



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
LAND CASE NO. 138 OF 2013

MAHICAN INVESTMENTS LIMITED.....PLAINTIFF

=VERSUS=

MADDALALENA STUCCI.....1ST DEFENDANT

FERRI MAURO.....2ND DEFENDANT

R U L I N G

Introduction

1. In the Plaint dated 21st August 2013, the Plaintiff has averred that in the deed dated 16th November 1998, the Plaintiff let to the Defendants a house and premises known as Chalet No.136/A2 Karibuni, on Land Portion Number 654 and 657, Karibuni Villas for a term of 999 years from 29th July 2009 for Kshs.1,000,000.
2. The Plaintiff alleges that the Defendant has breached the covenant it had with the Plaintiff and claims for Euro 2,739.18 due and owing for non-performance of the management and maintenance agreement.
- 3.
4. The Defendants subsequently filed an Application seeking for an order to refer the dispute to arbitration.
5. The Plaintiff filed a counter-application seeking for a stay of Arbitration proceedings pending the hearing and determination of the suit. The two Applications have not been heard. The Defendants have also filed a Preliminary Objection which is the basis of this Ruling.
6. The Preliminary Objection by the Defendants is seeking for the orders that the Application and the entire suit is totally defective, null and void ab initio and the same ought to be struck out with costs; that the lease document forms the subject matter of the entire suit herein was drawn by an unqualified person albeit being witnessed by an advocate and therefore the suit should be struck out with costs.
7. In alternative, it was averred, the advocates appearing for the Plaintiff ought to cease acting for the Plaintiff because the lease agreement was witnessed by an advocate whose firm is appearing for the Plaintiff.
8. The parties agreed to dispose of the Preliminary Objection by way of written submissions.

Analysis and findings

9. Although the Defendants' counsel stated in her Preliminary Objection that the entire suit was totally defective, null and void ab initio, she did not specifically state on which ground she was raising the objection.
10. However, when she filed her submissions in respect to that ground, she started off by stating that the suit herein was filed without the resolution of Plaintiff's Board of Directors.
11. In my view, the proper thing for a party to do while filing a Notice of Preliminary Objection is to specifically state the grounds on which he/she shall be raising the objection. It is only proper that an opponent while litigating is made aware of the kind of objection that he/she should expect from his opponent, be it a Preliminary Objection or a substantive issue. One cannot raise a Preliminary Point of Law in submissions without notifying his opponent. That is litigation by ambush which this court frowns upon.
12. Although the Plaintiff's Advocate has responded to the said preliminary point of law, I will not make any findings on it for failure by the Defendants to give notice to the Plaintiff. In any event, how does one challenge the authority of a company to file a suit as against him when he is not a director or a shareholder of the company as a preliminary point of law?
13. The issue as to whether a company has authorised the commencement of the suit or not can only be ventilated upon the filing of a formal application or at trial. That issue cannot be dealt with as a preliminary point of law.
14. On the issue of the dismissal of the entire suit because it was drawn by an unqualified person, the Applicant's counsel submitted that the entire suit is hinged on the Lease Agreement dated 23rd July 2009 which was drawn by the Plaintiff itself. Counsel relied on the provisions of section 34(1), 43(1) and (2) of the Advocates Act. Because the Lease Agreement was drawn by an unqualified person, it was submitted, the instrument is invalid ab initio.
15. I have looked at the provisions of Section 34(1) of the Advocates Act. That section does not prohibit parties from drawing agreements relating to their rights and obligations in relation to movable or immovable properties.
16. According to the 1st Defendant's own Supporting Affidavit, he entered into a lease agreement with the Plaintiff where by the Plaintiff agreed to lease to them the suit property. The interpretation of the clauses in the said Lease Agreement is what is at the center stage of these proceedings. Although it is indicated that the document was drawn by the Plaintiff, it still remains an agreement that was entered into between the parties.
17. A lease is a contract between parties for a grant of a time in land. **In Prudential Assurance Company Limited -Vs- London Residuary Body (1992)2 AC**, Lord Templeman explained that a lease is a contract for the exclusive possession and profit of land for some determinate time. By its nature, a lease is an executory contract where rights and obligations remain outstanding between the parties during the course of the lease. (See **National Carriers Limited Vs Panalpine (Northern) Limited (1981)A66675**)
18. Even if it is argued that the Lease Agreement that was entered into by the Plaintiff and the Defendant on 23rd July 2009 and registered on 3rd August 2009 is an instrument relating to the conveyancing of property, and therefore falling under the documents that must be drawn by a qualified person, which might be true, the document cannot be invalidated on the basis that it was not drawn by a qualified person because the court will still consider it as an agreement *inter se* as contrasted with a document which binds third parties. Where a document is to be considered as an agreement *inter se*, it need not be drawn by a qualified person as defined by the Advocates Act or registered. The drawing of a lease by an unqualified person does not exclude the use of the lease to show the terms of the contract between the parties. (See **Bachelors Bakery Vs Westlands Securities Ltd (1982) KLR 366**).
19. The other issue that has been raised by the Defendant is that the lease document was witnessed by an advocate whose firm is appearing for the Plaintiff and as such, the said firm ought to cease acting for the Plaintiff in the suit.
20. The Defendants' Advocate submitted that pursuant to the provisions of Rule 9 of the Advocates (Practice) Rules, an Advocate who would be required as a witness to give evidence in a transaction ought to disqualify himself from appearing for a party in the transaction. Counsel relied on the case of **Francis Mugo and 22 others Vs James Bress Muthee & Another. Nakuru Civil Suit NO. 122 of 2005.**
21. In response, the Plaintiff's counsel has submitted that the Defendants have not demonstrated any

- conflict of interest arising out of the fact of one of the partners of the Plaintiff's firm having witnessed the Lease document and the other partner acting for the Plaintiff in this litigation.
- 22.I agree with the Plaintiff's counsel's submissions. The Plaintiff has not shown that the advocate who witnessed the signing of the Lease document will be called as a witness. No notice has been given to that effect.
- 23.In any event, the Defendants are not contesting that they signed the lease agreement. In fact, the Defendants want the provisions in the lease on referring the matter to arbitration enforced. They have agreed in their affidavit that they signed the lease.
- 24.In view of the fact that one of the partners in the Plaintiff's Advocates Law firm witnessed the signing of the Lease and in the absence of the evidence to show the conflict of interest that arises in such a scenario, I shall dismiss that preliminary point of law.
- 25.For the reasons I have given above, I dismiss the Defendant's Preliminary Objection dated 26th September 2013 with costs.

Dated and Delivered in Malindi this **20th** Day of **December, 2013**

O. A. Angote

Judge