounge, kitchen, bedroom, store and verandah.
 108. It was the evidence of PW1 that after purchasing the premises, she engaged a contractor who refurbished the building.
 109. PW4 informed the court that Talking Trees Hotel premises would attract a monthly rental income of Kshs.50,000.

110. It was the evidence of PW4, that currently, the 1st Defendant is utilising the premises as a Bar.
111. The evidence of the valuer, PW4 was not challenged by the 1st Defendant. Consequently, I allow the Plaintiffs' prayer for mesne profits at the rate of Kshs.50,000 per month from the date of filing of the Plaint until payment in full
112. I shall however not award to the Plaintiffs special damages as pleaded in the Amended Plaint because the same were not proved.
113. The issue of whether or not the Plaintiffs passed a resolution before filing HCCC No. 49 of 2011 was never raised in the Defence. I shall therefore not consider that issue.
114. For the reasons I have given above, I dismiss the Plaint filed by Ghalib Ahmed Alwi in ELC No. 149 of 2010 with costs and allow the Plaintiffs Amended Plaint in ELC Case NO. 49 of 2011 in the following terms:

(a) A permanent injunction be and is hereby issued restraining the Defendants and their employees, servants and or agents from entering, remaining and or taking possession of the beach banda known as "Talking Trees".

(b) A mandatory injunction be and is hereby issued ordering the Defendants, their employees, servants, and or agents to forthwith vacate and handover the beach banda known as "Talking Trees" to the Plaintiffs.

(c) The 1st Defendant to pay to the Plaintiffs mesne profits at the rate of Kshs.50,000 per month from the date of filing this suit until payment in full.

(d) The 1st Defendant to pay the Plaintiffs the costs of the suit.

Dated and delivered in Malindi this 19th day of February 2016

O. A. Angote

Judge