



Case Number:	Land Case 96 of 2016
Date Delivered:	06 Dec 2017
Case Class:	Civil
Court:	Environment and Land Court at Malindi
Case Action:	Judgment
Judge:	James Otieno Olola
Citation:	Pollini Tommaso & another v Afrika Kivulini Management Limited & another [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO.96 OF 2016**

**POLLINI TOMMASO**

**RUS LEONIDA SORINA** (both suing through their Attorney

**VALENTINA BERTONICELLI.....PLAINTIFFS**

**VERSUS**

**AFRIKA KIVULINI MANAGEMENT LIMITED**

**PAOLO BO.....DEFENDANTS**

**JUDGEMENT**

1. By a Complaint filed herein on 27<sup>th</sup> April 2016, the Plaintiff prays for Judgment to be entered against the two Defendants and more specifically that:-

**(a) A permanent injunction does issue restraining the Defendants, servants, employees and/or agents, or any other party from otherwise leasing, renting out, managing, renovating, constructing, transferring, conveying and/or selling the said property and/or otherwise encroaching on and/or interfering with the possession by the Plaintiffs of all that property known as Unit Numbers 42A and 42B erected on Portion Number Kilifi/Kivulini Block 1/1, 1/2/ and 1/41 Malindi;**

**(b) An order of vacant possession to issue of all that property known as Unit Numbers 42A and 42B erected on Portion Number Kilifi/Kivulini Block 1/1/, 1/2 and 1/41 Malindi;**

**(c) Costs and incidentals to this suit and interest thereof at court rates.**

2. The basis for the Plaintiffs' claim is that they are the owners of the described property which property was being managed on their behalf by the 1<sup>st</sup> Defendant Limited Company. The 2<sup>nd</sup> Defendant Paolo Bo is sued in his capacity as a Director of the 1<sup>st</sup> Defendant Company. It is the Plaintiffs' case that sometime in the year 2015, the 1<sup>st</sup> Defendant acting on the instructions of the 2<sup>nd</sup> Defendant denied the Plaintiffs access to their described property without any prior explanation and/or reason. Subsequently the Defendants commenced constructions and/or renovation of the suit properties without the plaintiffs' knowledge and proceeded to add another floor on top of the Plaintiffs' premises.

3. The Plaintiff's aver that the Defendants have since taken control over the suit property from which they now receive rental income and thereby undermining and interfering with the Plaintiffs' ownership thereof.

4. By a Memorandum of Appearance dated and filed in Court on 10<sup>th</sup> May 2016, M/s Tonia Mwanja &

Associates Advocates entered appearance for the two Defendants. The Defendants did not however file a Statement of Defence and/or Witness Statements herein.

5. On 26<sup>th</sup> July 2017 when the matter came up for hearing, Ms Mwanja, counsel for the Defendants, attended Court having been served with a hearing notice. Counsel however declined to participate in the hearing and/or to cross-examine the Plaintiffs' sole witness on the basis that she no longer had instructions to proceed with the matter.

6. The Plaintiffs called one witness. Ms Valentina Bertocelli informed the Court that she is a businesswoman in Malindi and held duly registered Powers of Attorney on behalf of the Plaintiffs. She produced the two Powers of Attorney registered as Numbers PA 17993 and PA 17991 as Plaintiffs exhibits Number 1 and 2 before this Court.

7. PW1 told the Court that the Plaintiffs acquired the Suit premises through a Sale Agreement dated 10<sup>th</sup> December 2014 between themselves and an entity known as Oceanic Sun View Ltd who were the Vendors. The purchase price was Kshs 5,000,000/= She produced an original copy of the Sale Agreement in Court (PEX 3).

8. PW1 further told the Court that sometime in the year 2015, the 1<sup>st</sup> Defendant's Managers acting on the instructions of the 2<sup>nd</sup> Defendant denied the Plaintiffs access to the property. Thereafter the Defendants commenced constructions on the property and added another floor on top of the Plaintiffs' property.

9. It was PW1's testimony that the Defendants have no proprietary right whatsoever upon the suit property and that the Plaintiffs stand to suffer great prejudice unless the Orders sought herein are granted.

10. I have considered the material placed before me. From the Sale Agreement, (PEX 3), it is evident that the Plaintiffs purchased Unit No. 42 A and B constructed on a portion of land described as Kilifi/Kivulini 1/1/ - 1/2 - 1/41 Mayungu on 10<sup>th</sup> December 2014. Vacant possession to the said premises was given effective the date of the sale agreement. It is also evident from the agreement that the Vendors - Oceanic Sun View Ltd had developed upon the said land a residential complex comprising of cottages, shops, gardens and other amenities. The purchase agreement entitled the Plaintiffs to use of the said Unit 42 A and B together with the Common areas of the estate in common with the Vendor and the other purchasers or occupiers of the other Units within the complex.

11. It is further evident that the residential complex was managed by a Management Company to which, under Clause 11 of the Sale Agreement, the Plaintiffs were to pay a sum of Kshs 150,000/= annually as Service Charge to cover the cost of maintaining the property including the common areas. From the description given in the Plaint herein, it is apparent that the 1<sup>st</sup> Defendant was the Management Company described in the Sale Agreement.

12. I am satisfied that the Defendants had notice of the suit herein hence their instructions to an Advocate to enter appearance on their behalf. Neither the averments made in the Plaint nor the testimony of the Plaintiffs' sole witness have been controverted by the Defendants and I have not seen any reason to doubt the evidence placed before me.

13. Accordingly, I am satisfied that the Plaintiffs have proved their case on a balance of probabilities. I allow the same as prayed in the Plaint with costs.

Dated, signed and delivered at Malindi this 6<sup>th</sup> day of December, 2017.

J.O. OLOLA

**JUDGE**



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