



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**CIVIL SUIT NO. 46 OF 2011**

**WORBURN ESTATE LIMITED .....PLAINTIFF**

**VERSUS**

**MARGARET BASHFORTH .....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. The background to this case is as follows. In the year 2005 the defendant, Margaret Bashforth, acquired a lease of 125 years, over a residential property in Malindi (described as apartment 2E) developed and owned by the plaintiffs.

The defendant took possession of the apartment identified as flat 2E. Like other lessors in this gated community, she was entitled to the use of common amenities in the estate including the garden, gym and restaurant.

2. This Woburn Estates Ltd property was managed by Woburn Estate Management Company which had common directors, namely Franco and Emmy Esposito who are a couple. Under the lease agreement the lessees were required to pay a service charge for the provision of cleaning, security services and general maintenance of the property. All seemed to go relatively well until July 2009 when the service charge was increased to about shs. 22,000.- in respect of the defendant.
3. Several property owners including the defendant took objection to the increase. Eventually they referred the dispute to the Institute of Surveyors Kenya (ISK) who appointed a valuation surveyor (DW3) to deal with the dispute. It would appear that relations between the defendant in particular, and Franco Esposito, a director of the plaintiff deteriorated steadily thereafter. In April 2010, the defendant evinced an intention to sell the property to one Mike Carnall. Alarmed by this development, the plaintiff filed this suit. At the time of filing suit the outstanding service charge stood at shs. 547,736.50 as the defendant ceased payment in July, 2009 despite numerous demands

from the plaintiff.

## **THE PLEADINGS**

4. The plaintiff's action against the defendant therefore is for recovery of service charge since January, 2009 or repossession of the defendant's apartment. It was commenced by a plaintiff filed on 6th May, 2011 seeking:

***“1. payment of the entire sum due in terms of service charges since January, 2009 till the date of judgment or repossession of the apartment.***

***2 Costs to this suit***

***3interest***

***4. any other relief this honorable court may deem fit to grant in the circumstances.”***

5. The defendant filed a defence and counterclaim disputing the plaintiff's claim and asserting that the plaintiff rejected payment of service charge when tendered, denied the defendant access to the apartment since April, 2012, as well as the approval to enable her dispose of the lease to a willing buyer. The defendant's counterclaim has five key prayers:

***“a) An order compelling the plaintiff to allow the defendant to sell her rights of the suit apartment being apartment 2E situate at Woburn Residence.***

***b) Damages for loss of the prospective buyer one Mr. Mike Carnall.***

***c) In the alternative and without prejudice to (a) above, the plaintiff be compelled to compensate the defendant in the sum present value of the apartment.***

***d) Damages for loss of the use of apartment from April, 2011, until she obtains possession of or sale of the apartment.***

***e) Any other or further relief as the honourable court may deem fit and just to grant.”***

## **EVIDENCE**

6. The plaintiff adduced evidence in support of its claim through Franco Esposito PW1, who with his wife Emmy Esposito is director of the plaintiff and Woburn Estate Management Co. the company charged with the responsibility of managing the apartments. In summary his evidence is that the defendant is in breach of the lease agreement by failing to pay service charges in respect of the apartment No. 2E since July, 2009. That despite demands being made of her the Defendant has persisted in default.
7. The defendant freely admitted non payment of the arrears but justified her action by citing several instances of breach of the lease by the plaintiff, as well as lack of justification for the “exorbitant increase” in 2009 which led to the present debacle. To this end, she called a professional valuation surveyor with ISK, Maina Chege (DW2) and an accountant Willis Nyamamamba (DW3). The sum total of the testimony of these witnesses is that the plaintiff had failed to supply certified extracts of company accounts as required under the lease, and that ultimately the charges were not based on proper accounts. In short the service charges were unjustified.
8. The defendant stated that she was denied access into her apartment since April, 2012. The record shows that she had obtained interim orders in that month to restrain the plaintiff but the application was overtaken by the courts direction to proceed into the full hearing of the matter. The defendant claims that the plaintiff maliciously sued her for the arrears after rejecting the offer

by one Mike Carnall to purchase the apartment and settle the arrears.

## **ANALYSIS AND FINDINGS**

9. I have now looked at the entire record of pleadings evidence and submissions of the respective parties. It is not in doubt that the plaintiff served a notice on the apartment owners in the year 2009 notifying them of an increase in the service charges. The defendant was required to pay about shs. 22,000/- per month. Attached to the notice dated 23rd July, 2009 was a purported summary of income of expenditure allegedly prepared by the firm of Grant Thornton. The account supposedly for the year ended 30th April, 2009 contains details in justification of the increment in the notice.
10. These accounts have been declared a forgery in the sense that the same are not by the firm of Grant Thornton. They were prepared by DW3 without the authority and knowledge of the firm of Grant Thornton. DW3 explained that he obtained the raw working figures from the Esposito (PW1). In my considered view, this should be sufficient to dispose of the plaintiff's claim in respect of increased charges as the said claim is based on a document which is not authentic. This document together with the admission of DW3 shores up the defendant's assertion that the plaintiff is in breach of the lease agreement by failing to furnish extracts of certified accounts in accordance with clause 2.2 Fourth schedule Part B of the Lease Agreement. Other lapses proven on the part of the plaintiff include the lodging of double charges in management fees and director's fees and unilateral management of the apartment contrary to the letter and spirit of the Lease Agreement. In addition expenses for private businesses operated by the plaintiff e.g restaurant were mingled with expenses related to the apartments. That is contained in DW2's unchallenged report.
11. It appears that prior to the disputed increase in 2009 there had been an increase in June, 2006 and in March, 2008 ascribed to fluctuation in foreign exchange (the Euro). In both instances the defendant had raised objections. The plaintiff's director told the court that it was resolved to file this suit to secure the plaintiff's interests because the defendant had caused an "offer" for the purchase of the apartment 2E by one Mike Carnall who was proposing to rent it out to an "Italian Tour Operator." I do agree with the plaintiff that this letter, dated 5th April, 2011 was more of a threat than a genuine offer to buy the apartment or to clear the service charge outstanding. Hence the defendant cannot be heard to say that she had tendered the claimed sum before the suit.
12. It is also true that under the lease agreement (Fourth Schedule Part B Clause 2.5B) the obligation on the part of the defendant to pay the service charge was not suspended by an objection taken to the rate of the charge. In the present case, the defendant ought to have continued to make payments even while referring the dispute to ISK. Other tenants had also done the same. In that sense she is in breach of the lease agreement and it is not conscionable for such a defaulter to continue receiving free services.
13. It is apparent that in April, 2012 the plaintiff denied the defendant any further access to her premises. Counsel for the plaintiff has submitted that there was a court order to that effect. In fact that is not accurate. An ex parte order restraining the plaintiff issued in favor of the defendant in this regard on 3rd April, 2012 expired without extension after the mention before Mwongo J. on 4th May, 2012. Before this, this court had by its ruling delivered on 5th March, 2012 denied the plaintiff's prayer in a notice of motion filed on 9th May 2011 to repossess the apartment.
14. It seems the plaintiff applied self help and eventually threw out the defendant. That is hardly the conduct of a party who is asking the court to redress the breach of an adverse party by seeking specific performance, for that is the true essence of the plaintiff's prayers. Hence both the plaintiff and the defendant have not done equity even as they seek it. Both are blameworthy albeit to different degrees. The defendant has through the evidence of DW2 and DW3 destroyed the factual basis of the plaintiff's claim for the sums in the plaint. The court therefore cannot ascertain exactly how much the defendant ought to pay or owes the plaintiff by way of arrears of service

charge since the increment has been disavowed.

15. Equally, although the defendant was denied access to the apartment since April, 2012, she has not provided any evidence to assist the court to determine what damage she has incurred thereby. She claims to have had to rent alternative residential premises but no proof of the expenses thereby incurred was tendered.

### **FINAL ORDERS**

16. In the circumstances of this case, in order to resolve the dispute completely and in a just manner, I have found it appropriate to make the following orders regarding the plaintiff's claim and the defendant's counterclaim.

#### **The plaintiffs claim:**

1. The defendant will pay service charge to the plaintiff at the rate subsisting before 23rd July, 2009 vide notice dated 28th March, 2008, for the period the defendant was in occupation of the premises, namely 23rd July, 2009 to 16th April, 2012.
2. If the above sum remains unpaid after thirty days of today's date, it will attract interest at court rates until full payment.

#### **The Counterclaim**

3. The plaintiff will allow the defendant free access to her apartment upon receipt of payment under '1' above OR in the alternative compensate her for the value thereof, as will be established by an expert from ISK or by agreement of both parties.

The parties will bear their own costs.

Judgment is entered accordingly.

Delivered and signed at Malindi this **16th** day of **April, 2013** in the presence of Ms. Mwanja holding brief for Mr. Otara for the plaintiff, defendant in person.

Court clerk – Evans

**C. W. Meoli**

**JUDGE**