Paragon Electronics Limited & another v Esufali & another (Environment & Land Case 178 of 2017) [2022] KEELC 2871 (KLR) (12 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2871 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 178 OF 2017

JA MOGENI, J

MAY 12, 2022

BETWEEN

PARAGON ELECTRONICS LIMITED ..... 1ST PLAINTIFF

REMAX PROPERTY MANAGEMENT LTD ..... 2ND PLAINTIFF

AND

YUSUF SHARAFALLY ESUFALI ..... 1ST DEFENDANT

AMAMA YUSUF SHARAFALLY ESUFALI ..... 2ND DEFENDANT

JUDGMENT

1. For determination before me is a matter wherein the plaintiffs commenced this suit by way of plaint dated February 22, 2017 and filed on March 17, 2017 against the Defendants seeking the following orders:

    a. A permanent injunction restraining the Defendants from in any way parking their or allowing the parking of any motor vehicles on property LR No 330/355, Nairobi.

    b. Payment of Kshs 300.00 per day per motor vehicle being parking fees from November 11, 2016 until such time as the Defendants will stop parking 4 vehicles at the premises on property LR No 330/355, Nairobi.

    c. Costs of the suit.

Plaintiffs' Case

2. Paragon Electronics Limited (the 1st plaintiff) is the registered proprietor of Land Reference Number 330/355. On the said parcel of land are erected four (4) blocks of apartments known as Remax Terrace Apartments (the suit property). Remax Property Management Limited (the 2nd plaintiff) is

a management company incorporated to manage the premises. The two defendants in this suit are joint owners, as lessees, of Apartment Number 12, located on the 5th Floor of Block B1 within Remax Terrace Apartments.

3. Pursuant to a lease dated November 30, 2015 and registered in the Government Lands Registry on 11/3/2016 under Presentation No 1448 Volume N 119 Folio 87 File 31674, Yusuf Sharafally Esufali and Amama Yusuf Sharafali Esufali (the defendants) are joint owners as lessees of Apartment Number 12 located on the 5th Floor of Block B1 within the premises. Under Clause 1.1.5 as read together with Paragraph 10 of the Tenth Schedule of the said Lease, the defendants by virtue of owning the said Apartment are entitled to two (2) parking slots.

4. They contend that the Defendants Park about four (4) motor vehicles on the property, in breach of the licence. They have particularized the breach in the following manner; Parking more than 2 cars on the property and allowing and/ or authorizing more than 2 motor vehicles to be parked on the property.

5. The plaintiffs brought this suit contending that the defendants were occupying four parking slots instead of the two (2) which they were entitled to. That despite several warnings, the defendants were adamant and continued to act in breach of the license. This cumulated in the 1st plaintiff's terminating the car park licence on November 10, 2016. That despite being notified of the termination, the Defendants continue to unlawfully park their motor vehicles within the premises.

Evidence By The Plaintiff – Via Video Link

6. PW1 – Bulent Gulbahar – he relied on the Plaint dated February 27, 2017, adopted his witness statement dated 22/2/2017, a list of documents dated 22/2/2017 and a further list of documents dated December 2021 as his evidence.

7. During cross – examination, he clarified that Paragon was the developer and the 2nd Plaintiff was the management company. He testified that the Defendants had not paid him the full amount. He added that the defendant chose to finish some interiors for themselves, and they were then given a percentage but which the 1st Plaintiff paid them. The agreement has two aspects, a lease and a car parking agreement. He avers that they granted the use of two car parking slots not ownership. There are 48 units. He contended that they are all owned but he did not know how many people lived there. That they have a car parking licence with all 48 units. The agreement was standard.

8. He avers that there are no share certificates issued to the 48 owners. He testified that apartment owners wrote to the plaintiffs and one of the complaints was that the car park had not been demarcated. The letter on page 257 is the plaintiff's letter. In 2016, he agreed to the car parking but up to now it has not been demarcated. He however added that the same does not stop the residents from parking.

9. It is his contention that he knows Cecilia Bjeborn and Mr Fardouse Adams. He confirmed that they own apartments on the premises. The car park licence is a right to use not to rent out or transfer. He stated that he was not aware of whether the defendants were allocated more parking space or bought additional space for guests on the outside gate. He is also not aware that the owners were seeking the support from the institute of surveyors of Kenya to determine service charge payable.

10. With that, the Plaintiff closed his case.

Defendant's Case

11. The Defendants entered appearance on 12/4/2017 and filed their statement of defence dated May 29, 2017 on May 30, 2017 wherein they pray that Plaintiffs suit be dismissed with costs.

12. The Defendants admit that the 1st Plaintiff is the owner of LR No 330/35S, Nairobi as reversionary interest is yet to be done and the 2nd Plaintiff is the Management Company tasked with the duty of managing the Apartments. The Defendants further aver that the Management Company has failed to perform its mandate of managing the said apartments and the 1st Plaintiff has failed to transfer its reversionary interest to the 2nd Plaintiff as mandated.

13. The Defendant also, admit that they are joint purchasers of apartment number 12 on block B1 on the 5th floor and that they entered into a Car Park Licence relating to the property. That they have two reserved parking bays with respect to the apartment. However, the parking slots allocated to the said apartments are against the conditions/regulations granted by the City County.

14. The defendants deny the allegations that they park four (4) vehicles on the property, and they aver that they are not in breach of the said Licence.

15. The Defendants deny specifically the particulars of breach by the defendants as alleged.

16. They aver that they had parked two additional motor vehicles temporarily at the premises on or about the 3rd and 4th week of August. However, they contend that it was with the authority of the owners of apartments number B2 and number 1 on Block 1 to utilize the said one parking each for the said period only and that the two parking spaces were used at night only during the specific said time.

17. The defendants deny that any demand and notice of intention to sue was conveyed to it and/or duly served as alleged.

18. The Defendants contend that apart from the said specific time, only two motor vehicles have always been parked on the defendant's own two reserved parking spots.

Defendants' Evidence

19. DWI – Amama Yusuf Sharafali Esufali – She testified that the 2nd Defendant is her husband. She adopted her witness statement dated January 21, 2019. She testified that the same was authorized by her husband. She also relied on a list of documents filed on January 21, 2019 (exhibit 1-12) as her evidence before this court. The photographs and the survey report were however struck out on February 17, 2022.

20. During cross examination, DW1 testified that the dispute is about the car parking licence agreement. The plaintiff wrote about the breach of the car licence and she responded. She averred that she stopped parking more than two cars after the letter. She avers that she has not received any cancellation of the car parking licence.

21. She stated that she signed the license agreement, but it was under duress. She contends that she spoke to PW1 and also notified the Plaintiff's advocate but she did not write to them formally about it. She did not formally express her reservations. The car parking licence was executed on April 20, 2015. She never sought legal advice before she signed the license agreement. She admits that she has never read the car license agreement.

22. It is her contention that the plaintiff sent her a notice of breach dated October 24, 2016 and she did respond by way of email on 8/11/2016. It is her evidence that she complained to the Plaintiff that she was being harassed. That she was being barred by security from parking extra motor vehicles.

23. She averred that she was issued with a termination letter dated November 10, 2016. She admits that she did not stop parking her vehicles. She also admits that she did not file a suit but that they had invoked arbitration. She has not asked the court to restore the licence.

24. With that, the Defendants closed their case.

Written Submissions

25. Both the Plaintiffs and the Defendants have filed submissions which I have read and considered. The Plaintiffs and the Defendants submissions are dated March 15, 2022 and 7/03/2022 respectively. The Plaintiffs also filed further written submissions dated 5/05/2022.

Determination.

26. Having read and considered the pleadings, the evidence adduced at the hearing, the written submissions by the plaintiff and all other materials placed before me, the issues that commend themselves for determination are as follows; whether the termination of the car parking licence agreement dated November 30, 2015 was valid? Whether the plaintiff is entitled to the reliefs sought?

27. An agreement will be deemed duly formed and binding where consideration exists and has been as accepted. Where therefore parties reach an agreement on all the terms of contract they regard or the law requires as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract; the intention to create legal obligations and consideration. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain. The court will not seek to re-write the contract for the parties as was held in the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* [2002] EA 503 and *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR).

28. In the case of *Rufale v Umon Manufacturing Co (Ramsboltom)* [1918] LR 1KB 592, Scrutton LJ held as follows:

> " The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

29. Equally in the case of *Attorney General of Belize et al Vs Belize Telecom Ltd & Another* (2009), 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd v Northwest Metropolitan Regional Hospital Board* [1973] I WLR 601 at 609, held as follows:

> " The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

30. It is common ground that what constitutes the Contract between the Plaintiffs, and the Defendants is the Lease Agreement dated November 30, 2015 and the Car Park Licence Agreement dated November 30, 2015. It is trite law that parties are bound by their Agreement. The allegations by the Defendants made in open court during hearing that they signed the car parking agreement under duress are unfounded. It is also trite law that once a signature is admitted the plaintiff has discharged his or her burden and the burden is then on the Defendant to prove fraud, misrepresentation, illegality, duress or whatever defence he or she might have. This is in consonance with the burden of proof under Section 107 of the *Evidence Act*.

31. "Undue influence" is described in *Black's Law Dictionary* as:

> "persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party."

32. In *All Card v Skinner*, [1887] 36 Ch D 145 which decision was quoted with approval by the Court of Appeal in In *Nabro Properties Limited v Sky Structures Limited (Z.R. Shah) Southfork Investments Limited)*[1986] eKLR, Lindley L J held that undue influence can be classified into two groups and the first group being cases in which there has been some unfair and improper conduct, some coercion from outside, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor.

33. The second group consists of cases in which the position of the donor to the donee has been such that it has been duty of the donee to advise the donor, or even to manage his property for him (thus a person abusing his position). These two classes were discussed in *Bank of Credit and Commerce International SA v Aboody* [1992] 4 All ER 955, the court classified the doctrine of undue influence into two types: actual and presumed.

34. In her testimony, DW1 admitted that she had not read the Car Park Licence Agreement. I find that the Defendants did not offer tangible evidence to the conclusion that there was duress at the time of execution of the car park licence. When a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not (see *L'Estrange v F Graucob Ltd* [1934] 2 KB 394). A person who signs a lawful contractual document may not dispute his or her agreement to the terms which it contains, unless he or she can establish one of five defences; fraud, misrepresentation, duress, undue influence or non est factum.

35. There is common ground that the plaintiffs are the proprietor and manager respectively of the suit premises. There is also common ground that under the lease, the defendants are entitled to a parking licence for two parking bays. The defendants contend that the four vehicles that are the subject of the alleged breach were parked in the premises intermittently. They further contend that they had authority from other owners of apartments to occupy their respective parking slots.

36. The defendants own one apartment. By dint of that, they are entitled to two parking slots. They are alleged to have breached the terms of the car parking licence leading to a termination of the licence. They have contended that the licence is an integral part of the lease.

37. As to whether the defendant breached the terms of the car parking licence agreement dated November 30, 2015 and the lease, *Black's Law Dictionary*, 9th Edition, Page 213, defines a breach of Contract as;

> "a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

38. The plaintiffs aver that the terms breached are Clause 4.1 (c) as read with Clause 2 of the Agreement. Read together, the two clauses dictated that the Defendants would not at any given time park more

than two motor vehicles at the property known as LR No 330/355 or otherwise use the car Parking spaces at the property for any other purposes than for parking the said two motor vehicles.

39. From the records, I find that the breach of terms has been proved by the Plaintiffs and the same is not disputed by the Defendants. They admitted having parked more than 2 cars in the parking bays. The Defendants alleged that they parked the extra motor vehicles with the authorization of their neighbours. My brother Judge Eboso in rendering his Ruling in this matter held that, the role of the management company in the scheme of things at Remax Terrace Apartments cannot be gainsaid. It is the entity that is mandated to ensure there is order in the premises. For this reason, any authorization by one apartment owner to another apartment owner sanctioning the other to utilize one's parking slot must be granted with the concurrence of the management company. To disregard the need to seek concurrence from the management company would lead to disorder.

40. The Agreements herein provide the manner in which the parties to it can remedy breach of terms and termination thereof if the party in breach fails to remedy a breach.

41. According to the exhibits adduced in Court, the 1st Plaintiff first wrote to the Defendants on 2/08/2016 requesting them for details of the cars that they would be parking at their 2 parking bays. Thereafter, they wrote to the Defendants again on October 24, 2016 issuing them with a 30 days' notice to remedy their breach. I note from the letter that they relied on paragraph 7.1.1.2 (b) of the Lease Agreement dated November 30, 2015. The Defendants did acknowledge receipt of the said letter and they testified that they responded to the same. Evidence was adduced to demonstrate the same. Lastly, the Plaintiffs went ahead and terminated the Car Park Licence Agreement vide letter dated November 10, 2016 with immediate effect pursuant to paragraph 6, 6.1 (a) & (b) of the said Licence Agreement.

42. The Lease Agreement at Paragraph 7 is on "rights of re-entry and general". Under sub – paragraph 7.1.1.2 (b):

> "
>
> "7. 1.1.2 The lessee breaches or fails to comply with, perform or observe any of the covenants, agreements, conditions and undertakings contained herein or in the car park licence agreement (whether such covenant, agreement, condition or undertaking is for the benefit of or in favour of the Lessor or the Management Company) to be complied, performed and observed by the Lessee and which (in the case of a breach capable of remedy) shall not have been remedied within ninety (90) days of a written request by the lessor to the Lessee in that regard,
>
> then and in any of the said cases the Lessor shall issue a notice in writing to the Lessee (the Notice):
>
> a. .....
>
> b. In the case of a breach capable of remedy) requiring the Lessee to remedy the breach within thirty (30) days from the date of the Notice."

43. Additionally, Paragraph 6 of the Car Park Licence Agreement is on "Termination". It provides that:

> "6. 1 The Grantor may terminate this Agreement forthwith and without notice in any of the following events:
>
> (a) if the Grantee fails to comply with any term or condition of this Agreement; or

(b) if the Grantee shall be in breach of or does not observe any of the covenants and agreements contained in the Lease and notwithstanding any cure period in the Lease such breach or non-observance is not remedied.

6.2 This Agreement shall terminate automatically and without the requirement of notice from one party to another upon any transfer or assignment of the Lease by the Grantee Provided That the Grantor or the Management Company (as defined under the Lease) (as the case may be) shall enter into a new agreement with any such transferee or assignee of the Lease on the same terms as contained in this Agreement.

6.3 Termination of this Agreement under clause 6.1 shall not release or otherwise absolve any party from its liabilities, duties and obligations accrued due to the date of the termination until such liabilities, duties or obligations and the accounts relating thereto shall have been fully settled and discharged."

44. Seeing that it is not in contention that the Lease Agreement and the Car Park Licence Agreement are read together, under the aforementioned provisions, upon breach of terms, the Plaintiffs were required to first allow the Defendants to regularize the breach within 90 days of a written request. Thereafter, a notice to be issued requiring the Defendants to remedy the breach within 30 days from the date of the notice.

45. The Plaintiffs themselves admitted and submitted that they opted to issue the Defendants with a notice before terminating the licence agreement even though they submitted that the Car Park Licence Agreement did not make provision for termination by notice.

46. The Court notes that the Plaintiffs did not follow the procedures for termination of the Agreement. The Plaintiffs failed to first expressly request the Defendants to remedy the purported breach in writing as per paragraph 7.1.1.2. Additionally, the notice period given was no sufficient. The Agreement provided that the notice was to require the Defendants to remedy the breach within Thirty (30) days from the date of Notice. The Plaintiffs issued the Defendants with a notice on October 24, 2016. The termination of the Licence Agreement should have taken place on or about November 23, 2016. I agree with the Plaintiffs' submissions that the duty of the Court is to interpret the terms of the Contract as they are. The termination of the Car Park Licence Agreement did not meet the threshold under the provisions of the Agreements herein. It was therefore not properly issued and thus invalid.

47. Is the plaintiff entitled to reliefs sought? I am of the view that the plaintiff succeeds in part. This is because the defendants in their evidence admitted to have breached the contract by parking more than two vehicles which was not allowed under the agreement they signed and therefore the plaintiff's suit succeeds partly. I am aware that I have made a finding that the termination of the car parking licence agreement was not valid. This court cannot issue orders whose effect would be to rearrange or to renegotiate a business relationship that had been agreed between two consenting parties. It would be too harsh to grant an order of permanent injunction restraining the Defendants from parking their allowable two motor vehicles on the property on which they reside and also own a residential Apartment. The defendants in their evidence adduced in court stated that the two extra vehicles were only parked for two days and that they had stopped parking the extra two vehicles. This evidence was not rebutted. I therefore note that this prayer is overtaken by events.

Disposal Orders

a) Prayer 1 succeeds in part. I will however rephrase the order to limit the defendants to only two (2) parking slots. The defendants are permanently restrained from parking more than or allowing the parking of more than two (2) cars in this premises LR NO 330/355 Nairobi.

b) Prayer 2 succeeds in part and the court orders the defendants to pay the plaintiff Kshs 300 per vehicle per day for the two extra vehicles that they parked at the premises for a period of 90 days.

c) Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 12TH OF MAY 2022.

.....

MOGENI J.

JUDGE

In the presence of

Mr. Ataka for the Plaintiffs

Mr. Ng'ang'a for the Defendants

Mr. Vincent Owuor Court Assistant.