



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 186 OF 2013

1. FAVALE SALVATORE
 2. LUA MATTEOTTI
 3. SABATINI ROSALIA
 4. RUCHETA MARCELLA
 5. CANASSI ELIA
 6. PREANI ALDO
 7. LIBERO GRATZIANO
 8. PESCI SERGIO
 9. LIUNI FRANCESCO
 10. CODOGNO
SANTE.....PLAINTIFFS/A
PPLICANTS
- =VERSUS=
1. ANGELS BAY HOLDING LTD
 2. MAMBRUI PROMOTIONS
LTD.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction

1. The 1st Plaintiff's Notice of Motion is the one dated 5th February 2014 seeking for following reliefs;-

(a) That this Honourable Court be pleased to issue an order a temporary order of injunction restraining the 2nd Defendant/Respondent or the 2nd and 1st Defendants/Respondents, their servants and or agents or anyone whomsoever from denying the Applicants or any other resident and or parties in this suit the access including ingress and egress at any time to the house number CR 23176 or any other house they occupy within Angel Bay Village or the Applicants right of movement into or out of the property or to harass, intimidate and threaten the rights and freedoms of liberty, enjoyment of their private properties, freedom of movement and association and all other forms of liberties accorded to private owners of properties under the Constitution of Kenya.

(b) THAT the 2nd Defendant, Mambrui promotions or their agents or servants and in particular MASSIMILANO FORCATI alias MAX be restrained from holding itself or themselves as the management company of the Plaintiffs private premises and managing the said private property as the Applicant is the duly registered power of attorney over the said property until the inter partes hearing of this application and until the full hearing and determination of this suit.

(c) THAT THE O.C.P.D Magarini Police Division, the OCS Magarini Police Station, the officer in charge of the Tourist Police at Magarini Police Station and the Immigration Department to ensure compliance of the Orders of the court in terms of prayer 2 and 3.

(d) The cost of this Application be in the cause.

2. The Application is supported by the Applicant's Affidavit.

The Applicant's case:

3. According to the 1st Plaintiff's/Applicant's Supporting Affidavit, he is a duly registered power of attorney over CR 26864 belonging to Mario Venturi and Vacca Maria within the property collectively known as Angels Bay Village; that the two have transferred their rights to him and that he has been residing with his family in the house as the owner for over a year.
4. It has been deponed that the 1st Defendant caused to be registered a limited liability company known as Mambrui Promotions Limited, the 2nd Defendant to manage the property and to perform various tasks including collecting money to pay VAT taxes on behalf of the property owners of the entire property known as CR 26864/1.
5. According to the Applicant, the 2nd Defendant is an imposter over him and other house owners by virtue of the fact that they were not involved in its incorporation.
6. According to the 2nd Defendant purported to give him a notice threatening to deny him access to the property because he had failed to register as a resident of Angel Bays Village, which act is unlawful and unconstitutional.

The Defendant's case

7. The Defendants' director swore an affidavit and deponed that house number 215 erected on portion number 654/55 Mambrui did not belong to the Applicant at the commencement of the suit; that Angels Bay Village is a condominium that has regulations contemplated by the lease and that each of the house owners are bound by the said rules and regulations.
8. It is the Defendants' case that the 2nd Defendant as a management company provides services to the condominium and that the Value Added Tax Act, Cap 476 requires the Defendants to pay VAT on all its tax transactions while the Hotels and Restaurants Act, Cap 494 imposes a catering and training levy on the sale of services to the Public. The Defendant has deponed that it is the designated collecting agent for the mentioned taxes.
9. On the issue of the service charge, it is the Defendant's case that the Plaintiffs must pay the service

charge either to the 1st Defendant or to the party nominated by the 1st defendant and in this case the 2nd Defendant. That has been the case since the year 2005. The Defendants' director deponed at length the activities that the Defendants have undertaken on the suit property including the submission of the records that was required by the Immigration department, Tourist Police and the Income Tax Department.

10. The 2nd Defendant's director swore a separate Replying Affidavit and stated that Angels` Bay Village is a development comprising of a hotel and more than 260 houses; that the houses are leased to the various owners on conditions, inter alia, of payment of service charge for the maintenance of the common areas and that the Applicant sold his house to Libero Graziano by way of assignment of his lease dated 21st August 2012.

1st Plaintiff's Further Affidavit

11. The 1st Plaintiff filed a Further Affidavit and deponed that he had been authorized to file the affidavit by the nine other Plaintiffs. The 1st Plaintiff deponed that the 2nd respondent has admitted that it has been operating as a manager of the entire village which is unacceptable and illegal as no consent was obtained from the Plaintiffs.
12. It is the 1st Plaintiff's deposition that no specific service charge has ever been agreed upon as provided for in the lease.
13. The 1st Plaintiff conceded that he once owned a home situated in the suit property which he later sold to Libero Graziano but that he has since transferred one of the houses in the Village to himself.

Defendants' Further Affidavit

14. The Defendants' filed a Supplementary Affidavit on 1st February, 2014 and deponed that the cause of action pleaded in the Plaint and the one being dealt with in the Notice of Motion have nothing in common; that the Plaintiff initially misled the court to believe that he owned house number 215 which he had sold to Libero Graziano and then later on changed to claim that he was the attorney of Marion Venturi and Vacca Maria who owns house number 28 and that he has no claim over CR 23176.
15. The parties appeared before me on 19th February, 2014 and made oral submissions.
16. The Plaintiffs'/Applicants' counsel submitted that nine other residents have been enjoined in the suit; that the Respondents have no legal rights to interfere with the Plaintiffs' enjoyment of the suit premises and that the 2nd defendant has no legal rights over the property.
17. The Plaintiffs' counsel further submitted that it is only the apartment owners who can appoint a person to manage the condominium; that the Assignment of lease does not make any reference to the 2nd Defendant neither do the original leases. Consequently, it was submitted, the Defendants cannot purport to manage the Village.
18. The Defendants' counsel submitted that the prayers in the Plaint do not support the Application before the court; that the 1st Plaintiff misled the court when he stated initially that he was the owner of house number 215 which was not true and that the power of attorney that the 1st Plaintiff is relying on only authorized him to sell house number 28 and not to leave in the premises.
19. The Defendants' advocate took the court through the requirements under the Hotel and Restaurants Act under which the suit property falls and that his clients were entitled to seek for the information that they had sought from the Plaintiffs.
20. The Defendants' counsel further submitted the under the leases, the Plaintiff was under an obligation to pay the service charge and other costs. The orders that the Plaintiff is seeking, it was submitted, will be in contravention of the terms of the lease. Counsel referred the court to the Rules which govern the residents and which took effect in the year 2003.

Analysis and findings:

21. Before I delve into the issue as to whether the 1st Plaintiff has established a prima facie case with

- chances of success and whether he is likely to suffer irreparable loss which cannot be compensated by damages if the injunctive order is not granted, I should address the issue as to whether the Notice of Motion is compatible with the Further Amended Plaintiff.
22. The 1st Plaintiff initially filed this suit as the only Plaintiff against the Defendants. However, on 25th October, 2013, the 1st Plaintiff filed an amended Plaintiff dated 24th October, 2013. On 23rd January, 2014, the 1st Plaintiff filed an Application for leave to file a Further Amended Plaintiff which Application was allowed by the consent of the parties on 11th February 2014. The Further Amended Plaintiff was filed on 18th February 2014 introducing nine (9) other Plaintiffs in the suit.
23. By the time the Application to amend the amended Plaintiff was allowed by the consent of the parties, the 1st Plaintiff had already filed the Application dated 5th February, 2014 which is currently before me. The 1st Plaintiff did not amend the said Application and consequently the Application is only in respect to the 1st Plaintiff. The Application as currently filed has nothing to do with the other nine (9) Plaintiffs who were subsequently enjoined in the suit.
24. The Plaintiff that is validly before the court is the Further Amended Plaintiff filed on 18th February 2014. In the said Plaintiff, the Plaintiffs are seeking for three substantive prayers;-

(i) That the court do issue a permanent injunction restraining the defendants from demanding and or collecting VAT from the plaintiffs including the VAT set out in their letter dated 29th August 2013.

(ii) An order of permanent injunction restraining the Defendants from collecting management fees from the plaintiffs or from managing the said premises

(iii) That the 1st Defendant be ordered to facilitate the sub-division and the issue of the title documents to the plaintiffs in relation to the respective parties of the land that they have acquired from it.

(iv) That the 2nd defendant be ordered to refund all the monies that it has been collecting illegally from the plaintiff and

(v) That the plaintiffs together with other house owners within Angel Bay village be allowed to form their own management company.

25. On the other hand, the Application of 5th February, 2014 is seeking for an injunction to restrain the Defendants from denying the Applicant (1st Plaintiff) or any other resident and or any parties in this suit access to the house number CR 23176 or any other house within Angels Bay Village.
26. This order cannot be granted in view of the fact that there is no corresponding prayer for a permanent injunction in the Plaintiff. The Plaintiffs have only sought in the Further Amended Plaintiff an injunction to stop the Defendants from collecting VAT and management fees and not an injunction restraining the Defendants from denying the Plaintiffs access to their property or houses.
27. It is trite law that for a temporary injunction as framed in the Application to issue, a corresponding prayer for a permanent injunction must be prayed for in the Plaintiff. It is only with such a corresponding prayer in the Plaintiff that the court can be able to ascertain whether a party has a prima facie case with chances of success or not.
28. The Applicant has further sought in his Application that the 2nd Respondent or its agent should be restrained from holding itself as the management company of the Plaintiff's premises. It is not clear from the prayers in the Application and the Further Amended Plaintiff the premises that the Defendants should be restrained from managing.
29. It is not the function of this court to delve into the bundle of documents presented before it to ascertain the house or houses or the suit property that the Applicant is seeking to injunct the Defendants from managing.
30. The situation becomes even more complicated considering that the said "Angel Bay Village" is

said to comprise a hotel and more than 260 houses with leases registered under one title. Is the injunction to apply to all the houses, the 1st Plaintiff's house or to the single title registered as CR 23176/1 under which all the leases have been registered? The second prayer cannot therefore be granted by the court because the order will be in vain. A court of equity does not grant orders in vain.

31. In the circumstances and for the reasons I have given, the Application dated 5th February, 2014 cannot be allowed as drafted. The same is bad in law and unsustainable. I dismiss it with costs.

Dated and delivered in Malindi this 21st day of **March**, 2014.

O. A. Angote

Judge