



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 84 OF 2010

SALAMA BEACH HOTEL LTD.....PLAINTIFF

=VERSUS=

MARIO ROSSI.....DEFENDANT

RULING

1. The Plaintiff, Salama Beach Hotel Limited, filed a Plaint dated 23rd July, 2010 seeking for a declaratory order that the Defendant has no right in law and equity to trespass, enter or occupy any part of the premises erected on Plot number 9890 Watamu.
2. The Defendant filed a defence and counter-claim on 19th August, 2010 alleging that he is the sole proprietor and owner of the property known as Villa number 6. The said Villa number 6 was said to be within the establishment of plot number 9890, Watamu, otherwise known as Temple Point Resort.
3. The Defendant then filed an Application dated 23rd August, 2010 seeking for temporary injunctive orders against the Plaintiff in respect to Villa number 6. The Plaintiff filed a similar application on the same day.
4. Before a Ruling could be delivered on the two Applications, the parties entered into a written consent, the subject of the current Applications. The consent was in the following terms.
 - a. **The Plaintiff, SALAMA BEACH HOTEL LIMITED builds for the Defendant, MARIO ROSSI, a Villa on the Plot No. Gede/ Dabaso/762 similar to Villa No. 6 in the establishment TEMPLE POINT HOTEL situated on LR. NO.9890 WATAMU, within a period of six to twelve months (maximum) from the date of this consent.**
 - b. **Upon completion, to the mutual satisfaction of both the Plaintiff and the Defendant, or in default of such mutual satisfaction, to the satisfaction of a qualified architect and/or valuer as may be appointed by the court, of the construction of the Villa on Plot No. Gede/Dabaso/762, this suit and the counterclaim therein be marked as settled.**
 - c. **In the meantime, pending the completion of the construction of the Villa on Plot No. Gede/Dabaso/762, if the Defendant should come to the establishment, TEMPLE POINT HOTEL, he may be treated as a guest to the said establishment.**

- d. **This suit may be mentioned at the instance of either party, any time from the date of this consent to the completion of the construction of the Villa on the Plot No. Gede/Dabaso/762 to update the court on the progress of the execution of this consent.**
5. On 23rd May 2012, the Defendant filed an Application of the same date seeking for an order to have Villa number 6 built on L.R. Number 9890 (Cr 11576) valued and for the Plaintiff to be ordered to pay to the Defendant the amount assessed by the valuer within 30 days. On 6th September 2012, the Plaintiff filed an Application dated 4th September 2012 seeking for an order to set aside the said consent.
6. I heard the two Applications and delivered my consolidated Ruling on 18th July, 2013 in the following terms:
 - a. **That a government valuer or any other licensed valuer be appointed by the Plaintiff and the Defendant to conduct a valuation of Villa number 6 built on land reference number 9890, (CR. 11576).**
 - b. **Each party be at liberty to appoint its own valuer to conduct the valuation of Villa number 6 on land reference number 9890; CR NO. 11576.**
 - c. **The report(s) by the valuer(s) appointed by the Defendant and the Plaintiff be filed in this court within 30 days from the date of this Ruling.**
8. In nutshell, I allowed the Defendant's Application to have Villa number 6 valued for the purpose of actualising the consent order and dismissed the Application which was seeking to set aside the consent.
9. Pursuant to my Ruling, the Defendant appointed Paul Wambua Valuers who valued Villa number 6 and filed in this court a report dated 6th August 2013. On the other hand, the Plaintiff appointed Basemark Valuers Limited who also valued "House (casa) No. 6 upper floor" and filed their report dated 26th September 2013.
10. In the meantime, the Plaintiff filed an Application dated 4th November 2013 seeking to review or set aside my Ruling of 18th July 2013 on the ground that the consent that was signed by the parties and which formed the basis of my Ruling was ambiguous because the word "similar" incorporated in the consent did not clearly capture what the Plaintiff envisaged it was building for the Defendant.
11. According to the Plaintiff's Managing Director's deposition, there was a valuation report prepared in 2009 which outlines the fact that the Defendant only resided on the upper floor of Villa number 6. Consequently, it was deponed that the Defendant stands to reap where he did not sow by benefiting from an entire Villa whereas what was envisaged by the Plaintiff when it entered into the consent was to construct a house similar to what the Defendant was occupying and not the entire Villa.
12. The Plaintiff's Managing Director further deponed that when the Defendant vacated the upper floor of Villa number 6, the Plaintiff renovated the whole Villa to meet the standards of a four Star hotel and a valuation cannot be based on a building that was renovated and totally changed after the Defendant left.
13. In response to that Application, the Defendant deponed that the Plaintiff was seeking for orders to re-open what had already been determined by the court.
14. The Plaintiff applied to have the Defendant cross-examined on the issue of whether he was entitled to the whole of Villa 6 or only the upper floor.
15. The Defendant was cross-examined on 25th February, 2014. The Defendant informed the court that he took possession of Villa number 6 in 1988 and moved out when he was denied entry in July, 2010. By the time the Defendant was denied entry, he informed the court that he was occupying the upper floor while renting the lower floor to the Plaintiff. The consideration for the said lower floor were the air tickets that the Plaintiff used to pay for the Defendant to come to the country. The Defendant referred to an agreement that he entered into with the Plaintiff which was

- annexed to his Replying Affidavit.
16. According to the Defendant, the Plaintiff paid him every month for the ground floor which he rented to it in 1991. In 1993, he built the upper rooms. The Plaintiff later on stopped paying the rent for the ground floor and would instead procure for him air tickets to travel to and from, Italy. He was allowed to use the facilities of the hotel without paying.
 17. In re-examination, the Defendant referred the court to the plan of Villa 6. The Defendant stated that he vacated Villa 6 when the Plaintiff agreed to build for him a Villa which was similar to Villa number 6 which has two floors.
 18. The Plaintiff's advocate filed his submissions and reiterated that there is a big discrepancy between the valuation done by the Plaintiff's and the Defendant's valuers. However, It was submitted, the Defendant's valuation report was based on the standards of a five star hotel whereas the Defendant's apartment was never in such a state.
 19. The penultimate paragraph of the Plaintiff's advocate's submissions is that relevant factors should be considered before arriving at a decision as to what amounts to *restitution integrum*.
 20. It would appear, at least from the Plaintiff's submissions and the Affidavits that the Plaintiff's claim is that the Defendant should only be compensated for the upper floor of Villa number 6 and not for the entire Villa.
 21. Mr. Paul Wambua of Paul Wambua Valuers testified on 19th July 2013. According to the valuer, all valuations are normally undertaken to determine the market worthy of a property.
 22. It was the evidence of Mr. Wambua that he was instructed to value Villa number 6 which is situated within Temple Point Hotel which is a high end hotel.
 23. According to the valuer, the Villa has five exotic rooms which he valued at Kshs. 14,000,000/=. The valuer produced in evidence his report dated 16th August, 2013.
 24. In cross-examination, Mr. Wambua informed the court that his instructions were to value Villa number 6 and to give an estimate of its market value. It was his evidence the cost of the Villa and does not include the cost of the land.
 25. The valuer maintained that the cost of constructing a similar Villa will not change even if the construction was to be done in a residential area or in a different place because the cost of construction depends on coverage. The witness took the court through the report and how he had arrived at the figure of Kshs. 14,000,000 in his report.
 26. The Plaintiff's valuer, Mr. Edwin Otieno Oduor of Basemark valuers testified on 7th October 2013.
 27. The Plaintiff's valuer informed the court that he prepared a report dated 29th September 2013 on the Plaintiff's instructions.
 28. According to the valuer, he was instructed to value the upper floor of Villa number 6 which is a two storey apartment within Temple Point Resort. He visited the Villa, inspected it and valued the property at kshs.2,000,000/=. According to the witness, he referred to a valuation report that was prepared in the year 2009 by "Burn and Fawcett". The witness stated that he only valued the upper floors of Villa number 6 whose rooms he marked as C, D and E.
 29. It was the evidence of the valuer that the cost of the entire Villa would cost kshs. 3.3. million being the open market value, although that aspect was not in his report.
 30. The valuer agreed with the report of Paul Wambua on the issue of the main frame of the building. According to the valuer, if he was to value the building as a new building, then he would agree with the findings of the report of Mr. Paul Wambua. However, he denied that the replacement cost of the whole Villa was kshs. 14,000,000/= as concluded by Mr. Wambua. According to him, the cost, including furnishings will be about kshs. 6,000,000/=.
 31. In cross-examination, Mr. Oduor admitted that his report does not indicate a figure of Kshs.6,000,000/= as the replacement cost of the entire Villa. The witness stated that he only costed the upper floor and that he was not aware of the order of the court that put in motion the requirement to have the said Villa valued.

Analysis and findings

32. The issues for determination in this matter are as follows:

- a) **Was the consent that was recorded in this court in respect to the entire Villa**

number 6 or a portion thereof.

b) What is the value of Villa number 6 or a portion thereof.

33. As I have already stated, the Plaintiff agreed to build for the Defendant a Villa on plot number Gede/Dabaso/762 which is similar to Villa number 6 in the establishment known as Temple Point Hotel within a period of twelve months. This suit and the counter-claim were to be marked as settled upon the construction of the said Villa.
34. In my Ruling of 18th July, 2013, I stated at paragraph 34 that once the value of Villa number 6 is ascertained by the court, then the Plaintiff will be required to pay to the Defendant an amount equivalent to Villa number 6 with a view of satisfying the consent. The court therefore directed that Villa number 6 be valued by the parties to ascertain its value.
35. The order of the court was for the valuation of the whole Villa and what it will cost to build similar Villa on a different piece of land and not a portion thereof. This order was informed by the consent that was recorded by the parties themselves.
36. Although the Plaintiff has argued that it was only supposed to compensate the Plaintiff for the upper floors of Villa number 6 and not the entire Villa, the Plaintiff's own pleadings, the consent and the evidence that was adduced by the Defendant shows otherwise.
37. In its Plaint filed on 23rd July, 2010, the Plaintiff averred that it is the owner of land reference number 9890 registered on CR 11576; that it has never parted with possession or sold to any person any interest of it within the suit property. The Plaintiff further averred that on 22nd July 2010, the Defendant arrived from Italy and attempted forcibly enter the Plaintiffs premises.
38. The Defendant filed a Defence and Counter claim and averred that what is known as Temple Point Hotel consisted of eight independent Villas which were variously owned by different people. The Plaintiff built the second phase which jointly made up a bigger establishment known as Temple Point Hotel. The Plaintiff then bought off seven of the eight Villas in the first phase except Villa number 6 owned by the Defendant.
39. The Defendant further deponed in his defence that on 24th July 2006, he agreed with the Plaintiff that for him to vacate Villa number 6, the Plaintiff was to construct a Villa in the exact likeness and features of Villa number 6 on Plot Gede/Dabaso/762. The Plaintiff went ahead to pay the purchase price for land known as Gede/Dabaso/762 for the Defendant but never built the Villa as earlier agreed.
40. In his Application for injunctive orders, the Defendant annexed a letter purportedly written by a Mr. Guido Bertoni, a former director of the Plaintiff acknowledging that there were eight Villas in the Plaintiff's suit property which were constructed between 1986 and 1987. The letter goes ahead to confirm that Villa number 6 was owned by the Defendant and that the Villas were to be managed by the Plaintiff on terms.
41. Annexed on the Application is another agreement marked as confidential between the Plaintiff's former directors and the Defendant in respect to a property known as Gede/Debaso/ 762. That is the document that the Defendant says represented the agreement that was entered into for the construction of a Villa on land known as Gede/Debaso/ 762 similar to Villa number 6.
42. Annexed on the Defendant's Application was also a map which had been prepared by the Plaintiff which shows the entire lay out of Temple Joint Hotel owned by the Plaintiff. The map shows Villa number 6 as owned by the Defendant.
43. It is on the basis of the documents and averments in the Defendant's Defence and Application for injunctive orders which I have alluded to above that the consent dated 6th June 2011 was recorded in this court in the terms that I have reproduced above.
44. It is therefore clear that the consent that was recorded in this court was informed by the averments in the Defendants Defence: that he is the one who owned Villa number 6 and not a portion thereof.
45. The Defendant confirmed that position during cross-examination. Indeed, the Plaintiff did not lead any evidence to show that the Defendant only owned the upper floors of Villa number 6 to enable me rule otherwise. It was upon the Plaintiff to lead evidence to show that it owned the ground floor of Villa number 6.
46. The report prepared in the year 2009 by Burn and Fawcett and annexed on the Plaintiff's Affidavit was in respect to the entire Hotel. The Report neither stated that the Defendant only owned the top

- floor nor gave the value of the top floor of Villa number 6 or at all.
47. Having found and held that the Plaintiff agreed to build for the Defendant a Villa on plot number Gede/Dabaso/762 which was to be similar to Villa number 6 situated on the Plaintiff's parcel of land, I should now determine the value of the said Villa number 6.
 48. In compliance with my orders of 18th July, 2013, the Defendant's valuer prepared a report on the value of Villa number 6 that is situated at Temple Point Hotel.
 49. According to the report, Villa number 6 is identifiable on the ground as house number 6. The valuer gave a detailed description of the Villa, the materials that were used to build it, the number of rooms on the ground floor and the upper floor and the type of furniture in the entire Villa. The valuer also gave the plinth area of the Villa.
 50. In the report and his testimony in court, the valuer stated that the valuation of Villa number 6 is based on the replacement cost analysis without regard to incomes generated. The land element was also ignored by the valuer since, according to the report and the evidence of the valuer, his instructions were to only value the improvements.
 51. The valuer valued the replacement cost of the Villa as Kshs. 14,000,000 and the cost of soft furnishings in the fine guest rooms as kshs. 2,500,000.
 52. Mr. Oduor, on behalf of the Plaintiff produced his valuation report dated 26th September 2013. According to the report, the subject of the valuation is the upper floor of a 2-storey bungalow which comprises three living units name 6 C, 6 D and 6E.
 53. The valuer described in detail what comprised the said three units on the upper floor. The valuer also stated the repairs that were to be carried out in the said three rooms which included the demolition and reconstruction of the stair case, the removal of the balcony's floor and the refurbishment of the bedrooms. He estimated the cost for the said repairs to be Ksh.3,987,600 plus an additional amount of kshs.1,650,000 for the change of the roof. The valuer then gave the valuation of the building works as kshs.2,000,000.
 54. The Plaintiff's valuer admitted in court that his valuation was not based on the order of the court and it was only limited to the upper floor. It is not even clear whether the valuer considered that the upper floor would need a foundation to stand on.
 55. Consequently, and considering that the valuation of Villa number 6 was not limited to the upper floor, the court cannot rely on the valuation report of Basemark Valuers Limited. The only professional report that this court can rely on to arrive at a just decision is that of Paul Wambua Valuers dated 16th August, 2013.
 56. The replacement cost of Kshs. 14,000,000 is what the Defendant needs to put up a Villa that is similar to Villa number 6 on a different piece of land. The valuer was categorical that this value does not change with the location of the building and it does not include the cost of the land that the Villa stands on. The said value does not also include the cost of soft furniture which he assessed separately as Kshs. 2,500,000.00.

52. In the circumstances, and for the reasons I have given above, I find and hold that the Plaintiff do pay the Defendant Kshs. 14,000,000 being the replacement cost of Villa number 6 situated at the Plaintiff's premises. The Plaintiff shall also pay the Defendant the costs of the suit.

Dated and Delivered in Malindi this **9th** day of **May**, 2014.

O. A. Angote

Judge