



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 84 OF 2010

SALAMA BEACH HOTEL LTD.....PLAINTIFF/APPLICANT

=VERSUS=

MARIO ROSSI.....DEFENDANT/RESPONDENT

RULING

Introduction:

1. What is before me is the Plaintiff's Application dated 4th June, 2014 seeking for the following orders:

(a) That pending the hearing and determination of the Plaintiff's/Applicant's intended Appeal, there be a stay of execution and a stay of all further proceedings in Malindi High Court Civil Case Number 84 of 2010.

(b) That the costs of the Application be provided for.

The Plaintiff's/Applicant's case

2. According to the Affidavit of the Plaintiff's counsel, the Plaintiff is aggrieved with the Ruling of this court in which the Defendant was awarded Ksh.14,000,000 being the replacement cost of villa number 6 situated within the Plaintiff's premises; that the Plaintiff has filed a Notice of Appeal to challenge the said Ruling and that the Plaintiff has an arguable appeal.

3. The Plaintiff's counsel has further deponed that due to the strained relationship between the parties, the Applicant is reasonably apprehensive that if the disputed amount is paid over to the Respondent, the Respondent would be extremely opposed to refund the same if the intended appeal is successful.

4. The Applicant's director swore an affidavit on 19th June 2014 and reiterated the contents that were in the affidavit sworn by his counsel.

The Defendant's/Respondent's case

5. The Defendant's Advocate filed Grounds of Opposition in which he averred that the Applicant's active directors are both foreigners; that there is no proof that this suit has been suctioned by the other directors since the Plaintiff's company is embroiled in a legitimacy suit being HCCC No. 118 of 2009 and that for that reason the Plaintiff should deposit the entire principal amount in an interest earning account in the

names of the respective advocates.

6. The Defendant also filed an affidavit and deponed that Mr. Antony Ndegwa, being the advocate for the Plaintiff cannot attest to how the applicant will suffer irreparable loss and that there is need for security.

7. The Defendant deponed that both Mr. Langer and his current advocate have no idea how he came to own Villa number 6 and that Villa number 6 is still intact and provides sufficient security on his part.

8. The Defendant further deponed that the appeal has no chances of success because no leave to appeal was obtained by the Plaintiff.

9. The Defendant finally deponed that he travels from Italy every time the matter is listed for hearing and that it has become extremely expensive for him to have the matter finalised.

Submissions:

10. The Plaintiff's counsel submitted that the Plaintiff has the right to appeal against the orders of this court; that for the purpose of a stay of execution pending appeal, an appeal to the Court of Appeal shall be deemed to have been filed when a notice of appeal is filed and that the Plaintiff shall suffer substantial loss if the decretal sum of Kshs.14,000,000 is paid to the Defendant by the Plaintiff because the Plaintiff might not recover the said amount from the Defendant if its appeal succeeds.

Analysis and findings

11. The Affidavit annexed on the Application was sworn by the Plaintiff's counsel. I agree with the submissions made by counsel for the Defendant that the Plaintiff's counsel, being not one of the Directors of the Plaintiff, cannot depose on behalf of the Plaintiff on how it is likely to suffer substantial loss in the event the decree is executed. The said affidavit is therefore bad in law.

12. However, the Applicant salvaged its Application when the Applicant's director swore an affidavit on 19th June 2014 and reiterated the contents that were in the affidavit sworn by counsel. In any event even when an affidavit is expunged from the record, the court can still entertain an application without the affidavit if the nature of the Application does not require evidence by affidavit. (See Order 51 Rule 4) of the Civil Procedure Rules.

13. I am aware of the hotly contested issues in Malindi HCCC No. 118 of 2009 in respect of directorship in the Plaintiff's company. However, the decree in this suit is not against the current active directors of the Plaintiff, it is against the Plaintiff as a juristic person. The Plaintiff should be able to meet its legal obligations notwithstanding the directors who will be in place as at the time the Court of Appeal shall deliver its decision. The Defendant shall always be in a position to execute as against the company in the event that the Plaintiff's intended appeal fails.

14. I am satisfied, on the basis of the evidence before me, that the Applicant is likely to suffer substantial loss in the event its appeal succeeds after paying the decretal amount to the Defendant because it might not be possible to recover the said amount from the Defendant, who is an Italian citizen and whose source of income is not known.

15. On the issue of security, the subject matter is land whose value keeps on appreciating. Indeed, villa number 6 is just one of the many villas standing on the Plaintiff's parcel of land. The villa, amongst others, is therefore security in itself for the due performance of the decree of this court in the event that the appeal does not succeed. The current Application was filed within reasonable time. The Applicant has therefore complied with the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules.

16. For those reasons, I allow the Plaintiff's Application dated 4th June, 2014 in terms of prayer number 4 with no order as to costs.

Dated and delivered in Malindi this **24th** day of **October**, 2014.

O. A. Angote

Judge