REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 439 OF 2017

SIFA TOWERS MANAGEMENT LIMITED.....PLAINTIFF

VERSUS

BELL ESTATE AGENCY LIMITED.....1ST DEFENDANT

SIFA INSURANCE BROKERS LIMITED.....2ND DEFENDANT

NIC BANK LIMITED.....3RD DEFENDANT

POSH PALACE HAIR STUDIO LIMITED.....4TH DEFENDANT

FELICITY WARDROBES LIMITED.....5TH DEFENDANT

JUDGMENT

1. A row has erupted over the management of the common areas of part of a building known as Sifa Towers erected on LR. No. 1/1356 (original number 1/688). The row is substantially between Sifa Towers Management Limited (Sifa Management or the Plaintiff) on the one hand and Bell Estate Agency Limited (Bell Estate or the 1st Defendant) and Sifa Insurance Brokers Limited (Sifa Insurance Brokers or the 2nd Defendant) of the other.

2. The land on which Sifa Towers stands was initially owned by one Diva Singh, who on 1st July 1996 (D1 Exhibit Pages 2-3) conveyed it to Sifa Insurance Brokers after purchase. By two Joint Venture Agreements (JVAs) of 20th June 2011 (D1 Exhibit Pages 4-11) and 26th March 2012 (D1 Exhibit Pages 12-20), Sifa Insurance Brokers and Kings Developers Limited (Kings) agreed to construct a 12-14 storey office block which eventually became Sifa Towers. A term of that agreement was that Sifa Insurance Brokers would be the owners of the mezzanine and 1st floors of the building while Kings would own the rest of the floors upwards. The ground floor and basement being reserved for parking and each of the parties owned specified parking spaces.

3. In respect to LR No. 1/1356, it is currently owned by a Company in the name Sifa and Kings Investments Company Limited (Sifa and Kings Investments) and the building comprises of several units owned by different persons. The case for Sifa Management is that it is responsible for obtaining and providing common services within the building for the benefit of all occupants. In the arrangement the units in the building are owned by way of long term leases between Sifa Management, Sifa and Kings Investments and the individual owners.

4. In a Plaint dated 2nd November 2017 and filed on the same day, Sifa Management avers that the owners and occupants of the units are obliged to pay service charge to Sifa Management to enable it offset expenses incurred in provision of common services and management of common areas. That in addition, the occupants are not to undertake any alterations of any part of the building, including the common areas, without its consent.

5. Sifa Management alleges that Bell Estate and Sifa Insurance Brokers are in breach of both these obligations. In respect to service charge, the sum claimed as at 1st November 2017 is Kshs.9,489,913.10. As to the other obligation, the Plaintiff avers that the two have caused alterations to the common area without seeking its consent. Sifa Management also alleges that the two have caused damage to some parts of the common area.

6. The 3rd, 4th and 5th Defendants are tenants of Sifa Insurance Brokers, either occupying the mezzanine or first floor.

7. The Plaintiff prays for judgment against the Defendants as follows:-

1. An order for permanent injunction to restrain the 1st 2nd and 3rd Defendants, their agents, their servants, their employees or any other person acting on behalf of the 1st, 2nd and 3rd Defendants or under their directions, from undertaking any installation and/or alterations on the common areas of the building known as Sifa Towers Building erected on all that property known as LR No. 1/1356 (Original Number 1/688) unless with the consent of the Plaintiff.

2. The amount of Kshs.9,489,913.10, being the service charge due and owing as at 1st November 2017.

3. Interest on 2 above at Court rates from date of filing suit until payment in full.

4. Costs of the suit.

5. Any other relief that the Court may deem necessary.

8. The 1st and 2nd Defendants filed a joint statement of Defence. They resist the claim and assert that it is *sub judice* Milimani HCCC 417 of 2017 or Milimani 860 of 2015. It is asserted that in the suit, the two were through a Joint Venture Agreement (JVA) dated 26th November 2012, given express authority to own and manage the affairs of the mezzanine and 1st floors to the exclusion of Sifa Management or any other persons. They deny owing the claimed sum of Kshs.9,489,913.10 and contend that it is not obliged to pay any service charge to Sifa Management.

9. Two other defences are raised. First, that the suit as drawn and filed is fatally defective in law as the verifying affidavit to the Plaint lacks the requisite authority from the Directors of Sifa Management to file the suit. This Court will determine this as a preliminary issue. Second, that the Plaint does not disclose the existence of HCCC 860 OF 2015 and is therefore fatally defective and ought to be struck out.

10. Although the rest of the Defendants have each filed separate statements of Defence, they take similar positions. These defendants allege that they each have lease agreements with Bell Estate and have paid the rent and service charge due under the lease agreements. They deny any privity of contract with Sifa Management and see misjoinder.

11. This suit was consolidated with Civil Suit no 417 of 2017 (Sifa Insurance Brokers Limited vs Bernard Chenge, Tom Opiyo and Charles Ayoro) for purposes of hearing and determination. The record in this suit forms the lead proceedings. In Suit 417 of 2017 Sifa Brokers states that upon completion of Sifa Towers, it took possession of the mezzanine and 1st floors and leased out portions to several tenants including the 3rd, 4th and 5th Defendants in the lead suit. Another tenant is Bell Estate said to be a subsidiary of Sifa Insurance Brokers. It is alleged that the subsidiary is also the manager of the two floors.

12. Sifa Insurance Brokers states that in late September 2017 and the early part of the following month, its tenants complained about several issues largely related to lack of water and electricity supply to the building which rendered the building inhabitable. That they took steps to remedy the situation. That on 3rd October 2017, the Nairobi City County authorized Sifa Insurance Brokers to install water tanks and pipes, and it commenced the works.

13. Sifa Insurance Brokers complains that while the works were underway, the three Defendants in that matter stopped it and disconnected water supply, backup generator and elevators leading to the mezzanine and 1st floors. It is alleged that the trio were wrongfully purporting to act on instructions of the management company. Sifa Insurance Brokers asserts that there is no management company of the building as it has exclusive ownership of the two floors and has the right to make the installations and to carry out the works.

14. Sifa Insurance Brokers alleges that it has suffered loss and damage as the tenants who rely on the utilities have threatened to terminate their leases unless the situation is remedied.

15. In that suit, Sifa Insurance Brokers seeks the following reliefs against the three, jointly and severally;

i. A permanent Injunction restraining the Defendants, their servants ,agents or others acting on their behalf or instructions from anyone from stopping and interfering in any way with the installation of storage water tanks and laying water pipes by the applicant ,servicing the Mezzanine Floor and 1st Floor of Sifa Towers on L.R No 1/688 Lenana Road, Kilimani.

ii. A permanent Injunction restraining the Defendants, their servants ,agents or others acting on their behalf or instructions from anyone from stopping and interfering in any way with the electricity and backup generator and elevators servicing the Mezzanine Floor and 1st floor of Sifa Towers on L.R No 1/688 Lenana Road, Kilimani.

iii. A permanent Injunction restraining the Defendants, their servants ,agents or others acting on their behalf or instructions from anyone from limiting the access of persons visiting the Mezzanine Floor and 1st floor of Sifa Towers on L.R No 1/688 Lenana Road, Kilimani.

iv. Damages

v. Costs.

16. In a Defence filed on 9th November 2018, the three assert that they are members of a committee formed to assist in the management of the building and are agents of the management company of the building which is Sifa Towers Management Limited (Sifa Management).The trio hold that in so far as they have been sued as agents of a known principal, they have been wrongly sued.

17. As regards the management of the building, the three take a similar position taken by Sifa Management in the lead proceedings and it would be fruitless to rehash it. In the end they seek the dismissal of the suit.

18. Before turning to the substance of both claims, it would be opportune to consider and determine a preliminary issue raised by the 1st and 2nd Defendants in the lead matter as to whether or not the suit is presented with due authority of Sifa Management. In the final submissions to Court, Counsel for the two pointed to the provisions of Order 4 Rules 4 and 6 of the Civil Procedure Rules as providing the basis of the objection. Counsel must have meant Order 1 Rules 4 and 6 as these latter provisions are what he reproduces in the submissions.

19. It is argued that at the time of filing of the suit, the Plaintiff did have the resolution authorizing the institution of the suit and no letters of authority pursuant to which the verifying affidavit to the Plaint was sworn. It is submitted that the special resolution dated 29th October 2017 was an afterthought and in any event the only three directors who were said to be in attendance at the meeting giving rise to the resolution have no shares in the company. That resolution was attached to the replying affidavit of Bernard Chenge sworn on 29th November 2017 and under the seal of Sifa Management.

20. For the Plaintiff, it was argued that the resolution of 29th October 2017 is a proper resolution and was by inadvertence only not filed together with the Plaint. That the oversight was corrected through the replying affidavit which was filed with leave of Court.

21. In respect to this preliminary controversy, the Court has to examine the Memorandum and Articles of Sifa Management and the CR 12 dated 2nd May 2017 against the provisions of the Companies Act 2015 and the resolution of 29th October 2017. But first, it has to be observed that even where a company fails to file a resolution authorizing the bringing of a suit contemporaneously with the presentation of the suit and accompanying the Plaint, it can still make up for such an omission by late filing of the resolution (See amongst other decisions, Ochieng J in **Fidelity Commercial Bank Limited V Simon Maina Gachie** [2016 eKLR). For this reason, the late filing by itself does not render the suit defective. What is more decisive is whether the resolution of 29th October 2017 is the authority contemplated by Order 4 rule 1(4) of the Civil Procedure Rules which reads:-

> Order4, rule 1. (4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

22. Article 13 of the Articles of Association of Sifa Management (P. Exhibit Page 17) reads:-

> [13] Until otherwise determined the number of Directors shall not be less than two and not more than seven. The names of the first Directors shall be determined in writing by the subscribers of the Memorandum of Association or a majority of them and until such determination the signatories to the Memorandum of Association shall be the First Directors.

23. The Form CR 12 dated 2nd May 2017 is in respect to that company (P. Exhibit Page 71).It is a Form from the Registrar of Companies that provides information of a company in accordance with the records held by the Registrar relating to the company at a particular date. The Form produced by the Plaintiff shows that the directors of Sifa Management Company Limited as at 2nd May 2017 were;

1. Abdul Kadir Shabbir Hussein D. Hassanali
2. Paul Debagko Gogo
3. Taherari Dawoodbhai Hassanali
4. Tom Odago Opiyo
5. John Oscar Juma
6. Patrick Ngotho Chege
7. Charles Odhiambo Ayoro
8. Bernard Busiku Chenge

24. To be noted is that the number of Directors are 8 and may breach Article 13 which places the maximum Directors at 7 "unless otherwise determined". Yet this suit is not about whether the Board of Directors of Sifa Management is properly constituted or as to membership of the Board. For that reason the more crucial Article in respect to the matter at hand is Article 23 which reads:-

> "The seal shall not be affixed to any instrument except by the authority of a resolution of two Directors or at least one Director and the Secretary or some other persons approved by the Board and the Directors or the Director and the Secretary or the other person as the case may be shall sign every instrument to which the seal is so affixed in their presence".

25. The extract of the Board resolution of Sifa Management of 29th October 2017 shows that the seal of the company was affixed upon the authentication of Bernard Busiku Chenge and Charles Odhiambo Ayoro. The CR 12 of 2nd May 2017 shows both to be directors of the company as at 2nd May 2017. There is no evidence that suggests that this position had changed as at 29th October 2017, about 5 months later. Indeed, a CR 12 obtained by the 1st and 2nd Defendants (D. Exhibit page 1) shows that the two were still Directors as at 6th November 2017. A date after the resolution. I have to find that the seal was affixed in accordance with Article 23 of the Articles of Association of the Company, and complied with the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules in so far as it authorized the filing of the suit and Bernard Bukisu Chenge to sign any and all documents necessary for that purpose. To be noted is that the verifying affidavit that accompanied the Plaint in the lead suit was indeed sworn by the said Chenge. That does it for the objection.

26. Before considering the merits of the dispute, I need to mention that the Court had on several occasions urged the parties to attempt an amicable settlement to this matter but it all came to naught. In resolving the dispute by this Judgment, the Court shall only give regard to the evidence it formally received and ignores any information that the parties shared with the Court during the attempts at a negotiated settlement.

27. What then are the substantive issues for determination by Court? The parties herein proposed separate issues. Keeping those in mind and looking at the pleadings in the two consolidated suits, this Court is able to frame the following issues for determination:-

1. Is Sifa Management mandated to manage the common areas of Sifa Towers and also responsible for obtaining and or providing common services within and to the building for the benefit of all occupants?

2. Is Sifa Insurance Brokers, as owner of the mezzanine and 1st floors of the building, obliged to pay service charge in respect to the common areas of the two floors?

3. Did Sifa Insurance Brokers owe service charge of Kshs.9,489,913.10 as at 1st November 2017?

4. Was Sifa Insurance Brokers obliged to obtain the consent of Sifa Management before carrying out any alterations on any part of the Building including common areas?

5. If the answer to 4 above is in the affirmative, is Sifa Insurance Brokers, Bell Estate and the other Defendants in breach of that obligation?

6. Were Bernard Chege, Tom Opiyo and Charles Oyoo agents of Sifa Management and if so, are they properly sued?

7. Are the 3rd, 4th and 5th Defendants necessary parties to these proceedings?

8. What are the appropriate orders to be made?

28. In answering these questions, the Court will consider the evidence of Tom Opiyo who testified for Sifa Management, Paul Gogo for Sifa Insurance Brokers and Bell Estate, Ibrahim Ngatia Mbogo for N.I.C and Felicity Mugambi for the 5th Defendant, if and where necessary.

29. The first two issues are easily answered in view of the submissions filed by counsel for the 1st and 2nd Defendants. The evidence by Opiyo is that Sifa Management was incorporated for purposes of managing the common area of the building known as Sifa Towers. It is also not in dispute that ownership of individual units by different owners is by way of long term sub-leases between the Plaintiff, Sifa and Kings Development and the individual unit owners.

30. However, Sifa Insurance Brokers Limited seems to have a somewhat special place. There is evidence that by virtue of being the land owner of LR 1/688 (where the building stands), Sifa Insurance Brokers entered into joint venture with Kings to put up Sifa Towers. The relationship was governed by the Joint Venture Agreement of 20th June 2011 (D. Exhibit Pages 4-11) and a subsequent one of 26th March 2012 (D. Exhibit Pages 12-20).I have read both agreements .Some terms are similar yet the agreement coming later in time does not expressly make reference to the earlier one. However, by dint of clause 16.3 of the latter agreement it supersedes all prior agreements and understandings between the parties in relation to the subject matter. I take it therefore that the later agreement became the operative contract between the parties after the date it was signed and superseded the agreement of 20th June 2011. Under the terms of the agreement of 26Tt march 2012, Sifa Insurance Brokers became the owner of the mezzanine and 1st floors of the building. It is the case for Sifa Insurance Brokers that it incorporated Bell Estate for purposes of managing the affairs of that part of the building owned by it, that is, 1st and mezzanine floors.

31. It is common ground that parts of mezzanine and 1st floors are leased to the 3rd, 4th and 5th Defendants.

32. At the very center of this dispute is whether the management of the common areas of the two falls to Bell Estate or Sifa Management. Yet as early stated this matter appears to have been resolved by the following concession in the final submissions of Counsel for Sifa Insurance Brokers and Bell Estate. Counsel submits:-

"20. The 2nd Defendant incorporated the 1st Defendant to manage the interests of the 2nd Defendant in Sifa Towers and in line with its Memorandum and Articles of Association, the 1st Defendant has leased out spaces in mezzanine and 1st floors to various tenants including the 3rd ,4th and 5th defendant herein.

21. It's our humble submission that the 1st and 2 Defendants do not owe the Plaintiff any service charge.

a. It is the duty of the 1st Defendant to pay service charge to the Plaintiff on behalf of the 3rd, 4th and 5th Defendants…."

Underlining mine.

33. This submission is in consonance with what emerged in the cause of the testimony of Gogo. At cross examination he stated;

"I do not know the arrangement between Kings Developers and Sifa Towers (the Plaintiff)…we were paying service charge. Page 55 showed we had overpaid by ksh 521,985.20…We paid the service charge to the management company (i.e the plaintiff) through their managers, Good living"

34. He was later to testify that;

"I receive service charge from all my tenants. Before we separated, I remitted it to the Plaintiff"

35. From this evidence it is clear that before going it alone, Sifa Insurance Brokers paid service charge to Sifa Management. This would be an acknowledgment by Sifa Insurance Brokers that Sifa Management were the managers of the common areas of Sifa Towers. That there would be such a management company was indeed contemplated in the JVC agreement between Kings and Sifa Insurance Brokers. See clause 6.2.

36. That the mandate of Sifa Management to manage the common areas to the building extended to those of the mezzanine and 1st floors is further buttressed by the minutes of the company's annual general meeting of 13th February 2017 (P. Exhibit Pages 53 to 55). Robert Gogo and Elizabeth Anyula attended that meeting on behalf of Bell Estate. In his evidence Paul Gogo confirmed that he also attended the meeting but left before making any contributions, leaving the two behind. The minutes show that the meeting, in general, discussed the management of the common areas of the building and dedicated substantial time on various aspects of service charge. The inevitable conclusion to be drawn is that Bell Estates (agents of Sifa Insurance Brokers) attended the meeting in recognition that they were members of the company and that the company was responsible for the management of the common areas of the entire building including the two floors owned by Sifa Insurance Brokers.

37. In winding up on this part of the decision, the Court notes that in his testimony, Mr. Gogo stated that Sifa Insurance Brokers had, by the date he was testifying, had leases over the two floors registered. A sample of a lease entered and registered between the unit owners, Sifa and Kings, and Sifa Management was produced by Sifa Management (P. Exhibit Pages 24 to 52). The lease, inter alia, obligates the unit owner to pay service charge to Sifa Management. The evidence of Opiyo is that ownership of all individual units was by way of a similar lease. There is nothing to suggest that the lease involving Sifa Insurance Brokers and registered after the commencement of these proceedings would be any different.

38. The Court is now able to answer the first two issues. Sifa Insurance Brokers had by repeated conduct acknowledged that Sifa Management had the mandate to manage the common areas of the entire Sifa Towers, which mandate extended to the provision of services to the common areas. Further, that Sifa Insurance Brokers as owners of the mezzanine and 1st floors were under an obligation to pay service charge to Sifa Management in respect to services provided for the common areas of the two floors. I must add that it would seem that the obligation has since been fortified by the leases registered during the pendency of these proceedings.

39. The case of Sifa insurance Brokers is that it opted out of the arrangement because some of its tenants complained of lack of water and electricity supply (see Plaint in suit No. 417 0f 2017).At the hearing Mr. Gogo revealed another reason for the lone ranger attitude. Although unable to point to any document, he stated that Sifa Insurance Brokers as part developers of the building were to pay less service charge than the purchasers. Second, that unrented space owned by it would not be subjected to service charge. So, from 31st October 2017, Sifa Insurance Brokers began to provide services to the common areas on its two floors outside the framework of Sifa Management. It is therefore not surprising that the claim by Sifa Management regarding alleged non-payment of service charge is for the period to 1st November 2017.

40. Has Sifa Management proved this claim? The claim by Sifa Management is for special damages and must be specifically proved. As proof, it produced a statement of Sifa Insurances Brokers' account for the period July 2015 to December 2017 (P. Exhibit Page 67). It shows a debt of Kshs. 9,489,913.10. To be noted, however, is that in the Plaint the amount claimed is that due and owing as at 1st November 2017. I shall return to the issue of period later. For now, I note that for the period July 2015 to December 2016 the rate of service charge applied is Kshs. 25 plus VAT (Value Added Tax) and for the remainder is Kshs. 20 plus VAT per square foot.

41. Sifa Insurance Brokers on its part has produced accounts for the period July 2015 to October 2017 (D. Exhibit Page 55). It asserts that an overpayment of Kshs. 521,985.20. The rate applied throughout the period is Kshs. 5 per square foot. Another difference between the two accounts is that those of the management company is in respect to 8 units while that of the unit owner is for 6 units, less by 2 units. The last difference is that the management accounts adds Value Added Tax while the other does not. Which statement of accounts, if any, is accurate?

42. On this I turn to other pieces of evidence. First, there was unanimity between the evidence of Opiyo for Sifa Management and Gogo for the Sifa Insurance Brokers that service charge was levied on a rate per square foot. Opiyo elaborates that "**service charge is worked on area of floor occupied''.** Then there are the minutes of the annual general meeting of Sifa Management held on 13 February 2017 (P. Exhibit Pages 53 to 55). The meeting was attended by Gogo, albeit for a short time, and two of the representatives of Bell Estates for the length of the meeting. The veracity of the minutes is not challenged by any of the parties to the suit.

43. The minutes tell us two important things about the controversy immediately at hand. The service charge was Kshs. 25 per square foot up

to December 2016 and Kshs. 20 thereafter. Another is that Bell Estate (as agents of Sifa Insurance Brokers) had 8 units under its docket.

44. Contrast these with the unsupported allegations of Sifa Insurance Brokers that it enjoyed a concessionary rate on service by virtue of being a part developer. And that this special position entitled it to further privilege of not paying service charge for space it owned but not rented out. This may explain why it has worked out its account by applying Kshs. 5 which is much less than that paid by other unit owners and only on 6 units instead of 8 units it owned.

45. On VAT, the Lease agreement which other Unit Owners entered provided for its charge as outgoings in clause 3.2.2. While the Leases to Sifa Insurance Brokers had not been registered by the time this suit was filed, the Court has already held that, by conduct, Sifa Insurance Brokers accepted the obligation to pay service charge to Sifa Management and that obligation would have to extend to paying taxes that would be chargeable to the payment. It is the finding of this Court the further charge of VAT by the Management Company is justified.

46. Emerging from this evaluation is that the rates applied and number of units covered by the statement prepared by Sifa Management is the accurate one. This Court has itself applied those rates on the floor area provided by Bell Estate in the table on page 55 of its exhibit and finds that the workings by Sifa Management cannot be faulted. On payments received, the statement of the Management Company (P. Page 68) shows that all payments that unit owner says it made (D. Exhibit Page 55) have been credited.

47. That said, the claim pleaded is the amount due and owing as at 1st November 2017 yet the accounts include service charge for the months November and December 2017. There can be no reason for the Plaintiff to be awarded more than he formally sought in his pleadings. Service charge for these two months is Kshs. 732,098.27. This has to be deducted.

48. In the end the Plaintiff has provided cogent proof of the special damages claimed. Although Counsel for Sifa Insurance Brokers had argued that the Plaintiff had failed in this claim because of not producing such documents as invoices, receipts and bills, there is more than one way to skin a cat. Here, the Plaintiff has achieved the goal without relying on the proverbial invoice and receipt.

49. The next issue is whether the unit owner was obliged to obtain the consent of the Management before making any alterations to the building including common areas. The Court proposes to say little on this for reasons that will become apparent. However, unlike the issue of service charge, no evidence was produced to show that Sifa Insurance Brokers had submitted itself to the authority of the Management Company in terms of requiring consent before making alterations to common areas on the floors owned by it. Sifa Management cannot rely on the terms of the leases of other unit holders as Sifa Insurance Brokers did not have such a registered lease at the time the suit commenced.

50. On the other hand, it can be argued that by paying service charge, Sifa Insurance Brokers acknowledged that there existed common parts of the building which jointly belonged to all unit owners and for any alterations to be made to any part of those areas, the consent of all unit owners, acting together, was required.

51. But it may be futile for this Court to answer the question because, it is common ground, that alterations have already made and yet the Plaintiff does not seek their reversal by way of a mandatory edict. At any rate, the Plaintiff holds that, as testified by Mr. Gogo, the leases of Sifa Insurance Brokers were registered after the suit had been filed. It was submitted that the leases are as the sample lease exhibited (P Exhibit Pages 23 to 52). If this be true then the Plaintiff need not be anxious as, going forward, the leases will be the reference point of the relationship between it and Sifa Insurance Brokers.

52. I turn my attention to the prayers in suit 417 of 2017.I hold that even if the Sifa Management was not entitled to stop Sifa Insurance Brokers from carrying out the alterations, the right defendant was the Management Company and not Bernard Chege (Chenge?), Tom Opiyo and Charles Oyoo (aka Ayoro?). The evidence is that the AGM of the Company of 13th February 2017 appointed Bernard and Charles as part of the management committee of the company and at the date material to the complaint, the three were directors of the company. There is no evidence that they acted on their own and without authority of the company. There is no evidence that they acted in their personal capacity. The suit against the three, in the very least, fails for misjoinder.

53. Turning back to the lead proceedings, it is apparent that the discussion this far features Sifa Management, Sifa Insurance Brokers and Bell Estate. Nothing or very little is said about the other 3 Defendants and their involvement in this dispute. The three hold the position that they should never have been sued in the first place as they have no privity of contract with the Plaintiff.

54. It is not in contention that the three are tenants of Sifa Insurance Brokers and each, separately, have lease agreements with the landlord through its agent. It is also common cause that none of the three has a contract with Sifa Management. On its part, Sifa Management nevertheless argues that there exists a legal relationship between it and the three by virtue of the law and the services enjoyed by them.

55. Plaintiff relies on the provisions of the Land Act to make the argument that the term “lessee” extends to the three because they are lessees of the 1st and 2nd Defendants and also because they enjoy services provided by Sifa Management either directly or indirectly. It is asserted that the three have an obligation to pay service charge and any arrangement between them and their landlord is not the concern of the Plaintiff. Finally, it is submitted that there was an onus on the three to satisfy themselves that the 1st and 2nd Defendants had discharged their obligations to the Plaintiff.

56. Under section 2 of the Land Act the words “lease” and “lessee’’ are assigned the following meanings;

> “Lease” — (a) a lease or sublease, whether registered or unregistered of land; or (b) a short-term lease or agreement to lease;
>
> “Lessee” - a person to whom a lease is granted or a person who has accepted a transfer or assignment of a lease.”

57. Section 55(3) extends the references of a lease to include a sublease unless the context expressly or by implication renders it unfeasible. The qualification, in my view, is not without significance. The case pleaded by the Plaintiff is that ownership of the unit holders of their units is by way of long term leases with the obligation of the Plaintiff to purchase the reversionary interest after registration of the long term lease to the individual purchasers. Although the leases for Sifa Insurance Brokers had not been registered by the time the suit was filed, I understood the Plaintiff to be pressing that Sifa Insurance Brokers held its units on similar terms as the other Unit Holders. One such Unit Holder was Itec Engineering Limited whose lease was produced as a sample (P. Exhibit Pages 24 to 52).

58. Clause 3.9 of the Lease on alienation helps the Court resolve the matter at hand;

> **3.9.1 Subject to fulfilling the conditions set out in clauses 3.9.2 and 3.9.3 to the reasonable satisfaction of the lessor and to indemnifying the lessor against any costs incurred by the Lessor in that connection the lessee may with prior written consent of the Lessor (such consent not to be unreasonably withheld or delayed but the Lessee to pay such consent fees as the Lessor's Advisor may require for perusing any such instrument) assign or charge the whole or part of the Unit.**
>
> **3.9.2 Prior to any assignment of the whole or part of the Unit ,the Lessee shall;**
>
> **3.9.2.1 effect payment of any outstanding Charges or Other payments due to the lessor; and**
>
> **3.9.2.2 procure that the assignee enters into direct covenants with the lessor to perform and observe all the Lessee's covenants and all other provisions during the residue of the Term.**
>
> **3.9.3 The lessee shall without delay produce to the Lessor a properly completed and registered copy of the assignment or charge (if required) in question to be retained by the Lessor.**

59. From the terms of this provision, it would seem that, notwithstanding that the unit holder has assigned its interests, it remains the primary obligant of its covenants under the lease. Further, because of the requirement of clause 3.9.2.2, the assignee does not have any privity of contract with Sifa Management until and unless it enters into direct covenants with the Management Company. As it has not been proved that the three entered into direct covenants with Sifa Management, the Court is unable to hold that they were necessary parties to these proceedings.

60. Ultimately the Orders this Court makes is as follows;

60.1. The Plaintiff's suit in Civil Suit No 417 of 2017 is hereby dismissed with Costs to the Defendants.

60.2. As for civil suit no 439 0f 2017;

60.2.1. Prayer 1 of the Plaint is dismissed.

60.2.2. Judgment is entered against the 1st and 2nd Defendants jointly and severally for the sum of Kshs. 8,757,815.00.

60.2.3. The sum above shall attract interest at Court rates from the date of filing suit until payment in full.

60.2.4. The Plaintiff shall have Costs of the suit against the 1st and 2nd Defendants.

60.2.5. The Plaintiffs suit against the 3rd, 4th and 5th Defendants is dismissed with Costs.

Dated, Signed and Delivered in Court at Eldoret this 29th Day of April 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT: