



REPUBLIC OF KENYA



Nextgen Mall Management Company Limited & another v Kimani & 14 others (Environment & Land Case E002 of 2023) [2023] KEELC 21778 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21778 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E002 OF 2023
LN MBUGUA, J
NOVEMBER 21, 2023**

BETWEEN

NEXTGEN MALL MANAGEMENT COMPANY LIMITED 1ST PLAINTIFF

NEXTGEN OFFICE SUITES LIMITED 2ND PLAINTIFF

AND

STANLEY KIMANI 1ST DEFENDANT

ALEX MUEMA 2ND DEFENDANT

ABDUL SALAD 3RD DEFENDANT

LILIAN MACHARIA 4TH DEFENDANT

GEORGE KANYI 5TH DEFENDANT

RINKESH PATEL 6TH DEFENDANT

DICK NDIEWO 7TH DEFENDANT

HUSSEIN ALI 8TH DEFENDANT

GAD AWUONDA 9TH DEFENDANT

ASHA 10TH DEFENDANT

SANJAY BUDHIA 11TH DEFENDANT

SOFIA ABDI 12TH DEFENDANT

DAMARIS ONDUSO 13TH DEFENDANT

IDEL IBRAHIM 14TH DEFENDANT

MOSES GITHAIGA 15TH DEFENDANT



RULING

1. There are 2 pending applications and a preliminary objection for determination in this matter.

Application dated 2.7.2023

2. The above application was brought forth by the plaintiffs seeking interim orders barring the Respondents by themselves/agents from demanding or collecting service charge from any of the tenants and unit owners of Nextgen Commercial center erected on Land Reference Number 209/18648 using the account details; Bank Name: KCB, Branch: Capitol Hill, Account name: Keaton & Keaton Advocates-client, Account Number 1316209075 pending determination of the suit.
3. They further seek a temporary injunction restraining the Defendants from harassing the tenants occupying the parking slots at Nextgen Commercial Center, or interfering in any way with their quiet use of the suit premises.
4. They also seek interim orders restraining the Defendants from interfering with their management duties contrary to underlying sale agreements and subleases pending hearing and determination of the suit as well as a temporary injunction restraining the Defendants from interfering with assets constituting capital assets within Nextgen Commercial Center.
5. The application is premised on grounds on its face and on the affidavit of Rameshkumar Amlani, a director of the 1st Plaintiff. He avers that the 1st Plaintiff is the management company as envisaged under Section 20 of the *Sectional Properties Act* with respect to the suit property; Nextgen Mall, while the 2nd Plaintiff is the developer and lessor of the suit premises comprised of a total of 475 commercial units and over 500 parking slots or thereabouts to which 297 commercial units and 57 parking slots or thereabout have been sold to various unit owners, while the rest of unsold units belong to the 2nd Plaintiff.
6. That in violation of the 1st Plaintiff's management duties and responsibilities as envisaged under Section 20 of the *Sectional Properties Act*, the Defendants jointly as 'The Nextgen Mall Unit Owners Association' have previously unilaterally changed the bank account details for collection of service charge without the consent and or knowledge of the Plaintiffs.
7. To this end, the Defendants have opened another Bank Account Name; KCB Branch: Capital Hill, Account name: Keaton & Keaton Advocates-client, Account Number 1316209075 purportedly for collection of service charge and neither him nor the directors of the 1st Plaintiff have either consented to the said change of the account details nor are they signatories to the said bank account as per the terms of the underlying sale agreements and sub-leases with unit owners.
8. He adds that the Respondents have proceeded to enforce the account by circulating a notice to all unit owners directing them to pay service charge to the said new account.
9. He avers that he is aware that the arrangement and allocation of units to include parking spaces and other operations touching on the elevators within the suit premises amount to capital assets solely vested with the 2nd Plaintiff developer as per the underlying sale agreements and sub-leases with the individual owners but in violation, the Defendants have purported to re-assign part of units within the suit premises by issuing notices to some of the unit purchasers within the parking slots constituting units within the suit premises in a manner threatening their quiet use and possession.



10. That in further violation, the Defendants have jointly advertised in the local dailies and entered into negotiations with contractors purporting to replace and service the lifts within the premises without the knowledge or consent of the Plaintiffs.
11. He avers that if the orders sought are not granted, the tenants within the suit premises will proceed to deposit their respective service charge to the said account as notified by the Defendants and that the Defendants will proceed with their intended re-allocation of parking slots within the suit premises.

Preliminary Objection dated 29.9.2023

12. In response to the application dated 2.7.2023, the Defendants filed a Preliminary Objection dated 29.9.2023 objecting to hearing of the Plaintiffs' application and the suit on grounds that the issues raised in the plaint offend the doctrine of sub-judice as the issues herein are being canvassed in Misc Application No. E1734 of 2022, Civil Suit No. MCCC/E690/2023, ELC 63 of 2023 while another suit ELC 072 of 2023 was withdrawn by the Plaintiffs.
13. The Defendants also filed a replying affidavit sworn by the 1st Defendant on 29.9.2023. He avers that the 1st Plaintiff is not a management corporation as envisaged under Section 20 of the Sectional Properties Act, 2020 but a management company under the old sub-lease regime. That if 297 commercial units have been sold to owners, then a similar amount of parking slots ought to have been allocated to such owners as they form part of the purchase.
14. He avers that opening of new accounts was necessitated by the fact that the management accounts which the Plaintiffs' directors were signatories to were frozen and garnished in the case CMCCC No. 4803 of 2018. Consequently, the unit owners opened an association account to collect service charge but it was also garnished vide Misc. Application No. E1734 of 2022 which is still pending in the High Court.
15. That the unit owners having no account to collect the service charge decided to open a client account with Keaton and Keaton Advocates to help run operations of the mall, thus closing it will automatically collapse the mall. He adds that the Plaintiffs have never provided the unit owners with an alternative account after the 1st and 2nd accounts were garnished.
16. The 1st Defendant also avers that the Plaintiff's directors specifically Mr. Rameshkumar Kantilal is aware of all negotiations pertaining to the replacement of lifts.

The Application dated 29.9.2023

17. The 2nd application is filed by Representative of owners of Nextgen Mall Unit owners (The Commite) seeking to be enjoined as Interested Parties in these proceedings. The application is based on grounds on its face and on the 1st Defendant's supporting affidavit sworn on 29.9.2023.
18. He avers that the Applicant is a decision making committee mandated by all unit owners of Nextgen mall to represent them and is duly recognized by the 1st Plaintiff through an agreement dated 15.2.2018.
19. He avers that the alleged decisions for which the Defendants are being sued were not made by themselves in their individual capacity but rather collectively by the Applicant (committee) and that they have an identifiable stake in the matter as they will be directly affected by any decision issued herein.
20. The Plaintiffs did not file any documents in opposition to the application for joinder.
21. The matter was heard orally. On the application dated 1.7.2023, the Plaintiffs submitted that the 1st plaintiff was to undertake management duties of the mall, of which individual purchasers were to be



- allocated shares in the management after sale of last unit, so unit owners are yet to have shareholding in the management company.
22. It was further submitted that the 1st Plaintiff has donated its management powers to the Defendants vide the agreement dated 15.2.2018. Therein, clause 11 provides that the Respondents shall not hold themselves as agents of the 1st Plaintiff. Clause 2 provides how service charge shall be collected from unit owners and that Parties agreed that the 1st Plaintiff's directors must be signatories to the account for collection of service charge.
 23. It is also submitted that there is interference of capital assets by the Defendants who purport to allocate parking slots yet they are not unit owners.
 24. In response to the Preliminary Objection filed by the 1st Defendant, counsel for the Plaintiffs submitted that ELC No. 072 of 2023 was withdrawn. That in ELC 063 of 2022, the issues are totally different since the suit relates to conversion of the suit property under *Sectional Properties Act* while the suit E1734 of 2022 relates to garnishee Proceedings.
 25. On their part the Defendants submitted that since the Plaintiffs have admitted into entering into an agreement with the Intended Interested Party who are representatives of all the unit owners, they will be affected by any orders of the court thus their application for joinder should be allowed.
 26. On the application dated 1.7.2023 counsel for the 1st Defendant reiterated the averments set out in the replying affidavit of the 1st Defendant. He added that the 1st Plaintiff is not the incorporation contemplated under Section 17 and 20 of the *Sectional Properties Act*, rather, the plaintiff is masquerading as an incorporation which prompted the filing of ELC E063 /2022 where on 16.6.2023 a jurisprudential ruling was delivered granting leave for the owners to form a corporation.

Determination

27. Having regard to all the rival arguments, I frame the issues falling for determination as follows;
 - a. Whether the Defendants' Preliminary Objection dated 29.9.2023 is merited.
 - b. Whether the application for joinder by the representative of owners of Nextgen Mall Unit owners (The Commite) is merited.
 - c. Whether the Plaintiff has met the threshold for grant of interlocutory orders sought.
28. On the 1st issue, the 1st Defendant filed a preliminary objection contending that this suit offends the doctrine of sub-judice as the issues herein are being canvassed in Misc Application No. E1734 of 2022, Civil Suit No. MCCC/E690/2023 and in ELCE O63 of 2023.
29. In Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR it was stated that;

“.... A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
30. Pleadings annexed to the 1st Defendants replying affidavit indicate that Misc Application No. E1734 of 2022 relates garnishee proceedings.



31. Pleadings relating to ELC E063 of 2022 were not annexed, but the court was able to peruse the said file, where the current defendants had sued Nextgen Office Suites LTD, the developer (current 2nd plaintiff) with others and they also filed an application seeking orders inter alia, to be allowed to incorporate a management company of owners and purchasers, and to be allowed to manage the common areas. In a ruling delivered on 16.3.2023, the application was allowed.
32. For the case MCCC/E690/2023 the same is between Nextgen Mall unit owners Association v Nextgen Office Suites Limited & Nextgen Mall Company Limited. In the said matter, there is an order issued also on 16.3.2023 restraining the Defendants therein who are the Plaintiffs herein from interfering with the affairs & operations of the Plaintiff/its management committee representing the unit owners of Nextgen mall inter alia collection of service charges from unit owners, procuring and payment of service providers, contracting independent property management companies, employing executive property manager or executing any of its functions and mandate spelt out in the agreement dated 15.2.2018 and 2.1.2020 and its registered Constitution.
33. In this matter, the Plaintiffs' main complaint is that the Defendants are demanding and collecting service charge from tenants and unit owners of Nextgen mall. In both ELC E063 of 2022 and MCCC/E690/2023, the Plaintiffs herein have already been restrained from interfering with the Defendants' operations concerning the suit premises.
34. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the court held thus;

“The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings”.
35. The court went on to state that;

“It is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other”.
36. If the plaintiffs herein have already been enjoined from managing the affairs of the suit premises in other suits, how can they turn round to seek similar orders but in their favour before this court. Such conduct can only be termed as an abuse of the court's processes. It is not lost to this court that in the verifying affidavit to the current plaint, the plaintiffs gave a false averment that there are no other pending suits.
37. In the end, I find that the preliminary objection is merited. Thus this suit is found to be subjudice to the suits ELC E063 OF 2022 and MCCC/E690/2023. The net effect is that this suit as well as the application dated 2.7.2023 are hereby struck out with costs to the defendants. The application for joinder is subsequently marked as SPENT with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA



JUDGE

In the presence of:-

Moriasi for Plaintiff / Applicant

F. Keaton for Defendants / Respondents and for the Interested Parties

