



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 87 of 2012

GLOBAL REAL ESTATEPLAINTIFF

VERSUS

SIMONE MANCINI

SARA FERRARIDEFENDANTS

RULING

1. On 7th June, 2012 the Plaintiff obtained *ex parte* orders to restrain the Defendants from continuing with the construction next to the boundary wall of their (plaintiff's) property on grounds that the said construction compromised the security of the Applicant's property. And secondly that the construction did not have the necessary National Environmental Authority Management Authority (NEMA) approval. Thirdly that rain water from the construction roof was draining into the Applicant's property in particular the wall thereby causing cracks and damage thereto.
2. The Defendants denied each of these assertions through the Replying affidavit of Simone Mancini. In addition, the Defendants said the notice by NEMA exhibited by the Applicant related to a period in 2009 and was used in another similar pending case, namely HCCC 72/2009. That the Defendants have since been authorized by the Municipal Council of Malindi to proceed with the renovation of their property. Pleadings in **HCC 76 of 2009 Global Real Estate Ltd vs Scorpio Villa Enterprises Ltd** were attached. It would seem the suit is yet to be determined.
3. Before the application was heard, the court visited the scene at the request of Mr. Kiarie for the Defendant. Elaborate notes were recorded. The parties thereafter filed their respective submissions which I have also considered alongside the affidavits and my own notes on the scene visit.

4. The court must determine whether the applicant has shown a *prima facie* case and secondly, whether it will suffer irreparable damage if the orders sought are denied. If the court is in doubt, it will consider the balance of convenience (See **Giella vs Cassman Brown & Co. Ltd**).

5. Regarding grounds (a), (c), and (d) upon which this application is based, I have the following to say. While it would be premature for the court to determine disputed matters of fact at an interlocutory stage, (see **Mbuthia vs Jumba Credit Finance Corporation [1988] KLR1**), my observations at the scene do not seem to correspond with the description contained in the Applicant's affidavits. Villa 47 the subject of this matter appeared an old building without roofing but whose total height is two meters shy of the height of the applicant's wall the latter which is topped with an electric fence.

6. The applicant's wall did not bear any visible cracks or discoloration from rain water. Besides, there is a space of about 1½ metres between the edge of the roof of villa 47 and the subject wall hence putting to doubt the possibility of rain water running from the Defendant's roof to the Applicant's wall or property. Standing at the balcony of the applicant's property, it did not seem plausible that a person could easily access the property from the roof of villa 47. Vertically the villa roof is some two metres below the top of the Applicant's wall and horizontally there is a distance of about 1½ metres between the edge of the roof and the said wall. One would need a ladder to climb over to the Applicant's property.

7. The question whether or not the Defendant had necessary authority to commence works on villa 47 is related to the disputed fact, namely, whether the defendants were merely repairing a roof, and had duly notified the local authority (as stated by the defendants) or secondly, whether the works being undertaken were fresh extensions, which required change of user from a garage to a villa (as alleged by the plaintiff).

8. On the one hand the local council received renovation fees from the Defendants upon the application dated 21st May, 2012 (see annexures SM2 and 3 to replying affidavit). On 28th May, 2012 the said council served the Defendants with a stop order. A letter dated 19th June, 2012 was subsequently issued, clarifying that the receipt of payment was not tantamount to approval (see annexure "A" to the Plaintiff's further application).

9. That being the last communication from the Municipal Council of Malindi, it does seem that the issue of approval for the renovations is unsettled. It is true though as submitted by Mr. Kiarie on behalf of the Defendants that the Plaintiff cannot act as the agent of the Council in this matter. The council has its own mechanism for enforcing such orders including demolitions. The court however should not appear to endorse blatant disobedience of lawful orders.

10. There is yet another pertinent vexed question in this matter relating to a previous similar suit between the same parties namely HCCC 76 OF 2009. In the verifying affidavit of the applicant, the same was said to have been determined through dismissal. That is clearly incorrect and Mr. Osiemo for the Applicant concedes as much in his submissions. He urges that the two suits now be consolidated.

11. I have been asked by the Defendant to take these contradictory statements as evidence of material non-disclosure. Indeed I should. The wording of the verifying affidavit is misleading as the material suit is still subsisting. The court would certainly not have entertained this fresh suit if it was aware of the now admitted existing suit. On the face of it the applicants filed a fresh suit in order to take a short cut because their application to enjoin the present defendants in that suit had not been determined. I have already recorded my other reservations to this application but for the above reason alone, I am disinclined to grant the application by the plaintiffs and will dismiss it with costs.

12. However in the interest of justice and for the sake of the rule of law and good order, I will direct that:

1) This suit and HCCC No. 76 of 2009 be consolidated and heard together before the Environment

and Land Court.

2) Until and unless the Municipal Council of Malindi grants renovation permission to the defendants, the status quo in respect of Villa 47 should be maintained.

Delivered and signed at Malindi this **21st** day of **December, 2012** in the presence of Mr. Kiarie for the Defendants, Mr. Ogunde holding brief for Mr. Osiemo for the Plaintiff.

Court clerk – Evans.

C. W. Meoli

JUDGE

MR. OGUNDE – I seek leave to appeal.

C. W. Meoli

JUDGE

COURT – Leave is granted.

C. W. Meoli

JUDGE



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