



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO. 87 of 2015**

**JITENDRARAY NATHWANI & ANOTHER.....PLAINTIFFS**

**=VERSUS=**

**HITESH DEVENDRA MAKWANA & 3 OTHERS.....DEFENDANTS**

**JUDGEMENT**

**Introduction.**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants owned LR No.209/20258 (original number 209/3451). The three agreed to develop ten (10) apartments on the said land which were then sold to ten owners off plan. The 1<sup>st</sup> and 4<sup>th</sup> Defendant are brothers. The 2<sup>nd</sup> Defendant is wife to the 4<sup>th</sup> Defendant. The Plaintiffs are purchasers of one of the ten apartments.
2. A management company known as Sai Nivas Management Limited was incorporated and after all the apartments were sold out , the reversionary interest in the lease was transferred to the Management company. The sale agreements contained building plans which among other common facilities provided for a management office on the ground floor. Also the ten apartment owners are directors and shareholders of the management company. The 1<sup>st</sup> Plaintiff is the Chairman of the Management Company.
3. The 1<sup>st</sup> Defendant owns apartment No. P1 and the 4<sup>th</sup> Defendant owns apartment No. P2 which are both on the 5<sup>th</sup> floor. The two defendants have jointly taken an office on the ground floor which they have shared equally in undivided shares. The ground floor office is being used by the two as a store. It is this appropriation of the ground floor office for the exclusive use of the two that forced the Plaintiffs to file a suit against the Defendants in which they claim the following reliefs:-

***a) A declaration that the management office on the ground floor of premises constructed on land reference No.209/3451 is part of the common areas available for common use and enjoyment by the owners of the apartments constructed on land Reference No. 209/3451.***

***b) An order that the lease(s) for flat P1 and P2 be amended to delete any reference made to the management office on the ground floor.***

***c) Any other or further orders that the Court may deem just.***

***d) Costs of this suit.***

**Plaintiffs Case**

4. It is he Plaintiff's case that when they were purchasing the apartment which they own, the sale agreement contained building plans which showed that there was to be a management office on the ground floor which was to be for the benefit of all the ten owners of the apartments. The Plaintiffs argue that during the preparation of the lease for apartment P1 and P2, the management office on the ground floor was appropriated by the 1<sup>st</sup> and 4<sup>th</sup> Defendants who are owners of apartment No. P1 and P2 respectively. This appropriation left the apartment owners without a Management Office.

5. The Plaintiffs now argue that the accounting documents of the management company are being kept at the apartment of the secretary of the Management Company and that accessing the accounting documents from a private residence is a challenge as any inspection must be in accordance with the convenience of the apartment owner.

## **Defendant's case.**

6. It is the Defendants' case that the Plaintiffs have no locus standi to bring this suit against them. The Defendants argue that once the ten apartments were sold out and the reversionary interest in the lease transferred to the management company, any claims could only be brought by the management company. The Defendants also argue that the 1<sup>st</sup> Plaintiff who is the Chairman of the management company had never tabled any complaint before the management company and therefore he lacks standing to bring this case on behalf of the apartment owners.

7. The Defendants further argue that the architectural plans were subject to change at the sole discretion of the developer's architect and that the plans were altered which did away with the management office where instead more parking spaces were put up. They argue that what is being taken as a management office is a small store behind the staircase which is being used by the 1<sup>st</sup> and 4<sup>th</sup> Defendants as a store. The Defendants deny that there was appropriation of the management office as alleged by the Plaintiff and that the Plaintiffs' claim is frivolous which should be dismissed.

## **Analysis and issues for determination.**

8. I have carefully considered the Plaintiffs' evidence and that of the Defendants. I have also considered the submissions by the Plaintiffs and Defendants. There is no doubt that the ten apartments were developed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. There is also no doubt that all the 10 apartments were sold out and a management company incorporated. The reversionary interest in the lease regarding the property on which the ten apartments lie was transferred to the management company.

9. The first issue which emerges for determination is whether the Plaintiffs have locus standi to bring this suit. Black's Law Dictionary, 9<sup>th</sup> Edition at page 1026 defines the term locus standi as follows:-

***“ The right to bring an action or to be heard in a given forum”.***

10. In the instant case, the Plaintiffs' relationship with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants started when they entered into a sale agreement dated 15<sup>th</sup> July 2011. This relationship was further advanced when the Plaintiffs were granted a lease over apartment No. B2. Clause D of the recital to the agreement of 15<sup>th</sup> July 2011 provided as follows:-

***“ The vendor shall incorporate a management company (hereinafter referred to as “ the management company”) for the purpose of managing and maintaining the Estate and upon the Vendor having granted long term leases in respect of not more than Ten (10) apartments in the Estate and upon registration of all the said leases the Vendor intends to convey the reversion of the property to the Management Company as a nominal amount of Kshs.10,000/= payable by every lessee”.***

11. Clause 4 (Vii) of the lease agreement dated 20<sup>th</sup> November 2013 provided as follows:-

***“ After the sale by the Lessor of all the Flats in the Estate and within One Hundred and Twenty (120) days after the last of the leases in respect of the same having been registered at the Land Office the Lessor shall sell and the Manager shall purchase the Lessor's reversionary interest in the said land Reference Number 209/20258 for a consideration of Kenya Shillings One Hundred thousand ( Kshs.100,000/=) and from the day of the transfer (conveyance ) of the said reversionary interest, subject to the leases of that Flats all the obligations and likewise , all benefits of the lessor will vest in and be carried out by the Manager”.***

12. There is no contention that by a transfer of reversionary interest dated 6<sup>th</sup> June 2014, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants transferred all their rights, title and interest in the property to the management company. It is therefore clear that if any wrong was committed to the management company, any action should be brought by the management company. The Plaintiffs' suit is clear that they are complaining on behalf of the other apartment owners. They are not complaining in their individual capacities. The Plaintiffs have therefore no locus standi to bring the suit against the Defendants particularly the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who had transferred their interest to the management company. The 1<sup>st</sup> plaintiff who is the chairman of the management company did not have any resolution from the management company to file this suit. In this regard, I am in agreement with the finding of **Justice Hatari Waweru in the case of Julius Gachuhi Kamau & II others Vs Joseph N Maina & 9 Others 2008** where the Judge struck out the suit brought by the Plaintiffs for lack of locus standi. I therefore find that the management company having been put in place and having taken over the right, title and interest of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the Plaintiffs had no locus to bring up this suit. This is enough to dispose of this suit but in case I am found wrong in this finding I will proceed to address the other issues.

13. The second issue for determination is whether the Defendants breached the agreement. Clause 16 of the agreement of 15<sup>th</sup> July 2011 provided that the developers architect had the final decision in any variation and once the certificate of practical completion was issued by the developer, it was taken that they had fulfilled their obligation as far as the works were concerned. There is evidence which was not controverted that there were alterations to the building plans. The place where the management office was to be was converted into parking spaces. It was upon the Plaintiffs to show that the management office was built according to plans and that this is the space which was appropriated by the 1<sup>st</sup> and 4<sup>th</sup> Defendants. There was no evidence to this effect given.

14. The Defendants evidence is that they took the small space which was built behind the staircase which they converted into a store as they had small houses. There was no invitation to the court to visit the site and confirm the allegations. The case of **Joseph Ngata Kamau Vs Bernard Wachira Kamau & 2 other (2018) eKLR** which has been relied upon by the Plaintiff is distinguishable in that in that case, the Court made a finding that the 1<sup>st</sup> Defendant in that suit had erected a wall which annexed part of the common parking area. This is not the case in this particular case where the Plaintiffs have not given any evidence to support their allegations. I therefore find that there was no

breach of agreement on the part of the Defendants.

**Conclusion**

15. There being no breach of the agreement, it follows that the Plaintiffs reliefs cannot be granted. I therefore find that besides the Plaintiffs lacking locus standi, they have failed to prove their case which is hereby dismissed with costs to the Defendants.

**Dated, Signed and delivered at Nairobi on this 20<sup>th</sup> day of February 2020.**

**E.O.OBAGA**

**JUDGE**

In the Presence of:-

M/s Nduati for Mr Njuguna for Plaintiff

M/s Athumani for Mr Khan for Defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**