



**Sea Star Malindi Limited v County Government of Kilifi (Civil Appeal
121 of 2019) [2022] KECA 22 (KLR) (21 January 2022) (Judgment)**

Neutral citation: [2022] KECA 22 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 121 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 21, 2022**

BETWEEN

SEA STAR MALINDI LIMITED APPELLANT

AND

COUNTY GOVERNMENT OF KILIFI RESPONDENT

*(An appeal from the judgment and decree of the Environment and
Land Court at Malindi (Olola, J.) dated 29th May 2019 in ELC Case
No. 47 of 2006) Consolidated With Civil Appeal No. 95 of 2019)*

JUDGMENT

1. These consolidated appeals arise from the judgment of the Environment and Land Court (ELC) (Olola, J.) delivered on 29th May 2019. In that judgment, the ELC dismissed a suit by Seastar Malindi Limited against the County Government of Kilifi for alleged wrong demolition of its property but condemned the latter to pay the costs of the suit. Aggrieved by the order on costs, the County Government of Kilifi instituted Civil Appeal No. 95 of 2019. On its part, Seastar Malindi Limited was dissatisfied by the order dismissing its suit and instituted Civil Appeal No. 121 of 2019. Both appeals were scheduled for hearing before us on 26th October 2021 when by consent they were consolidated with Civil Appeal No. 121 of 2019 as the lead file. We will refer to Sea Star Malindi Limited as the appellant and the County Government of Kilifi as the respondent.
2. The appellant's case before the ELC was that the Municipal Council of Malindi, the predecessor to the respondent unlawfully demolished the appellant's development, a 5-star hotel, on its property known as L.R. No. 3170 Malindi, that was 90% complete despite the development having been approved. In the suit, the appellant had sought judgment for exemplary damages; cost of reconstruction including professional fee of Kshs.129,923,240.00; loss of expected revenue and profits from when the hotel was expected to be opened Kshs.558,448,457.00; expenses incurred by the appellant's directors from



January 2005 to January 2007 in connection with the demolition and travel, Euros 102,624.82; interest; and costs.

3. At the trial, the appellant called three witnesses. The respondent had no witnesses. Having reviewed the material before him, the learned Judge noted in the impugned judgment that the respondent “did not do anything much to challenge and/or controvert” the appellant’s claim; that if indeed the respondent demolished the appellant’s structure as indicated, then the appellant “is certainly entitled to compensation”. The Judge stated that it “would only be fair” that the respondent “covers the cost of reconstruction” of the project as “well as the income that would consequently be lost by the [appellant] during the intervening period.”

The learned Judge then went on to state as follows:

“This Court however takes judicial notice of the fact that arising from the same circumstances, the plaintiff herein had also instituted Nairobi HCCC No. 579 of 1998 seeking inter alia damages for stoppage of the construction of the hotel from the Kenya Wildlife Service and it’s then Director one Dr. David Western. That suit was later transferred to Malindi as ELC No. 56 of 2016. In a judgment delivered by this Court in regard to the said suit on 31st July 2018, this Court entered judgement and awarded the plaintiff costs as follows:

- a. Kshs. 90,000,000/- being cost of reconstruction of the hotel.
- b. Kshs. 30,000,000/-as general damages.
- c. Interest...”

4. In light of awards made in favour of the appellant in that judgement, the Judge did not consider that the appellant was entitled to a separate award against the respondent; that he was not satisfied that the appellant had put up another hotel in 2005 which was demolished; or that the structures demolished would be of the amount to what the appellant claimed. The Judge concluded:

“...In my view these claims were intertwined and related and should have at best been pursued as one claim albeit against different defendants.”

5. With that, the Judge dismissed the appellant’s suit and ordered that in the unique circumstances of the case and given its role, the respondent “shall be condemned to pay the costs of the suit.”

The appellant was dissatisfied with the order dismissing its suit while the respondent was dissatisfied with the order condemning it to pay the costs of the suit hence the present appeals.

6. Mr. K. Anami learned counsel for the appellant in highlighting his written submissions referred to the grounds of appeal and submitted, on the strength of the case of *Gitobu Imanyara & 2 Others vs. A.G. [2016]eKLR* that the learned Judge acted on wrong principles in failing to award damages to the appellant; that even if credit was to be given to the appellant for the award made in its favour in Malindi ELC No. 56 of 2016 (previously Nairobi HCCC No. 579 of 1998) to which the Judge referred, a balance of Kshs.698,388,445.50 would still have been payable and an award in that regard should have been made.

7. According to counsel, the Judge failed to appreciate that the matters giving rise to Malindi ELC 47 of 2006 and those giving rise to Malindi ELC 56 of 2016 were different, involving different parties and the two suits could not be consolidated as the learned Judge purported to do. That Malindi ELC 56 of 2016 arose from stoppage of construction of the hotel in 1997 when only 40% of construction had



been undertaken whereas Malindi ELC 47 of 2006 related to events of January 2005 at which point the hotel had been reconstructed to the extent of 90% subsequent to demolition. The case of *Joseph Mzungu Nyoka vs. Vros Produce Limited & 9 Others, Nairobi Civil Appeal 168 of 2002* was cited.

8. Moreover, counsel complained, the Judge purported to consolidate the matters on his own motion at the judgment stage without involvement of the parties to the detriment of the appellant who was thereby denied damages to which it was entitled. It was submitted that the Judge also failed to appreciate that the appellant was also seeking loss of revenue from 2005, a claim specifically attributable to the appellant which was also denied.
9. As regards the order for costs to which Civil Appeal No. 95 of 2019 relates, counsel submitted that there is no basis for this Court to interfere with that decision as it is not demonstrated that the learned Judge did not properly exercise his discretion in that regard.
10. In his written submissions which he highlighted, learned counsel for the respondent Mr. Paul Mwangi began by addressing the Court on the matter of costs, the issue in Civil Appeal No. 95 of 2019. He submitted that the Judge flouted the principle that costs follow the event; that although costs are discretionary, such discretion must be exercised judiciously; that there was no good reason to deny the respondent costs in this case. In support, counsel made reference to Richard Kuloba's Judicial Hints on Civil Procedure and to the Halsbury's Laws of England in submitting that no good reason was given by the Judge for deviating from the general rule that costs follow the event.
11. Turning to the appellant's Civil Appeal 121 of 2019 counsel for the respondent submitted that the ELC did not err in declining to award the directors costs of 102,624.82 Euros as claimed as there was no evidence that the appellant's directors incurred the same; and that the claim comprised of figures that were plucked from the air and could not therefore be awarded as there was no proof. It was urged that the appellant's claim for loss of profits of Kshs.558,448,547.00, was speculative as there was no business plan or feasibility study when seeking to establish the hotel; that the assumption of "ready reservoir of customers" was hypothetical; that there was no comparative analysis with similar hotels opened around the same time and that the reports tendered in support were inconsistent.
12. As regards the claim for the costs of reconstruction including professional fees of Kshs.129,923,240.00, it was submitted that it was neither pleaded nor demonstrated that the property could not be repaired and neither was evidence tendered to demonstrate that the hotel was indeed reconstructed; that there was no evidence that the appellant engaged licensed professionals during the alleged construction, and that had that been done then the assessment of damages would be on an indemnity basis against evidence of payment of fees for professional services rendered. Counsel urged that the claim for fees for professional services rendered of Kshs.17,309,748.00 being 13.5% of alleged reconstruction costs would be an unjustified windfall.
13. It was submitted that that the judge of the High Court did not, as suggested by the appellant, consolidate ELC 56 and 47 of 2016; that all the Judge did was to avert to the double compensation that would have resulted from an award of damages in light of the previous awards; that considering the award made in ELC 56, a further award of damages in ELC 47 would have amounted "to double enriching the appellant."
14. We have considered the consolidated appeals. We have reviewed the records, the submissions and the authorities cited cognizant of our duty under Rule 29(1)(a) of the Court of Appeal Rules and the principles stated in the case of *Selle vs. Associated Motor Boat Co. [1968] EA 123*.
15. As the learned trial Judge correctly stated in the impugned judgment, the respondent offered no evidence at all to challenge or controvert the appellant's case that despite approval having been given



for the development and construction of the hotel on the appellant's property, the defunct Municipal Council of Malindi mobilized the demolition of the hotel the construction of which was in progress. In that regard, learned Judge found as a fact that on 15th August 1996, the Council approved the building plans and granted the [appellant] a building permit" but "around 15th January 2005, the Council turned around and proceeded to destroy and pull down the structures on the [appellant's] property". The learned Judge went to state, as already noted, that:

"As it were the [respondent] did not do anything much to challenge and or controvert the [appellant's] claim herein. If indeed the [respondent] had demolished the [appellant's] structures as indicated here in then the [appellant] is certainly entitled to compensation. In that regard it would not only be fair but also just that the [respondent] covers the cost of reconstruction of the [appellant's] project as well as the income that would consequently be lost by the [appellant] during the intervening period."

16. The respondent has neither appealed or cross appealed against that conclusion. We do not discern therefore that liability is in issue in these consolidated appeals. What is in issue is whether the learned Judge erred in concluding, without hearing the parties in that regard, that appellant was not entitled to an award for the sums claimed in view of the awards the judge had granted in his judgment in Malindi ELC No. 56 of 2016.
17. The matter of the award in Malindi ELC No. 56 of 2016 had not been raised by either party at the trial or in their respective submissions before the learned Judge. That is probably because the judgment in Malindi ELC No. 56 of 2016 was delivered on 31st July 2018 well after the close of the hearing in ELC No. 47 of 2016 and after the appellant and the respondent had filed their respective submissions in ELC No. 47 of 2016 on 21st June 2018 and on 10th July 2018 respectively. The parties did not therefore have an opportunity to address the ELC on the impact, if any, of the award in ELC No. 47 of 2016 on the appellant's claim in Malindi ELC No. 56 of 2016. The proper course the learned Judge should have taken, should have been to invite the parties to address him on the matter. The learned Judge erred in failing so to do, with the result that the appellant's claim was dismissed on grounds that had not been canvassed by either party.
18. The effect of the foregoing is that the parties were denied an opportunity to be heard on the question whether the appellant was entitled to the awards claimed. That amounted to a violation of their right to be heard, a violation of the rules of natural justice. To that extent we are persuaded that the learned Judge erred. Accordingly, the decision of the Judge dismissing the appellant's claims for relief cannot stand as a decision made in violation of the rules of natural justice is null and void. (See *Onyango Oloo vs. Attorney General [1986-1989] EA 456* and *Pashito Holdings Ltd. & Another vs. Paul Nderitu Ndun'gu & Others [1997] 1 KLR*.)
19. Rule 31 of the Court of Appeal Rules provides that:

"On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such direction as may be appropriate, or to order a new trial and to make any necessary incidental or consequential orders, including orders as to costs."

This, in our view, is a proper case to refer the matter back to the ELC for purposes of fresh hearing and consideration regarding the question whether the appellant is entitled to the reliefs claim. We order that this matter be remitted back to the ELC before a Judge, other than Olola, J., for purposes of hearing and determining the reliefs to which the appellant may be entitled. To that extent, we hereby set aside the judgment of the High Court.



20. Regarding the respondent's appeal on the order of costs, suffice to restate the principle, as expressed in *James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR*, that an award of costs is generally a matter within the discretion of the court save that where costs are withheld from a successful party, the court ought to give an explanation as to the reason for withholding such costs. Where no explanation has been given, the appellate court has jurisdiction to inquire into the surrounding circumstances and intervene as deemed appropriate.
21. In the present case, the learned Judge alluded to the unique circumstances of the case and the respondent's role in the matter as the basis on which he condemned the respondent to meet the costs. That must be understood in light of the judge's earlier conclusion that the appellant would be entitled to relief on account of the respondent's actions. We would have no basis for interfering with the decision of the Judge in that regard absent a demonstration that that constituted a wrong exercise of discretion. That said, in light of the conclusion we have reached with respect to the appellant's appeal, the ELC to which the matter is remitted back will determine the appropriate order on costs.
22. The result of the foregoing is that:
 - a. The appellant' appeal, Civil Appeal No. 121 of 2019 succeeds and is hereby allowed.
 - b. The respondent's appeal, Civil Appeal No. 95 of 2019 fails and is hereby dismissed.
 - c. The matter is remitted back to the ELC, before any judge other than, Olola, J., for purposes of hearing the parties, and determination of the reliefs to which the appellant may be entitled.
 - d. The appellant shall have the costs of the consolidated appeals.
 - e. The costs of the proceedings in the ELC shall abide by the outcome of the hearing before the ELC.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

