IN THE HIGH COURT FOR ZANZIBAR
HOLDEN AT TUNGUU
CIVIL CASE No. 70 OF 2020

ZANZIBLUE RESORTS LIMITED .... PLAINTIFF

VS

VILLA NOUR BUNGALOWS LIMITED .... FIRST DEFENDANT

MIRAMONT RETREAT LIMITED .... SECOND DEFENDANT

JUDGEMENT OF THE COURT

19/05/2023 & 30/08/2023

KAZI, J.:

The plaintiff is an incorporated company duly registered under the laws of Zanzibar. The first and second defendants are also companies incorporated in Zanzibar. The plaintiff is a hotelier doing a hotel business at Matemwe Zanzibar, whereas the first defendant possessed a hotel property leased to the second defendant.

The plaintiff's claim against the defendants is for a permanent prohibitory injunction and a mandatory injunction for restraining the defendants from raising any construction adjacent to the plaintiff's hotel. She is also claiming for a permanent prohibitory injunction and a mandatory injunction restraining the defendants from causing any construction adjacent to the plaintiff's land contrary to the laws

concerning Environment Management for Sustainable Development, Zanzibar Investment Promotion and Protection; Land development, Contractors Registration, Architects, Engineers and Quantity Surveyor's Registration, Town and Country Planning and other relevant laws governing construction adjacent to plaintiff land owned and possessed by the plaintiff, and also directing the demolition of the construction already raised or raised during the pendency of this suit on the set-back area of the suit land owned by the defendants.

The plaintiff is also claiming for stoppage of noise pollution, which is alleged to be done by the defendants under construction and operating disco music many times a week without sound control devices from 10:00 pm to 3:00 am.

The plaintiff is therefore praying for the following orders: -

a. A decree for a permanent prohibitory injunction and mandatory injunction restraining the first defendant from raising any construction over the plaintiff land comprising in the following physical boundaries; North by property of ZANZIBALUE RESORTS LIMITED South by property of Rashid (Omani Individual) East by Beach and sea (Indian Ocean) West by road.

b. A decree for permanent prohibitory injunction and mandatory injunction restraining the defendants from causing any construction adjacent the plaintiff land contrary to the laws in relation to Environment Management for Sustainable Development, Zanzibar Investment Promotion and protection; Land development,

Contractors Registration, Architects, engineers and Quantity Surveyor's Registration, Town and Country planning and other relevant laws governing construction.

c. Orders directing the defendants to remove illegal and unauthorised construction adjacent to plaintiff land owned and possessed by the plaintiff and also directing the demolition of the construction already raised or raised during the pendency of this suit on the set-back area of the suit land owned by the first defendant:

d. An order that the defendant jointly and severally should pay the Plaintiff general damages to be assessed by the Court for injury to the hotel's reputation, health of the plaintiff's visitors, right of enjoyment of easement and ones' quiet enjoyment of plaintiff's visitors/clients.

e. An order that the fefendants jointly and severally should be compelled to demolish and build in compliance with fire safety regulations.

f. An order that the defendants jointly and severally should pay the Plaintiff general damages for financial loss, mental and psychological torture to the plaintiff to be assessed by the Court of not less than Tsh 100,000,000/-.

g. An order that the defendants jointly and severally should pay the plaintiff further interest on the decreral sum at the Court Rate of Interest 07% from the date of judgment and decree to the date of full satisfaction of the decree.

h. An order that the defendants jointly and severally and their agents should be compelled to follow the relevant laws of Zanzibar and stop the nuisance.

i. Cost of and incidental to the case be provided for.

j. Any other order(s) deemed fit to the plaintiff be issued.

The brief facts of this suit, as gathered from the pleadings, are that the defendant's property situated at Matemwe, operated under the business name Miramont Retreatt, is neighboured by the plaintiff's properties. The plaintiff pleaded in his plaint that the defendants were running and operating disco music many times a week in the yard or summit of their new hotel building, which was under construction when this suit was instituted. It was claimed that the defendants conducted disco and other music functions from 10.00 pm to 03.00 am with loud sounds and noises without sound controls. As a result, a nuisance was caused to the plaintiff and their guests, hence the plaintiff was deprived of their right to quiet enjoyment of their premises. The plaintiff further pleaded that the defendant's music activities had caused her economic losses following the cancellations of bookings and accommodation of the guests who were already checked into the plaintiff's hotel.

Moreover, the plaintiff pleaded that the defendants constructed their hotel without leaving any set-backs as prescribed by the law. In addition, she claimed that the defendant encroached plaintiff's land by obstructing the view, light, air and sun to the building of the plaintiff and thereby depriving the plaintiff of its easement, i.e., rights of view, light, air and sun, the rights which were being enjoyed by the plaintiff and his

guests from time immemorial peacefully and openly. It was further pleaded that the defendants' construction was made to the extent that it diminished the value of the plaintiff's property and was made with loud noises from construction equipment and the workers' noises adjacent to the plaintiff's hotel windows that caused nuisance and annoyance to the plaintiff and his guest client. The plaintiff further pleaded that the defendants made the construction contrary to the laws governing construction.

On the other side, the defendants contested the plaintiff's claim through a written statement of defence. They pleaded that as the construction of their hotel had been completed, the plaintiff's prayer for the permanent injunction was nugatory or defunct. They also pleaded that the construction was made after the defendants granted relevant permits from the Government. Furthermore, the defendants pleaded that they stopped conducting music activities since the outbreak of the Covid-19 pandemic in October 2019.

Before the commencement of the hearing of this suit, the following issues were framed: -

1) Whether the defendant was conducting discotheque activities and other music performances without putting into effect soundproof and causing nuisance to the plaintiff and their guest.
2) Whether the defendants were making construction contrary to the law.

3) Whether the defendants' construction caused noise and air pollution to the plaintiff and her guests.
4) Whether the defendants' construction did diminish the value of the plaintiffs' property adjacent to the defendant.
5) If the first, second, third and fourth issues are answered in the affirmative, whether the plaintiff suffered any loss and inconveniences.
6) What are remedies the parties are entitled to, including costs?

Both sides were represented by learned legal practitioners, whereby Mr Salum B. Mnkonje represented the plaintiff, and Mr Saleh Ali Said, who Mr Rajab Ngwatu assisted, represented both defendants.

During the trial, the plaintiff called three (3) witnesses to support her case: Christian Gheorghe testified as PW1, Khatib Kheir Khatib, testified as PW2, and PW3 was Bahati Kanyimka Saleh. Along with oral testimony of witnesses, the plaintiff tendered in Court as evidence three (3) documentary evidence, which was two (2) computer printouts from the booking.com website, one titled Miramount Guest Complaints, which was admitted as Exhibit P1. Another was untitled and was admitted as Exhibit P10, and an email printout which was admitted as Exhibit P9, USB drive containing seven (7) video folders which were admitted as Exhibit P2, P3, P4, P5, P12, P13 and P14 four (4) printed photographs taken from the mobile phone admitted as Exhibit P6, P7, P8 and P11.

In a bid to defend their case, the defendants called four (4) witnesses; Said Yunus Mohamed testified as DW1, Nouman Zahir Khamis testified as DW2, Radu Colis testified as DW3, and Mussa Abdalla Mussa testified as DW4. On their side, the defendant tendered in Court two (2) documentary evidence which was an agreement for the construction of 30 rooms to be built at Matemwe Kilima Juu – Zanzibar on Plot DP 1277/2016 admitted as Exhibit D1 and a building permit numbered DCU/275/2020 was admitted as Exhibit D2. After the defendants' case was closed, both sides were allowed to file their final written submissions. I thank learned advocates for their work to assist the Court in resolving this matter.

Conveniently, I will summarise and consider the evidence presented by both sides and the final written submissions filed by the advocates when determining the issues framed.

The first issue was whether the defendant was conducting discotheque activities and other music performances without putting into effect soundproof and causing a nuisance to the plaintiff and their guest. In his testimony PW1, Christian Gheorghe testified that their property, Zanziblue, is located at Matemwe, where it shared a wall with defendants, Villanour and Miramount. He stated that when the second defendant started their operation in 2016, the problem arose from the music they played, which disturbed them. Therefore, he contended that they tried to talk about it as good neighbours, but the defendants continued with parties and loud shows, which were conducted until 2 or 3 am. It was PW1's testimony that they tried to complain to Sheha of

the village, who tried to resolve the matter without success. They then lodged their complaint to the office of the District Commissioner of North A and had several meetings with the defendants' managers. He testified further that the defendants continued playing loud music at night till 2019 and that during the Covid-19 outbreak, they demolished their villa and built a new building. He added that, after the completion of the construction, they continued playing loud music. PW1 testified that they complained to the Commission of Tourism and District Commission of North A, and the District Commissioner and the Commissioner of Tourism mediated the matter. PW1 testified further that guest of their hotels complained about the loud music which was played through booking.com. To support his evidence, PW1 tendered in Court Exhibit P1, the defendant's guest reviews posted at the booking.com website.

PW1 testified further that they took videos and photographs on his phone, showing the loud music played. He stated that he took the videos and photos while he was at their (plaintiff) property through their staff house. He contended that after taking videos and photographs, he transferred them to the USB drive. PW1 maintained further that he was the one who took the said videos and pictures and claimed that they were authentic records of what had happened. He tendered a USB drive containing video folders, Exhibit P2, P3, and P4, to support his averment. PW1 further stated that the loud music was played in the open air at the beach without sound protection. He, therefore, told the Court that the noise pollution affected them and their guest to the effect that they had booking cancellation, which forced them to reduce the accommodation price.

PW2, Khatib Kheir Khatib is the plaintiff's General Manager. In his testimony, he stated that they complained about the first defendant's attitude of playing music at night from 8 pm to midnight. He stated that the defendants played live band, makombora or amplifier music. He testified that the music played by the defendants affected their visitors as it was played in an open space with loud volume where the waves went to the side of their (plaintiff) villas, disturbing their guests in their sleep. He averred further that he took several measures regarding the matter as they reported to Sheha, wrote a complaint letter to the District Commissioner, and complained several times to the latter. PW2 testified that as they failed to resolve the matter at the District Commissioner, they lodged their complaint to the Department of Culture at Mwanakwerekwe, but nothing happened.

PW3 Bahati Kanyimka Saleh is the plaintiff's assistant manager. His testimony was almost similar to that of PW1 and PW2. He stated that the defendants played loud music at night, which disturbed the plaintiff's visitors. PW3 also said they took steps to control the situation, such as reporting the matter to the department concerned with music permits and Sheha. PW3 then told the Court that they were informed by the officer from the culture department that the defendant's music permit allowed them to play music up to 12 pm. During cross-examination, PW3, when responding to the question asked by Mr Ngwatu, a learned advocate, stated that he could not tell the extent of the volume of the music played but insisted that the sound was beyond normal, and their visitors complained about it.

In defence DW1, Said Yunus Mohamed, an acting Manager and Director of the first defendant, testified that in providing entertainment to their guest during lunch, they used a normal music system and played slow music with a reasonable sound. He, therefore, contended that the claim that they play loud music is untrue. DW1 testified further that on the times when they used to hire a band for entertainment, they followed the procedure for acquiring a permit from Baraza la Sanaa (the Art & Censorship Council) for performing such activities and make sure that they were in compliance to the permit's terms and conditions regarding prescribed time for the entertainment.

DW4, Mussa Abdalla Mussa, an officer from the Ministry of Information, Youth, Culture and Sports working at the Art and Censorship Council, also testified regarding the first issue. He stated that he knew the dispute between the parties as when the same was reported at their office, he went to Matemwe to inspect how the music was played and found that it was played with average volume. He contended that they determined the sound of the music played through their sensory organs as they didn't have sound test equipment.

In his final written submission, the learned advocate for the defendant contended that the plaintiff did not lead any evidence to support the allegation as her witnesses failed to adduce evidence to show that the alleged nuisance, if any, exceeded the minimum limit standard required by the law. Moreover, he submitted that not every nuisance is actionable. He cited **Sadhu Construction Company Limited v Peter E. M. Shayo** (1984) TLR 127 to support his point. In addition, the

learned advocate submitted that the plaintiff was supposed to present his complaint to Zanzibar Environment Management Authority (ZAEMA) which could have discovered whether or not the alleged noise exceeded the minimum standard.

On the other side, in his final submission, the learned advocate for the plaintiff briefly narrated what was testified by the witnesses. He then submitted that from the wording of section 8 of **the Ngoma Regulation Decree** Cap. 36 of the Laws of Zanzibar, the Court can award any damages from any act of nuisance made by the defendants in this matter, so the plaintiff prayed to be awarded as prayed in her plaint. In his conclusion, the learned advocate contended that the plaintiff did not have valid permits for the music which was played.

Having considered the evidence and the final submission regarding the first issue, it is with no doubt that the gist of this issue revolves around the tort of nuisance or noise pollution. It is imperative to understand that in our jurisdiction, these branches of torts, *to wit*, pollution/nuisance and toxic injury torts, have all been codified in statutes. Therefore, the laws under which the plaintiff's claim falls are the **Zanzibar Environment Management Act**, No 3 of 2015 (ZEMA) and the **Public and Environment Health Act**, No. 11 of 2012 (PEHA).

ZEMA, among other things, prescribed that the Director of the Environment will propose environmental standards to the Zanzibar Bureau of Standards for noise, water, air or wastewater to enhance the

quality of the environment. Moreover, ZEMA prohibits environmental pollution, whereby Section 51 (1) of this Act provides as follows: -

> *"A person shall not pollute or permit any other person to pollute the environment in violation of any environmental standards prescribed by any written law."*

The law further provides a duty to every person to maintain, safeguard and enhance a safe and healthy environment and hence grants a right to every person to lodge a complaint to relevant institutions and to institute a suit against the person who caused or is likely to cause harm to the environment, **See;** Section 5 (2) (3) of ZEMA.

On the other hand, PEHA is a specific statute regarding the tort of nuisance. This law, among other things, deals with cases related to air, water and land pollution. Section 42 (1) of PEHA prescribes what constitutes a nuisance, including any noise, sound, or music that may cause discomfort, social disturbance, or unrest without permission. Moreover, PEHA acts as a preventive tool as well as a remedial tool. Therefore, any victims of the pollution mentioned above can seek justice through PEHA by reporting the existence of nuisance to the Director General of Health or any authorised officer for the same to be abated. Thus, as stated, Section 43 of PEHA provides as follows: -

> *"Information of a nuisance liable to be dealt with summarily under this Act may be given to the Director or authorised officer by any person, and it shall be the duty of the Director or authorised officer to give such directions to his officers as*

will ensure that the existence of the nuisance is immediately brought to the notice of any person who may be required to abate it."

By implication, ZEMA and PEHA require any person injured by another person's nuisance act to exhaust remedies provided before bringing an action to the Court of law.

In the instant matter, the plaintiff narrated the steps she took after being annoyed by the music the defendants played. Plaintiff's witnesses in their evidence told the Court that they reported the defendant's act of nuisance to Sheha of their locality, District Commissioner and Baraza la Sanaa. Nonetheless, there is no evidence from the plaintiff's side to show that they reported the matter either to ZEAMA as per ZEMA provisions or to the Director General of Health as per the provision of PEHA. The learned advocate for the defendant noted that omission and submitted that the plaintiff was supposed to submit his complaint to ZAEMA, whereby the noise complained could have been determined if it exceeded the minimum standard.

To the extent of what I have demonstrated afore shortly, I agree with the learned advocate that the plaintiff failed to establish that the alleged music which the defendant played exceeded the minimum standard to the extent that it was intolerable and unacceptable hence caused discomfort to the plaintiff and his hotel guests. Therefore, it is my view that the first issue is not answered in the affirmative.

The second issue is whether the defendants were making construction contrary to the law. In his testimony, PW1 told the Court that the defendants built their structure close to their boundary wall, which is less than a meter. He testified that the defendants constructed another structure close to Tangawizi Villa and altered their boundary wall by extending it to the extent that it looked horrible. To support his averments, PW1 tendered Exhibit P6, P7 and P8. He also testified that the construction finishing of the Miramont was improper since the toilet pipes are visible and its wall lack a plaster. He tendered Exhibit P11 to support his testimony.

PW2, in his testimony, told the Court that they were complaining about how the defendant's building affected their business. In his evidence, he averred that the defendant's building is a one-quarter meter from their wall and that the structure of the defendant's building can endanger their villa, which is made by the *makuti* roof. He contended further that the defendant left the pipes outside their building wall, which vitiates the plaintiff's view. He concluded that the look of the defendant's building affected their business.

PW3 evidence regarding this issue is almost like that of PW2, but he added that the defendant building block their view, and now they have no privacy as a person from the defendant building can see direct to their Tangawizi Villa.

On the defendant's side, DW1 testified that they followed all the laws and procedures in constructing their new building. He stated that they

hired a contractor through Exhibit D1 who were Star Construction Company and asked the said company to follow all procedures in applying for relevant construction permits and to build the hotel at the required standards. DW1 further stated that they had a construction permit which is Exhibit D2. Therefore, he maintained that they followed all procedures in the construction of their hotel and observed all surrounding circumstances regarding their neighbour's rights of peaceful enjoyment. When cross-examined, PW1 stated that their property is ground plus two and that the height of their property did not block the plaintiff's view at the south side.

DW2, Nouman Zahir Khamis is the architect, contractor, and Star Construction's owner. He testified that he was the one who designed, drew and constructed the defendants' hotel. He stated further that before starting the construction, he secured all necessary and relevant permits from the Development Control Unit (DCU) and registered the project with the Board of Contractors. He testified that the construction time was 6 am to 7 am and that he completed the construction six months earlier. In his testimony, DW2 stated that after the completion of the construction, he received a call from Zanzibar Investment Promotion Authority (ZIPA) and was asked to have a meeting at the construction site with several officers, including the Director of Urban Planning, DCU Chairman and other officers from ZIPA and DCU. He stated that he was asked to inspect the plaintiff and defendant's hotel at the meeting due to complaints received. He proceeded to testify that they began to examine Villa Nour, the concern being the distance between the boundary wall and the constructed building, which was

three and a half meters. He further stated that they inspected Zanziblue and found nothing. DW2 contended that after the inspection, the Chairman of DCU concluded that the conflict between the parties was related to their business. At the cross-examination, DW2 stated that he did not have a permit from the fire department and that he did not have a special permit to work after 6 pm.

Radu Colis, DW3, is the first defendant's Director and majority shareholder. In his testimony, he stated that they secured all permits before commencing construction. He further testified that in January 2021, commissioners from the Board of Contractor, ZIPA, DCU and council inspected the construction and found everything was conducted under the spirit of the law.

When submitting on the second issue, the learned advocate for the defendants stated that the plaintiff witnesses failed to adduce evidence to prove the allegation that the construction was carried out contrary to the law. He maintained that the plaintiff's witnesses failed to establish which law the defendants contravened when constructing her building. He submitted that the defendants followed the required procedures by obtaining a building permit from the responsible authority before starting construction. He submitted further that in civil cases, a burden of proof lies on the part who alleged. While citing **Attorney General and Two Others v Eligi Edward Masawe and Others**, Civil Appeal No. 86 of 2002, he submitted that the plaintiff's witnesses failed to prove the size of the distance the defendants required to leave as a set-back and the law which provides for the said requirement. The learned

advocate further submitted that DW2's testimony shows that the defendant's construction had blessings from the land authority through DCU, as evidenced by Exhibit D2. He concluded that if the defendants' construction were contrary to the law, the plaintiff was required to lodge her complaints to the responsible authority. The said construction could have been stopped by the cancellation of the building permit, and they could have been ordered to demolish their constructed building.

Conversely, the learned advocate for the plaintiff submitted that in determining this issue, they are inviting the Court's attention to the **Town Decree** Cap 79 of the Laws of Zanzibar (Cap 79), which was repealed by Section 81 (e) of the **Local Government (District and Urban Authorities) Act** No. 3 of 1986. Further, he submitted that the rules of Cap 79 still survive under the provision of Section 28 of the **Interpretation Act** No. 7 of 1984. He then contended that carrying construction contrary to the law means the defendant's building is being made below the minimum distance requirement, which is eight feet contrary to rule 6 of the **Building Rules** of Cap 79. He added that the defendants failed to cover the construction area to restrict harmful substances contrary to rule 11 of Cap 79 Rules. He submitted that PW1 testified that there was a smell from mixing the cement coming to the plaintiff's hotel and that had the defendants put cover or scaffolding materials, there had not been any such claims. It was his submission that Exhibit PE14 shows the construction was carried out without placing material to cover toxic material to the public. He concluded that the defendants conducted their construction contrary to the laws.

I have carefully considered the witnesses' testimony and learned advocate submissions. What was pleaded by the plaintiff in her plaint, especially in paragraphs 4 and 17, was that the defendants conducted a construction adjacent to the plaintiff's land contrary to the laws in relation to Environment Management for Sustainable Development, Zanzibar Investment Promotion and Protection, Land Development, Contractors Registration, Architects, Engineers and Quantity Surveyor's Registration, Town and Country Planning and other relevant laws governing construction. In their testimony, the plaintiff's witnesses did not narrate how the defendant's construction violated the provisions of the mentioned laws. Thus, as rightly submitted by the learned advocate for the defendant, the plaintiff's witnesses failed to establish which law the defendant contravened when constructing her building.

It is apparent that PW1 and PW2 stories on how the defendant's construction was conducted are not backed up with any concrete evidence. In his final submission, however, the learned advocate for the plaintiff, among other things, relied on Exhibit P6, P7 and P8, and other pictures tendered in Court showing how the construction activities were carried out. He also maintained that the defendants violated rules 6 and 11 of Cap 79 Rules when constructing their hotel. Nevertheless, it should be noted that what was submitted by a learned advocate for the plaintiff regarding the rules of Cap 79 is just a statement from the bar, as no witness from the plaintiff's side testified regarding the same. Moreover, it should be noted that all exhibits tendered by the plaintiff's witness are electronic documents, including Exhibit P6, P7 and P8, the photos taken from PW1's phone. Therefore, its weight depends on its authenticity.

At the trial, PW1 did not establish that the exhibits were authentic as per the requirement of section 73 (4) of the **Evidence Act** No. 9 of 2016. It is crucial to enlighten at this juncture that the law now is apparent regarding the admissibility and weight of electronic evidence. The Evidence Act has special provisions regarding how the contents of electronic records may be proved in Court. According to this law, electronic records may be proved in accordance with its provision of section 73. This section provides for procedures on how the contents of the electronic evidence may be presented and proved. The provision aims to ensure the authenticity, integrity and reliability of the contents of the evidence to be presented in Court. Thus, section 73 of the **Evidence Act** requires the Court to, *inter alia*, determine whether the party adducing the electronic evidence has discharged the burden of authenticating the evidence. Section 73 (1) (2) (a) (b) (c) of the **Evidence Ac**t provides thus: -

"*73.-(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer hereinafter referred to as the computer output, shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of*

any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in subsection (1) of this section in respect of a computer output shall be the following:

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during that period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of those activities;

(c) throughout the material part of that period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of those activities."

Whereas subsection (4) (a) (b) (c) of section 73 of the same legislation provides: -

"(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following:

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; or

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) of this section relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities, whichever is appropriate, shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

According to the above-quoted excerpts, a person who wishes to present in Court an electronic record as evidence must prove; **One**, the authenticity of the records; **Two**, the integrity of the records, i.e., a record was recorded or stored in, **See**; Section 73 (2) of the Evidence Act; and **Three**, that the record was made in the usual and ordinary course of business. Moreover, in discharging the burden of authenticating the electronic evidence, a person must present as evidence in a legal proceeding a certificate showing the authenticity of the digital object, which:

1. Identifies the electronic record containing the statement.
2. Describe how the electronic records were produced.
3. Provide the particulars of the device used in the production of that record.

Additionally, the certificate of authenticity must be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities, whichever is appropriate and must be verified by such person that it is made to the best of his knowledge and belief.

During the trial, as alluded to herein earlier, PW1 did not comply with the provisions of section 73 of the **Evidence Act**. He did not present in Court a certificate of authenticity when tendering electronic records in support of his testimony, so the Court cannot accord any weight to Exhibit P6, P7, P8 and the rest of the plaintiff's exhibits, and they will accordingly be disregarded.

Contrariwise, the defendants contended that they followed construction law and procedures for their building project. DW2, in his testimony, claimed that they secured all relevant permits from the DHU, such as Exhibit D2, and that he registered the project with the Board of Contractors before the commencement of the construction. It was also the evidence of DW2, which was not contested, that after the completion of the construction, ZIPA and DCU inspected the project following the plaintiff's complaint, and nothing was found against the defendants.

From the testimony of DW2 and on the strength of Exhibit D2, it is evident that the defendant's construction was carried out according to the **Town and Country Planning Decree**, Cap. 85 of 1955 and its regulations, PEHA, its regulations, and other relevant laws and regulations. Exhibit D2 by itself, which is issued under the **Development Control Regulations** of 2015 (DCR), contained conditions which are required to be abide by and observed by the grantee of the permit. The DCR gave the mandate to the DCU to ensure that all building standards, guidelines, conditions and construction procedures are followed in accordance with the construction and as per the laws and DCR permit requirements. It also has the power to act for those who failed to comply with construction laws and regulations; **See;** Regulation 8 of DCR. Therefore, if the defendants were carrying out the construction without proper permits and or contrary to the law, then the right of action would belong to the concerned law enforcers like DCU. Hence the plaintiff was required to exhaust remedies available under Cap 85, DCR and PEHA before seeking

Court's intervention. For that reason, I find the second issue without merit.

The third issue is whether the defendants' construction caused noise and air pollution to the plaintiff and her guests. PW1, at his testimony, contended that the defendant's construction caused noise at unreasonable hours. He averred that there was a time when construction started at 6 am till 11 pm. Regarding air pollution, PW1 testified that there was a lot of dust during the construction caused by trucks that transported sand to the defendant's construction site. PW1, in his testimony, also tendered Exhibit P13, a video he took through his mobile phone showing the defendant's construction was carried out on 23rd December 2020 at night.

PW2, when testifying, told the Court that the defendant's construction was carried out twenty-four hours and that air pollution was caused by a concrete mixer at night. PW3 also, in his testimony, contended that the defendant's construction was conducted twenty-four hours which caused noise every time.

On the side of the defendants, DW1, when testifying concerning the third issue, stated that they constructed their hotel while observing their neighbour's rights of peaceful enjoyment. This is why other neighbours who are bounded very close to them, and other villagers did not complain about the construction noise. He also stated that the local authority never accused them of the alleged noise. It was his further

testimony that their contractor used modern tools which did not cause any noise pollution to their neighbours.

DW2 testified that before starting the defendant's construction, he rented a place from one of the defendant's neighbours. He then used the said place to keep his construction equipment and materials. He stated further that he kept a concrete mixer in the rented area and that all work was conducted there. He mixed the concrete from his rented place and then transported it to the construction site. He maintained further the steelwork and other job done at the said place and transported the material to the site for installation. DW2 testified further that they conducted construction during regular hours from 8 am to 6 pm, except during the day of shedding concrete, they started construction from 6 am to 7 pm. When responding to the question asked during cross-examination, DW2 stated that they hammered the nail in fixing the slab, so noises were unavoidable. He also stated that steel fixers did not cause noise due to the technology used.

In his final written submission, the learned advocate for the defendant argued that the plaintiff adduces no evidence to justify her claim. He submitted that there was no written claim from the plaintiff's guests regarding construction noises. He added that the plaintiff failed to tender the ZAEMA report showing that the defendant's construction violated environmental laws or any guidelines. The learned advocate then quoted the provisions of sections 50 and 13 of ZEMA and argued that all claims concerning air and noise pollution are dealt with by the responsible authority, which is mandated to prove whether or not the

alleged noise exceeded minimum standards hence intolerable. He argued further that the plaintiff failed to prove the degree of the noise claimed, and they failed to call even one villager to support their evidence regarding noise and air pollution. He added that the failure of the plaintiff to bring evidence of at least one professional from ZAEMA staff to prove their allegation of noise and air pollution diminished the probative value of the evidence of the plaintiff as there is no proof of emission of noise and air pollution.

In his final written submission, the plaintiff's learned advocate stated that it is evident that the defendant's construction was carried out from early in the morning up to 10 pm or some days to 11 pm. He stated further that Exhibit P14 shows there is dust from the construction of the defendants, and it is air pollution caused by the defendant's construction. The learned advocate refers to paragraph 4 of the amended written statement of defence, stating that "there is no construction which is carried out silently" and argued that the defendant, by implication, admitted that their construction caused the noise to the plaintiff's detriment. In addition, he stated that the admission made in paragraph 4 of the amended written statement of defence falls under Order XIV rule 6 of Cap 8.

I have addressed in the first issue that the tort of nuisance is governed by the statutes (ZEMA and PEHA). I have also stated that ZEMA prescribed environmental standards for all kinds of pollution. It is important to note that PEHA described nuisance, be it noise or air pollution, as unlawful interference with a person's use and enjoyment of

his land or property. Therefore, nuisance can be attributed to any disturbance that hampers one's ability to enjoy his space without hindrance. Thus, to prove a nuisance, one must establish that he is facing unnecessary disturbances from the unreasonable actions of the defendants. In doing so, it must be proved that the defendant's noise or air pollution crosses the threshold set by the law.

In this issue, the plaintiff's witnesses narrated how the defendants' constructions caused air and noise pollution as it was carried out from early morning to 10 or 11 pm. They have also relied on Exhibit P14. However, it was not established if the nuisance complained of exceeded the standard ZEMA set. Furthermore, as submitted by the defendant's advocate, the plaintiff witnesses failed even to tender any written claim from his guests about the same or to call villagers as her witnesses to support her case regarding nuisance, considering the fact that noise pollution is a public nuisance, which causes discomfort to many at once. Besides, in this issue as well, it was not established by the plaintiff that she exhausted the remedies provided under ZEMA and PEHA before instituting this matter.

All in all, considering the evidence adduced from both sides, the plaintiff has not made out the case of an actionable nuisance. Consequently, the third issue is not answered in the affirmative.

The fourth issue is whether the defendant's construction diminishes the value of the plaintiff's property adjacent to the defendant. PW1, in his testimony, claimed that the defendant's construction had a substantial

impact on his property, *to wit*, Tangawizi Villa, which is situated close by the defendant's construction. He claimed that some of their guests cancelled their booking in December because of the construction noise after staying for a few days on their property. He testified further they had booking cancellations even after the completion of the construction because of the unattractive view of the defendant's property. To support his testimony regarding their hotel's booking, he tendered copies of printed emails which are Exhibit P9 and P10. To support PW1 evidence came PW2, who testified that the defendant's building was constructed in a manner that would endanger their villa which was made of makuti (coconut tree leaves). He stated that the defendant's building pipes are visible and vitiate the view of their villa and affects their business.

PW3 evidence was nearly similar to that of PW1 and PW2. He added that the deck of the defendant's building is facing their villa, so there is no privacy at their villa. PW3 further testifies that before the defendant's construction started, Tangawizi Villa was very marketable, but the situation now is different. He stated that now when their visitors book the villa, they tend to request to be allocated to another villa at night because of the construction noise. He added that the reviews at booking.com about the noise also affect the market of Tangawizi Villa. Furthermore, he asserted that the defendant's building block's the sea view of their Tangawizi Villa.

DW1, on the other side, contended that the defendant's claim was based on business competition. He averred that they did construction during the peak time of the Covid-19 pandemic between March and

October 2020, when there was no tourist in Zanzibar and most hotels were vacant. Thus, he believed the defendant's construction couldn't affect the plaintiff's business. During cross-examination, DW1 stated that their property did not reduce the value of the plaintiff's Tangawizi Villa.

In his final written submission, the defendant's advocate argued that the plaintiff failed to prove this issue on the balance of probability. He maintained that a mere allegation that the defendant's construction diminished the value of the plaintiff's property did not constitute sufficient proof of the same. He submitted that the plaintiff did not prove by evidence what was the economic status of her hotel during the time before the construction, how many guests were accommodated by the plaintiff prior to the commencement of the construction, during and after the construction and the number of her guest who cancelled the booking because of the noise of the defendant's construction. The learned advocate submitted that the plaintiff did not tender in Court any booking receipt to prove the presence of the alleged guests who stayed at the plaintiff's hotel during such time when there was an outbreak of the Covid-19 pandemic. He concluded by submitting that the defendant's construction did not diminish the value of the plaintiff's property.

On his side, the learned advocate for the plaintiff submitted that the value of any property is determined by many factors, among which are very important are the safety of the property from the fire, which from the circumstance of the case, the plaintiff's property has *makuti* roof. Therefore, the safety of the hotel and the people in the hotel is

questionable. He further submitted that from the fact that the two premises are very close to one another, any fire issue would endanger the safety of the plaintiff's hotel. He claimed that this unsafe situation diminished the value of the plaintiff's hotel. The plaintiff's advocate further submitted that the people's privacy in the hotel is paramount. He maintained that due to the illegal construction, which was made very close to the plaintiff, now there is no privacy at the plaintiff's villa. He added that any person who would want to buy or any guest who would like to spend time will consider the situation.
Moreover, he submitted that the issue of the defendant's music performance has now escalated to become more serious since the defendant's building is closer to the plaintiff. It was the learned advocate's view that the hotel business is about relaxation and enjoyment. He submitted that because of illegal construction, the plaintiffs' guest does not have the same enjoyment and relaxation as expected. He continued his submission by arguing that from the acts of the defendant, the plaintiff or any person intending to buy the plaintiff's hotel has to adjust himself to cope with the safety, enjoyment, privacy, security and other things. In his conclusion, the learned advocate submitted that the issue had been answered in the affirmative based on the submission and testimony of both sides.

On the strength of the testimonies of the witnesses from both sides and the strength of the learned advocate's submission, this issue is also answered negatively. I hold that view after considering the weight of the evidence from the parties' witnesses while having in mind the provision of section 119 of the **Evidence Act**, 2016, which provides as follows: -

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

As the plaintiff claimed that the defendant's construction diminished the value of her property, she was required to establish the facts with concrete evidence. Having reviewed the evidence the plaintiff's witness adduced, I found nothing substantive to prove the plaintiff's allegation. As submitted by the learned advocate for the defendant, a mere allegation that the defendant's construction activities diminished her property's value was insufficient to prove the alleged fact. I agree with the submission of the defendant's advocate that in establishing the allegation against the defendant, the plaintiff was at least expected to furnish the Court with the hotel records that show the comparison of the number of guests the plaintiff received at a period before the defendant's construction started, during the construction and post the construction, and or the records of the booking cancellation made during construction and after.

The plaintiff's witnesses, who were not professional valuers, believed that the defendant's unattracted building also diminished the value of Tangawizi villa. However, their testimony was not supported by any report from the specialised hotel valuers and/or building valuers, which could verify the plaintiff's claim. The only evidence the plaintiff relied on in support of the oral testimony of her witnesses regarding this issue is

Exhibit P9 and P10, copies of emails with which this Court accord no weight to it for the reasons stated herein earlier.

Furthermore, I have noted DW1's testimony and the submission of the defendant's advocate that the defendant's construction was conducted during the peak time of the Covid-19 pandemic in 2020, when there were very few tourists in Zanzibar, and most hotels were vacant. The law allows the Court to presume the existence of certain facts which it thinks have happened. This is according to section 129 of the **Evidence Act** 2016, which provides: -

> *"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case".*

It is a matter of fact that between 2019 to 2022, the world at large was affected by the Covid-19 pandemic. The Zanzibar tourism sector was one of the most affected sectors on the island due to the restrictions on mobility and the closure of many international borders. It is, therefore, as asserted by DW1, most of the hotels in Zanzibar were vacant during such period due to a lack of tourists. For that reason, I accept DW1's testimony that it was impossible that the defendant's construction had any impact on the plaintiff's business when the tourism sector in Zanzibar was significantly affected by the said global pandemic and most hotels were closed. Consequently, as I stated beforehand, the fourth issue is answered in the negative.

The last issue is what remedies parties are entitled to, including costs. The plaintiff has failed to prove his case to the required standard and hence is not entitled to any relief.

In consequence, I dismiss this suit with costs.

It is so ordered.

Dated at Tunguu, Zanzibar this 30th day of August 2023.

G. J. KAZI
JUDGE
30/08/2023