



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 191 OF 2015

VINCENT A. CHOKAA.....1ST PLAINTIFF

BROAD GAS PETROLEUM LIMITED.....2ND PLAINTIFF

-VERSUS -

CHENGDU GUANGLING KENYA COMPANY LIMITED1ST DEFENDANT

JAMES GICHUKI, WYCLIFFE OLUOCH AND REBECCA JUMA (Sued as Chairman, Secretary and Treasurer of SUNNING HILLS APARTMENTS WELFARE ASSOCIATION.....2ND DEFENDANT

HERITAGE PROPERTY CONSULTANTS LIMITED..... 3RD DEFENDANT

ODHIAMBO (Sued for and on behalf of ODHIAMBO & OTHERS4TH DEFENDANT

JUDGMENT

1. Through a plaint dated 5/3/2015, the two plaintiffs sought the following reliefs against the defendants, jointly and severally:

a. An order of injunction restraining the 2nd, 3rd and 4th defendants, their servants and agents from interfering with the plaintiffs' use and occupation of Flat Nos M21 and M24 and parking bays near the plaintiffs' flats and now purportedly marked M7 and M8 on LR No 330/432, Lavington, Nairobi, and their access, ingress and egress thereto.

b. An order directing the 3rd and 4th defendants to publish and furnish audited accounts relating to their collections and management of service charge moneys for the years 2010 to 2014 including moneys collected from Safaricom Ltd for the aerial mast installed by Safaricom Ltd on the premises.

c. An order directing that the first defendant do incorporate a company called Sunning Hills Apartments Management Company Limited and do transfer the reversionary interest in Land Reference Number 330/432 to the said company.

d. Costs of this suit.

2. The suit was heard before me at Milimani Environment and Land Court and now falls for determination. The case of the plaintiffs was contained in the plaint dated 5/3/2015, the testimony of the 1st Plaintiff tendered on 22/6/2021; and the written submissions dated 27/7/2021. In summary, their case was that in 2010 and 2013, they purchased Apartment Numbers M24 and M21 respectively, located within an estate developed on Land Reference No. 330/432, situated in Lavington, Nairobi. It was a term of the respective purchase contracts and leases that the developer of the estate would incorporate a management company under the name Sunning Hills Apartments Management Company Limited [the management company] to manage the estate. Each apartment owner was to hold a share in the management company denoting ownership of one apartment. Lastly, the reversionary interest relating to LR No 330/432 was to be transferred to and held by the said management company. However, the developer failed to incorporate the management company, despite the fact that almost all the 168 apartments on the parcel of land and in the estate had been sold.

3. They further contended that it was a term of the respective leases relating to the apartments that each apartment owner would be entitled to the use of the road, pathways and parking areas and other conveniences and common arrears within the estate. Pursuant to the foregoing, the 1st plaintiff was allocated Parking Bay No M7 while the 2nd plaintiff was allocated Parking Bay No M8.

4. They added that during the occupancy of their respective apartments, the 4th defendant started an organization known as Odhiambo and

Others for the purpose of collecting service charge from apartment owners and tenants, which organization mutated into an organization known as **Sunning Hills Apartments Welfare Association**. The Association began to run the affairs of the estate and in turn appointed the 3rd defendant to manage the estate, without the consent of some of the residents. The plaintiffs contended that they were not members of the Association but were being coerced and forced to pay service charge to the Association, with threats of penalties and sanctions. They contended that the money collected was not being paid into the association's bank account but was being paid into an account designated as **Odhiambo and Others**. They added that the organizations known as **Sunning Hills Apartments Association** and **Odhiambo and others** were run in an opaque manner intended to defraud the residents who did not have access to their bank accounts.

5. The plaintiffs further contended that on 31/1/2015, without prior consultation, officials of the 2nd, 3rd and 4th defendants went to the estate and removed their cars from their usual parking bays which were located near their respective apartments and moved them to bays far away. The plaintiffs contended that the 2nd, 3rd and 4th defendants were strangers to them and busy bodies that did not have the mandate to manage the estate and /or interfere with their property rights.

6. At the hearing, the plaintiffs led evidence by the 1st plaintiff [PW1]. He adopted his written witness statement dated 20/3/2018 as part of his sworn evidence in chief. He reiterated their case as summarized above. He produced 9 exhibits. During cross-examination, PW1 stated that after he filed this case, the defendants allowed him to park at the original Parking Bay, No M7. He added that in the past, he had been coerced to pay money to the association. He stated that he did not make a formal demand for audited accounts prior to initiating these proceedings. In re-examination, he stated that he wrote a demand letter through his advocates.

7. In paragraph 1 of the written submissions dated 27/7/2021, counsel for the plaintiffs indicated that the 2nd plaintiff had vacated the estate, hence the said submissions related to the 1st plaintiff alone. Counsel cited **Articles 23(1); 23(3)(b); 36(1); and 36(2)** of the Constitution and argued that every person has the right to freedom of association which includes the right to form, join or participate in activities of an association of any kind. Counsel added that under **Article 36(2)**, no person should be compelled to join an association of any kind. Counsel submitted that where one citizen or a group of citizens give themselves the mandate to interfere in the freedoms of others and collect money from others with a promise that they would provide services to them, they should account for the money. Counsel argued that the 1st plaintiff was entitled to be provided with accounts by the 2nd, 3rd and 4th defendants in relation to moneys collected from the year 2010 to 2014 and a mandatory order of injunction as prayed.

8. Counsel further submitted that since the management company had been incorporated, the plea for an order directing the 1st defendant to incorporate the management company was not necessary. Counsel urged the court to order transfer of the reversionary interest in **Land Reference No 330/432** to the management company. Counsel urged the court to condemn the 1st defendant to pay costs of the suit because it was due to its inaction that these proceedings ensued.

9. The 1st defendant filed a statement of defence dated 23/3/2015 through the firm of **Kwengu & Company Advocates**. It admitted selling **Apartment No M24** to the 1st plaintiff and added that it had already formed the management company at the time of selling the apartment to the 1st plaintiff. It was the case of the 1st defendant that the management company was in existence at the time of filing this suit. It admitted that the plaintiffs were entitled to use common areas within the estate but denied the plaintiffs' contention that it allocated them specific parking bays. It denied marking the parking bays at the time of transferring the apartments to the respective purchasers. It was the case of the 1st defendant that issues relating to parking slots was an internal matter to be handled by the management company and its shareholders. The 1st defendant added that the suit herein was fatally defective, incompetent, misconceived, vexatious and an abuse of the process of the court, contending that it did not disclose any discernible cause of action against the 1st defendant. The 1st defendant further averred that the plea for an order compelling the 1st defendant to incorporate a management company was unnecessary because it duly incorporated the company. The 1st defendant contested the jurisdiction of this court, contending that there was a pending suit, to wit, **Milimani CMCC No 1732 of 2011**, raising the same issues. The 1st defendant urged the court to dismiss the suit. It did not, however, lead evidence during trial. Similarly, it did not file written submissions.

10. The 2nd, 3rd and 4th defendants filed a statement of defence dated 20/3/2018, through the firm of **B. Mosei & Company Advocates**. Their case was that, owing to failure by the 1st defendant to address issues concerning the estate, owners, residents and occupants of the apartments, including the 1st plaintiff, came together to address the general welfare of the estate. It was their case that the 1st plaintiff acted as the legal advisor to the said stakeholders on various issues and he attended meetings and appended his signature on the resolutions which led to the formation of a welfare association to address common issues affecting the estate. They added that the welfare association which was formed was an informal organization which could not open and operate a bank account in its name and this necessitated the stakeholders to come up with a viable alternative in the form of a bank account in the name of **Odhiambo and Others**. It was their case that their actions were lawful and a result of extensive consultations in which the 1st plaintiff was an active participant and advisor.

11. At the hearing, they led evidence by **Wycliff Cleophas Omondi Oluoch [DW1]** who adopted his written statement dated **20/3/2018** and produced seven (7) documents, among them, Audited Financial Statements for **Sunning Hills Apartments** for the **Years 2014 to 2016**. His evidence was that he was a resident of the estate and a past chairman. He served as chairman of the association when this suit was filed. The association was formed after a break-in-incident in which a guard in the estate was shot. The incident prompted the residents to come together to address issues which the 1st defendant had failed to address, among them, incorporation and operationalization of the management company; issuance of shares; and transfer of the reversionary interest. He added that the coming together of the residents was intended to improve the welfare of the estate. It was his evidence that the coming together of the residents had achieved many gains, among them: (i) the engagement of an estate management firm to manage the estate on behalf of the apartment owners; (ii) orderly allocation of parking bays; (iii) regular cleaning of the estate; (iv) lighting of the estate; and (v) fixing of the access road. DW1 added that accounts of the association were regularly audited and were available for inspection by the residents. DW1 added that the 1st plaintiff was one of the residents who came together to form the informal residents association.

12. It was the evidence of DW1 that according to all the leases, the developer (1st defendant) was supposed to incorporate, operationalize and hand over the management company and convey the reversionary interest to the management company. He supported the plaintiffs' plea relating to conveyance of the reversionary interest to the management company.

13. In their written submissions, counsel for the 2nd, 3rd and 4th defendants identified the following as the three key issues falling for

determination in the suit: (i) Whether Sunning Hills Apartments Welfare Association is a valid entity; (ii) Whether the plaintiffs have established a case on a balance of probability; and What is the current status in the matter.

14. On whether the estate welfare association is a valid entity, counsel gave the background to the establishment of the estate welfare association and urged the court to be guided by the decision in **HCCC No 1 of 2014; Benard Nzioka v Francis Kitongu & 3 others** and find that the estate welfare association is a valid entity. On whether the plaintiffs had established their case on a balance of probability, counsel submitted that the 1st plaintiff had failed to demonstrate that the 2nd, 3rd and 4th defendants interfered with the use of his apartment. Counsel added that accounts of the estate welfare association were always available and had been presented to the court. On the current status of the matter, counsel submitted that the process of operationalizing the two management companies incorporated to manage the estates on Land Reference Number 330/432 and Land Reference Number 330/433 was ongoing through efforts of the estate welfare association. Counsel contended that the plaintiffs had failed to prove their case on a balance of probability.

15. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence. Parties did not present a common statement of issues to be determined by the court. Having considered the pleadings, evidence and submissions in this suit, the following are the three key issues that fall for determination: (i) Whether Sunning Hills Apartments Welfare Association is an illegitimate informal association and a busy body; (ii) Whether the plaintiffs' rights as property owners/residents were violated by the defendants; and (iii) Whether the plaintiffs are entitled to the reliefs sought in this suit. I will make brief sequential pronouncements on the three issues in the above order.

16. The first issue is whether Sunning Hills Apartments Welfare Association is an illegitimate informal association and a busy body. From the evidence placed before this court, and from my understanding of the genesis of this dispute as discerned from the pleadings and from the evidence, the author of the circumstances giving rise to the dispute is the developer [1st defendant]. The estate in which the two apartments are located is a gated estate sitting on two abutting parcels of land. Apartment owners share amenities and conveniences. In an arrangement of this nature, upon disposal of a reasonable number of apartments and registration of the relevant leases; and upon obtaining certificates of occupation, the developer is required to: (i) incorporate and operationalize a management company; (ii) issue proportionate shares to the eligible apartment purchasers; and (iii) cause the first annual general meeting of the management company to be held. Among the businesses to be transacted at the first annual general meeting of the management company would be the election of the board of directors of the management company. Once a board of directions is elected, the developer would hand over the management of the estate to the board elected by apartment owners. As soon as that is done, the developer would convey the reversionary interest in the mother title to the management company.

17. What emerges from the lease exhibited by the plaintiff is that as at 29/10/2010, the 1st defendant had incorporated **Sunning Hills Apartments Management Limited**, for the purpose of managing the estate. The 1st defendant did not, however, operationalize the management company. The developer did not properly hand over the affairs of the management company to a duly elected board of the management company. The result was that there was no operationalized management company to run the affairs of the estate.

18. With the above vacuum in place, desperate residents and apartment owners came together and formed a committee to proactively address the common problems confronting them in the estate. In my view, it would be irrational for the court to adjudge the informal adhoc committee [the informal estate welfare association] that was constituted as an illegal busy body. It was a legitimate informal adhoc committee of apartment owners and residents of the estate. Indeed, there is evidence that the 1st plaintiff was an active participant in the activities of the adhoc estate welfare committee. It is also true that without a registration certificate, the property owners and the residents could not open an account in the name of the association under which they had organized themselves. I cannot in the circumstances fault the apartment owners and the residents for taking measures to proactively address common issues affecting them within the estate.

19. In the circumstances, my finding on the first issue is that Sunning Hills Apartments Welfare Association is a legitimate adhoc committee of apartment owners and residents of Sunning Hills Apartments Estate and it is not a busy body. It is expected that the adhoc committee will immediately facilitate the operationalization of the management company and cease to oversee the affairs of the estate as soon as the management company is operationalized.

20. The second issue is whether the plaintiffs' rights as property owners/residents were violated by the defendants. What emerged from the evidence presented to the court is that the plaintiffs were aggrieved by the adhoc committee's decision to relocate them to new parking bays. They objected to that and the decision was subsequently rescinded by the adhoc committee. DW1 testified that the estate was grappling with issues related to parking of motor vehicles in the estate, where often one apartment owner/resident would occupy parking bays beyond his entitlement, causing other apartment owners/residents to miss out on parking bays. I entirely agree with the 2nd, 3rd and 4th defendants that, in those circumstances, it was necessary for the apartment owners/residents, through the adhoc committee, to allocate specific parking slots to specific apartments.

21. Indeed, the 1st defendant stated in its defence that it did not allocate parking bays. It is therefore true that there was a problem which needed to be addressed by the apartment owners/residents collectively. Given the above circumstances, and given the fact that the plaintiffs' concerns about being assigned parking bays that were located far away from their apartments were addressed, I do not think there was breach of their constitutional rights of to warrant the intervention of this court. My finding on the second issue, therefore, is that breach of the plaintiffs' property rights has not been established.

22. The third issue is whether the plaintiffs are entitled to the reliefs sought in this suit. The first prayer in the plaint is a plea for an injunctive order restraining the 2nd, 3rd, and 4th defendants against interfering with the plaintiffs' use and occupation of their flats together with Parking Bay Nos M7 and M8. Counsel for the plaintiffs submitted that the 2nd plaintiff relocated from the estate and was no longer pursuing his the claim. The evidence that was presented by the 1st plaintiff in relation to the above prayer relates to the decision to assign the 1st plaintiff a new parking bay. That decision was rescinded and DW1 confirmed that the 1st plaintiff had been assigned his original parking bay. In the circumstances, there would be no need for a restraining order in terms of prayer (a).

23. Prayer (b) is a plea for an order directing the 3rd and 4th defendants to publish and furnish audited accounts relating to the moneys collected from 2010 to 2014, including moneys collected from Safaricom Ltd in respect of the aerial mast mounted on the land. The

jurisdiction of this court is defined under **Article 162(2)(b)** of the Constitution and **Section 13** of the Environment and Land Court Act. Broadly, this court deals with disputes relating to the environment, the use and occupation of land and title to land. The above plea is purely a civil dispute relating to accounts in respect of money collected by the adhoc committee. It is not a dispute about the environment, occupation and use of land or title to land. In my view, this is a plea which should be ventilated either in the Magistrate Court or in the High Court, depending on the amount of money involved.

24. Prayer (c) is a plea for an order directing the 1st defendant to incorporate the management company and transfer the reversionary interest to the said company. There was evidence, and indeed counsel for the plaintiff conceded in his submissions, that the management company was incorporated. What therefore remains to be considered is whether the 1st defendant should be directed to transfer the reversionary interest in the mother title to the management company. The 2nd, 3rd and 4th defendants agreed with the plaintiffs that the plea should be granted. The 1st defendant did not tender any evidence to demonstrate why the reversionary interest in the mother title should not be conveyed to the management company. I will in the circumstances issue an order directing the operationalization of the management company and conveyance of the reversionary interest into the name of the management company.

25. Taking the circumstances of this dispute into account, parties will bear their respective costs of the suit.

26. In summary, my finding on the first issue is that, in the absence of an operationalized management company, owners of apartments on **Land Reference Number 330/432 and 433** properly came together as an informal welfare association to take care of the general welfare of the estate, pending the operationalization of the management company/companies. To this extent, the association was neither an illegitimate association nor a busy body. Secondly, the activities of the 2nd, 3rd and 4th defendants did not constitute a breach of the plaintiffs' constitution rights.

27. In light of the foregoing, this suit is disposed through the following orders:

a. The 1st plaintiff's Parking Bay having been restored to him, the dispute relating to the parking bay is treated as amicably resolved.

b. The plea for audited accounts is rejected on the ground that such a plea ought to be canvassed in the court vested with jurisdiction to deal with general civil disputes.

c. The plea for an order directing the 1st defendant to incorporate a management company is rejected because it is evident from the lease exhibited by the 1st plaintiff and from the evidence of the defendants that the management company was incorporated.

d. The 1st plaintiff is granted the following orders:

i. An Order directing the 1st defendant to issue shares to apartment owners and to convene an annual general meeting to elect directors of the management company responsible for the estate erected on Land Reference Number 330/432 and hand over the management company to the new board of directors within six (6) months from today.

ii. An order directing the 1st defendant to transfer the reversionary interest in Land Reference Number 330/432 to the management company within nine (9) months from today.

e. Parties shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 25TH DAY OF JANUARY, 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr S M Kayonzo for the Plaintiffs

Mr Moseti for the 2nd, 3rd, and 4th Defendants

Court Assistant: Phyllis Mwangi

NOTE:

This suit was fully heard before me when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why, upon filing of submissions by the parties, the Presiding Judge of the Court directed that the file be transmitted to me to write and render a judgment.

B M EBOSO

JUDGE