REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO.1 OF 2017

MARGARET BASHFORTH.....PLAINTIFF

VERSUS

WOBURN ESTATE LIMITED.....1ST DEFENDANT

WOBURN MANAGEMENT LIMITED .....2ND DEFENDANT

Coram: Hon. Justice R. Nyakundi

Gicharu Kimani Advocates for the plaintiff

Richard O. Advocate for the defendant

JUDGMENT

By way of a Counterclaim dated 15th February 2017, the defendants sought a declaration that the **Wambua** report is final and binding upon the plaintiff and that service charge should be calculated basing on the same report. The defendants have also asked for the costs of the suit and interest at court rates.

Background

The plaintiff, **Margaret Bashforth**, acquired a 125 years' lease in 2005 over a residential property in Malindi known as apartment 2E developed and owned by the plaintiffs, **Woburn Estate Limited**. The plaintiff proceeded to take of possession of the said property. As the apartment is situated in a gated community, the plaintiff was entitled to the use of comm on amenities within the Estate, to wit, gym, garden and restaurant. This suit emanates from a previously instituted suit being **Malindi HCC No. 46 of 2011** wherein the plaintiff was directed to pay her service charge at the rate that was subsisting at the time of judgement until the service charge has been professionally determined.

The Estate was under the management of **Woburn Estate Management Company** which had common directors, namely Franco and **Emmy Esposito**, a couple. In terms of the lease agreements, the lessees were required to pay a service charge for the provision of cleaning, security services and general maintenance of the property. Everything was in course until July 2009 when the service charge was increased to Kshs. 22,000=/ with regard to the plaintiff.

Following the said increment service charge payable, the owners of apartments at **Woburn Residence Club** protested against as they perceived the same as excessive and unreasonable. The parties made efforts to resolve the dispute directly which did not bore fruit. The plaintiff proceeded to invoke Clause 2.5 Fourth Schedule Part. B of the lease the agreement (hereinafter Claused 2.5). In compliance with the aforementioned clause, the matter was referred to the Chairman of the Institute of Surveyors of Kenya, which resulted in the appointment of an Expert, **Maina Chege** whose report was issued in April, 2011. The defendants, **Woburn Estate Limited & Woburn Management Limited**, refused to comply with the recommendations of the **Maina Chege** report which they took part in.

The plaintiff then showed an intention to sell the property to one **Mike Carnall** in April of 2010. The same prompted the defendant herein to initiate this matter and at the time of filing the suit the outstanding service charge stood at Kshs.547, 736.50/= as the plaintiff ceased payment in July, 2009 despite several demands from the defendant. As a result of the aforementioned matter, the plaintiff was directed to pay service charge at the rate that was subsisting at the time of the Judgment until service charge has been professionally determined.

The defendant has brought to the attention of the court that the service charge has since been professionally determined by one **Paul Wambua** who has since come up with a report. In the Counter-Claim dated 15th day of February, 2017, the defendants therefore sought for a declaration that the **Wambua** report if final and binding upon the plaintiff and service charge should be calculated basing on the **Wambua** report. The parties herein have also filed submission to support their respective positions in this matter and the court shall take the same into consideration in its analysis and determination below.

Submission By The Respective Counsels.

The defendant herein filed submissions dated 20th July 2020 expounding on the following issues:

1. ***Whether or not Wambua Report is final and binding to the parties herein?***

2. ***Whether or not service charge ought to be based on the Wambua Report?***

3. ***What effect does the decision in Court of Appeal Civil Appeal number 20 of 2018 has to this matter?***

4. ***Jurisdiction of this Court***

5. ***What order as to costs***

On the question of whether the **Wambua** report was properly obtained, the defendants are adamant that the same was done as per the law. The basis under which the Report was done were to comply with Judgment delivered by **Justice Meoli** in **Malindi HCC No. 46 of 2011** which directed that service charge be professionally determined. Secondly, the defendants wanted to be sure of the exact and correct service charge that ought to be paid by each apartment owner after they had complained.

As regard the person mandated to refer a dispute and its terms to the chairman of the institution of survey Kenya under clause 2.5 Part B of the lease agreement, the Counsel for the defendants cited Clause 2.5 of Part B of the lease agreement which provides in part as follows;-

> ***"if the owner shall at any time during the term objects to any item of the charges as being unreasonable or the insurances mentioned in section 5 as being insufficient then the matter in dispute shall be determined by a person to be appointed by the chairman for the time being of the institute of surveyors of Kenya (or such institution's successor or assign) who shall in making his determination act as an expart and not as an arbitrator and whose decision shall be final and binding on the parties....."***

The Learned Counsel for the defendants took the view that the matter can only be referred to the chairman of the institute of surveyors of Kenya who shall appoint a person to act as an expert only when there is an objection and that it is therefore the affected party who can move and commence the process. It is further contended that in this case, it is the defendants who had to move the process of solving the dispute as almost all the apartment owners were not agreeable on the charge, the lease agreement allows any party aggrieved to write and refer the matter to the chairman of the institute of surveyors Kenya

On the question as to whether the procedure in Clause, 2.5 of Part B of the lease agreement was followed, Counsel referred to exhibit No.1 in the defendants' list of documents is the letter that the Defendant wrote to the chairman of the institute of surveyors Kenya in accordance with clause 2.5 of part B of the lease agreement. The terms of reference are contained at page 2.

"TERMS OF REFERNCE

> ***...to verify that the accounts for each financial year are consistent with the service charges applied for the period….***
>
> ***To verify if there were unreasonable charges and if those charges could have altered substantially the service charges paid by the apartment owners...***
>
> ***..determination of the service charge applicable for the accounting period if necessary...."***

Learned Counsel also referred to Exhibit No. 2 which is a letter by the chairman of the institute of surveyors Kenya in accordance with clause 2.5 of part B of the Lease agreement appointing **Paul Wambua** as an expert to audit and inspect the service charge account of Woburn Management Limited.

On the binding effect of the Report in question, Learned Counsel for the defendants asserted that on the 5th day of September, 2005 the plaintiff entered into a lease agreement with an intention of binding the parties herein into strict application and compliance of the instrument. Further that according to Clause 2.5 of part B of the lease agreement, the intention of the parties herein was to have any report prepared by an expert duly appointed by the chairman of the institute of surveyors of Kenya as Final And Binding on the parties. In counsel's view, no amount of arguments can change this position.

Counsel for the defendants' also referred to Civil Appeal No. 20 of 2018 at page 21 paragraph 21 were the Court held that parties are bound by the terms of their respective leases to have the dispute resolved through the mechanism set out thereunder. To buttress the same position, he relied on the case of the **Bank of Uganda v Banco Arable Espanol (2002) 2 EA 333**, where it was held that a party cannot deny the authenticity of a condition precedent where it had agreed to be bound by it.

On the question as to whether or not service charge ought to be based on the **Wambua** report, Counsel for the defence is unbending that the report by **Paul Wambua** is final and binding to the parties to the lease agreement parties to the said lease agreement had all the intention to be bound by the terms of the lease agreement parties had all the intention to make any decision by an expert appointed by the chairman of the institute of surveyors of Kenya final and binding on all the parties.

The lease agreement executed herein is binding on the parties thereto. Counsel further contended that there is only one report so far which

has addressed the issue of service charge and which report was done in accordance with the lease agreement.

It also Learned Counsel's view that **Mrs. Bashforth** in cross examination confirmed the following:

a) A letter was written to the chairman of the institute of surveyors of Kenya.

b) The chairman of the institute of surveyors of Kenya appointed Paul Wambua to inspect and audit accounts of Woburn Management Limited.

c) She confirmed that a report was finally done by Paul Wambua.

d) She also confirmed that according to the lease agreement, the decision of Paul Wambua who acted as an expert should be final and binding on the parties.

As regards the **Maina Chege** report, the learned counsel for the defendant argues that both the plaintiff and the defendants are in agreement that Maina chege report did not determine the service charge payable. He further asserts that a keen reading of **Maina Chege** report will reveal the following:

a) Maina chege did not understand or read the lease agreement as he took an assumption that the Sectional Property Act, of 1987 was applicable which is not the case.

b) The report itself is not dated.

c) The report itself did not solve any dispute capable of making it final and binding

d) Lastly, there is no claim in this Court requesting implementation of Maina Chege Report which in any case has got no solution and which cannot be relied upon. What effect does the decision in Court of Appeal Civil Appeal number 20 of 2018 has to this matter?

In response to the plaintiff's contention that **Mr. Paul Wambua** withdrew his report vide a letter dated the 15t day of January, 2014 which she exhibited during the hearing, the Court of Appeal in its Judgment at page 9 paragraph 22 last sentence had this to say.... **As for the effect of the letter dated 15h January, 2014 we believe that Mr. Wambua who acted as an expert within the terms of the dispute resolution mechanism lacked the mandate or power to withdraw his report.....** The plaintiff contents that this was just a belief as opposed to a directive. The next sentence states as follows....***Consequently, the learned judge erred in relying on the allegation of withdrawal of the report as the basis of dismissing the preliminary objection....***

The Learned Counsel for the defendants therefore hold the view that any allegation that **Mr. Wambua** withdrew his report is wrong and against the findings of the Court of Appeal and the end result being that the Wambua report remains to be the only expert report determining service charge payable by the plaintiff.

On the question of jurisdiction of this Court, Counsel relied on the the case of **Filipo Fedrini Vs. Ibrahim Mohamed Omar (2018) eKLR** where the court held that parties to a contract are free to determine terms that govern their relationship and the Court's role is limited to enforcement of those terms. Counsel the contended that in this case parties had agreed that any dispute centred around service charge should be solved in accordance to clause 2.5 of part B of the lease agreement and that parties had also agreed and bound themselves that the decision by an expert appointed in accordance to clause 2.5 of part B of the lease agreement should be final and binding on the parties. He therefore argues that the powers of the court are limited to enforcing the **Wambua** report and the Court cannot change the terms of the contract or rewrite the same for the parties.

Counsel placed further reliance in the case of the **National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Limited & another (2001) eKLR** in which the Court held that a Court of law cannot re-write a contract between parties and that he parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. He also cited **Tom Otieno Odongo vs. Cabinet Secretary Ministry of Labour Social Security Services & Another (2013) eKLR** wherethe court made a reference to an English case **Fender V St. John-Mildmay** where the House of Lords and the judicial committee of his Majesty's privy Council held that it is the sacred duty of Courts to uphold contracts. Counsel therefore argue that Contracts are exhibit the intention of the parties and the court is bound to uphold those intentions when disputes arise.

The Learned Counsels for the plaintiff, **Gicharu Kimani & Associates**, filed submission dated 29th July 2020 in support of their claim. On whether or not the **Maina Chege** report is final and binding to the parties herein, the learned counsel for the plaintiff asserted that the **Maina Chege** report was done having exhausted all reasonable attempts to resolve the service dispute amicably between the parties the Plaintiff was left with no option but to invoke the dispute resolution mechanism clause 25 and request the Chairman of the **Institute of Surveyors Kenya** to appoint an Expert to determine the dispute. On the issue as to who is mandated to refer a dispute to the Chairman of the Institute of Surveyors of Kenya, under clause 2.5 FOURTH SCHEDULE Part 8 of the lease agreement. Counsel holds the view that from the onset the Lessor, the defendants are duty bound to present the accounts to the Owners, Lessees, for their review and objection and in the event of any objection, only owner being the lessee, has the right to invoke Clause 2.5 and that there is no provision whatsoever for the lessor, the Defendants to invoke said Clause 2.5.

Counsel further argues that the Lessors cannot be the Judges in their own cause where they are expected to prepare the Accounts for and on behalf of the Owners and thereafter be expected to object to the same and this will go against the tenets and principles of natural justice. Counsel contends that the resolution mechanism envisaged at Clause 2.5 is triggered by a dissatisfied Owner or Lessee only. It is therefore

argued that in this case the plaintiff, in her capacity as an owner, exercised her right to invoke Clause 2.5 and correctly referred the dispute to the Chairman of Institute of Surveyors of Kenya

On whether the procedure under Clause 2.5 was followed properly, the Counsel for the plaintiff averred that on 7th November 2010, in accordance with Clause 2.5 the plaintiff referred the dispute to the Chairman of the Institute of Surveyors of Kenya who in turn sent her a letter dated 23d November 2010 confirming the appointment of **Maina Chege** and inviting her to get in touch with same to arrange the way forward. According to counsel, the same is confirmed through plaintiff Exhibit 1 to 3 in the further list of documents dated 7th July 2020 and the plaintiff then met with **Maina Chege** and outlined her objections. Subsequent to this initial meeting, a further meeting took place at **Woburn Residence Club** when **Maina Chege** had an opportunity to meet with other apartment owners and to have a look around the compound Maina Chege then wrote to the 2nd defendant via e-mail on 1st March 2011 confirming his appointment and requesting a meeting with a representative of **Woburn Management Ltd.** This is confirmed through plaintiff Exhibit 3 in our list of documents dated 7th July 2020After meeting with both sides in the dispute **Maina Chege** issued his report on 14th April 2011 as evidenced by plaintiff Exhibit 4 in our list of documents dated 7 July 2020

It is averred that, the **Maina Chege** report concluded that all the plaintiff's objections were justified and gave recommendations as to the way forward and he was not able to determine what the true service charges should have been because he couldn't. Further that during the course of his investigations, a review of accounting materials and the analysis of his findings, he uncovered anomalies touching on the validity of some of the expenses included in the service charges and on the actual methodology used for calculating said service charges that needed to be addressed before the true service charge could be determined and therefore he could only give recommendations as to what needed to be done in order to pave the way forward for determining the true service charge. Counsel therefore argued that Clause 2.5 does not in any way state that the Expert's report must categorically determine the true service charge.

On the binding effect of the report, Counsel shaded light that Clause 2.5 states in part the matter in dispute shall be determined by a person to be appointed by the Chairman for the time being of the Institute of Surveyors of Kenya (or such institution's successor or assign) who shall in making his determination act as an expert and not as an arbitrator and whose decision shall be final and binding on the parties. It is contended that to this very day, the Defendants herein have declined to comply with the **Maina Chege** report in direct contravention of Clause 2.5 even though through an e-mail sent by them on 6 April 2012 to another owner, they state that their advocate had confirmed that the Expert Report was legitimate under the lease agreement as is evidenced by plaintiff Exhibit number 9 in our list of documents dated 7 July 2020. Furthermore, counsel pointed out that it was noted in **Lady Justice Meoli's** judgement in **HCCC 46 of 2011**, delivered on 16 April 2013 that the Maina Chege report was unchallenged, as evidenced by Defendant exhibit number 6.

Counsel also pointed out that given that Clause 2.5 of the lease agreement states very clearly that the decision of the Expert appointed by the Chairman of the Institute of Surveyors of Kenya is final and binding upon the parties it is incumbent on the parties to automatically abide by the terms of said clause.

On the question of whether or not service charge ought to have be based on the **Maina Chege** Report to provide a proper foundation for the calculation of future service charges, the Learned Counsel for the plaintiff pointed out that, the **Maina Chege** report is final and binding on both parties and cannot simply be ignored by one party or indeed superseded by any subsequent report, as to allow this to happen would render Clause 2.5 of the lease agreement redundant and give lessees no means of recourse to dispute any part of service charges levied upon them or when insurance cover is deemed to be insufficient. Further that, had the **Maina Chege** report been complied with by the defendants at the time of issue, by implementing his recommendations, the true service charge based on the 2009 accounts would have been determined, and a solid foundation would have been established for the ongoing calculation of service charges in which apartment owners could have confidence, however, the reluctance on the part of the defendants to be compliant with Clause 2.5 has done nothing other than to create an environment that completely lacks transparency and openness and which breeds mistrust.

On the **Paul Wambua** report, the Learned Counsel for the plaintiff contended that the same have no legal standing for the following reasons:

> ***a) The Defendants herein have no rights conferred upon them to invoke Clause 2.5 of the lease agreement. There is only provision for the owner/lessee to invoke said clause with the purpose being to allow owners/lessees to object to any part of the charges levied by the Defendants or insufficient insurance cover.***
>
> ***b) The approach to the Chairman of the Institute of Surveyors of Kenya made on 11th September 2013 was made by the 2nd Defendant that is neither and owner/lessee or the lessor.***
>
> ***c) The Paul Wambua report was procured on a unilateral basis as there was no input on the part of private owners, only the Defendants herein.***
>
> ***d) The service charges arrived at by Paul Wambua are at best speculative given that the accounting and service charge calculation anomalies identified in the Maina Chege report had not been dealt with prior to Paul Wambua arriving at his figures.***
>
> ***e) The Maina Chege report cannot simply be swept under the carpet and superseded by the Paul Wambua report as this amounts to re-writing the contract between the parties.***
>
> ***f) Paul Wambua formally withdrew his report on 15 January 2014 as shown by Plaintiff Exhibit 7 and has not reinstated it in whole or in part since that date.***

The Learned Counsel for the plaintiff also submitted on the effect of the decision in the Court of Appeal Civil Appeal number 20 of 2018 on this matter. He points out that the thrust of the defendant's claim herein is solely based on the Judgment of the **Court of Appeal at Mombasa in Civil Appeal Number 20 of 2018** presented as defendant Exhibit Number 7 and it is worth noting that the plaintiff is neither a party in the said appellate case and its Judgment nor is she a party in the primary suit being **MALINDI ELC NO. 51 OF 2014.** A reading of the said judgement reveals that it revolves was about the dismissal of a Preliminary Objection by the defendants herein as relates to the jurisdiction

Environment and Land Court and nothing more. Therefore, Counsel argued that the purported endorsement and/or enforcement of the **Wambua** report was not part of the original prayers by either party to the Appeal. It is humbly submitted that the Court of Appeal did not in any way order for the recognition, endorsement and/or enforcement of the impugned **Paul Wambua** Report and what was pronounced in its Judgment is purely obiter dicta.

Counsel resorted to the **Black Law Dictionary Ninth Edition** which defines Obiter dictum as

> ***"A Judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."***

Counsel also relied on **Justice John M. Mativo's** decision in **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** stated as follows with regard to the Doctrine of Precedent at Paragraphs 40 to 43:

> ***"It is important to address the question whether or not the observations by the Supreme Court were obita dictum or ratio decidendi. The said observations and the clear provisions of Article 163 (7) brings to the fore the important doctrine of precedent, a core component of the rule of law, without which deciding legal issues would be directionless and hazardous. Deviation from it is to invite legal chaos. The doctrine is a means to an end.***
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> ***The doctrine of precedent is widely recognized in developed legal systems. It has been described as a manifestation of the general human tendency to have respect for experience. Its importance is captured in the following passage:***
>
> ***"In the legal system the calls of justice are paramount. The maintenance of certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rules in previous judicial decisions. The individuallitigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.***
>
> ***It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with allke.... Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.***

I can also borrow from the eloquence of **Cameron JA:-**

> ***"The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions."***
>
> ***The doctrine of precedent decrees that only the ratio decidendi of a judgment, and not obiter dicta, have binding effect. The fact that obiter dicta are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as obiter what is otherwise binding precedent. Only that which is truly obiter may not be followed. But, depending on the source, even obiter dicta may be of potent persuasive force and only departed from after due and careful consideration.***

Learned Counsel for the plaintiff therefore humbly state that the defendants are merely trying to sneak in the **Paul Wambua** report to be deemed to be proper under Clause 2.5 which effort has miserably failed both factually and legally. Further that in upholding the appeal and hence the Preliminary Objection, the court has stated that it has no jurisdiction to hear matters relating to service charge disputes and that view is shored up by that fact that it has pointed out that a prescribed resolution mechanism exists for such matters and should be followed.

It is Counsel's humble submission that it would be misleading and very wrong of a Party to juxtapose the Obiter dicta in this case to be deemed as enforcement of the Paul Wambua Report

We humbly submit that it would be misleading and very wrong of a Party to juxtapose the Obiter dicta in this case to be deemed as enforcement of the **Paul Wambua** report. Further that, by the Honourable Judges of the Court of Appeal merely stating that they believe that **Wambua** has neither the authority or mandate to withdraw his report does not in any way legitimize the Report or sanitise it as being deemed to be a proper report for intents and purposes of Clause 2.5 and certainly it does not preclude **Mr. Wambua** from withdrawing it.

Analysis and Determination

The central issue of contestation herein is whether or not the **Wambua** report is final and binding to the parties. The Counsel for the defendants argued that the **Wambua** report should see the light of the day for the reasons that it was done to comply with the Judgment delivered by **Justice Meoli** in **Malindi HCC No. 46 of 2011** which directed that the service charge be professionally determined. Secondly, to ascertain the exact and correct service charge that ought to be paid by each apartment owner after they had protested the increment of the same.

Thirdly, the defendant raised the point as to whom Clause 2.5 Part B of the lease agreement confer the mandate to refer a dispute and its terms to the chairman of the Institution of Surveyors of Kenya (ISK). In the defendant's understanding, such matters can only be referred to the Chairman of ISK who is authorized to appoint an Expert only when there is an objection. Further that it is therefore the affected party who initiates the process and that includes the apartment owners. Fourthly, the defendant is adamant that procedure which led to the preparation of the report in question was properly followed hence it must be considered to be binding on the parties.

On the other hand, the plaintiff is adamant that the **Paul Wambua** report conveys no legal standing. The plaintiff contended the defendants have no rights conferred upon them to invoke Clause 2.5 of the lease agreement. In the plaintiff's view, the said provision can only be triggered by the owner/lessee and the purpose being to allow owners/lessees to object to any part of the charges levied by the defendants or insufficient insurance cover. The plaintiff questioned the approach to the Chairman of the Institute of Surveyors of Kenya on the 11th September 2013 by the 2nd defendant when he is neither and owner/lessee or the lessor.

The plaintiff also contended that the **Paul Wambua** report was procured on a unilateral basis as there was no input on the part of private owners but only that of the defendants. Further, it is argued that the service charges arrived at in the **Paul Wambua** report are speculative given that the accounting and service charge calculation anomalies identified in the **Maina Chege** report had not been dealt with prior to **Paul Wambua** arriving at his figures.

The plaintiff also reiterated that the **Maina Chege** report had cannot be simply swept under the carpet and superseded by the **Paul Wambua** report as this amounts to re-writing the contract between the parties and that **Paul Wambua** formally withdrew his report on the 15th January 2014 as shown plaintiff Exhibit 7 and has not reinstated it in whole or in part since the said date. In short, the plaintiff wants the **Maina Chege** report to see the light of the day.

I have considered all the viewpoints as presented by the respective parties. One of the issues that stood out is the question of process under which the **Wambua** report was obtained. That is, whether such a process can best be described as one that fits within the bounce of fair hearing and procedural justice. I am alive to the general rule of the law of contract that the court has no business in rewriting a contract for the parties unless the terms and provisions of that contract is manifestly unconscionable. In **Margaret Njeri Muiruri -V- Bank of Baroda (Kenya) Limited (2014) eKLR** it was stated: -

> ***"It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."***

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, ***commercially unreasonable, and grossly unfair given the existing circumstances of the case."***

The Clause that gave rise to the preparation of the **Wambua** report reads as follows:

> ***"if the owner shall at any time during the term objects to any item of the charges as being unreasonable or the insurances mentioned in section 5 as being insufficient then the matter in dispute shall be determined by a person to be appointed by the chairman for the time being of the institute of surveyors of Kenya (or such institution's successor or assign) who shall in making his determination act as an expert and not as an arbitrator and whose decision shall be final and binding on the parties…."***

There is no dispute that the parties herein entered into a lease agreement contract on the 5th day of September, 2005 which encapsulates the above-cited Clause 2.5 Part B with an intention to be bound by it. On that note the Learned Counsel for the defendant has argued that this Court lacks jurisdiction to hear and determine a dispute emanating from the said contract and that it can only go to the extent of enforcing the report in question without interfering with it. I have carefully perused the **Wambua report** and the clause in question and one of the issues that have stood out as raised by the plaintiff is the question of process under which the **Wambua Report** was obtained. That is, whether such a process can best be described as one that fits within the bounce of fair hearing and procedural justice. The outcomes of the report have serious financial implications on the plaintiff and therefore it would not just to impose a financial burden on her without having given a chance to factor in her input.

The aforesaid clause seems to suggest that a unilateral decision can be made by any of the owners of the apartments to initiate the process whenever they are aggrieved by any charges as being untenable even without having given other owners or parties a chance to participate in the process. To make matters worse, the decision so obtained is said to be final and binding on the all parties. The procedural due process requires that parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.

This raises the question of procedural justice which requires that parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. In general, legal parlance, procedural justice refers to the fairness of a process by which a decision is reached. It promotes legitimacy by giving individuals a neutral and trustworthy decision maker, allowing parties to have a voice, and treating them with courtesy and respect. Needless to say, the Kenyan Legal System is adversarial and it relies on the parties to present their own evidence, which allows parties to have a voice and an opportunity to be heard. That is a cardinal principle of the rule of Law.

The plaintiff herein decried that report in question was procured on unilateral basis as there was no input on the part of private owners but only that of the defendants. In terms of article 50 of the Constitution of Kenya 2010, it underscores the nature of the right to a fair hearing to

the extent that; every person is afforded the opportunity to have any dispute resolved by application of law decided in a fair and public hearing before a court or independent and impartial tribunal or body. Fair Hearing is one of the cornerstones of a just society which applies in any dispute that can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another **independent and impartial tribunal or body**. It is a right that cannot be limited by law or otherwise as under Article 25(c) of the Constitution. The selection of an expert due to its binding nature is perhaps the most critical aspect of this arbitration agreement choosing the right expert to 'arbitrate' the dispute on service charge in this regard was left to the sole discretion of ISK Chairman.

It therefore the view of the Court that the above cited clause does not afford parties whose rights are to be affected by the process, such as the plaintiff in this matter, access to justice or an opportunity to be heard. Such a process cannot be said to be fair one in a just society. Alternative Dispute Resolution mechanisms are bound to respect individual rights; treating parties with courtesy and respect. Needless to say, that if his right to be heard is violated, the plaintiff's dignity and the integrity and that of the process is ruined. The foundation of the right to be heard is not only constitutional; it is also anchored, in the common law principle of audi alteram partem that recognizes as part of the rules of natural justice the right of every person to be consulted or heard before a decision or step is taken that affects or may affect such person.

As a consequence, **Paul Wambua** emerged to be the one nominated by the institute to reconcile the divergent views between the plaintiffs and the defendant. Thereafter, circumstances indicate a process which gave rise to the referred **'Wambua report'**. A clearly controversial dispute arose directly to the selection of the expert and the stipulations in the report.

This is a dilemma which emerged and with no easy solution and has kept the parties in the corridors of justice litigating on that one issue. On one hand the plaintiff is challenging the enforceability of the report and the defendant focuses on the need to place reliance on the contents of the report for the reliefs sought in the counter-claim. What is puzzling is the character, structure and procedural process of the chosen expert and the forum in which an aggrieved party can have his or her grievances addressed. The long outstanding dispute is fundamentally about the adjudication of the expert report which is meant to bind the parties.

Also problematic to the legitimate complaints about the 'binding report' is the apparent inequality of bargaining power that is demonstrated between these contracting parties to the arbitration agreement. For example, the essentiality in support of the clause that the expert report shall be final and binding to the parties.

More to the points perhaps is what **Professor McInnes 'The Canadian Law of Unjust Enrichment and Restitution , Markham Ont: LexisNexis 2014** where he describes the diversity of possible disadvantage as follows:

> ***"Equity is prepared to act on a wide variety of transactional weaknesses. Those weaknesses may be personal (i.e., characteristics of the claimant generally) or circumstantial (i.e., vulnerabilities peculiar to certain situations). The relevant disability may stem from the claimant's "purely cognitive, deliberative or informational capabilities and opportunities," so as to preclude "a worthwhile Judgment as to what is in his best interest." Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was "a seriously volitionally impaired or desperately needy person," and therefore was specially disadvantaged because of "the contingencies of the moment." [Emphasis in original; footnotes omitted; p. 525]*** **(See also Chen – Wishart {2018}, at p. 363)**

There was no mutuality and equal participation in the said process. I therefore, hold the view that the failure by the defendants to give the plaintiff a chance to participate in the process of obtaining the report in question is not in tandem with the right to a fair hearing (a non-derogable right) hence an outcome thereof is questionable. It is also my view that parties herein cannot be bound by a clause that is manifestly unconscionable as it does not provide for procedural justice. In the case of **Baron v Suderland Corporation {1966} 1 ALL ER 555**:

> ***"Here the Court held that mutuality was necessary for a valid arbitration agreement and defined it to mean that all parties to an agreement should have access to equal procedural rights."***

In **Bookmakers v Development & Property Holding {1985} 2 WLR 603** the Court held that:

> ***"the clause gave parties unequal procedural rights and was therefore void."***

I observe inevitably that the claim before me is not for the setting aside of the Wambua report but to take its essence and content to make a determination of the counter-claim. The plaintiff's reasons for not complying with the report have been fully set out in her oral and witness statement during the trial. This concern should be considered in the light of the test outlined in **Gathigia v University Nairobi HCMA No. 1029 of 2007 {2008} KLR 587** the Court held:

> ***"I would at this stage adopt the observations made in the Hypolito Cassiani De Souza v Chairman Members of Tanga Town Council 1961 EA 77 where the Court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the Court said; "1. If a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3. In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best….; 4. The person accused must know the nature of the accusation made; 5. A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6. The tribunal should see to it that matter which has come into existence for the purpose of the quasi-lis is made available to both sides and once the quasi-lis has started, if the tribunal receives a communication from one party or from a third***

party, it should give the other party an opportunity of commenting on it."*(Emphasis added)*

Based on the principles of the above Law, and the chronology of events in this litigation, the decision of the expert ought to flow in the philosophy behind contract formation that parties to the arbitration agreement are based placed to judge and protect their interest in the bargaining process. The quasi-judicial power that is reduced in the personification of the expert to be appointed by ISK is to be guided by achieving dispute resolution on service charge. The formulation in **Gathigia case (supra)** applies **Mutatis Mutandis** to the instant claim.

In the same vein, the plaintiff has also raised an issue concerning the manner in which the accounts for the estate were handled. It seems that the defendants have not been very transparent and accountable with this aspect despite numerous efforts made by the plaintiff to that effect. It is also as per the unchallenged evidence of the plaintiff that the defendants even proceeded to obtain the **Wambua report** without having supplied the owners of the apartments with the accounts pertaining to the service charge. It is therefore my view that there is need for a fresh process which respects procedural justice, a process that is inclusive and allows all parties who maybe foreseeably be affected by the report to participate in the process and eventual outcome.

On the issue at hand and the facts of this case, it does appear to me that it would be necessary for the Court to invoke inherent powers pursuant to Section 3(A) of the Civil Procedure Act essentially to permit the parties re-open the clause by triggering an application to ISK chairman for an appointment of an expert to ultimately determine and carry out the review process on service charge under consultative framework. In **Connelly v DPP {1964} 1254 Lord Morris of Borth-y-Gest stated at page 130:**

> ***"There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."***

This is significant to have this controversy arising out of or broadly in connection with service charge between the parties be settled in relation to the arbitration agreement. This would primarily address the procedural concerns raised by the aggrieved party.

For all these reasons, I find no anchor to grant the counter-claim in respect of the service charges between the defendant and the plaintiff. I make no orders for costs in the suit as well. Leave to appeal granted.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27th DAY OF OCTOBER, 2020

……

R. NYAKUNDI

JUDGE

In the presence of:

1. Gicharu Kimani advocate for the plaintiff
2. Richard Otara advocate for the defendant
3. Margaret Bashforth - The plaintiff