



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 144 OF 2012**

1. DR. JOHN CHAMIA
2. DR. AJONI ADEDE
3. BENSON CHEROMOI
4. MARY KARANI T/A ROMA ENTERPRISES
5. CHARLES OPULU
6. CHRISTINE KIPSANG
7. SANDRA MWACHIA ..... PLAINTIFFS

V E R S U S

1. THE BOARD OF TRUSTEE  
NATIONAL SOCIAL SECURITY FUND
2. KIRAGU & MWANGI LIMITED .....DEFENDANTS

**JUDGMENT**

1. The seven (7) Plaintiffs in this case have brought this case against the Managing Trustee National Social Security Fund (NSSF) who are their landlord in NSSF house on Plot No. Mbsa/Block XXV/123 (**the building**). The case against the 2nd Defendant was struck out by this Court's ruling of 11th October, 2012.
2. By their Pleint the Plaintiffs state that they pay to NSSF Service Charge which relates to payments made by NSSF in respect of essential amenities for the building. They pleaded in the plaint that they pay NSSF an estimated Service Charge alongside the rental payments made quarterly in advance. They further pleaded that NSSF contrary to the lease agreement failed to supply the Plaintiffs not later than six months the audited accounts of the Service Charge. That NSSF sought payment from the Plaintiffs of the backdated Service Charge for the years 2009/2010 and 2010/2011. That demand was made in June, 2012. The Plaintiffs pleaded in their plaint that the said backdated Service Charge was unfair and oppressive.
3. The Plaintiffs also pleaded that NSSF wrongly increased the Service Charge for the year 2012.

4. In their final prayers in the plaint the Plaintiffs sought an order of injunction to restrain NSSF from recovering backdated and increased Service Charge; a declaration that the backdated service charge was oppressive, unfair, illegal and unconscionable and a declaration that the Plaintiffs as the main contributors and beneficiaries of the Service Charge be allowed to participate in the management of the Service Charge its expenditure and its audit.
5. NSSF other than admitting that the Plaintiffs are its tenants denied the Plaintiffs claim in its defence.
6. The Plaintiffs called two witnesses. Dr. John Mutua Chamia the 1st Plaintiff admitted that he has been a tenant at the building since 1997 to date. He is also the Chairman of the Tenant Association of the building since 2003. He stated in evidence that he had brought this suit on his own behalf and on behalf of the other tenants of the building. It is important to state at this point that no order has been issued by the Court granting the first Plaintiff leave to represent the other Plaintiffs and other tenants of the building. There was need for such leave to be sought as provided under Order 1 Rule 8 of the Civil Procedure Rules, 2010.
7. The first Plaintiff further stated that the standard lease between the tenants and NSSF provided for the payment of the service charge. That Service Charge was to be utilized to provide essential utilities such as electricity, security, parking amongst others. He further stated that the standard lease provided that the audited accounts of the Service Charge were to be supplied to the tenants annually within six (6) months of the end of the year. According to him the end of the year occurred on the 31st June of every year. In this regard, this witness referred to a letter of offer which he wrongly referred to as the lease. That letter of offer is dated 30th September 2009. It is addressed to Amanye General Supplies. It relates to the tenancy of Amanye General Supplies over the building. That letter of offer has various terms but the term relevant to this case and which the first Plaintiff referred to is in Clause 6. It is important to reproduce that Clause as follows-

***“SERVICE CHARGE:***

***Each tenant will be liable to pay a Service Charge determined in the manner stated in the standard lease in order to reimburse the Landlord for a fair proportion of the operating expenses of the building. These expenses shall include but not be limited to the following-***

- ***Electricity supply to common areas***
- ***Water supply***
- ***Insurance cover***
- ***Cost of periodic maintenance and decoration of common areas***
- ***Plant and landscaping maintenance***
- ***Management agent fees and costs***
- ***Caretaker and associated staff salaries***
- ***Rates and ground rents and other Municipal charges***
- ***General repairs and maintenance***
- ***Security services***
- ***Fire equipment maintenance and services***
- ***Structured cable maintenance***

***The landlord will provide, through its managing agents, independently audited accounts for the Service Charge expenditure no later than six months after the end of each calendar year to all tenants of the building. In the event the audit indicates an over-expenditure, the tenant will pay Additional Service Charge on demand.***

***The Service Charge budget for the initial year of occupation commencing, 2009 is calculated at Kshs. 12.00 per square foot. In the case of this lease the amount is equal to Kshs. 2,136.00 per month. Service Charge will be paid in like manner to rent and will be treated***

***as rent in the event of non-payment and the remedies for collecting unpaid rent will apply. Service Charge, like rent, will be subject to VAT where applicable at the prevailing rates in force from time to time.”***

8. The first Plaintiff stated that the audited accounts of the Service Charge were not provided to the tenants by NSSF as provided in the above Clause. That is the tenants were not provided with those accounts within six (6) months after the end of the calendar year. He concluded by saying that NSSF's demand for the payment of the backdated Service Charge was illegal.
9. Further the first Plaintiff stated that NSSF unfairly demanded an increased service charge from Kshs. 15/- to Kshs. 24/-.
10. The first Plaintiff stated that the tenants of the building felt that the

extra Service Charge was an ambush on them and that the audited accounts of the service charge should not have been done without their input. He stated that they should have been given the raw data which would have included electricity, security and water bills. He also stated that NSSF failed to provide good services for its tenants. That the lifts failed to function toilets were a no go zone and the pathways were dirty. To this end, he referred to a letter written by Social Security House Tenant Society dated 20th July 2012. By that letter the tenants complained to NSSF about the unfair demand of the backdated Service Charge and the lack of transparency of the amount of Service Charge demanded and the lack of adequate services of the building. By that letter the tenants stated that they were opposed in paying the Service Charge demanded.

11. On being cross examined the first Plaintiff confirmed that most of the

services in the building were provided by third parties. He also confirmed that the audited accounts had been supplied to the tenants. He confirmed that those audited accounts showed that NSSF had overspent on the Service Charge and hence why the tenants were required to reimburse NSSF. He confirmed that the tenants lease did not provide that the tenants needed to be consulted on the appointment of the companies that were to undertake the audit of the Service Charge.

12. PW2 stated that he is a registered and Practicing Valuer. He produced a report which reflected a survey done on service charge of different buildings within the Mombasa Central Business District. At the end of that report PW2 stated as follows-

***“We note from the above data that the rates for N.S.S.F Building compare fairly well with those of the other building above for the old tenants, new tenant and the average service element. We also observe that N.S.S.F Building has of late become among the buildings with improved quality services in terms of lifts, cleanness, general security, status etc.”***

13. The defence called its Regional Manager as a witness. He stated that

Service Charge related to expenditure on the maintenance of the building such as repairs, cleanliness, landscaping, electricity, security, water, insurance cover, land and ground rates amongst others. As an example he stated that NSSF pays Kshs. 1.2 million for electricity per month for the building, Kshs. 300,000/- per month for sewage costs and Kshs. 1.2 million for security services. At the end of the year NSSF appoints accountants after competitive binding to carry out an audit of the Service Charge visa vice the costs that are incurred. It is only after such an audit that the tenants are required to reimburse NSSF for the over expenditure. In the year 2009 NSSF had spent Kshs. 40 million in the provision of services on the building while they had only budgeted for Kshs. 15 million. In the year 2010 they had spent Kshs. 42 million which amount exceeded the budgeted amount. This witness conceded that there was a delay in having the service charge audited in the year 2009 which he attributed to the need to procure for such services as per the Public Procurement Act. He however added that although there was that delay

in auditing those accounts the fact remained that the services were provided to the tenants.

14. Having received the parties evidence and having considered the documentary evidence I find that I am confronted with four (4) issues for consideration as follows-

1. Was the backdated Service Charge oppressive, unfair or illegal?
2. If the answer to number (1) above is in the affirmative are the Plaintiffs entitled to their prayer of injunction to restrain the Defendants from collecting backdated Service Charge.
3. Are the Plaintiffs entitled to an order that they do participate in the management of expenditure of Service Charge?
4. Is the Defendant entitled to impose on the Plaintiffs an increase of Service Charge?

15. On the first issue I would begin by saying that although the Plaintiffs laid an emphasis on the letters of offer which contained Clause 6 reproduced above it is important to note that that very Clause stated that Service Charge would be determined as provided in the standard lease. To reiterate that Clause stated-

***“Each tenant will be liable to pay a service charge determined in the manner stated in the standard lease in order to reimburse the landlord for a fair proportion of the operating expenses of the building.”***

16. Interestingly the Plaintiffs only attached one lease relating to the tenancy of Opolu & Co. Advocates and even then not all the pages of that lease were produced before Court. It was therefore difficult to confirm what other terms were contained in that lease or whether that lease was indeed executed. By that lease in Clause 2(a) to (m) the obligations of the tenants to reimburse NSSF the operating expenses of the building is set out. That Clause in part is in the following terms-

***“To pay to the Lessor in addition to the said rent by way of reimbursement of the Lessor all the outgoings and operating expenses of the building a Service Charge to be calculated prorate (sic) by reference to the floor space of leased premises (excepting parking bays) as against the total floor space of the building available for leasing such advance together with but not as part of the rent hereby reserved PROVIDED THAT the initial assessment will be Kenya Shillings Twelve Thousand Two Hundred Forty (Kshs. 12,240/-) per quarter commencing to alteration at any time during the term of the Lease after prior notice to the Lessee and to pay the cost PROVIDED THAT the Lessee shall have the right to ask for and be provided by the Lessor with all such details as the Lessee shall reasonably require concerning the elements of the Service Charge and the basis of the calculation thereof and preparation of yearly management accounts and shall be in respect of the aggregate amount from time to time expended by the Lessor in respect thereof.”***

17. The sub paragraphs to that Clause provide the different categories of expenses that are to be reimbursed by the tenant. Those expenses relate to electricity consumed at the building, salaries of the cleaning staff, costs of redecorating, salaries of NSSF employees servicing the building, security costs, water and insurance policy amongst many others. Clause 2 as reproduced above does not provide a limited period within which NSSF should provide to the tenants audited accounts of the Service Charge. Indeed that Clause simply provides that details of those charges would be provided when reasonably required. The first Plaintiff did confirm that audited accounts were provided to the tenants in the year 2012. This is confirmed by the fact that the Plaintiffs annexed those audited accounts to their list of documents to this case. It was however conceded by the defence that there was a delay in providing those accounts.

18. The Plaintiffs by the standard lease such as the one referred to above relating to the tenancy of Opolu & Co. Advocates were legally bound to reimburse NSSF of the costs of the services provided at the building. The Plaintiffs by executing their leases accepted that term in the lease. The Plaintiff therefore cannot be heard to argue that the terms that they bargain for in that lease

were unfair, oppressive or illegal. All parties have the freedom to contract. Once they exercise that freedom the Courts cannot interfere with their freedom to contract. In this regard I will refer to the authority relied upon by the Defence on the case **SECURICOR COURIER (K) LTD -VS- BENSON DAVID ONYANGO & ANOTHER (2008)eKLR** where the Court of Appeal referred to the case **L'ESTRANGE F. GRAUCOB LTD [1934] 2 K.B.394** as follows-

***“When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.”***

That case was applied in **CURTIS VS. CHEMICAL CLEANING & DYEING CO. LTD. [1951]1 AII E.R. 631** where Denning L.J. said at page 633 H:

***“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exemption clauses, unless the signature is shown to be obtained by fraud or misrepresentations.”***

19.It is important to state that the terms of the letter of offer were overtaken or superseded by the leased. Accordingly there was no obligation on the part of NSSF to provide audited accounts of the Service Charge within six months of each calendar year. The only obligation that NSSF had according to Clause 2 of the lease was to provide those accounts when reasonably required to. The first Plaintiff's evidence on being cross examined was that following the letter dated 20th July 2012 the tenants association at the building were supplied with the audited accounts of the Service Charge of the period from 2009 to 2011. In the light of the above I find that the demand by NSSF of the backdated Service Charge was not oppressive nor unfair nor illegal.

20.Having made that finding it follows that the Plaintiffs are not entitled to an injunction to restrain the Defendants from demanding the backdated service charge.

21.On the third issue, the Plaintiffs were unable to show by evidence that

they were entitled to participate in the management of the expenditure on Service Charge. Since the lease which governs the parties relationship does not contain a term which allows such participation this Court cannot impose contractual terms on the parties as sought by the Plaintiffs. The Court cannot rewrite the parties agreements. In that regard see the case **SHAH -VS- GUILDERS INTERNATIONAL BANK LTD [2003]KLR** where the Court in considering the terms of the parties contract stated-

***“The parties executed the same willingly and they are therefore bound by it.”***

22.On the fourth issue my finding is in the affirmative. I find that the Defendants would be entitled to demand an increase in the Service Charge so long as such an increase is accounted for in the audited accounts and necessary credit is given to the tenants when they make payment. That I believe is a spirit of Clause 2 of the lease reproduced above.

23.Having made the above finding on the issue in this matter I find that this case must and does fail. However before concluding this judgment I need to state that the plaint contrary to Order 4 rule 1(3) of the Civil Procedure Rules, 2010 was only supported by the verifying affidavit of the first Plaintiff. For that verifying affidavit to support the claim of the other six (6) Plaintiffs there was need for the first Plaintiff to obtain the written authority of those six (6) Plaintiffs. This is what Order 4 Rule 1(3) provides. That Rule is in the following terms-

***“Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.”***

24. On that score the suit in respect of the 2nd to the 7th Plaintiff also fails for lack of a verifying affidavit.

25. Further there was no leave obtained from the Court for the first Plaintiff to give evidence on behalf of the other Plaintiffs. It follows therefore that the case of the second to the seventh Plaintiffs also fails for lack of evidence.

26. In the end, the Plaintiffs case is hereby dismissed with costs to the Defendant.

**Dated and delivered at Mombasa this 19<sup>th</sup> day of December, 2013.**

**MARY KASANGO**

**JUDGE**