



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.313 OF 2013

SHIRIN JIWA.....PLAINTIFF

VERSUS

THE ISMAILIA ECONOMIC DEVELOPMENT

SOCIETY LIMITED.....DEFENDANT

JUDGMENT

(1) Before this Court is the Complaint dated **18th February 2013** filed in Court on even date by **SHIRIN JIWA**, (the Plaintiff herein) praying that: -

“(a) The Defendant be compelled to restore the withdrawn maintenance and other services ancillary thereto for the Plaintiff to enable her peaceful and quiet enjoyment of her properties within the old Ismailia Highridge Flats.

(b) That this Honourable court be pleased to issue a permanent injunction restraining the Defendant through its agents, servants or assigns thereof from allowing any party to conduct commercial ventures within Old Highridge Ismailia Flats premises.

(c) Damages

(d) Any further orders that this Honourable Court may deem fit to grant.

(e) Costs of the suit.”

(2) On **18th April 2013** **THE ISMAILIA ECONOMIC DEVELOPMENT SOCIETY LIMITED** (the Defendant herein) filed an Amended Defence and Counter Claim dated **29th February 2016** pursuant to leave granted by the Court on **22nd February 2016**. In that counterclaim the Defendant sought judgment in the sum of **Kshs.472,183/=** together with cost and interest.

(3) In a judgment delivered on **7th December 2018** the court dismissed the Defendant’s counter claim on grounds that the same had not been served upon the Plaintiff. The Defendant thereafter filed a Notice of Motion dated **18th December 2018** seeking to have that judgment reviewed and set aside. The Application was duly heard and the same was allowed vide this Court’s Ruling delivered on **1st August 2019**. The Counterclaim therefore proceeded for hearing on **4th December 2019**.

(4) **DWI DIAMOND NAPARA** who was the Chairman of **THE ISMAILIA ECONOMIC DEVELOPMENT SOCIETY LIMITED** (the Defendant herein) testified in open Court on **4th December 2019**. He adopted in its entirety his witness statement filed in court on **17th September 2019** and similarly relied upon his oral evidence before this court of **1st October 2018**.

(5) The Plaintiff **SHIRIN JIWA** despite having proper notice of the said hearing vide the Affidavit of service sworn by one **JACKSON KIEMA MUTHAMI** on **8th November 2019** and filed in court on **14th November 2019** did not appear in court to testify.

(6) The evidence of **DW1** was that the Defendant which is a non-profit making limited liability Company owns and manages a housing estate on **LR NO.209/3458** and **LR NO.209/345** along **Wangapala Road** in the **Parklands area** of Nairobi. All occupants of the said flats are required to pay monthly maintenance charges (hereinafter “**service charges**”). The purpose of this service charge was to cater for various

services provided in the common areas of the flats e.g cleanliness, garbage collection, security, lighting, general repairs, road maintenance etc. At the material time the monthly charge amounted to **Kshs.4,000/=** per month.

(7) The Plaintiff occupied two flats within the estate namely Flat No.16 and Flat No.37. As such **DW1** contends that the Plaintiff was obliged to pay service charge to pay service charge for two (2) flats in the amount of **Kshs.8,000/=** per month. However, it is alleged that the Plaintiff defaulted in the payment of the required service charge and thus owes to the Defendant total arrears of **Kshs.472,183/=** particularized as follows:-

(i) Flat No.16 - **Kshs.255,883/=**

(ii) Flat No.37 - **Ksh.216,300/=**

TOTAL ARREARS Kshs.472,183/=

(8) As stated earlier the Plaintiffs did not appear for the hearing of this counter-claim. As such the evidence tendered by **DW1** remains uncontroverted.

(9) I have carefully considered the evidence in support of this counter-claim. Annexed to the Defendant's Further List of Documents filed on **21st September 2018** are the service charge records for the period **October 2013** to **December 2014** which support the fact that the Plaintiff made no payments for several months and was therefore in arrears. As I stated earlier the evidence tendered by the Defendant in support of their counter claim is neither challenged nor controverted. Indeed, the Plaintiffs did not file any defence to the Defendants Counter claim at all.

(10) In the circumstances, I am satisfied that the Defendant has proved its counterclaim and I therefore enter judgment in favour of the Defendant in the amount of **Kshs.472,183** plus costs of the suit and interest at court rates from **14th September 2018** until payment in full.

It is so ordered.

Dated in Nairobi this 27th day of May, 2020.

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Justice Maureen A. Odera