



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL CASE NO. 84 OF 2010

SALAMA BEACH HOTEL LIMITED.....PLAINTIFF

=VERSUS=

MARIO ROSSI.....DEFENDANT

R U L I N G

1. The two Applications before me are dated 4th September, 2012 and 23rd May, 2012 by the Plaintiff and the Defendant respectively.
2. The Plaintiff's Application is seeking for the following orders:
 - a. **The consent dated 6th June, 2012 be set aside.**
 - b. **The Applications both dated 23rd August 2012 (sic) by the Plaintiff and the Defendant respectively and upon which submissions have been filed be determined on merit.**
 - c. **Costs of this application be borne by the Defendant.**
3. The Plaintiff's Application is premised on the grounds that, firstly, the Defendant has abused the consent entered into and that he is taking undue advantage over the Plaintiff, secondly, that the Defendant has abused the favour that was being extended to him by the Plaintiff's Managing Director and lastly that the Decree that exists touching on the property of the Plaintiff stops the parties in interfering with the assets of the Plaintiff.
4. On the other hand, the Defendant's Application is seeking for enforcement of the consent that was entered into on 6th July, 2011 in the following terms:
 - (a) **An order be issued for a government valuer to conduct a valuation of Villa No. 6 built on land reference number 9890 (CR11576) and confirm to the court what it would cost to build a similar villa on plot number Gede/Dabaso/762.**
 - (b) **The Plaintiff to be ordered to pay the amount assessed in (a) above to the defendant within (30) days or such period as the court may direct.**
5. The Defendant's Application is premised on the grounds that there is a court order which was arrived at pursuant to the consent dated 6th July, 2011 which binds the Plaintiff and the Defendant; that the Plaintiff was given up to twelve (12) months to comply with the court order which it has not and that the alternative of the construction of another villa is for the court to direct the Plaintiff

- to pay the equivalent value of the house contemplated to be built in the consent.
6. The Application is supported by the Affidavit of the Defendant.

BACKGROUND

7. 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.
8. 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 Hotel.
9. The Defendant 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.
10. 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 the 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 the 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 the 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 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.

11. The Defendant has deponed in his affidavit that at the time they were recording the consent, he was free to stay at his villa situated at Temple Point but after recording the consent, the management of the hotel stopped him from accessing the villa.
12. According to the Defendant, he has been staying with his friends every time he comes to Kenya, an act which is seriously inconveniencing him; that he presented to the Plaintiff's managing director a building plan for a villa resembling his villa but the Plaintiff's managing dismissed the plan for being very expensive.
13. The Defendant also asked for the payment of 85,000 Euros which sum would have constructed a villa similar to villa number 6 but the Plaintiff counter offered with a sum of 35,000 Euros; that the consent order of 6th June, 2011 was endorsed by the court and consequently became a court order which must be complied with.
14. The Plaintiff's director, on his part, deponed that the Defendant attempted to forcibly occupy villa number 6 erected on the hotel's piece of land which was acquired by the said director and his wife through a court Decree.
15. The Plaintiff's director further deponed that the Decree which put the hotel into his possession restrained everybody, including himself, from alienating Grant number 11576 plot number 9890 Watamu; that the reason why he decided to build a house for the Defendant was because he

- requested him (the Plaintiff's director) to assist him (the defendant) have shelter in Kenya since he was a foreigner and that he did not know the relationship the Plaintiff had with the Defendant prior to the Decree which bestowed him with the ownership of the hotel.
16. The Plaintiff's director finally deponed that the Defendant has turned a privilege into a right by demanding for a villa of his own design.
 17. The parties agreed to dispose of the two Applications by way of written submissions.
 18. The Defendant filed his written submissions and list of authorities on 31st October 2012 while the Plaintiff filed its submissions on 15th November 2012.
 19. The Plaintiff's Advocate has submitted that the consent that was filed on 6th June, 2011 was a negotiating document and was never intended to crystallize into an order or Decree and that is why no order or Decree has been extracted therefrom.
 20. The Plaintiff's counsel further submitted that there was no consensus ad litem and consequently the said consent order should be set aside; that the suit and counter claim still subsist and that since the Plaintiff has withdrawn the favour intended for the Defendant, the consent filed be set aside and the court to hear the pending applications for injunctive orders.
 21. The Defendant's counsel submitted that a consent judgment cannot be set aside by the court unless the consent was obtained by fraud or collusion or the consent was contrary to the policy of the court or the consent was obtained without sufficient material facts.
 22. The Defendant counsel relied on the cases of **Flora Wasike VS Wamboko (1976-1985) East Africa Law Reports; KCB vs Specialized Engineering Company Limited (2010) e KLR and E. A. T. E. C Vs William Odera (2006) e KLR.**
 23. It is not in dispute that on 6th June 2011, the parties herein recorded a consent in this court.
 24. The effect of the consent that I have reproduced above was for the Plaintiff to construct a villa similar to villa number 6 on the Defendant's parcel of land number Gede/Dabaso/762. The consent, in my view, was an admission of liability on the part of the Plaintiff viz a viz the Defendant's Counter Claim.
 25. In the Counter Claim, the Defendant had sought for an order to issue against the Plaintiff to vacate the property known as villa number 6 situated in the establishment known as Temple Point Hotel in Watamu Malindi.
 26. It is trite law that a consent judgment or order, whether final or interlocutory can only be set aside or varied on such grounds as fraud, mistake, misrepresentation, collusion, duress, undue influence, agreement contrary to policy of the court, lack of capacity of parties, misapprehension or ignorance of material facts, or if certain conditions remain to be fulfilled which are not carried out (**see Wasike vs Wamboko (1976-1985) EA 625**).
 27. The Plaintiff has not alleged or proved that any of the grounds enumerated above have occurred to enable this court set aside the consent order of 6th June, 2011.
 28. It is not clear to this court why the Plaintiff is referring to the consent as a negotiating document. The wording of the consent was clear and unambiguous in terms of what the Plaintiff was supposed to do; *the Plaintiff was supposed to build for the Defendant a villa on plot number Gede/Dabaso/762, similar to the villa no. 6 which was in the establishment of Temple Point Hotel situated on LR NO.9890 Watamu.*
 29. According to the second limb of the consent, the suit and counterclaim was to be marked as settled "*upon the completion, to the mutual satisfaction of both the Plaintiff and the Defendant*". (Emphasis mine).
 30. The converse of the second limb of the consent is that if the completion of the proposed villa was not to the satisfaction of the parties, or a qualified architect or valuer appointed by the court, the suit and counter-claim will proceed for hearing, probably for damages or for specific performance.
 31. The consent however did not address the issue of what would happen in the event that the construction of the proposed villa does not happen at all, like in this case.
 32. As I have stated above, the Plaintiff agreed to build a villa similar to villa number 6 which was existing. That is a fact which was agreed upon and which this court cannot revisit or set aside in the absence of the established principles for setting aside a consent order.
 33. The only issue that the court has to determine is the value of villa number 6 situated on plot

- number 9890 Watamu.
34. 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.
35. This position is informed by the consent itself. However, the issue of the value of villa number 6 on plot number LR. No. 9890 can only be ascertained by the court upon hearing the parties' expert witnesses with a view of assisting the court in arriving at a just decision.
36. In the circumstances, and for the reasons I have given above, I dismiss the Plaintiff's Application dated 4th September 2012 with costs and allow the Defendant's Application dated 23rd May 2012 partly in the following terms:
- a. **That a government valuer or any other licensed valuer 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.**
 - d. **The Valuer (s) to testify on a date to be fixed in the registry.**
 - e. **The Plaintiff to pay the costs of the Application.**

Dated and delivered in Malindi this 18th day of July, 2013.

O.A. Angote

Judge