



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.183 OF 2014

MAMBRUI PROPERTIES LTD.....PLAINTIFF

=VERSUS=

MICHELE SERVO.....DEFENDANT

R U L I N G

Introduction:

1. Before me is the Plaintiff's Application dated 30th September 2014. In the Application, the Plaintiff is seeking for the following orders:

(a) That this Honourable Court pleased to order temporary injunction restraining the defendant, his agents, servants and or employee from constructing, continuing to construct, altering, renovating and or in any other way alienating and or changing the design of the villa no.5 belonging to one MASCARELLO FRANCO situated within Karibuni Villas, Mambrui within Kilifi County pending the hearing and determination of this suit.

(b) Alternatively the court be pleased to order a 15 day stop order stopping the defendant from erecting and or altering the roofing and design of the said villa 5 situated at Mambrui villas, Kilifi County pending the further orders of the court.

(c) There be a mandatory injunction compelling the Defendant to remove the illegal design and roofing erected on the said villa no. 5 belonging to MASCARELLO FRANCO.

(f) The court be pleased to order the Defendant to comply with the clear provisions of the lease obligations entered between the Plaintiff and the said MASCARELLO FRANCO forthwith such that it doesn't interfere with the enjoyment of the villas by the neighbouring users and or owners

The Plaintiff's/Applicant's case:

2. According to the Plaintiff's director, the Plaintiff is the registered proprietor of land known as portion number 657 and owns several villas known as Karibuni villas originally owned by Caluwa Limited.

3. It is the deposition of the Plaintiff's director that the Plaintiff manages the villas and caters for the provision of light, passages, pavements, flower beds and all common areas; that the Defendant is a donee of the power of attorney from Mr. Mascarello Franco and that Mascarello Franco entered into a lease agreement with Caluwa Limited on 4th October 1999 in respect to villa number 5.
4. It is the Plaintiff's case that according to the lease, the lessee was duty bound not to make any structural alteration on the premises or remove any fixture therein; that the Defendant has materially damaged the walls of villa number 5 and that the Lessee has caused unlawful alteration of villa number 5.
5. The Plaintiff's director has deponed that the Defendant's actions have inconvenienced other tenants who can no longer enjoy unfettered use and occupation of their villas.

The Defendant's/Respondent's case:

6. In his response, the Defendant deponed that Karibuni villas are situated on two parcels of land, that is plot 675 and 654 Mambrui; that the Applicant has not stated who owns portion numbers 654; that he is the owner of a villa known as Chalet No. 5 on plot numbers 657 and 654 from Mascarello Franco and that given the long nature of the lease, he is the one obligated to make repairs to his premises.
7. It is the Defendant's case that he sought the consent of the owner of Karibuni villas by way of a letter dated 14th January 2014 and also submitted the plan for the intended alterations, renovations and improvements.
8. The Defendant has deponed that the Plaintiff's general manager authorised the said alternations by writing an "ok" on a copy of his letter and that he then obtained approvals from the council.
9. It is the Defendant's deposition that after the Plaintiff's director complained that he has done his constructions within 60 meters of the riparian reserve, he commissioned an Environmental Impact Assessment.
10. It is the Defendant's case that on 30th August 2014, he was issued with an Environmental Impact Assessment Licence which authorised him to make the proposed alterations. It is the Defendant's deposition that the Plaintiff's refusal to allow him to continue with the alterations as per the licensing conditions is arbitrary, discriminatory and a violation of the conditions of the lease.

Submissions:

11. The Plaintiff's advocate submitted that the Defendant has not received authorization from the owner of the suit property, who is the Plaintiff to carry any alterations to villa No.5; that the Plaintiff stands to suffer loss if the said construction proceeds and that the failure to get authorization from the Plaintiff amounts to unlawfully altering and destroying the Plaintiff's property.
12. The Defendant's advocate submitted that the suit is not properly instituted because the letter dated 25th September 2014 is not a resolution of the Plaintiff's company and that the letter was only signed by the Managing Director and is not under the seal of the company.
13. Counsel submitted that the Defendant obtained all the requisite consent from NEMA to make extensions on his villa; that there exists a service contract between the parties herein and that the Defendant has a right to alter the area occupied by his villa as long as it does not affect the common areas.
14. The Defendant's advocate submitted that in any event, the Plaintiff has put up a notice stating that any square meter added to the original size of a villa will rise the amount of the management fees, meaning that one could increase the area of his villa as long as it does not affect the common areas.
15. According to the Defendant's counsel, the Plaintiff's general manager allowed the construction of the extension of his villa by writing the word "ok" on the Defendant's letter.
16. Counsel submitted that the Defendant has since brought building materials on site; that the said materials are likely to be wasted if not used within a reasonable time and that the building is partly demolished and presents a sore sight within the village.

Analysis and findings:

17. It is not in dispute that on 4th October 1999, the Plaintiff's predecessor, Caluwa Limited, being the registered proprietor of plot number 627 and 654, entered into a Lease Agreement with the Defendant's predecessor, Mascarello Franco. In the said Lease, Caluwa Limited Leased to Mascarello Franco "Portion of Chalet being No.5."
18. The Plan of villa number 5 was attached on the lease. Mascarello Franco transferred villa number 5 to the Defendant on 25th December 2012. The said transfer was done subject to the lease that was signed in 1999.
19. The Plaintiff, on the other hand, acquired the interest of the Lessor, Caluwa Limited, in the suit property.
20. The Plaintiff's complaint is that the Defendant has commenced alterations and extension of villa number 5 without its consent. The Plaintiff has annexed letters that were done by the owners of villa numbers 6, 7, 19 and 55. All the owners of these villas were complaining that the extension and alteration of villa number 5 will block their view of the sea.
21. The only issue that I am supposed to determine at this state is whether the Defendant has, prima facie, breached the Lease Agreement of 4th October 1999.
22. Clause 1(h) of the Lease Agreement governing the parties in this suit provides as follows:

"The Lessee hereby covenants with the company as follows. Not to make any structural alterations in or addition to the said premises or remove any fixture therein and not to damage any of the floor, walls or structures thereof and not to change the external color or decoration of the said premises without the company's written authorization (such an authorization shall not be unreasonably withheld)."

23. The Defendant has not denied that he intends to structurally alter villa number 5. Indeed, the Defendant has annexed the plans that he submitted to the Municipal Council of Malindi for approval in respect to the structural alterations he intends to make on villa number 5.
24. The Defendant has also annexed on his affidavit the Environmental Impact Assessment Report "for proposed alteration and extension of existing house on plot no. 645 and 657 Mambrui".
25. According to the Defendant, he obtained the Plaintiff's approval to make the structural alterations on his house.
26. The Defendant has annexed on his affidavit a copy of a handwritten letter dated 14th January 2014 authored by him and addressed to the General Manager, Mr. Nadin. In the letter, the Defendant informed the General Manager that he wants to make extensions and alterations to the existing Chalet. In the same letter, the Defendant informed the "General Manager" that he will pay for the increased square meters.
27. The Defendant's case is that the General Manager approved the said request by making a note of "ok" on a copy of his letter dated 14th January 2014.
28. I have gone through the said letter and I have not come across anything that can amount to an approval in writing by the Plaintiff allowing the Defendant to proceed with the proposed structural alteration of the suit property.
29. The Lease Agreement is clear: the Plaintiff needs to give a written approval of any structural alteration, approval which has not been shown to me.
30. Considering that the alteration that the Defendant intends to put up will alter the structure of villa 5, the most appropriate order to grant in the circumstances is an order of injunction. I say so because firstly, the Plaintiff has shown that it has a prima facie case with chances of success and secondly, if the construction is completed, there will be nothing to go on trial. However, the order of mandatory injunction cannot be injunction at this stage.
31. The issue of whether the Plaintiff's company passed a valid resolution to commence the suit can only be dealt with at the hearing of the suit. Unless a director or a shareholder of the Plaintiff complains that the Company never resolved to file this suit, the Defendant's objection cannot hold at this stage.
32. For the foregoing reasons, I allow the Plaintiff's Application dated 30th September 2014 in the

following terms;

(a) A temporary injunction be and is hereby issued restraining the Defendant, his agents, servants and or employees from constructing, continuing to construct, altering, renovating and or in any other way alienating and or changing the design of

villa number 5 situated within Karibuni villas Mambrui pending the hearing and determination of the suit.

(b) The Defendant to pay the costs of the Application.

Dated and delivered in Malindi this **19th** day of **June**, 2015.

O. A. Angote

Judge