



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 91 OF 2010

MAHICAN INVESTMENTS LIMITED.....PLAINTIFF
=VERSUS=
TEMPESTA FRANCA GIANNA.....DEFENDANT

J U D G M E N T

Introduction

1. The Plaintiff moved this court by way of a Plaint dated 5th August 2010 and filed on 26th August 2010.
2. In the Plaint, the Plaintiff is seeking for judgment to be entered against the Defendant for possession of a house known as Chalet No. 32 Karibuni situated on Land Portion Number 654 and 657, Karibuni Villas, Mambui Village within Malindi District.
3. The Defendant was served abroad pursuant to the provisions of Order 5 Rule 27 and 29 (a) of the Civil Procedure Code. The Defendant neither entered appearance nor filed a defence. The matter proceeded for formal proof before me on 5th November 2013.
4. The Plaintiff's advocate made an oral application to amend paragraph 3 of the Plaint to read "16th November 1998" instead of 16th November 1988". The Plaintiff's advocate also made an oral application to amend the provisions relating to the claim of special damages to read "Euro 15, 875.47" instead of Euro 7,870.04". I allowed the two Applications pursuant to the provisions of Section 100 of the Civil Procedure Act.

The Plaintiff's evidence

5. One of the Plaintiff's directors, PW1, informed the court that the Plaintiff is the proprietor of the Villas known as "Karibuni Villas" which it purchased in February 2001. The villas are situated on parcel of land numbers 654 and 657, Mambui, Malindi.
6. According to PW1, the Defendant has a lease contract for one of the properties in Karibuni Villas although he had never met him in person. The Defendant's apartment is number 32. The unit was sold to the Defendant for Kshs.200,000. The witness produced the lease as Plaintiff exhibit number 1 c.
7. Under clause 1U, the Plaintiff having purchased the two parcels of land from Caluwa Limited, the

- initial Lessor, could enter and duly perform a management and maintenance agreement respecting the common parts of the villas. PW1 testified that according to clause 3(a) of the Lease, if one did not abide by the terms of the Lease Agreement, one would be barred from entering the suit premises.
8. PW1 testified that the management fees varied depending with the size of each villa. In respect to the Defendant's villa, the management fee payable was Kshs.400,000 per annum. These fees would vary every year depending with the exchange rate of the Euro. The variation will also depend with the change in the cost of living which would be determined by the Government of Italy. The variation will be in the region of 1 to 1 ½ percentage which was the index that the Lessor used.
 9. As at the time PW1 was testifying, the amount due and owing to the Plaintiff in respect to the suit premises was Euro 15,875.47. The witness produced the schedule showing the tabulation as Plaintiff exhibit 2c.
 10. Although the Plaintiff demanded for the said amount from the Defendant, PW1 testified that the Defendant has failed or refused to pay the demanded amount. PW1 produced as exhibit number 3a the demand letter.
 11. On 18th October 2007, the Plaintiff decided to re-enter the Defendant's premises which are uninhabitable because the Defendant had abandoned it. PW1 stated that the valuation of the Defendant's house that was done in the year 2008 put the value of the apartment at Kshs.650,000. The witness produced the valuation report as exhibit number 4 a.

Analysis and findings

12. The Plaintiff's suit is not defended. PW1 testified and produced in evidence the lease document in respect to the suit premises that was entered into between the Plaintiff and the Defendant.
13. According to clause 1u of the Lease, the Plaintiff has the right to enter into and duly perform management and maintenance agreement respecting the common parts. Clause 3(a) of the Lease provides that if the rent or any other payments provided for under clause 1u shall remain unpaid for a period of 30 days after becoming payable, or if any of the obligations on the part of the Defendant shall not be performed, then it shall be lawful for the Plaintiff to serve upon the Lessee a notice in writing specifying the breach. The Plaintiff is obligated under the Lease Agreement to re-enter the premises if the Defendant does not abide by the notice and the lease shall be deemed to have been terminated.
14. The Plaintiff produced in evidence the demand letter that was sent to the Defendant on 24th July 2007 demanding for Euro 6,220.53 as at that date. The Defendant never responded to the said letter.
15. In the absence of the evidence by the Defendant to controvert the Plaintiff's evidence and in view of the terms of the Lease which was produced as Plaintiff's exhibit number 1, the court finds and holds that the Plaintiff has proved its case on a balance of probability. I therefore enter judgment against the Defendant in the following terms

(a) The Plaintiff to take possession of the house and premises known a as Chalet No. 132 Karibuni, on Land Portion Number 654 and 657, Karibuni Villas, Mambrui Village within Malindi District.

(b) The Defendant to pay to the Plaintiff Euro 15,875.47.

(c) The Defendant to pay interest on (b) above from the date of this judgment until payment in full at court rates.

(d) The Defendant to pay to the Plaintiff the costs of this suit.

Dated and Delivered in Malindi this 20th Day of **December 2013**

O. A. Angote

Judge